

THE CANADIAN JUDICIAL COUNCIL

**IN THE MATTER OF AN INQUIRY COMMITTEE CONSTITUTED
PURSUANT TO SECTION 63 OF THE JUDGES ACT R.S.C. 1985,
C. J-1 AS AMENDED INTO THE CONDUCT OF
THE HONOURABLE PAUL COSGROVE OF
THE SUPERIOR COURT OF JUSTICE OF ONTARIO**

**HELD BEFORE THE HONOURABLE LANCE S.G. FINCH (CHAIRPERSON),
THE HONOURABLE ALLAN H. WACHOWICH
THE HONOURABLE J. MICHAEL MACDONALD
KIRBY CHOWN and JOHN P. NELLIGAN, Q.C.**

at Federal Court of Canada

180 Queen Street West, Courtroom No. 7A, Toronto, Ontario
on Wednesday, September 10, 2008 at 10:21 a.m.

APPEARANCES:

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pursuant to the *Complaints Procedure*

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for The Honourable Paul Cosgrove

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for the Inquiry Committee

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1 Toronto, Ontario
2 --- Upon resuming on Wednesday, September 10, 2008
3 at 10:21 a.m.

4 THE CHAIR: Mr. Pelletier.

5 MR. PALIARE: Chief Justice and
6 members of the panel, Justice Cosgrove would like
7 to address the panel at this time.

8 STATEMENT BY JUSTICE COSGROVE:

9 JUSTICE COSGROVE: Chief Justices,
10 members of the panel, this is an extremely humbling
11 and chastening experience. It is one I certainly
12 never hoped for, but it is one from which I have
13 learned a great deal.

14 The trial in Her Majesty The Queen
15 and Elliott was extraordinarily difficult for me
16 and for everyone, I am sure. I have thought about
17 the trial virtually every day for ten years. It
18 was like nothing I had seen before, or since.

19 By September of 1997, I had
20 presided over thousands of cases during my 15 years
21 on the bench. Not one of them nor all of them
22 together prepared me adequately for the challenges
23 of this case. I offer that not as an excuse, but
24 in partial explanation for the mistakes that I
25 made.

1 To be clear, I made many mistakes
2 in that trial. In my desire to discharge my
3 obligations as a judge and to provide a fair trial
4 to a person accused of a horrific crime, I at times
5 lost my way. I approached each decision I made
6 with an open mind, and I never acted in bad faith,
7 but I now realize that I made a series of
8 significant errors that affected the proceedings.

9 On December 4th, 2003, the Court
10 of Appeal released its decision allowing the
11 Crown's appeal from my order staying the
12 proceeding. Almost every trial judge knows the
13 sting of a Court of Appeal allowing an appeal from
14 one of your judgments.

15 This wasn't the first time for me.
16 However, these reasons were very different. I read
17 the decision carefully. I was humbled. I thought
18 I had done my best in very difficult circumstances.

19 Nevertheless, the Court of Appeal found that I had
20 made many errors in my findings of fact and I had
21 misapplied the law on numerous occasions. I accept
22 their reasons without reservation.

23 I have reflected on the Court of
24 Appeal's decision for the past five years. I have
25 thought about what it said about that case and what

1 it said about me as a judge. The Court of Appeal's
2 reason for decision have affected me greatly. I
3 have no doubt that they have made and will make me
4 a better judge.

5 I fully appreciate my duties and
6 responsibilities as a judge. I have changed and
7 will continue to change my approach to judicial
8 decisions based upon the insights that I have
9 obtained from the reasons of the Court of Appeal.

10 In addition, I have learned a
11 great deal from this inquiry process. Let me
12 assure you that Justice Sopinka, the late Justice
13 Sopinka, was absolutely correct when he wrote in
14 Ruffo that the disciplinary inquiry is a traumatic
15 ordeal for a judge.

16 I can think of no process more
17 difficult for a judge than to have the question of
18 whether he or she should be removed from the office
19 considered in public by a panel of fellow judges
20 and eminent counsel.

21 I have spent many hours reflecting
22 carefully on the notice provided by independent
23 counsel. It has not been easy to see my actions
24 characterized that way. I have tried to do my
25 best. Nevertheless, I want to acknowledge freely

1 that I made many findings against the Ministry of
2 the Attorney General and its senior
3 representatives, Crown counsel, police officers and
4 public officials that were set aside by the Court
5 of Appeal. I erred in so doing and I regret those
6 errors. I regret the effect of my findings on
7 them.

8 Moreover, my reasons contained
9 central references to individuals that were not
10 before the court, and that was an error, which I
11 regret.

12 I recognize now that my efforts to
13 ensure a fair trial for the accused and to get at
14 the truth made it very difficult for Crown counsel
15 to prosecute its case effectively. I regret very
16 much the effect my erroneous judicial decisions had
17 on the Ministry of the Attorney General, its
18 counsel and the trial process itself.

19 As I have mentioned, the trial was
20 extremely difficult. Counsel for both parties
21 aggressively represented their clients' interest.
22 From my position, it was a very difficult trial to
23 manage. I tried a variety of techniques to
24 maintain civility in the courtroom and to keep the
25 proceedings focussed on the relevant issues at

1 hand.

2 With hindsight, my attempts met
3 with only modest success. I regret that at times I
4 did not try harder and that I did not have more
5 success. In particular, I regret any intemperate,
6 denigrating or unfair language that I may have used
7 during what was the most stressful trial in my
8 career. It is certainly not typical of my conduct
9 in the courtroom. I have and I will continue to
10 ensure that I always conduct myself in the best
11 traditions of the judiciary.

12 During this inquiry process, I
13 have had the opportunity to review much of the
14 trial transcript. From time to time, defence
15 counsel used extravagant rhetoric to characterize
16 the conduct of Crown counsel and the police.

17 Some of the statements simply had
18 no place in a courtroom. While I interjected from
19 time to time in an attempt to curb his excesses, it
20 is evident to me now that I did not intervene
21 forcefully or often enough. I should have and I
22 would in the future.

23 With hindsight, I recognized that
24 I erred in my discretionary exercise of the
25 contempt jurisdiction. I accept that it is to be

1 used with restraint and it is a serious matter to
2 threaten anyone with contempt.

3 I appreciate the purpose of the
4 contempt power and have carefully reviewed the
5 CJC's Guidelines on the use of contempt power. I
6 will continue to be guided in the future by these.

7 I also recognize that some of my
8 judicial decisions, while made in good faith and
9 for the purpose of ensuring a fair trial,
10 unnecessarily expanded the scope of the trial and
11 diverted attention from the central issues of the
12 proceedings. These decisions were wrong. They
13 unnecessarily delayed the proceedings and wasted
14 scarce resources in matters that, with the benefit
15 of hindsight, were not material to the proceedings.

16 This proceeding has emphasized for
17 me the importance of the work of the judiciary. I
18 have spent much time reviewing the CJC's Ethical
19 Principles For Judges. It is an aspirational
20 document and it is one I work towards each day.

21 I recognize that judges must
22 exhibit and promote high standards of judicial
23 conduct so as to enforce, reinforce public
24 confidence.

25 I recognize that at times in the

1 Elliott trial my conduct did not meet the highest
2 standards articulated in the principles. I assure
3 the Inquiry Committee that I have and I will
4 continue to dedicate myself to striving to meet
5 those standards at all times.

6 For the significant errors that I
7 have described, I sincerely and unreservedly
8 apologize to the Ministry of the Attorney General,
9 its counsel and senior representatives, the police
10 officers, civilian witnesses and counsel that came
11 before me in this case, the public and your panel.

12 Finally, I would like to apologize
13 to the family of the victim of this crime who, as a
14 result of my legal errors, experienced a
15 significant delay in achieving the closure arrived
16 at by having a criminal prosecution reach its
17 substantive conclusion.

18 I want to address the timing of
19 this apology. At the time of the events, and for
20 years afterwards, I had a steadfast belief in the
21 correctness of my decisions. Although they were
22 criticized, I like every trial judge I know
23 believed my decisions were the right ones.

24 When the Court of Appeal issued
25 its reasons, its harsh assessment of my decision

1 came as a shock to me. Obviously, I accepted their
2 authority to review and correct my judgment.
3 Nevertheless, I was sustained by my view that I had
4 approached the case and its many problems in good
5 faith, to the best of my ability.

6 That overriding belief has
7 informed my view of the case and this proceeding
8 before the CJC.

9 Recently, I began to prepare for
10 the current hearing. My preparation has profoundly
11 affected my appreciation of the circumstance of
12 this case. Both on my own and with my counsel, I
13 have spent literally weeks reviewing the record of
14 the trial proceedings and even reviewing the bench
15 books of the time.

16 Finally, I have spent days in this
17 room hearing independent counsel reading passages
18 of the evidence from the proceedings.

19 All of these steps have caused me
20 to relive the trial, but, for the first time, from
21 an entirely different perspective.

22 As a trial judge, I have spent 24
23 years assessing the actions of others. This
24 process required me to step back and assess my own
25 actions and how they affected others. It has been

1 a revealing and chastening process.

2 That experience has driven home
3 the need for me to make this apology to those
4 affected by my actions and to make this statement
5 at this time.

6 I have been a judge for 24 years.
7 Aside from my family and my faith, it is the most
8 important thing in my life. I wish to continue to
9 serve the public as a member of the Superior Court
10 of Justice. However, under the circumstances, in
11 the event I am assigned to hear cases in the
12 future, it would be inappropriate for me to sit in
13 cases involving the Attorney General of Canada or
14 Her Majesty The Queen in Right of Canada, or the
15 Attorney General of Ontario or Her Majesty The
16 Queen in Right of Ontario, and I would take steps
17 to ensure that that would not occur.

18 I stand before you humbled and
19 chastened. While I always acted in good faith, at
20 times my actions were inappropriate.

21 I assure the Inquiry Committee
22 that I will at all times in the future execute my
23 office with the objectivity, impartiality and
24 independence that the public is entitled to expect
25 from a judge. Thank you.

1 THE CHAIR: Thank you.

2 MR. CHERNIAK: May I address the
3 panel?

4 THE CHAIR: Please, Mr. Cherniak.
5 SUBMISSIONS BY MR. CHERNIAK:

6 MR. CHERNIAK: I wish to say at
7 the outset that nothing that I am about to say is
8 intended to in any way fetter or interfere with the
9 discretion that this panel has to find, conclude
10 and recommend as you see fit should you see the
11 case differently than I am about to tell you I see
12 it.

13 As I stated in my opening, my view
14 is that judicial accountability is a matter
15 entirely for the Canadian Judicial Council,
16 including this panel, and not any other body, least
17 of all independent counsel. In my view, that is
18 the constitutional imperative of judicial
19 independence.

20 My role, as I said at the outset,
21 is simply to present the case and give you my views
22 on the case, the law, the process, impartially and
23 in the public interest, and that is what I have
24 strived to do to this point and that is what I
25 intend to do in the balance of my remarks.

1 Having said that, I had the
2 opportunity of learning yesterday what Justice
3 Cosgrove was going to say to this panel about his
4 conduct in the Elliott trial.

5 Knowing that the evidence to this
6 inquiry would be supplemented in this way caused me
7 to reevaluate my view of the case that I have been
8 presenting to this panel on the basis of the whole
9 of the evidence, and, in particular, whether the
10 record as a whole was capable of meeting the
11 onerous Marshall test that again I referred to in
12 my opening, which is, to restate it: That a judge,
13 in order that a recommendation for removal as
14 opposed to some lesser recommendation be made, has
15 conducted himself or herself in a way that is so
16 manifestly and profoundly destructive of the
17 concept of the impartiality, integrity and
18 independence of the judicial role, that public
19 confidence would be sufficiently undermined to
20 render the judge incapable of executing the
21 judicial office.

22 The statement that you just heard
23 contains a number of key elements in it that have
24 influenced my thinking. There is a recognition of
25 the errors that were made by Justice Cosgrove in

1 his conduct of the Elliott trial in fact, in law
2 and in process.

3 There is a recognition of the
4 effect that his conduct of the trial had on the
5 Crown's ability to present its case and on the
6 administration of justice, generally.

7 There is a clear statement from
8 Justice Cosgrove that this inquiry process has led
9 to an understanding and recognition such that it is
10 reasonable to assume that the conduct that has led
11 to this complaint and this inquiry is unlikely to
12 be repeated.

13 There is a series in the statement
14 of full and unreserved apologies in appropriate
15 form to those who are entitled to receive apologies
16 from Justice Cosgrove, including the Crown
17 attorneys, the Ministry of the Attorney General,
18 the lawyers in the Ministry, the police, the
19 civilian witnesses, the public and, most
20 importantly, the Foster family.

21 There is the understanding and
22 appreciation that it would be inappropriate, for
23 Justice Cosgrove's remaining 15 months or so on the
24 bench, to sit on any case involving the federal or
25 provincial governments or Attorney Generals.

1 The result of that is that my view
2 of the record as it now stands and of the
3 jurisprudence that I have reviewed, that I will
4 review briefly with you, that while the case on
5 that record is capable of providing a basis for
6 findings by this Inquiry Committee, and the
7 Judicial Council to which it reports, the findings
8 and conclusions that would warrant a strong and
9 pointed admonition to Justice Cosgrove about,
10 speaking generally, his conduct of the Elliott
11 trial.

12 That record as it stands now is no
13 longer, in my view, capable of supporting a
14 recommendation for removal from office, but,
15 rather, it is capable of supporting a
16 recommendation for a strong admonition, or whatever
17 the appropriate word is for what the Canadian
18 Judicial Council does in cases of this kind.

19 I will make no submission, now or
20 later, on the nature or form of what I say is the
21 strong and pointed admonition that would be
22 appropriate, because my view is that that is
23 something that is entirely for this panel and the
24 Canadian Judicial Council to which it reports,
25 because my view is that independent counsel or

1 anybody else would be trespassing on your
2 jurisdiction to make submissions.

3 You are, in effect, an expert
4 panel and you don't need my help. You just need to
5 make sure from me that you have the appropriate
6 information to make your findings and conclusions.

7 What I would like to do is briefly
8 outline the basis, in addition to what you have
9 heard from Justice Cosgrove, that informed the
10 change in my views.

11 I noted, in particular, the
12 importance to the Canadian Judicial Council in its
13 findings and recommendations in previous cases, the
14 evidence and position of the judge in question; in
15 particular, whether there was or was not a
16 recognition, an understanding, of how the judge
17 fell into error and an assurance that the conduct
18 would not happen again.

19 You will recall in my opening I
20 referred to the passages in Bienvenue, which I will
21 take you to briefly again. You will find them, if
22 you have your books of authorities, in tab 6 and 7,
23 7 being the finding of the independent committee.
24 The passages I referred to were at pages 55, and 61
25 and 62.

1 change his behaviour in any
2 way."

3 My view was that was important to
4 the Inquiry Committee in coming to the conclusion
5 that it did. If we turn to the report of the
6 majority of the Canadian Judicial Council dealing
7 with its consideration of the Inquiry Committee's
8 report, the Canadian Judicial Council majority
9 referred to those very words and said it is
10 important to note that the majority emphasized
11 that, the words that I just quoted to you. And the
12 Canadian Judicial Council as a majority said in the
13 second last paragraph:

14 "No attempt has been made by
15 Mr. Justice Bienvenue since
16 the delivery of the report of
17 the Inquiry Committee to
18 indicate any intention on his
19 part to, in fact, change his
20 behaviour."

21 My view was that that was an
22 important consideration in why the ultimate finding
23 was that he should be, the recommendation should
24 be, that he should be removed from office.

25 A similar consideration is found

1 in the Flynn report of the Inquiry Committee at tab
2 10. And this was a very different case, for those
3 of the panel that recollect it, because in the
4 Flynn case there was a one incident of Justice
5 Flynn taking part in making comments with respect
6 to a municipal matter that was going to, and in
7 fact did, I think, come before the very court in
8 which he was a judge. This inquiry committee took
9 a dim view of that.

10 What I want to refer to is what
11 the inquiry committee said at page 43 in paragraph
12 77. It said this:

13 "In answer to the second
14 question, we now apply to the
15 impugned conduct of Mr.
16 Justice Flynn the test for
17 removal set out in Marshall,
18 which has been considered
19 earlier in these reasons."

20 And they state the test as I
21 stated it to you.

22 At the bottom of the page:

23 "In this connection, we
24 particularly noted the
25 following: the

1 committee report, and I appreciate this is not a
2 complete matter, because the Matlow inquiry
3 committee report I do not think has yet been
4 considered by the panel, but the inquiry committee
5 report with respect to Justice Matlow went to very
6 considerable lengths to set out in detail its view
7 about that case and a number of matters, but what I
8 want to refer you to is at pages 62 to 64.

9 THE CHAIR: Which tab are we at
10 now, Mr. Cherniak?

11 MR. CHERNIAK: I beg your pardon.
12 Tab 12 of volume 1.

13 THE CHAIR: Thank you.

14 MR. CHERNIAK: What the Matlow
15 inquiry committee said, starting at paragraph 201,
16 is:

17 "The Inquiry Committee has
18 taken Justice Matlow's
19 expressions of regret into
20 account.

21 "From the underlined portion
22 of his direct examination, it
23 is clear that Justice Matlow
24 sees his conduct simply as
25 two errors of judgment:

1 delivering documents to the
2 Globe and Mail for John
3 Barber and failing to
4 disclose what he had done to
5 his two colleagues and to
6 counsel when the SOS
7 Application hearing was about
8 to begin. That position
9 fails to recognize any
10 impropriety in his conduct--"

11 And they go on to talk about what
12 the improprieties were, and I won't read that. At
13 paragraph 203, the inquiry committee goes on to
14 say:

15 "When asked, on
16 cross-examination, whether he
17 had any other regrets, his
18 immediate answers underlined
19 above make it clear that any
20 further regrets were limited
21 primarily to concerns about
22 the impact of the inquiry
23 process on him and his
24 family. When he was pressed
25 as to whether he regretted

1 any negative impact on the
2 public's view of the
3 administration of justice,
4 his responses were equivocal
5 and he indicated any regret
6 depended on knowing how many
7 people might think more
8 highly of the administration
9 of justice as compared with
10 how many might think worse of
11 it because of him."

12 The apparent lack of understanding
13 of Justice Matlow of the significance of what he
14 had done was important to that inquiry committee,
15 and what happened in the Matlow matter stands in
16 stark contrast to what we just heard from Justice
17 Cosgrove.

18 In the same vein, I would like to
19 refer you to tab 23 in volume 2, the Douglas
20 decision, which is the question of a Provincial
21 Court judge in Ontario. The chair of that panel
22 was Justice Stephen Borins.

23 This was the over 80 case. The
24 Provincial Court judge made some extremely
25 disparaging remarks about criminal counsel who used

1 the over 80 defence and attacked breathalyzer
2 findings, and the like; and the language was, to
3 say the least, intemperate.

4 Justice Borins, if you will turn
5 to page 11 and 12, and I won't take the time to
6 read it, but paragraph 40 contains part of the
7 written response of Justice Douglas to the
8 complaint that was made against him.

9 If we turn to paragraph 43, the
10 inquiry committee chaired by Justice Borins says:

11 "The issue is whether the
12 undisputed evidence amounts
13 to convincing proof that
14 Justice Douglas has engaged
15 in judicial misconduct as
16 that term has been
17 interpreted in the Ontario
18 situation. Justice Douglas
19 has acknowledged his errors
20 and has admitted that he
21 conducted himself
22 inappropriately. He has, in
23 effect, conceded that he
24 failed to conduct himself in
25 a manner that the public

1 expects of judges, resulting
2 in a loss of public
3 confidence. Justice Douglas
4 has stated that he has
5 learned a lesson and has
6 affirmed that there will not
7 be a repetition of the
8 conduct that resulted in this
9 hearing."

10 Down to paragraph 45:

11 "No doubt Justice Douglas has
12 learned a lesson from the
13 events leading to this
14 hearing, and from this
15 hearing. From all accounts,
16 it has been a hard lesson.
17 There is nothing that he said
18 or did that we are able to
19 condone. However,
20 considering all of the
21 circumstances, we are not
22 prepared to conclude that he
23 engaged in judicial
24 misconduct, although we are
25 bound to say that his conduct

1 was very close to the line.
2 We have come to this
3 conclusion because we believe
4 that Justice Douglas is
5 sincere in acknowledging his
6 inappropriate conduct. We
7 are satisfied that in the
8 future he will stick to the
9 issues both in presiding over
10 trials and in his rulings and
11 reasons for judgment which
12 will conform scrupulously
13 with their purpose."

14 Could I ask you to turn to the
15 Ruffo case? Turn to tab 25. The Ruffo case
16 describes the purpose of judicial accountability.
17 This case also involved a complaint against a
18 Provincial Court judge for a number of breaches of
19 ethical conduct.

20 If I could ask you to turn to page
21 309 of Justice Gonthier's lengthy judgment, and
22 although he was speaking of the role of the comité,
23 the provincial accountability provision for
24 Provincial Court judges, what he says has some
25 application, I think, to the way the Canadian

1 Judicial Council provisions operate.

2 At the marked paragraph on page
3 309, Justice Gonthier said, after quoting from a
4 judgment of Justice Parent:

5 "The Comité's mandate is thus
6 to ensure compliance with
7 judicial ethics in order to
8 preserve the integrity of the
9 judiciary. Its role is
10 remedial and relates to the
11 judiciary rather than the
12 judge affected by a sanction.

13 In this light, as far as the
14 recommendations of the Comité
15 may make with respect to
16 sanctions are concerned, the
17 fact that there is only a
18 power to reprimand and the
19 lack of any definitive power
20 of removal has become
21 entirely comprehensible and
22 clearly reflect the
23 objectives underlying the
24 Comité's establishment: not
25 to punish a part that stands

1 out by conduct that is deemed
2 unacceptable, but rather to
3 preserve the integrity of the
4 whole."

5 Of course the federal scheme is
6 somewhat different, because ultimately there is a
7 power to remove that resides in parliament,
8 although the Canadian Judicial Council has the
9 power to recommend only, but I think the
10 significant thing that flows from that passage and
11 that affected my view of the case is that what the
12 purpose of the judicial accountability system is is
13 the protection of the system as a whole, the
14 integrity of the system as a whole, and,
15 incidentally -- not unimportantly, but incidentally
16 -- the conduct of the particular judge.

17 My view of what that passage means
18 is that it is the integrity of the system as a
19 whole, and, looked at it from that point of view,
20 Justice Cosgrove's conduct, combined with his
21 remarks that he made today were among the factors
22 that led me to change my view.

23 If you look at what Madam Justice
24 Sharlow said in Cosgrove, again, referred to in my
25 opening, in tab 14, which is back to volume 1, tab

1 14 is the decision of the Court of Appeal in the
2 constitutional challenge by Justice Cosgrove in
3 this very case.

4 If you would turn to page 727 and
5 728, as I say, this was a passage I referred to in
6 my opening. Justice Sharlow said in paragraph 29:

7 "An independent judiciary is
8 essential to the rule of law
9 in a democratic society.
10 Indeed, the Inquiry Committee
11 in this case said that
12 judicial independence is the
13 single most important element
14 in the rule of law in a
15 democratic society, followed
16 closely by the necessity for
17 an independent bar."

18 Then after referring to Justice
19 Strayer in Gratton, Madam Justice Sharlow said at
20 paragraph 32 on page 729:

21 "However, judicial
22 independence does not require
23 that the conduct of judges be
24 immune from scrutiny by the
25 legislative and executive

1 branches of government. On
2 the contrary, an appropriate
3 regime for the review of
4 judicial conduct is essential
5 to maintain public confidence
6 in the judiciary."

7 Again, referring to the purpose of
8 the accountability scheme as a whole.

9 If I could ask you to look at the
10 very last tab in this book, the Moreau-Berube case,
11 again in the Supreme Court of Canada, Madam Justice
12 Arbour at page 285 speaks of the proposition in
13 similar terms.

14 If you look at paragraph 59 at the
15 bottom of page 285, you will see Madam Justice
16 Arbour says that:

17 "The New Brunswick Judicial
18 Council found that the
19 comments of Judge
20 Moreau-Berube constituted one
21 of those cases. While it
22 cannot be stressed enough
23 that judges must be free to
24 speak in their judicial
25 capacity, and must be

1 perceived to speak freely,
2 there will unavoidably be
3 occasions where their actions
4 will be called into question.
5 This restraint on judicial
6 independence finds
7 justification within the
8 purposes of the Council to
9 protect the integrity of the
10 judiciary as a whole."

11 And then Madam Justice Arbour
12 repeats the words of Justice Gonthier in Therrien,
13 which I quoted at length again in my opening and
14 which I won't repeat here.

15 Madam Justice Arbour goes on at
16 page 287 to make a point that I found important in
17 paragraph 60:

18 "Part of the expertise of the
19 Judicial Council lies in its
20 appreciation of the
21 distinction between impugned
22 judicial actions that can be
23 dealt with in the traditional
24 sense, through a normal
25 appeal process, and those

1 that may threaten the
2 integrity of the judiciary as
3 a whole, thus requiring
4 intervention through the
5 disciplinary provisions of
6 the Act. Separation of
7 functions between judicial
8 councils and the courts, even
9 if it could be said that
10 their expertise is virtually
11 identical, serves to insulate
12 the courts, to some extent,
13 from the reactions that may
14 attach to an unpopular
15 council decision. To have
16 disciplinary proceedings
17 conducted by a judge's peers
18 offers the guarantees of
19 expertise and fairness that
20 judicial officers are
21 sensitive to, while avoiding
22 the potential perception of
23 bias or conflict that could
24 arise if judges were to sit
25 in court regularly in

1 judgment of each other. As
2 Gonthier J. made clear in
3 Therrien, other judges may be
4 the only people in a position
5 to consider and weigh
6 effectively all the
7 applicable principles, and
8 evaluation by any other group
9 would threaten the perception
10 of an independent judiciary.

11 A council composed primarily
12 of judges, alive to the
13 delicate balance between
14 judicial independence and
15 judicial integrity, must in
16 my view attract in general a
17 high degree of deference."

18 Which also makes the point that I
19 made earlier as to why this is a matter for the
20 Canadian Judicial Council alone.

21 Finally, if I can refer you back
22 to volume 1 in tab 4 in respect of the authorities,
23 I will refer you to the Ethical Principles of the
24 Canadian Judicial Council under the heading of
25 "Integrity" at pages 13 to 15.

1 I am sure the panel knows that the
2 numbers are not in the normal place one finds page
3 numbers, but they are over to the side and middle
4 of each page.

5 I am referring to the commentary
6 which I am sure this panel knows well, and, in
7 particular, commentary 2:

8 "While the ideal of integrity
9 is easy to state in general
10 terms, it is much more
11 difficult and perhaps even
12 unwise to be more specific.
13 There can be few absolutes
14 since the effect of conduct
15 on the perception of the
16 community depends on
17 community standards that may
18 vary according to place and
19 time."

20 "As one commentator put it,
21 the key issue about a judge's
22 conduct must be how it '...
23 reflects upon the central
24 components of the judge's
25 ability to do the job.' This

1 requires consideration of
2 first, how a particular
3 conduct would be perceived by
4 reasonable, fair minded and
5 informed members of the
6 community and second, whether
7 that perception is likely to
8 lessen respect for the judge
9 or the judiciary as a whole."

10 At the bottom of the page, they
11 quote from Shaman:

12 "'-- the ultimate standard
13 for judicial conduct must be
14 conduct which constantly
15 reaffirms fitness for the
16 high responsibilities of
17 judicial office.' The judge
18 should exhibit respect for
19 the law, integrity of his or
20 her private dealings and
21 generally avoid the
22 appearance of impropriety."

23 I reviewed those authorities, and,
24 as I said in my opening in my opening today, the
25 position of independent counsel, the position I

1 occupy, is sui generis, has no real counterpart
2 elsewhere, because I have no client to report to or
3 seek instructions from and I am simply giving you
4 my view.

5 While I had no doubt and would
6 have argued before you at the start of this case,
7 had the matter been heard then, that the evidence
8 in support of the notice was capable of supporting
9 a recommendation for removal, it was never my place
10 to enter an opinion as to whether what
11 recommendation should be made.

12 What has changed is that we now
13 have had the public airing of the complaint of the
14 Attorney General and the case presented as a matter
15 of public record, as is Justice Cosgrove's
16 statement now a matter of public record.

17 I took into account those
18 authorities. I took into account the content, the
19 nature and the content, of Justice Cosgrove's
20 statement. I took into account the extreme nature
21 of the recommendation for removal by an address of
22 both Houses of Parliament, the rarity of such a
23 step actually being taken. I don't think it has
24 ever actually happened. There's been
25 recommendation, but I don't think it has ever

1 actually happened -- and the high test, the
2 Marshall test, for such a recommendation.

3 Unlike some of the cases where a
4 recommendation has been made, I refer to the
5 position of the judge, but in some of the cases
6 there was evidence of corruption or moral turpitude
7 on the part of the judge, and neither of those is a
8 feature of the evidence before you.

9 I took into account the
10 recognition, as I said earlier, that Justice
11 Cosgrove recognizes that it would be inappropriate
12 for him to sit on any case involving the federal or
13 provincial governments.

14 I noted the nature and the depth
15 of the statement that Justice Cosgrove -- that I
16 expected he would make and that he just made, and
17 its evident sincerity and the unlikelihood that the
18 conduct which characterized the Elliott trial will
19 ever be repeated.

20 I took into account Justice
21 Cosgrove's length of service and the fact he has
22 but a limited time left on the bench before
23 mandatory retirement.

24 I noted -- last night I was given
25 the folder that I understand Mr. Paliare is going

1 to give you -- the many being expressions of
2 support for Justice Cosgrove. As I say, that just
3 came to my attention, though I did not have it when
4 I made the decision for the opinion that I am
5 giving you now. But those expressions of support,
6 people from the bar, the judiciary and the public
7 that know Justice Cosgrove, do reinforce the view
8 that I had formed before I was given it.

9 For all these reasons, I am
10 prepared, and I do, give you my view that the case
11 as it stands now provides a basis for findings and
12 conclusions by this panel and a recommendation that
13 would result in a strong and pointed admonition, as
14 I indicated, but does not any longer rise to the
15 level that would justify a recommendation for
16 removal, what all of that entails.

17 I reiterate that that is my view
18 alone. It is for this panel and only this panel to
19 decide whether you do or do not accept that view.
20 If the panel sees fit to accept this view, then my
21 view is that the panel has enough evidence before
22 it now to make its report to the Canadian Judicial
23 Council and there is not a necessity for me to read
24 in the balance of volume 4 of the evidence books
25 that I have been reading to you for the past

1 several days, but the material in volume 4 is there
2 for you to review. It is evidence, part of the
3 case that I have presented.

4 If the panel wishes, I will mark
5 the passages in volume 4 that I would have read if
6 we don't go any further and I will read if we do go
7 further; nor, if you accept the view that I have
8 just expressed, do I feel it necessary to call the
9 witnesses that I otherwise would have called on
10 Thursday, in view of the statements, expressions of
11 regret and apologies that have now been made by
12 Justice Cosgrove.

13 Those witnesses -- there would
14 have been four of them from the ranks of the Crown
15 attorneys, the police and the family -- would have
16 been called primarily to illustrate the effect of
17 the conduct of the trial upon them and their
18 ability to do their job in the case of the Crown
19 and the police, and the effect in the case of
20 Steven Foster, who I was intending to call, of the
21 conduct of the trial on how it was viewed by the
22 family.

23 These matters have been addressed
24 and conceded, apologized for, by Justice Cosgrove.
25 His statement, as I said, is in the public record

1 and available to all, and I will ensure that his
2 statement and what I have just said in the
3 transcript comes to the attention of all of those
4 involved in the Elliott trial who were affected by
5 it.

6 If the panel does not see fit to
7 accept the opinion that I have just expressed, then
8 I will of course continue in my presentation of the
9 evidence and call the witnesses that I have asked
10 to attend tomorrow.

11 I am in the panel's hands now. I
12 think Mr. Paliare wishes to address you.

13 THE CHAIR: Perhaps before he
14 does, I have one or two questions for you, Mr.
15 Cherniak, and other members of the panel may have,
16 as well.

17 I am wondering whether you have
18 any submission to us as to the weight or effect to
19 give to Justice Cosgrove's apology in light of its
20 timing?

21 If I could just flush out my line
22 of thought, the letter of complaint from the
23 Attorney General was received by the Judicial
24 Council in May 2004. The Inquiry Committee
25 commenced its work that fall, and, as you will well

1 recall, there was a constitutional challenge to the
2 legislation, judicial reviews at two levels, and we
3 are now four years later, all of which is to say
4 that there has been a significant expenditure of
5 public monies in this process; and in terms of the
6 record, so far as I can see, nothing has changed
7 between then and now.

8 What do you say about the effect
9 of the timing of the apology on its weight?

10 MR. CHERNIAK: Of course, that is
11 obviously a very significant consideration and it
12 would have been better for everybody concerned,
13 including the public purse, had the statement and
14 apology been made earlier.

15 Justice Cosgrove did address that
16 in several paragraphs of his statement. The way I
17 read it is that Justice Cosgrove, as was his right
18 as any citizen, albeit ultimately wrongly, chose
19 two things.

20 He chose, first of all, to
21 challenge the constitutionality of section 63(1) of
22 the Judges Act. That challenge was ultimately
23 unsuccessful, but maybe it had some significance on
24 this issue that there was one judge of the Federal
25 Court that found it had merit. She was reversed.

1 And his challenge was supported by -- you will have
2 to remind me of the name, but the association of
3 judges, and strongly supported at all levels by the
4 association of judges, and indeed by the criminal
5 bar.

6 So while it was ultimately held to
7 have no merit, it did have support. As I say,
8 every citizen, even judges, are entitled to
9 exercise their rights to challenge the
10 constitutional validity of legislation that affects
11 them.

12 While I argued as strongly as I
13 could, and others did, that the legislation was
14 constitutionally valid, and this panel held indeed
15 it was constitutionally valid, that caused a
16 significant delay.

17 Secondly, Justice Cosgrove has
18 said, quite fairly, in his remarks that until
19 recently he was of the view that while he obviously
20 regretted what happened, as Mr. Paliare said in his
21 opening, that he was of the view that it did not
22 amount to a sufficient basis to result in a
23 recommendation of the Canadian Judicial Council for
24 his removal, and presumably for anything less than
25 that.

1 As you know, Mr. Paliare, for some
2 time, has served notice that he intended to
3 challenge the proposition as to whether the notice,
4 in effect, made a case that was capable of being --
5 resulting in a recommendation.

6 And my view, as you know, was that
7 the notice wasn't the issue. The evidence was the
8 issue and that the panel should hear the evidence
9 before it decided that issue, and the panel agreed
10 with the proposition that I put forward.

11 What Justice Cosgrove has said in
12 his statement is that it was really when he got
13 down really to read and review what was in those
14 books of evidence that Ms. Kuehl and I prepared,
15 and sat down with himself and his counsel, and I
16 think, equally importantly, when we come to the
17 timing, actually heard it being referred to and
18 read in context in the way that I have spent the
19 last four or five days reading it in its various
20 elements, that he at last, perhaps not -- I think
21 it is fair to say not when he might have or even
22 perhaps should have -- came to the firm and clear
23 realization that he had erred, and erred badly, and
24 that the time had come to put before this panel his
25 statement containing all the elements that I

1 outlined to you.

2 And I think it is significant on
3 that issue that you appreciate that he has done so
4 without any preconditions. In other words, the
5 statement is there and it is part of the record in
6 this inquiry right now.

7 If the panel was not to accede to
8 the opinion that I have given you -- it is not a
9 recommendation, it is an opinion that I have given
10 you -- we are where we are, and I said that we will
11 simply proceed with the balance of the hearing and
12 see what the rest of the evidence is, and
13 submissions will be made in due course.

14 There is no precondition. He has
15 simply at this time made the concessions and the
16 statements that he did. So I don't think that I
17 can help you further with that.

18 I certainly considered that when I
19 came to the conclusion I had, but that was only one
20 factor in the conclusion I came to, and, although
21 an important factor, the most significant factor
22 is, was for me, as to whether, on the whole of the
23 evidence to this time, the conduct was or was not
24 capable of reaching that onerous standard for a
25 removal, for a recommendation for removal that the

1 Marshall test requires.

2 Let me add this: It was very
3 clear, and very clear in the discussions that I had
4 with Justice Cosgrove's counsel, that if while the
5 statement was what I expected it to be, my opinion
6 as to the recommendation for removal was going to
7 be ameliorated, there still, was in my view, as I
8 have expressed to you, a basis for what I have
9 called a strong and pointed admonition.

10 Maybe there should be a stronger
11 word in there, but a strongly pointed admonition
12 was the way I phrased it to Justice Cosgrove.

13 So there is no suggestion that his
14 statement is going to in any way ameliorate that.
15 The only difference is the extent to which the
16 recommendation should go the next very considerable
17 step. I think that is the best answer I can give
18 you, sir. Do you have another question?

19 THE CHAIR: I have one more
20 question --

21 HON. WACHOWICH: It has to be
22 remembered, as well, that there is a partial
23 epiphany after he reads the Court of Appeal, the
24 decision.

25 MR. CHERNIAK: I am sure that is

1 right, but I think it is fair to say --

2 HON. WACHOWICH: That is parts of
3 his statement.

4 MR. CHERNIAK: The epiphany is in
5 that statement, but wasn't sufficient to eliminate
6 what's happened --

7 HON. WACHOWICH: It didn't
8 influence him to the extent that the apology should
9 follow after that.

10 MR. CHERNIAK: Right.

11 THE CHAIR: My second question,
12 Mr. Cherniak, has to do with the matter that you
13 just touched on briefly, and that is the evidence
14 that we have not yet heard. The mandate of this
15 Inquiry Committee, under the Council's bylaws, is
16 to make a report with findings and conclusions.

17 MR. CHERNIAK: Yes, exactly right.

18 THE CHAIR: Then the Council as a
19 whole considers that report, and they can either
20 accept it or it can ask for further information,
21 whatever. My question really is: Can we make an
22 adequate or a proper report without hearing all the
23 evidence?

24 MR. CHERNIAK: My answer is this.
25 I could have -- I won't even say that. I toyed

1 with the idea, but I could have simply come in on
2 the first day of this inquiry and said, Here is my
3 four books of evidence; go to it, panel.

4 I didn't think that would be a
5 very appropriate way for independent counsel to
6 present the case, but the case is not me reading
7 the four books of evidence. The case is in those
8 four books of evidence and the other exhibits that
9 I filed.

10 THE CHAIR: I was thinking
11 particularly of the reference you made yesterday to
12 calling viva voce evidence.

13 MR. CHERNIAK: As I say, the viva
14 voce evidence -- I will tell you who I intended to
15 call. We interviewed a lot of people, but I
16 intended to call two of the Crown attorneys, David
17 Humphrey, who came in for the last number of
18 months, and Curt Flanagan, the Crown attorney at
19 Brockville who was there from the start.

20 These people are all available.
21 None of them know they may not be needed. They are
22 all set up to be here tomorrow and I can have them
23 here tomorrow.

24 I intended to call Detective
25 Inspector Bowmaster, who you have heard a lot

1 about, and I intended to call Steven Foster, the
2 son of the deceased.

3 I wasn't going to ask any of them
4 about -- I wasn't going to take them to this or
5 that portion of the evidence, because the evidence
6 is what the evidence is, and I didn't think it
7 needed embellishment one way or the other, even
8 should be embellished one way or the other.

9 I was calling them to explain the
10 effect upon them and their roles, and, in the case
11 of Mr. Foster, the family. My friend has all the
12 will-says. He knows what I intend to ask these
13 people.

14 My thinking was -- and of course
15 we are entirely in the hands of this panel. My
16 thinking was that the apologies, the recognition
17 and the apologies in the statement, went
18 sufficiently far that when I provide all those
19 people -- and indeed I intend to provide all of the
20 main players from the Ministry and the Crown
21 attorneys involved and all of those who were
22 witnesses and the police and the family.

23 I intend to provide them at a very
24 early time with the events that have transpired
25 here this morning, both the statements and my

1 submissions and whatever goes on from this point,
2 so they will understand what happened.

3 I am of course in the panel's
4 hands. These people are available to come
5 tomorrow. As far as they all know, they will be
6 here tomorrow at this point. That was my thinking.

7 With respect to the balance of the
8 evidence, it is there. As I say, some of it I
9 wouldn't have read every page, as I haven't read
10 every page up to now, but the particulars in volume
11 4 are just as significant as the particulars in the
12 first three volumes.

13 If the panel wishes, I am prepared
14 to provide the panel with marked-up pages as to
15 what I would have read -- what I will read if we go
16 further. I hope that answers your question.

17 THE CHAIR: Thank you. I don't
18 know whether my colleagues have some questions.

19 MR. NELLIGAN: I assume there are
20 printed copies of Justice Cosgrove's remarks. He
21 was reading from them. I wondered if they could be
22 made available to us now or whether we would be
23 able to get --

24 MR. CHERNIAK: You will have to
25 ask my friend about that. I know there is a

1 printed copy available, because I reviewed a
2 printed copy and what he said was very close, a
3 couple of words changed, to what I was advised. It
4 exists. We may need to photocopy them, but it
5 exists.

6 HON. MACDONALD: I want to get my
7 head around your submission here this morning, Mr.
8 Cherniak. If the evidence as presented, in your
9 opinion, at the outset formed the basis for removal
10 and none of that evidence is --

11 MR. CHERNIAK: Sorry, just to
12 qualify that, formed the basis of being capable. I
13 have never gotten beyond that.

14 HON. MACDONALD: I am sorry. You
15 are right, capable for removal, and none of the
16 evidence is expunged. Wouldn't the new evidence
17 really go to the ultimate merits as opposed to
18 whether or not the --

19 MR. CHERNIAK: My view, and I have
20 already said this is only my view. You members of
21 the panel are the expert panel, so it is your view
22 that counts, not mine. I am not pleading a case
23 for a client. I am just trying to give you the
24 help I can.

25 My view was that the depth, the

1 scope, the nature, the sincerity of the statement
2 this morning was a significant change, based on the
3 jurisprudence that I outlined, when we consider
4 that what we are really here -- what I understand
5 your role is, it is to preserve the integrity of
6 the judiciary.

7 Given what we have heard, that the
8 integrity of the judiciary can be still maintained
9 without Justice Cosgrove being removed from the
10 bench, and to some extent dependent upon what this
11 panel thinks is an appropriate admonishment or
12 reprimand, or whatever you call it, without
13 removal, and, in part, because the position of the
14 justice in response is important.

15 The issue is: When should that
16 position be put forward? And I have addressed
17 that. What we are dealing here is, the way I have
18 approached this right from the start and in the
19 arrangement that Mr. Paliare and I came to when we
20 discussed how we would approach his motion, is that
21 there are really two stages to what we are doing
22 here.

23 The first is: Is there judicial
24 misconduct or conduct that would warrant some form
25 of censure? That is question one. I don't resile

1 from the proposition at all that the conduct here
2 is capable of resulting in a censure. The way I
3 have put it is a strong and pointed admonition, but
4 it is for this panel.

5 The second question is: Does it
6 go so far as to meet the test for removal as
7 opposed to the test for some lesser form of
8 recommendation? And it is that second stage that
9 has been affected by, as I say, the length and the
10 breadth and the sincerity of what we have heard
11 this morning.

12 HON. MACDONALD: Thank you. That
13 is helpful.

14 THE CHAIR: Perhaps before we hear
15 from Mr. Paliare, we will take a few minutes'
16 break, ten minutes.

17 MR. CHERNIAK: Thank you.

18 --- Recess at 11:36 a.m.

19 --- Upon resuming at 11:53 a.m.

20 THE CHAIR: Mr. Paliare.

21 SUBMISSIONS BY MR. PALIARE:

22 MR. PALIARE: Yes. Chief Justice
23 Finch, members of the panel, I have some brief
24 remarks to make, and then I wanted to take you some
25 letters that we wanted to file.

1 I wanted to begin by saying that,
2 at the outset, Mr. Cherniak talked about his role
3 in acting in the public interest, and he
4 underscored that he was, in his view, acting in the
5 public interest when he put forward the
6 recommendation that he did.

7 In dealing with the public
8 interest, one obviously has to balance a number of
9 important factors, and he has, in my respectful
10 view, very fairly set out all of those factors that
11 he took into account, and he then matched them
12 against the jurisprudence and clearly demonstrated
13 that the position he was advancing was one that was
14 appropriate in the circumstances.

15 We ask you to and urge you to
16 accept his recommendation, because we say it is
17 appropriate in the public interest.

18 He cites some of them that I
19 wanted to raise. One, you have heard personally
20 from Justice Cosgrove. His apology was, without
21 question, sincere and it was, as Mr. Cherniak, said
22 unconditional. There were no strings attached to
23 his apology.

24 I wanted to set out for you some
25 factors that you might take into account, if you

1 accept what Mr. Cherniak has suggested, in your
2 determination of what would be an appropriate
3 admonition in the unique circumstances of this
4 case, what factors should you take into account. I
5 have a couple that I think are important.

6 First, the apology that you have
7 heard.

8 Secondly, in my opening, I set out
9 a number of background facts concerning Justice
10 Cosgrove. I just ask you to review my comments and
11 take those into account. I don't want to repeat
12 them in their totality. I wanted to, however,
13 outline a couple of them.

14 Justice Cosgrove is 73 years of
15 age, and, as Mr. Cherniak points out, he retires in
16 December of 2009. He has devoted most of his adult
17 life to public service. He was a councillor, and
18 then a very popular mayor of the City of
19 Scarborough, which is now amalgamated with the City
20 of Toronto.

21 Following that, he was elected as
22 member of parliament and served as a cabinet
23 minister in the Trudeau government. He was
24 appointed a judge in 1984 and he has, as he told
25 you, heard thousands of cases in that time frame

1 between then and now, and of course this is the
2 only blemish on his record.

3 We have written to a number of
4 people asking for letters of reference on his
5 behalf. They speak volumes, in my respectful view,
6 about Justice Cosgrove.

7 I point out to the panel that the
8 Matlow panel took the view that notwithstanding the
9 consent of independent counsel that such letters
10 could be filed, that they would have no weight.

11 So I say to you, first, I
12 completely disagree with that position. Secondly,
13 that issue, as I understand it, is before the CJC
14 as part of the other aspects of the Justice Matlow
15 matter. That is, can such letters of reference
16 come forward and should they have some weight?

17 I say to you they should have a
18 lot of weight, particularly because what you have
19 before you is, in my respectful view, an isolated
20 example of a 24-year judicial career.

21 You can and should take into
22 account what the views are of judges, lawyers who
23 have appeared in front of him, and members of the
24 community, and it is in that spirit that I want to
25 provide you with the letters that we received and

1 propose to tender.

2 I also point out at the outset I
3 am very grateful to my friend. I must say Mr.
4 Cherniak has been extremely fair in this process,
5 and he said to you that he made his decision about
6 whether or not, given what Justice Cosgrove was
7 going to say, whether the conduct in question,
8 coupled with the response -- that is, the totality
9 of the evidence -- could reach the level of a
10 recommendation for removal.

11 So when he came to that
12 determination, he said, No, it couldn't. It could
13 rise to the level of an admonition, but not
14 removal, but he didn't have the letters. When I
15 gave him the letters last night, what he has said
16 to you is they reinforced his view.

17 So on all of those bases, I would
18 like to tender -- Mr. Macintosh has them -- the
19 letters and ask that they be made the next exhibit.

20 THE CHAIR: You don't oppose this,
21 Mr. Cherniak?

22 MR. CHERNIAK: I do not. I do
23 not. If I can just say my view is they would not
24 have had any effect on the first question, but they
25 do, in my view, affect the question of what the

1 ultimate recommendation might be.

2 THE CHAIR: Are we up to Exhibit 9
3 or 10?

4 MR. PALIARE: I think it is 10.

5 THE CHAIR: Thank you.

6 EXHIBIT NO. 10: Justice
7 Cosgrove's reference letters.

8 MR. PALIARE: I can also say that
9 Mr. Cherniak and I have both been involved in
10 defending and prosecuting professionals at their
11 various regulatory and licensing bodies, and this
12 approach is done as a regular matter of course in
13 order to give decision makers the kind of
14 background that is essential in terms of
15 determining what an appropriate resolution should
16 be.

17 I can also tell you that I am
18 happy to file with you, if you want, I have given
19 Mr. Cherniak a copy of the letter that we sent to
20 each of the individuals seeking their
21 recommendation and reference letter.

22 I enclosed the notice of hearing
23 setting out the allegations that had been prepared
24 by Mr. Cherniak so that they would have the notice
25 of hearing and what the allegations were.

1 I'm happy to file that, if the
2 panel wants, but I can advise you that is what I
3 did. If I could, that would be great.

4 THE CHAIR: We will call that
5 Exhibit No. 11.

6 EXHIBIT NO. 11: Letter sent
7 to each of the individuals
8 seeking their recommendation
9 and reference letter.

10 MR. PALIARE: I think it is fair
11 to say that we can assume that certainly the judges
12 and the lawyers would have read the Court of Appeal
13 decision in Regina versus Elliott.

14 I am going to take you to some of
15 the letters. I can tell you that there are several
16 themes that run through the letters.

17 First, there is no doubt that
18 Justice Cosgrove is a committed jurist.

19 Secondly, the reference letters
20 will tell you that he has a strong and abiding
21 belief in the need for people to be treated fairly
22 who come before the courts.

23 Thirdly, he is a person of great
24 integrity.

25 Fourth, he is, as I said, in my

1 opening, a judicial workhorse. He would take
2 whatever assignments were given to him by his
3 regional senior judges. He constantly gave up
4 non-sit weeks and vacation weeks to pitch in and
5 help where there was a need.

6 Fifth, that he was courteous and
7 thoughtful and recognized as a very good judge, if
8 not an excellent judge, in the area of family law;
9 sixth, that he is very respectful and helpful to
10 unrepresented litigants, an area I know of concern
11 these days to the judiciary.

12 Seventh, he has a strong
13 commitment to the community. He was really one of
14 the key factors in the restoration of the
15 Brockville Courthouse, which I know Mr. Cherniak
16 has told me that it is now a beautiful place,
17 really as a result of the tremendous effort he put
18 into restoring it.

19 My final point, as you will look
20 at some of these letters, is there is an irony that
21 gets mentioned, and the irony is that those who
22 appeared before him as lawyers considered Justice
23 Cosgrove, if he had any leanings, to be pro-Crown
24 as opposed to pro-defence. I raise that just
25 simply to point out that that was the view of

1 with him."

2 The next regional senior was
3 Justice Chadwick, and his letter is at tab 16, and
4 about half way down the page of the first page, he
5 says:

6 "In December of 1994, I
7 became the Regional Senior
8 Justice for Eastern Ontario.
9 Although Justice Cosgrove was
10 a judicial colleague from
11 1990 to 1994, I had very
12 little interaction with him.
13 "Upon becoming Regional
14 Senior Justice, I had more
15 involvement with Justice
16 Cosgrove. I was Regional
17 Senior Justice until 2006.
18 During that time, Justice
19 Cosgrove remained as the
20 Administrative Justice in
21 Brockville.

22 "Justice Cosgrove was a very
23 dedicated and hard-working
24 judge. Notwithstanding his
25 role as Administrative Judge

1 he sat on full-time basis."

2 Because apparently you can get
3 time off to do that role, because it does involve
4 administration:

5 "If the work load in
6 Brockville was not available,
7 he was the first person to
8 volunteer for reassignment in
9 the East region.

10 "During my term as Regional
11 Senior Justice, Justice
12 Cosgrove never turned down an
13 assignment or a request to
14 perform emergency judicial
15 services. I never had a
16 complaint from the public or
17 the Bar about his conduct or
18 reserve judgments.

19 "Justice Cosgrove, very
20 seldom, if at all discussed
21 the cases in which he was
22 involved with his judicial
23 colleagues or me. Although I
24 may not have agreed with all
25 his decisions, or his method

1 at arriving at the decision,
2 I considered Justice Cosgrove
3 competent to handle his case
4 load and reach a reasoned
5 conclusion. To me this was
6 part of judicial
7 independence. I know that my
8 judicial colleagues did not
9 always agree with my
10 decisions, or my method at
11 arriving at that decision."

12 He then talks about Regina versus

13 Elliott:

14 "The case of Regina vs.
15 Elliott, which is the subject
16 matter of the complaint by
17 the Attorney General of
18 Ontario, was conducted during
19 my watch. Prior to the
20 merger in 1990 --"

21 That is the merger of the County
22 Court and the Superior Court:

23 "-- murder cases were the
24 exclusive jurisdiction of the
25 Supreme Court of Ontario. As

1 Regional Senior Justice it
2 was my responsibility to
3 assign judges to various
4 cases. Justice Cosgrove had
5 been a Judge since 1984 and
6 had tried numerous criminal
7 cases. I had no reservations
8 assigning Justice Cosgrove to
9 the Elliott case."

10 In the last paragraph he says:

11 "It is my view Justice
12 Cosgrove handled all his
13 assignments in a fair and
14 responsible manner. I have
15 never once questioned Justice
16 Cosgrove's integrity."

17 Then at tab 11, the next regional
18 senior was Justice Metivier. She says in the third
19 paragraph:

20 "With respect to his current
21 difficulties, I am reminded
22 that I had a trial that went
23 for several weeks in
24 Brockville during the early
25 days of the Elliott trial and

1 he and I frequently had lunch
2 together during that time. I
3 remember his explanation that
4 he had attempted to resist
5 the assignment as he was a
6 neighbour of the Crown
7 Attorney and wanted to
8 maintain a pleasant
9 relationship with him. I
10 also remember clearly that
11 some of the details that came
12 out about the police in
13 particular and their actions
14 were quite shocking. As I
15 remember, the defence at that
16 time was looking to have him
17 recuse himself because he was
18 too pro-crown.

19 "I also had the opportunity
20 to oversee his work while I
21 was Regional Senior Justice.

22 He demonstrated integrity in
23 all of his dealings with the
24 Court, his colleagues and his
25 work.

26

1 "In March of 2004 we had
2 received the instructions of
3 the Chief Justice that he was
4 to have no further sitting
5 assignments. Justice
6 Cosgrove felt very bad about
7 this as he realized that our
8 region was extremely pressed
9 by the shortage of judicial
10 resources and our Family
11 Court was in crisis. He
12 asked to be allowed to assist
13 in some way. In
14 approximately February 2005
15 Chief Justice Smith advised
16 that he could assist by doing
17 non-adjudicative work. Since
18 then and until the end of my
19 tenure as Regional Senior
20 Justice in May of 2008, he
21 was assigned family case
22 conferences and settlement
23 conferences as well as civil
24 pre-trials. During that time
25 I found Justice Cosgrove

1 willing to work anywhere, any
2 time. He knew we needed help
3 and he wanted to assist as
4 much as possible.

5 "His keen and sincere
6 interest in the
7 administration of justice was
8 demonstrated by his
9 long-standing involvement in
10 Law Day in Brockville where
11 he has earned the
12 appreciation of teachers and
13 students for the yearly mock
14 trials he has organized.

15 When the Brockville
16 Courthouse was being
17 renovated and expanded,
18 Justice Cosgrove was at the
19 forefront of the planning,
20 working co-operatively with
21 all involved."

22 She goes on to say:

23 "I am aware that lawyers may
24 find him short, impatient,
25 opinionated and sometimes

1 arrogant but I am also aware
2 that those complaints are
3 made about certain other
4 judges. To the best of my
5 knowledge, he is competent
6 and I have been personally
7 aware that during my tenure,
8 he has frequently attended
9 educational seminars
10 particularly in family law."

11 And, finally, with respect to
12 regional seniors, it is at tab 5, the current
13 regional justice, Justice Hackland. I understand
14 that he had appeared in front of Justice Cosgrove
15 from time to time as a lawyer before he got
16 appointed. He says in the second paragraph:

17 "I have known Justice
18 Cosgrove for many years,
19 first as counsel appearing in
20 front of him periodically and
21 over the last 5 years as a
22 judicial colleague and more
23 recently as Regional Senior
24 Justice for the East Region
25 of the Superior Court of

1 Justice.
2 "I hold Justice Cosgrove in
3 high regard. I have observed
4 him to be extremely dedicated
5 and hard-working, always
6 willing to co-operate in
7 terms of judicial assignments
8 and always courteous and
9 pleasant to his colleagues.
10 Notwithstanding the personal
11 stress and embarrassment that
12 the current proceedings have
13 caused Justice Cosgrove, I
14 have not heard him complain
15 and he has not missed one day
16 of assigned work. Moreover,
17 he has continued his long
18 standing habit of waiving his
19 judgment writing weeks in
20 favour of taking on
21 additional work. While he
22 has not been sitting pending
23 the outcome of the present
24 proceedings, he has assisted
25 us by processing a

1 significant part of our large
2 volume of motions in writing
3 and he has conducted many
4 case conferences or
5 settlement conferences in
6 family law. I think this
7 attests to Justice Cosgrove's
8 characters and dedication in
9 the presence difficult
10 circumstances."

11 He goes on to talk about his
12 public service, as well, and mentions the activity
13 that he is involved in with Law Day.

14 Over the page in the second last
15 paragraph:

16 "To the best of my knowledge
17 and on the basis of my
18 personal experience and
19 observation, Justice Cosgrove
20 has never acted for personal
21 motives or benefit and has
22 always done what he honestly
23 considered to be in the
24 interests of justice. Such
25 errors of law and procedure

1 as he has made have been
2 addressed by our Court of
3 Appeal, as should be the
4 case. I am aware that some
5 lawyers dislike Justice
6 Cosgrove's judging style. On
7 the other hand, he has very
8 strong skills in dealing with
9 self represented individuals,
10 particularly in family law.
11 "In conclusion, Justice
12 Cosgrove is owed a debt of
13 gratitude for his
14 contribution to public life,
15 including his many years of
16 judicial service. He
17 continues to have my respect
18 and I wish him well as he
19 nears retirement after a
20 distinguished career."

21 If I could take you to tab 2,
22 which is a letter from Justice Byers, he says in
23 the second sentence:

24 "In a nutshell I would say
25 one bad case does not make a

1 bad judge. This is
2 particularly true for this
3 judge, who has conducted
4 thousands of cases over the
5 course of his judicial career
6 in a competent and thorough
7 manner.
8 "I was the Administrative
9 Justice for Hastings County
10 for the past twenty years.
11 Justice Cosgrove has presided
12 in this jurisdiction on
13 countless occasions. I know
14 his work and I am close to
15 all the local lawyers who
16 have appeared before him. It
17 is somewhat ironic that if
18 anything, in criminal matters
19 he was inclined to be a
20 little pro-crown. He is a
21 man of the highest integrity
22 and the best character. He
23 is a prodigious worker. He
24 regularly worked all his
25 non-sitting weeks and many of

1 his holiday weeks. He was an
2 absolute gentleman with the
3 staff. In short, I would
4 have him back in a minute."

5 If I could take to you to tab 6?
6 I am not going to read all of these, but some I
7 wanted to highlight. Justice Roydon Kealey was a
8 well-known family law lawyer in Ottawa before he
9 got appointed. He says in the second paragraph:

10 "There is no doubt that Paul
11 is one of the most diligent
12 and hard working Judges in
13 our Court. He has often set
14 aside vacation time and heard
15 matters on non-sitting weeks
16 to assist in the orderly
17 administration of justice in
18 our region. His dedication
19 to duty in this regard is
20 generally known by all
21 members of the Court.

22 "His personal and
23 professional integrity are
24 beyond question in my
25 opinion, and with most of his

1 fellow Judge. Furthermore,
2 over the years together on
3 the Court and in cases I
4 tried before him, I have
5 never known him to be or
6 experienced him as other than
7 a fair minded, capable trial
8 judge."

9 Then at tab 8, comments by Madam
10 Justice Helen MacLeod-Beliveau. The second
11 paragraph is:

12 "I have known Justice Paul
13 Cosgrove for 24 years. I
14 have appeared before Justice
15 Cosgrove as counsel between
16 his date of appointment of
17 July 9, 1984 and my date of
18 appointment of August 4,
19 1989, primarily in civil and
20 family matters. Justice
21 Cosgrove expected counsel to
22 be properly prepared and
23 familiar with the matters
24 argued before him. I found
25 Justice Cosgrove to be

1 fair-minded, informed,
2 competent and diligent in the
3 matters that I argued before
4 him. I found his decision to
5 be prompt and well reasoned,
6 even for the losing party
7 which sometimes I was."

8 Right at the very bottom, she
9 says:

10 "He is respected by his
11 colleagues for his work ethic
12 and his willingness to tackle
13 the most difficult of
14 matters."

15 Over the page:

16 "Over the years, I have come
17 to know other aspects of
18 Justice Cosgrove's character.
19 He is dedicated to his
20 community and gives
21 tirelessly of his time in
22 that regard. He was the
23 primary leader in the
24 restoration of the Brockville
25 Court House and has helped to

1 ensure its preservation as a
2 seat of justice in Brockville
3 for years to come."

4 At tab 10, this is a letter from
5 Justice Colin McKinnon, who practised in front of
6 him and now is a judicial colleague. He says:

7 "I have been acquainted with
8 Justice Cosgrove for over 20
9 years. I have had occasions
10 to appear before him in court
11 as an advocate on a number of
12 occasions and have spent many
13 hours with him as a
14 colleague, interacting
15 socially and professionally.
16 "In court appearances before
17 him, Justice Cosgrove was
18 always well prepared. He cut
19 to the marrow of the
20 argument. He was often
21 challenging in his comments
22 which, personally, I found
23 helpful in developing my
24 arguments. At no time did I
25 feel that I was treated

1 unfairly.
2 "For many years I did
3 criminal defence work.
4 Justice Cosgrove's general
5 reputation was that he was
6 'pro-Crown' which, to say the
7 least, renders these
8 proceedings require ironic."

9 He talks about the Elliott case
10 and it went terribly wrong. He says at the last
11 sentence of that paragraph:

12 "As unfortunate as the
13 handling of the case was by
14 Justice Cosgrove, it is
15 nonetheless atypical of
16 Justice Cosgrove's
17 twenty-four year judicial
18 career."

19 Over the page, the last paragraph:
20 "Justice Cosgrove has proven
21 to be a dedicated judge ever
22 ready to serve the public. I
23 would regard it as a great
24 shame were he to be removed
25 from office by virtue of his

1 for over twenty years and
2 involves presiding over a
3 mock jury trial with
4 students, Crown attorneys,
5 defence counsel and police
6 all participating.
7 "He was a key person in
8 arranging for the restoration
9 of the historic courthouse in
10 Brockville and spent
11 countless volunteer hours on
12 that project. He recently
13 also played an important part
14 in the development of the
15 beautiful Brock Gardens in
16 front of the courthouse.
17 "Justice Cosgrove has opened
18 this beautiful historic
19 courthouse to the community
20 through hosting tours through
21 the Doors Open Ontario
22 project and arranging to have
23 the medal presentations for
24 the Ontario Senior Winter
25 Games presented on the front

1 steps."

2 At tab 13 -- I can skip 13.

3 Fourteen, Justice Douglas Rutherford says in the
4 last paragraph on page 1:

5 "Justice Cosgrove approaches
6 his judicial work
7 industriously, with honest
8 and pure intentions. In my
9 discussions with him about
10 our work, I have never heard
11 or seen one iota of
12 indication that would support
13 a suggestion that he intends
14 anything but the due and
15 proper administration of
16 justice. He is proud of our
17 judicial system and feels
18 honoured to be part of it.
19 That he would import bad
20 faith into his judicial
21 decision-making, or knowingly
22 abuse his judicial office, is
23 totally foreign to the Paul
24 Cosgrove I have come to know
25 over the past 17 years."

1 Then he touches on the Elliott
2 case, and the second paragraph on page 2 says:

3 "The important point I wish
4 to make, however, is that at
5 no time did I ever hear one
6 word from Justice Cosgrove
7 that could possibly suggest
8 that he was allowing an
9 element of bad faith or
10 intentional abuse of his
11 office to intrude into his
12 efforts to try that case
13 fairly and properly.
14 Unfortunately, he appears to
15 have been overly influenced
16 by the strategic submissions
17 and arguments of defence
18 counsel at trial which led
19 him into the errors in his
20 disposition of the Elliott
21 case that the Ontario Court
22 of Appeal dealt with fully
23 and without 'pulling any
24 punches' that fell on Justice
25 Cosgrove.

1 "Paul Cosgrove has been a
2 dedicated hard-working judge,
3 conscientious in his efforts,
4 considerate, collegial and
5 supportive of his colleagues
6 and of the Court, and I was
7 witness to some of his
8 intense struggle with the
9 issues and problems raised in
10 the Elliott trial. His
11 disposition of them may been
12 marred by error, but it was
13 not without protracted effort
14 and consideration of the
15 consequences. Bad faith and
16 intentional abuse of office
17 are simply not part of the
18 man or of the judge."

19 At tab 15 you have a letter from
20 Justice Wright, and Justice Wright sits in Thunder
21 Bay and he talks about in the letter how, from time
22 to time, they need judicial colleagues to go up and
23 assist them in terms of their workload, and they
24 try to find judges who the local bar likes and
25 respects and who are compatible with the manner of

1 disposition, the way in which the judges in Thunder
2 Bay deal with their cases.

3 In that regard, in the third
4 paragraph, he says -- and I invite you to read the
5 entire letter, but I just wanted to highlight the
6 third paragraph:

7 "Of course, we tried to
8 monitor the Bar's impression
9 of the 'imported talent.'
10 The consensus seemed to be
11 that Justice Cosgrove
12 approached issues
13 compassionately but that he
14 would brook no nonsense.
15 Since the three resident
16 judges attempted to do the
17 same, the Bar was apparently
18 not discomfited by his
19 style. He is a man with a
20 deep sense of justice who is
21 not overawed by the
22 Bureaucracy or those highly
23 placed in the Executive. In
24 short, he exhibits the finest
25 qualities of the Irish."

1 And he had been invited back on
2 several occasions to preside up in Thunder Bay.

3 At tab 21, you have a letter from
4 the Honourable Justice Morin and a long-time,
5 highly respected trial lawyer from Ottawa who then
6 went to the bench. He says in the second paragraph
7 on page 1:

8 "I first met Justice Cosgrove
9 in 1988 or 1989 while acting
10 as a defence counsel in a
11 lengthy and somewhat
12 complicated personal injury
13 case. It was a jury trial
14 presided over by Justice
15 Cosgrove. Throughout the
16 trial Justice Cosgrove acted
17 in a most gentlemanly
18 fashion. He was fair and
19 even handed in his decisions
20 during the course of the
21 trial. His charge to the
22 jury was fair and reasonable
23 to both sides, setting out
24 their respective positions
25 and giving the jury

1 appropriate ranges of damages
2 depending on what view they
3 took of the evidence. There
4 is nothing in Justice
5 Cosgrove's conduct at that
6 time to call into question
7 his competency as a trial
8 judge and nothing has come to
9 my attention since that time
10 to change my views in that
11 respect."

12 Of the bottom of the page, he
13 says:

14 "Based on my knowledge and
15 dealings with him, I have
16 never known Justice Cosgrove
17 to lack integrity as a person
18 and as a judge. To my
19 knowledge, he has always
20 dealt fairly with those that
21 came before him. I have
22 never known him to judge a
23 case other than on his honest
24 view of the evidence and his
25 understanding of the law."

1 Over the page he says:

2 "Has he made mistakes as a
3 trial judge? Yes, as we all
4 have from time to time. The
5 Court of Appeal found that he
6 made many mistakes in the
7 Elliott case, but to suggest
8 that he was motivated by bias
9 against the Crown or in
10 favour of the accused, in my
11 view, does not in any way
12 describe the person and judge
13 that I have come to know and
14 respect over the last 20
15 years.

16 At tab 22 is a very interesting
17 letter that this lawyer from Brockville took a
18 considerable period of time to write. It is a very
19 thoughtful piece, and I wanted to read it to you in
20 its totality, if I may, from Greg Best.

21 It gets me back to the family law
22 issue that I had raised with you about how he seems
23 to be revered, certainly in that area, by those who
24 have appeared before him:

25 "I have practiced family law

1 before Justice Cosgrove since
2 his appointment as a Superior
3 Court judge of Ontario in
4 1984. I have appeared before
5 him on numerous occasions in
6 case conferences, settlement
7 conferences, contested
8 motions and full trials.
9 "I do not practice criminal
10 law or civil litigation.
11 Therefore, I have no direct
12 knowledge of Mr. Justice
13 Cosgrove's conduct in the
14 case Regina v. Julie Elliott
15 or his conduct in any other
16 criminal trial.
17 "However, I feel that I have
18 extensive knowledge of Mr.
19 Justice Cosgrove's
20 deportment, judicial conduct
21 and knowledge of family law.
22 I have a busy family law
23 practice and I generally
24 appear before the Superior
25 Court of Ontario several

1 times a week.
2 "I have found Mr. Justice
3 Cosgrove to be an insightful,
4 knowledgeable and fair minded
5 judge. When I am informed
6 that Justice Cosgrove is
7 sitting on a particular case,
8 I feel confident that the
9 case will be dealt with in a
10 thorough and fair manner. I
11 am confident that the
12 material will be read by Mr.
13 Justice Cosgrove and he will
14 be well prepared for the
15 hearing. If an issue of law
16 is to be argued, he will have
17 read the relevant cases and
18 legislation.
19 "There is no doubt that Mr.
20 Justice Cosgrove is a highly
21 demanding judge. He expects
22 counsel to be well prepared,
23 knowledgeable on the facts of
24 a particular case and ready
25 to refer to the relevant law

1 if required. Mr. Justice
2 Cosgrove can be impatient if
3 he feels counsel are not
4 properly prepared or their
5 filed material is deficient
6 or if he feels counsel have
7 been relegated to the
8 position of mere mouth pieces
9 for their client. He can be
10 very direct with counsel if
11 he feels they have resorted
12 to unfair tactics, undue
13 delays or unnecessary
14 complications in the process.
15 Mr. Justice Cosgrove is
16 acutely aware of the high
17 financial costs to litigants
18 and he is always anxious to
19 ensure that an appearance
20 before him is productive and
21 meaningful to the parties.
22 "Although Mr. Justice
23 Cosgrove's conduct does
24 sometimes appear to be abrupt
25 with counsel, I ascribe that

1 to his insistence on high
2 standards and his awareness
3 that the administration of
4 justice is always on trial.
5 "In my opinion Mr. Justice
6 Cosgrove's treatment of
7 parties in difficult family
8 law matters is exemplary. He
9 is acutely aware of the
10 common feelings of failure,
11 humiliation and fear. Mr.
12 Justice Cosgrove invariably
13 makes a concerted effort to
14 reassure parties. The vast
15 majority of clients are
16 highly appreciative of this
17 approach. There is a clarity
18 and directness which Mr.
19 Justice Cosgrove conveys to
20 the great relief of most
21 clients. Generally Mr.
22 Justice Cosgrove does not
23 like to spend time on
24 historical grievances,
25 ascribing blame to various

1 parties or rehashing mistakes
2 that parties have made in
3 their marriage or
4 relationship. He wants to
5 identify and focus on the key
6 issues of the case.
7 "During the year, I have
8 found Mr. Justice Cosgrove to
9 be very patient with the
10 litigants and sensitive to
11 their concerns. He is aware
12 of human foibles so often
13 displayed in family law
14 matters.
15 "I recall one very dramatic
16 custody trial before Mr.
17 Justice Cosgrove. The case
18 was quite complex and the
19 parties were not
20 sophisticated or particularly
21 well educated. After several
22 days of trial a settlement
23 was reached. On their own
24 accord both parties in open
25 court publicly thanked Mr.

1 Justice Cosgrove. They
2 stated that it was obvious to
3 them that the judge was
4 generally interested in the
5 welfare of their little boy
6 and they felt the case had
7 been conducted in a fair
8 manner.

9 "Mr. Justice Cosgrove is
10 diligent in ensuring that
11 witnesses in family law cases
12 are not bullied, harassed or
13 abused in the witness stand.

14 He has no hesitation in
15 cautioning or warning counsel
16 if he feels the
17 cross-examination is
18 inappropriate, prolix or
19 repetitive. It is not
20 infrequent that he intervenes
21 if he feels that
22 cross-examination is clumsy
23 or abusive. There are
24 certain counsel who take
25 great umbrage of this

1 approach. In family law,
2 where issues are frequently
3 highly sensitive and central
4 to the party's identity, the
5 parties often become
6 extremely upset. I have
7 found Mr. Justice Cosgrove's
8 approach appropriate for the
9 fair and orderly conduct of
10 the cases. Clear guidelines
11 are set for counsel, the
12 court explicitly takes
13 control and the conduct of
14 the judge engenders respect
15 for the process.

16 "Mr. Justice Cosgrove is
17 fully engaged as a respected
18 citizen in the City of
19 Brockville. He has been
20 instrumental in the
21 restoration and renovation of
22 a magnificent historical
23 courthouse overlooking the
24 St. Lawrence River in
25 downtown Brockville. While

1 many of our courthouses
2 resemble bus stations, Mr.
3 Justice Cosgrove championed
4 the preservation and
5 improvement of a historical
6 building which clearly
7 embodied the grandeur and
8 authority of the justice
9 system in Canada.
10 "The courthouse green in
11 Brockville is a deliberate
12 New England feature created
13 by Loyalists. The
14 beautification and
15 improvement of this landscape
16 has been enthusiastically
17 supported by Justice
18 Cosgrove.
19 "Mr. Justice Cosgrove has
20 been a leader in initiating
21 and conducting mock trials
22 each Law Day. In these
23 trials, high school students
24 act as counsel with local
25 members of the bar, sit as

1 jurors and appear as
2 witnesses. Although some
3 lawyers tend to be very
4 patronizing and cynical about
5 this process, the high school
6 students themselves and their
7 teachers are enthusiastic
8 supporters and participants.
9 Mr. Justice Cosgrove
10 presides over these
11 proceedings with dignity.
12 "In family law, the area of
13 law with which I am familiar,
14 I have found Mr. Justice
15 Cosgrove, in the exercise of
16 his judicial duties, to be
17 thorough, efficient,
18 dedicated and impartial.
19 There has been no conduct
20 that I have witnessed which
21 would undermine public
22 confidence in the
23 administration of justice in
24 Ontario."

25 At 23, just a very short passage,

1 a letter from again a practising lawyer, Clinton
2 Culic, from the Brockville area. At the bottom of
3 page, he says:

4 "In my own practice of law, I
5 specialize in civil cases,
6 mostly family and personal
7 injury cases. In the cases I
8 have had that were heard by
9 Justice Cosgrove I cannot
10 recall one single incident of
11 improper behaviour from the
12 bench. I cannot even recall
13 a seriously annoying incident
14 of behaviour from the bench.

15 In that regard I should
16 disclose that unlike some of
17 my local brethren, I am not
18 annoyed by being asked
19 pointed, thoughtful questions
20 from the bench. Such
21 questions only to serve to
22 guide and focus my approach
23 as the case evolves, which is
24 undoubtedly their purpose.
25 In my respectful opinion,

1 such a judicial demeanour
2 should not be viewed as the
3 judge 'high-jacking' an
4 advocate's case or dominating
5 the courtroom, although I
6 perfectly understand how
7 unprepared counsel may well
8 feel that way."

9 I should tell, you over the page,
10 he did talk about a criminal case that he had in
11 which he did something that was highly unusual and
12 beneficial. Mr. Culic says:

13 "I have only had one criminal
14 trial in front of Justice
15 Cosgrove and that was many
16 years ago, early in my
17 career. It involved a
18 defendant whose behaviour had
19 radically changed after
20 suffering a traumatic frontal
21 lobe brain injury. He went
22 from a straight 'A' student
23 to a hooligan; he was
24 entirely two different
25 people. Justice Cosgrove, on

1 his own initiative, contacted
2 a brain-injury organization
3 and obtained their assistance
4 for the defendant as part of
5 his rulings in the matter.
6 It was my first encounter
7 with such a thoughtful,
8 involved judge. Now, if I
9 understand correctly, the
10 proposal before you is to
11 remove Justice Cosgrove from
12 the bench because he became
13 too personally involved in
14 the legal defence of Julia
15 Elliott. How ironic. How
16 unfortunate."

17 I just wanted to point out that
18 example of the extra mile that he went to in that
19 case.

20 At tab 24, a letter from Peter
21 Hagen, and it again demonstrates a real life
22 example of the lengths to which Justice Cosgrove
23 was prepared to go to to ensure that justice was
24 done between parties in a fairly lengthy case.

25 Mr. Hagen says in the third

1 paragraph:

2 "I have had the opportunity
3 of appearing before Justice
4 Cosgrove as counsel on a
5 number of matters over the
6 years. Most recently I was
7 involved in an application
8 for Injunctive Relief which
9 eventually evolved into a
10 lengthy hearing that included
11 18 days of oral testimony.
12 My assessment of Justice
13 Cosgrove is from this
14 perspective.
15 "In dealing with the Motion
16 for Injunctive Relief,
17 Justice Cosgrove was
18 extremely accommodating to
19 the parties and allowed
20 argument to extend late into
21 the evening in order to
22 ensure that the matter was
23 addressed with the urgency
24 that the situation required.
25 "During the subsequent

1 eighteen day hearing Justice
2 Cosgrove made himself
3 available to ensure that the
4 matter proceeded
5 expeditiously. Throughout
6 the hearing he treated
7 counsel fairly.
8 "In my appearances before
9 Justice Cosgrove he has, in
10 my view, exemplified the
11 ethical principles for Judges
12 as outlined on page 13,
13 paragraph 7 of the notice to
14 Justice Paul Cosgrove. I
15 believe that on those
16 occasions where I have had an
17 opportunity to observe
18 Justice Cosgrove he has acted
19 in good faith and attempted
20 to perform his duties to the
21 best of his abilities and in
22 doing so has acted in a
23 manner so as to exhibit and
24 promote the high standards of
25 judicial conduct which in my

1 view would reinforce public
2 confidence in fair-minded and
3 informed persons observing
4 those proceedings."

5 One last one, if I may, without
6 taxing the panel. This is from a non-lawyer, a
7 citizen, who again wrote a very thoughtful letter.
8 She is involved with the Brockville Recorder, the
9 newspaper, at tab 27. It is a woman named Mildred
10 Craig, and she wrote:

11 "I am pleased to write this
12 letter to assist you on
13 behalf of Judge Paul
14 Cosgrove. Although I have no
15 legal educational background
16 or experience, I have
17 followed this judge's
18 decisions very closely over
19 many years. Our local
20 newspaper, The Recorder and
21 Times, carried the Brockville
22 proceedings quite thoroughly
23 in the past. I was always
24 struck with the wisdom of
25 Justice Paul Cosgrove's

1 opinions as they were
2 regularly reported. I
3 suppose it is easy to agree
4 with someone who seems to
5 make a similar decision to
6 what you would have made in
7 the same situation. I admit
8 that it became a bit of a
9 guessing game waiting for
10 Judge Paul Cosgrove's
11 verdicts in cases that were a
12 particular interest to me. I
13 would like to be more
14 explicit, however, I can say
15 without reservation that I
16 was particularly attracted to
17 cases involving younger
18 citizens that were accused of
19 crimes and subsequently
20 prosecuted. The manner in
21 which Judge Paul Cosgrove
22 considered the ages of the
23 young offenders and their
24 family circumstances, and how
25 he managed them as young

1 people impressed me greatly.
2 "On many occasions I felt
3 that Judge Paul Cosgrove
4 looked well beyond the
5 presenting facts or the
6 dramatics of the cases, and
7 took time to look carefully
8 at any motives, while
9 examining the extenuating
10 circumstances surrounding the
11 crimes. I often felt that he
12 went back to examine what had
13 caused the incidents to occur
14 in the first place and how
15 and why the victim and the
16 accused had come to together.
17 He seemed to carefully
18 consider and weigh the
19 background situation and the
20 cultural influences of the
21 cases. The reasons how
22 relationships had originally
23 been established, and why
24 they had gone wrong,
25 apparently mattered in his

1 deliberation. In other
2 words, I felt Judge Paul
3 Cosgrove went back to the
4 first principles of the case
5 that he was judging and I
6 admired his transparent lack
7 of biases, especially on
8 gender issues. In addition,
9 I felt the outcomes of any
10 decisions were thoroughly and
11 widely examined for their
12 financial and social impacts.
13 "I know Judge Paul Cosgrove
14 only as a professional within
15 the small city of Brockville
16 and I am not considered his
17 personal friend. However I
18 do believe that Judge Paul
19 Cosgrove has always been a
20 man of character and of
21 personal integrity. He
22 appears not to easily
23 tolerate unfairness,
24 perceived set-ups or
25 coercion. As a family

1 acquaintance, I know that he
2 is an impeccable family man
3 and a true and fine
4 gentleman. I believe that
5 justice is his prime reason
6 for being a judge. I also
7 know him to be a proud and
8 protective citizen of
9 Brockville, and of Canada,
10 and indeed he may be loyal,
11 honourable and conscientious
12 beyond the norm.

13 "I have no hesitation as a
14 life long citizen of
15 Brockville, a former hospital
16 nurse, a nursing teacher, a
17 college administrator, and a
18 public school board trustee
19 for Brockville for the past
20 fourteen years, in stating
21 that I have admired the
22 careful work of Judge Paul
23 Cosgrove. To me, he exudes a
24 high intelligence, a
25 sincerity of purpose to

1 improve our society and a
2 noble desire to eliminate
3 fraud and deception by
4 honouring and upholding the
5 truth for the common good."

6 Those are the letters that I
7 wanted to highlight. I commend them all to you. I
8 am sure that you will see that, as I said, there
9 are a number of themes that run through these
10 letters that demonstrate why it is that Mr.
11 Cherniak came to the conclusion that these letters
12 reinforced his view that the appropriate resolution
13 of this matter was to deal with it by way of
14 admonition and not by way of removal from the
15 bench.

16 I can also tell you that people
17 may say, Well, these letters were not
18 cross-examined on, and whatnot. I can tell you
19 that a number and I wouldn't say all, but if I had
20 asked, I am sure that they would have come to be
21 cross-examined on their letters, and I take it as a
22 great compliment that my friend accepts the letters
23 at face value, that there was no need for me to
24 have done any of that, but I can assure you that
25 his judicial colleagues, several of them, made it

1 clear to me that they were prepared to come here
2 and attest to the statements that they made in
3 those letters.

4 Unless the panel has any
5 questions, those are our submissions. As I say,
6 having Mr. Cherniak to consider this matter in the
7 public interest, we ask you to accept his
8 suggestion.

9 THE CHAIR: Did you wish to make
10 any comment on the question I put to Mr. Cherniak
11 about the timing of the apology and the intervening
12 events and the public expense, that sort of thing?

13 MR. PALIARE: Justice Finch, I
14 have thought about that, and I honestly can't
15 improve upon what Justice Cosgrove told you, in his
16 most sincere fashion, that it was evolutionary to
17 him, in the sense that, as you see from these
18 letters, people held him in high regard. He is a
19 judge who acts in good faith.

20 In my opening statements, you will
21 recall that I made the assertion that these were
22 decisions that were all made in good faith, and
23 that was why we were so committed to doing the
24 Boilard motion is that, in our view, you would have
25 concluded, if we had ever got there, assuming we

1 don't, that you could not make out a case once you
2 heard all of the evidence, including Justice
3 Cosgrove's evidence, that he did anything other
4 than act in good faith and he did not abuse his
5 office.

6 I say that notwithstanding all of
7 the errors, but he had this honest belief, and I
8 share it, as I read the transcript, that he was
9 doing the best he could with respect to the unusual
10 circumstances of that case, some of which you have
11 heard about.

12 I don't intend to get into the
13 debate that we would have had or may have at some
14 point about that. As I saw it evolving, Chief
15 Justice Finch, it got hit home when these passages
16 got read out in the way that they did; that is,
17 they are seen from a completely different
18 perspective than reading the decision from the
19 Court of Appeal or even reading these transcripts
20 in the comfort of our office.

21 They are, in my respectful view,
22 very different when they are vocalized in the way
23 that Mr. Cherniak did, and so that's the answer.
24 With respect to the delay on the constitutional
25 arguments, you must remember that for better or for

1 worse, Justice Cosgrove retained lawyers who
2 advised him that there was, from our perspective, a
3 constitutional argument here and we did not spend
4 one minute looking at the transcripts.

5 Mr. Cherniak, in fairness, told
6 us, Here's the transcript, you can look at it. I
7 was not going to spend weeks on end speaking of
8 protecting the public purse, when I felt that there
9 was a valid constitutional argument that this is a
10 case that should not go forward.

11 That was our call and not his, and
12 so the delay shouldn't be visited on him. Rightly
13 or wrongly, I think I had close to 1,100 judges
14 across the country that agreed with me. I forget
15 what the total number is of the association, but
16 they were there with us shoulder to shoulder on
17 this issue, and so it was a real live issue, and I
18 say this respectfully. We disagreed with the
19 panel's decision, so he shouldn't be visited with
20 that. Is there anything else, Chief Justice?

21 THE CHAIR: I don't know whether
22 you can respond to this or not, and we will
23 certainly look carefully at the language of the
24 apology expressed by Justice Cosgrove this morning.
25 I understood him to admit many errors and to

1 apologize for them.

2 Leaving aside the transcripts and
3 leaving aside the judgment of the Ontario Court of
4 Appeal and looking only at Justice Cosgrove's
5 reasons of September 7th, 1999, there are many,
6 many findings in there of deliberately dishonest
7 conduct on the part of various people.

8 To pick an example, starting at
9 paragraph 166, he talks about Detective Inspector
10 Bowmaster's deliberately false and misleading
11 evidence, actively misled the court, knew his
12 evidence was untrue, deliberately false and
13 misleading evidence, and so on.

14 I suppose my question is: Does
15 the judge characterize that simply as an error or
16 does he characterize that as judicial misconduct,
17 and what is he apologizing for when he says he
18 apologizes?

19 MR. PALIARE: It's a sort of a
20 rolled up --

21 THE CHAIR: It is a Mr. Murphy
22 kind of a question. You can break it down and deal
23 with it in parts.

24 MR. PALIARE: I would never accuse
25 you of a Mr. Murphy question. One answer I can

1 give you is that Mr. Cherniak is here in the public
2 interest. He has interviewed and spoken with all
3 of these people, including Detective Inspector --
4 if I have got the adjectives right -- Bowmaster,
5 and that from Mr. Cherniak's perspective, the
6 apology that we gave satisfied him both in the
7 public interest and with respect to the Attorney
8 General, the senior officers of the Attorney
9 General, the police, and we made sure that we
10 covered all of that off. And, as I say, Mr.
11 Cherniak was satisfied with that.

12 I can't imagine a more abject
13 apology. Justice Cosgrove has said that he
14 shouldn't have done what he did. I am not sure I
15 can put it any differently than that.

16 One of the reasons why you have
17 independent counsel, in my respectful view, in the
18 by-laws is that you have someone who is totally
19 independent from you who is there to protect the
20 public interest, weighs all of these things, has
21 met with the witnesses, has examined the file in
22 detail and makes a recommendation to you.

23 Of course we have said from the
24 outset you are not bound by it, but it has to hold
25 a lot of weight particularly -- it would be better

1 if he wasn't in the room, but someone with his high
2 stature. He is one of the deans in the country.
3 He is good as it gets, to choose a phrase from a
4 popular movie, and he's got a wealth of experience.

5 He has told you that this is, from his
6 perspective, an apology that not only satisfies the
7 public interest, but the players, the state actors
8 who were involved, the family and the civilians.

9 I can't put that any differently.
10 I am happy to answer any other questions.

11 THE CHAIR: All right.

12 MR. CHERNIAK: I wasn't going to
13 say anything, but I think I should state my
14 position on the last question that the Chief
15 Justice had. I had I hope not wrongly, I don't
16 think wrongly, read the apology as encompassing the
17 point that the Chief Justice made.

18 Had I not done so, I think I would
19 have taken a very different position, and I did so
20 for a couple of reasons, just rereading the
21 apology, the statement, and I obviously I don't
22 have a transcript, but I do have a pretty close
23 written version of what was said.

24 Justice Cosgrove, early in what he
25 said -- and I am not sure whether you have the

1 written statement, but I have it -- in paragraph 3,
2 he said that he realizes he made a series of
3 significant errors that affected the proceeding.

4 In paragraph 4 he said, among
5 other things: The Court of Appeal found that I had
6 made many errors in my findings of fact, and I
7 misapplied the law on numerous occasions.

8 And I characterized the kind of
9 findings that the Chief Justice referred to as
10 being findings of fact.

11 Then he said in paragraph 8: I
12 want to acknowledge freely that I made many
13 findings against the Ministry of the Attorney
14 General and senior representatives, Crown counsel,
15 police officers and public officials that were set
16 aside by the Court of Appeal. I erred in so doing,
17 and I regret those errors. I regret the effect of
18 my findings on them.

19 Then he goes on with the paragraph
20 about the findings of individuals that were not
21 before the court.

22 Then he said: I regret very much
23 the effect of my erroneous judicial decisions had
24 on the Ministry of the Attorney General and counsel
25 and the trial process.

1 So I read the apology as
2 encompassing all of those findings against, among
3 many others, Detective Inspector Bowmaster. If in
4 some way I am misreading that, then I invite my
5 friend or Justice Cosgrove to say so, because if I
6 am misreading it, I would take a different view.

7 I wouldn't have said what I said
8 unless I thought -- I mean, it would have taken a
9 long time to go through all of them, unless I
10 thought all of those findings that were unwarranted
11 were withdrawn.

12 I must say that's the way I
13 interpreted the apology and the statement, and I
14 think I'm hearing from my friends and from Justice
15 Cosgrove that I have not misunderstood that.

16 MR. PALIARE: From both of us.

17 THE CHAIR: I am still not clear
18 on this. I understand the judge acknowledges
19 errors of fact and errors of law and has apologized
20 for them, but what I haven't understood is whether
21 he acknowledges judicial misconduct.

22 MR. PALIARE: He does not.

23 THE CHAIR: He does not?

24 MR. PALIARE: Errors of fact and
25 law don't constitute judicial misconduct. They

1 can't. That is what the Court of Appeal is for.
2 We don't acknowledge that.

3 THE CHAIR: So on your
4 understanding of the judge's apology, it will still
5 be open to you to bring your application that this
6 committee is without jurisdiction?

7 MR. PALIARE: We never suggested
8 that. If in fact Mr. Cherniak's proposal is
9 accepted and adopted, there would be no such
10 application by us.

11 THE CHAIR: I understand that. I
12 am trying to understand the nature and quality of
13 the judge's apology, and you say that the judge
14 does not acknowledge that any error of his amounted
15 to judicial misconduct.

16 MR. PALIARE: Nor was it asserted
17 in Mr. Cherniak's submission to you. As I
18 understood it, this is a matter where the conduct
19 is such that it cannot rise to the level of
20 warranting dismissal, removal, as I understood it,
21 and could not reach the high test, the high level
22 that is required under the Marshall test.

23 But it is conduct that would
24 warrant an admonition, and we don't disagree with
25 any of that.

1 HON. MACDONALD: But to warrant an
2 admonition it has to be misconduct, doesn't it?

3 MR. PALIARE: It does not, in my
4 respectful view. The Douglas case makes that
5 absolutely clear, if there is any doubt about that,
6 Justice Borin's decision.

7 MR. CHERNIAK: All I can say to
8 the panel is I guess Mr. Paliare and I disagree on
9 this. My opinion is based on the proposition that
10 the conduct and all the facts do no longer support
11 the finding of removal from the bench.

12 The case shows facts, conduct
13 which I say amount to sufficient misconduct that
14 would warrant the pointed strong admonition that I
15 referred to. In listening to the evidence you
16 heard and reading this statement, at least the way
17 I read it and heard it, there is an admission of
18 the conduct that, in my view, leaves no doubt --
19 that leads to the proposition that there was
20 judicial misconduct, and that has been my position
21 from the outset.

22 There is varying degrees of
23 judicial misconduct. There is judicial misconduct
24 at the highest level that could result in removal
25 from office, and that has got to be a very high

1 level, and then there is judicial misconduct that
2 could result in the kind of admonition that would
3 be given.

4 I agree with the panel that if
5 there was no misconduct at all, we wouldn't be
6 here. If we have that difference, then we have
7 that difference. Mr. Paliare can say what he
8 wants. The evidence is here and the statement is
9 here.

10 My position is there an admission
11 here, whatever Mr. Paliare says, and evidence to
12 support a finding of misconduct that arises to the
13 level of requiring an admonition that you could
14 find is capable of that, but, for the reasons I
15 outlined, I am not going further.

16 THE CHAIR: We will stand down for
17 a few minutes.

18 --- Recess at 2:26 p.m.

19 --- Upon resuming at 2:52 p.m.

20 RULING:

21 THE CHAIR: While we are grateful
22 to both counsel and Justice Cosgrove for the
23 assistance that they have given us to today, we are
24 of the view that we should hear the balance of the
25 case that independent counsel has to present.

1 With respect to remaining
2 transcript evidence, we, of course, will treat that
3 as part of the record. We would however, Mr.
4 Cherniak, appreciate your assistance in directing
5 our attention to those passages that you say are
6 particularly deserving of our attention. It is not
7 necessary to read all of that material, as you have
8 been doing to date.

9 With respect to the viva voce
10 evidence you have mentioned, we consider it
11 appropriate to hear from those persons you have
12 already arranged to attend, subject always, of
13 course, to the discretion that independent counsel
14 has in presenting the case to be addressed.

15 MR. CHERNIAK: Thank you. Perhaps
16 in view of what you said, it may take me until the
17 weekend to mark up one clean copy of the
18 transcripts in book 4 with the passages that I
19 would have read.

20 It will be difficult for me to do
21 that overnight, given what I have to do overnight
22 with respect to the preparation of the witnesses
23 that I will call tomorrow. I will find some way to
24 make sure that your copies get equally marked up.
25 I will speak to Mr. Macintosh about that, if that's

1 okay.

2 THE CHAIR: Yes.

3 MR. CHERNIAK: Because I just
4 don't have the time to do that overnight tonight.
5 I have got it marked, but to do it right, I have to
6 rethink it and do it. I do now have other things
7 to do tonight. So if that would be satisfactory.

8 I hope we can deal with all four
9 of the witnesses that I propose to call tomorrow.

10 THE CHAIR: In terms of scheduling
11 overall, where would that leave us in terms of --

12 MR. CHERNIAK: That will conclude
13 the evidence that I wish to put forward, and then
14 it will be up to Mr. Paliare to decide.

15 In the normal course, before
16 today, I would have understood Mr. Paliare was
17 going to bring his motion, and Mr. Paliare will
18 have to consider where we are on Friday.

19 The case I'm presenting will
20 conclude when the witnesses are done, which I hope
21 will be tomorrow.

22 THE CHAIR: Subject to your giving
23 us whatever you are going to give us with respect
24 to the new transcripts --

25 MR. CHERNIAK: Yes, subject to

1 that, because we are going to have argument at some
2 point. That evidence is in. All I am talking
3 about is marking the passages that I would have
4 otherwise read.

5 Then I guess we will have to hear
6 from Mr. Paliare where we go from there, and, at
7 some point, we will have argument, either on his
8 motion or we will have Mr. Paliare's further
9 evidence, if there is any, and then we will have
10 the submissions, final submissions to the panel.

11 THE CHAIR: All right. Again,
12 thinking ahead so people can plan their lives,
13 would it be realistic -- and I am not asking you
14 for any commitment at this point, Mr. Paliare, but
15 is it realistic to think in terms of hearing final
16 submissions Tuesday, Wednesday?

17 MR. PALIARE: I would think that
18 that is premature, from our perspective, and that
19 we could not properly put forward our case until my
20 friend has indicated what it is he is relying on in
21 the fourth volume. From our perspective, that
22 would be essential.

23 THE CHAIR: I am just thinking out
24 loud here, Mr. Cherniak. Perhaps the way that can
25 be done would be for you to give your friend the

1 references without marking up the copies as you
2 have done for us.

3 MR. CHERNIAK: I can do that, but,
4 I mean, I am relying on the entire volumes. Just
5 because I only read certain portions to the panel
6 does not detract, in my respectful submission, from
7 the fact that the evidence is the transcripts in
8 the volume.

9 I did not feel it was either
10 necessary or appropriate to read everything in
11 those volumes. I read enough, and my friend
12 stopped me from time to time to say, You should
13 read X, Y, Z, and I always did.

14 Some of it is context and some of
15 it is there, but, I mean, it is there for all of us
16 to see. Just because I read it or don't read it
17 doesn't mean it may not be of some importance.

18 I must say I don't quite
19 understand that submission. I rely on all of it.
20 What I was going to do was to tell you what I would
21 have read, and I will do that and I will try to do
22 it as quickly as I can.

23 My problem is that because all but
24 one of these witnesses is from out of the city, I
25 am spending a good part of this evening talking to

1 them and getting my case ready for tomorrow, so it
2 leaves less time. I will do what I can, but it
3 leaves less time to mark the passages up, but I
4 think my friend should assume, as with the first
5 three volumes, that it is all evidence in this
6 proceeding.

7 THE CHAIR: Mr. Paliare.

8 MR. PALIARE: We take the position
9 that we need to know what it is, what aspects of
10 the transcript my friend is relying upon with
11 respect to which particular. Fair enough, it is
12 easy to say you can look at the whole 120 volumes,
13 but, in fairness to Justice Cosgrove, there are
14 certain particulars and we say we are entitled, as
15 a matter of natural justice and fairness, to know
16 which portions are being relied upon for which
17 particular, because we have to put forward a
18 defence with respect to these matters.

19 What has happened, and I am not
20 critical of my friend at all, is that he has side
21 barred a number of passages, and I was speaking to
22 him yesterday about it. I think he has read
23 probably 80 or 90 percent, or maybe all, of the
24 side barred portions, but he has read -- that
25 amounts to -- put it differently -- amounts to

1 about 50 percent of what it is he is relying on.

2 In other words, he has read
3 substantial portions that he is relying upon that
4 were never side barred, and so from our perspective
5 we get his binders, and the idea with the binders,
6 as I understood it from day one and from the time
7 that we talked about it with the panel, was to be
8 able to focus what it was that was being relied
9 upon, and then side barring those portions that
10 independent counsel was going to be able to assert
11 establish the particulars.

12 So from the defence side of this
13 case, we need to know what it is he is relying on
14 from the transcript.

15 THE CHAIR: Isn't it all tabbed
16 and marked in the last volume?

17 MR. PALIARE: No. It is tabbed
18 and it's side barred, but I have just told you that
19 50 percent of what has been read by Mr. Cherniak as
20 what he is relying on -- I may have the number
21 wrong, but it is a substantial portion -- was never
22 side barred. All you've got to do is look -- if
23 you have highlighted what it is he has read to you,
24 on almost any particular, substantial portions of
25 it were never side barred.

1 And so when we go in to prepare
2 this case, oddly enough, what do we look at? We
3 read significant portions of it, but what do you
4 focus on? You focus on what is side barred.

5 It is unfair to us, in terms of
6 our defence, to simply say, Here is volume 4. What
7 is it he is relying on in volume 4? And that's why
8 I understood him to say, I'm going to mark it up,
9 because he can't say to you, I don't think, just
10 rely on what is side barred.

11 THE CHAIR: No, I think what he
12 has been telling us is that he relies on everything
13 that is in volume 4.

14 MR. PALIARE: Then why side bar
15 anything? What is the purpose of the side bars,
16 because that's the way we prepared our defence?
17 Oddly enough, that's what you look at. What is it
18 that independent counsel is going to rely on? He
19 sidebars it. We say this is what we need to
20 respond to.

21 THE CHAIR: Mr. Paliare, you are
22 not suggesting to us that you and your client have
23 only directed your attention to those passages in
24 the first three volumes that were side barred?

25 MR. PALIARE: I never said that,

1 Chief Justice, but it is what you focus on as being
2 of critical importance; otherwise, why sidebar
3 anything?

4 THE CHAIR: I think you are as
5 well able to read and understand what it's in
6 volume 4 as the rest of us. All we asked Mr.
7 Cherniak to do was to just give us a notation of
8 where he wanted us to go.

9 I quite honestly don't think you
10 are at any disadvantage or without adequate notice
11 on this. I don't think we can do any better at
12 this point than leave it up to counsel to discuss
13 scheduling. From the sound of it, we do have more
14 than enough time to complete everything that has to
15 be completed by next Wednesday.

16 We are most grateful to counsel
17 for the way they have worked at bringing this case
18 down to manageable proportions. I think we will
19 perhaps just have to leave it there.

20 --- Whereupon the proceedings adjourned
21 at 3:04 p.m.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately recorded
by Shorthand and transcribed therefrom,
the foregoing proceeding.

Catherine Southworth, Computer-Aided Transcription