

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 Thursday, September 4, 2008 at 9:30 a.m.

APPEARANCES:

Earl Cherniak, Q.C.
Cynthia Kuehl

Independent Counsel appointed
pursuant to the *Complaints Procedure*

Chris Paliare
Richard Stephenson
Robert A. Centa

for The Honourable Paul Cosgrove

George K. Macintosh, Q.C.

for the Inquiry Committee

(ii)

INDEX

	PAGE
Continued Submissions by Mr. Cherniak	480

1 Toronto, Ontario

2 --- Upon resuming on Thursday, September 4, 2008 at

3 9:30 a.m.

4 THE CHAIR: Yes, Mr. Cherniak.

5 CONTINUED SUBMISSIONS BY MR. CHERNIAK:

6 MR. CHERNIAK: Yes, thank you. I

7 think you now have the updated cast of characters

8 and the evidence inserts that Ms. Kuehl provided,

9 as promised yesterday.

10 THE CHAIR: Thank you.

11 MR. CHERNIAK: I was in tab D in

12 volume 2. I think I will resume at page 6669 at

13 the bottom just to get the context.

14 THE CHAIR: Yes.

15 MR. CHERNIAK: Actually, it is

16 6668 at the bottom. Justice Cosgrove's gives a

17 short adjournment to give Mr. Stewart an

18 opportunity to deal with the authorities, and you

19 will see at page 6669, at about line 10, reference

20 is made to the court's great difficulty with Mr.

21 Stewart's factual involvement and the perception

22 that he is potentially privy to an area of the case

23 which has been challenged.

24 Then at page 6670, Mr. Stewart --

25 after the court recess Mr. Stewart says at about

1 line 10:

2 "Just so we are clear from
3 the Crown point of view, my
4 understanding is that I am
5 not a witness and I am not a
6 potential witness. I am
7 counsel sent by the regional
8 director of Crowns for
9 Ontario, Mr. Griffiths, to
10 deal with this case.

11 "The Court: How do I know
12 that you are not a potential
13 witness in light of the
14 information you have given to
15 the court today?

16 "Mr. Stewart: I know,
17 because I haven't had any
18 involvement other than
19 talking about an offer by the
20 defence that was --

21 "The Court: No, no, I
22 shouldn't have asked that
23 question, because now you are
24 giving evidence and I can't
25 permit that. You may be a

1 witness in this proceeding,
2 so please go on."

3 Mr. Murphy says:

4 "My friend is about to step
5 one step beyond where he
6 shouldn't go."

7 Mr. Stewart says on page 6671:

8 "Well, no --"

9 This is at line 12:

10 " -- my friend can't have it
11 both ways, your honour. He
12 has indicated he is the one
13 that had brought up that I
14 had some participation in the
15 case."

16 Mr. Stewart says:

17 "All right. I have had no
18 direct involvement in the
19 case.

20 "The Court: No, counsel. Do
21 not pursue that line of
22 argument before the court.
23 In the court's view, the
24 first thought that came to my
25 mind when you explained your

1 involvement in this trial
2 this morning was that you
3 were a potential witness.
4 That being the case, you
5 should not argue what your
6 involvement has been any
7 further. Please go on."

8 There is an exchange, and then at
9 page 6672 Mr. Stewart says, line 4:

10 "No, but, your honour, Mr.
11 Murphy outlined to the court
12 what he thought my
13 participation was, to deal
14 with one meeting and some
15 consulting.

16 "Mr. Stewart: I have had no
17 direct involvement, your
18 honour.

19 "The Court: No, no, counsel,
20 do not pursue that line of
21 argument any further.

22 "In light of what Mr. Murphy
23 has alleged and in light of
24 what you have said your
25 participation has been, which

1 is some four hours of
2 discussion, some subsequent
3 telephone conversations and I
4 thought I heard you say that
5 you were privy to discussions
6 dealing with the potential
7 resolution of this case.
8 "Mr. Stewart: Correct. That
9 was part of it.
10 "The Court: All right. It
11 may be that under those
12 circumstances you may be a
13 witness dealing with that
14 area of the case which is
15 complained of in paragraph 14
16 of the notice of motion
17 before the court. Therefore,
18 you should not pursue that
19 area. What I'm talking about
20 is the complaint, actions or
21 activity of the Crown, Mr.
22 Flanagan, in this case."

23 Page 6673:

24 "There is a detailed
25 complaint about action or

1 lack of action of Mr.
2 Flanagan, and what I'm saying
3 is that in the light of your
4 engagement or contact
5 discussion with Mr. Flanagan,
6 you indeed may be -- maybe
7 this is not the point for me
8 to go into that, because that
9 is evidence -- you may be a
10 person who may be able to
11 shed some light on that and
12 that's the problem, you see,
13 counsel, with your posture
14 before the court. As I say,
15 now you are Mr. Flanagan.
16 Mr. Flanagan says he can't
17 come and argue the case nor
18 can you, because you may have
19 been -- you may have been
20 involved in some of these
21 discussions. I don't know,
22 but you've told me you've had
23 four hours of discussion, so
24 you may have had some
25 discussion with Mr. Flanagan

1 dealing with these issues.
2 "Mr. Stewart: Well, I can
3 state certain things for the
4 record, your honour, at this
5 point in time. That is, your
6 honour, I am regularly
7 consulted in this province
8 and I was trying to count in
9 the last month or so, having
10 phone calls in major calls--"
11 I think he means cases:
12 " -- for Milton, Sudbury,
13 Toronto and whatever in
14 regards to the Crown
15 attorneys. It's common
16 practice when you're dealing
17 with cases, whether there's
18 plea negotiations or whether
19 there's tactics or whatever,
20 that we discuss matters in a
21 general way, because I have
22 been doing cases, murder
23 cases, for over 20 years.
24 That being said, in this
25 particular case there is no

1 evidence that I personally
2 directed the police to do
3 anything.

4 "The Court: No, please don't
5 pursue that. I prohibit you
6 from continuing in that line,
7 a presentation to the court.

8 I order you not to continue
9 in that line of presentation
10 to the court.

11 "Mr. Stewart: What happens,
12 your honour, in regards to
13 these types of matters, if
14 there's any Crown that comes
15 in to deal with the case,
16 they will have to be briefed
17 on the case, and especially
18 with the drastic measure that
19 was taken by Mr. Murphy in
20 this case; that is, by
21 subpoenaing the one person
22 that has more than a working
23 knowledge of the case. That
24 person would have the time to
25 deal with that. Obviously

1 they won't have to talk to
2 Mr. Flanagan, because you
3 don't have the transcripts of
4 the last number of months or
5 weeks, whatever that may be
6 in regards to it. By that
7 point in time and by the time
8 they get a working knowledge
9 in regard to the case, it's
10 going to be more than two or
11 three hours."

12 Then there is an exchange about
13 the time necessary. Mr. Stewart says on page 6675:

14 "What I'm proposing, your
15 honour, because we have an
16 interesting scenario -- if
17 I've misunderstood the court,
18 I apologize, but as I
19 understood the court this
20 morning, the court felt that
21 if Mr. Flanagan had not been
22 subpoenaed or indicated by
23 counsel he was going to be
24 subpoenaed, it works out the
25 same. He could do the abuse

1 motion. I thought that was,
2 and I asked the court
3 specifically that this
4 morning, and I thought the
5 court had said that.
6 "The Court: No.
7 "Mr. Stewart: Pardon?
8 "The Court: No, the record
9 was read. We have been over
10 that, counsel, and the record
11 is clear that Mr. Flanagan
12 was engaging counsel to argue
13 the motion, his role or
14 continuation in the trial
15 being only part of the larger
16 motion.
17 "Mr. Stewart: Well, what I'm
18 suggesting to you, your
19 honour, is that we deal with
20 that issue first.
21 "The Court: No.
22 "Mr. Stewart: Well, perhaps
23 may I be allowed to speak and
24 finish my submissions on this
25 point?"

1 that issue is decided.
2 "The Court: No, no, counsel,
3 please don't continue. The
4 first order of business of
5 this court is to settle your
6 role before the court. Your
7 role is challenged. We have
8 to deal that first before we
9 deal with any other issue.
10 Have you anything further to
11 say on the issue of whether
12 you are independent counsel
13 capable of representing Mr.
14 Flanagan on this motion?
15 "Mr. Stewart: Well, your
16 honour, if I can't deal with
17 what I want to argue, then it
18 ties in with your queries
19 regarding the independent
20 aspect."

21 The court asks how, and Mr.

22 Stewart says:

23 "Well, it ties in with this
24 aspect, your honour. If your
25 honour, after dealing with

1 the argument in regards to
2 this, decides that Mr.
3 Flanagan and the subpoenaing
4 of Mr. Flanagan should not
5 occur, then we deal with the
6 subsequent issue of whether
7 Mr. Flanagan should continue.

8 If he continues, that is the
9 end of the matter."

10 And then he refers to certain
11 cases, and he says:

12 "I would suggest it will
13 become clearer in regards to
14 the criteria that the defence
15 have to meet and have not met
16 and will not meet in this
17 case. It is that aspect once
18 that part is argued. I
19 suggest it is quite proper in
20 that case for me to argue the
21 subpoenaing of Mr. Flanagan.

22 I suggest there is no law
23 that says the Crown cannot
24 argue that issue, that
25 particular issue, at this

1 point, and it doesn't deal
2 with the aspect of myself at
3 all, and I am dealing with
4 the case law and the evidence
5 on that issue.

6 "The Court: I understand
7 your point. It is
8 troublesome to me, because
9 Mr. Flanagan indicated he
10 wanted independent counsel to
11 argue the issue of whether he
12 could be subpoenaed or not,
13 but now independent counsel
14 arrives -- so-called
15 independent counsel arrives
16 and says it doesn't matter
17 whether I'm independent or
18 not; I can argue the point,
19 anyways. That is what gives
20 me a problem.

21 "Mr. Stewart: We will
22 accept, your honour, for
23 this. When any counsel comes
24 in and starts to review the
25 case, they are not going to

1 be independent in the sense
2 that they are going to be an
3 advocate. Once they review
4 the evidence and deal with
5 that --
6 "The Court: But they will be
7 different than counsel before
8 me in this sense: Number 1,
9 they will not have had the
10 personal involvement that
11 counsel before has had with
12 Mr. Flanagan. Therefore,
13 their judgment or their
14 expressed opinions in the
15 case, whatever they are, will
16 not be the subject of any
17 cause or less than objective
18 presentation to the court.
19 Secondly, other counsel
20 appearing other yourself that
21 have had no dealings with the
22 case to this point would have
23 the appearance of being
24 independent of anything that
25 has transpired to this point.

1 any more than Mr. Flanagan."

2 Mr. Stewart says at the bottom of
3 page 6681:

4 "Mr. Murphy can't have it
5 both ways. He gave evidence
6 this morning. He started
7 this off this morning. I
8 walked in, I thought I was
9 going to be dealing with an
10 abuse motion, or at least
11 with the subpoena, and he
12 gave evidence with regard to
13 a certain meeting I was
14 supposedly at that I wasn't
15 at, and when I corrected --
16 attempted to correct in
17 regards to it, he has a
18 problem with that. He can't
19 have it both ways.

20 "Secondly in regards to, your
21 honour, there are special
22 prosecutors that deal with
23 police officers. I know,
24 because I just came back from
25 Toronto from doing it for two

1 years and you have people
2 that deal with it, but when
3 we talk about independent
4 counsel, first of all, that
5 was the turn of phrase that
6 Mr. Flanagan used. You will
7 not find it any of the case
8 law. As I said earlier, your
9 honour, we are not dealing
10 with the Morin Inquiry or
11 whatever. We are dealing
12 with a court of law where
13 there is always going to be a
14 Crown attorney involved in
15 the matter."

16 Then he says, with respect to the
17 Deslaurier case:

18 "There is no evidence before
19 this court in regards to why
20 I have to justify anything,
21 because I wasn't involved.

22 "The Court: The objection of
23 defence counsel to the
24 standing of Mr. Stewart to
25 represent Mr. Flanagan on

1 notice of application with respect to the
2 allegations against Mr. Flanagan. On page 6684,
3 Justice Cosgrove goes on:

4 "The court has learned this
5 morning that Mr. Stewart, who
6 presented himself as counsel
7 for Mr. Flanagan on this
8 motion, by his self admission
9 has had considerable
10 involvement in the
11 investigation and
12 presentation of this trial.
13 He said that he had
14 approximately four hours of
15 discussion with Mr. Flanagan,
16 some additional telephone
17 conversations, and he also
18 knew whoever was consulted on
19 the issue of a resolution of
20 charges against the accused.

21 In my view, under those
22 circumstances, the court is
23 left in the position of not
24 knowing whether any of that
25 involvement, it has

1 interfaced with the alleged
2 improper conduct of Mr.
3 Flanagan. Potentially Mr.
4 Stewart may have offered
5 opinion, advice, received
6 information or had dealings
7 on some of the very issues
8 which are challenged by the
9 defence in the motion for a
10 stay before the court. The
11 problem to the court is that
12 seems to be why Mr. Flanagan
13 initially agreed he should be
14 represented by counsel other
15 than himself on the motion to
16 stay where his own activities
17 are challenged."

18 The court refers to Justice
19 Twaddle and Deslaurier and goes on at page 6685:
20 "Presumably that's a basis or
21 part of the circumstances
22 taken into account by Mr.
23 Flanagan when he agreed there
24 should be independent counsel
25 to represent him on the

1 motion. His actions are part
2 of the complaint of actions
3 forming alleged and forming a
4 basis for the relief sought
5 by the court. Because of Mr.
6 Stewart's potential interface
7 in connection with that area
8 of activity of the Crown, in
9 my view it is improper that
10 he offer to be a counsel
11 representing Mr. Flanagan --"

12 And he quotes from Justice Twaddle
13 again, and goes on at the bottom of the page:

14 "In my view, Crown counsel
15 having no involvement with
16 Crown counsel in the
17 preparation of this trial and
18 of the investigation and of
19 the steps and actions of the
20 Crown taken from the outset
21 to this date in the trial,
22 that counsel who has no
23 contact or dealings with the
24 case is what is required
25 -- is who is required to

1 represent Mr. Flanagan. I
2 don't extend that so far as
3 defence counsel this morning
4 in arguing that a person
5 outside the Ministry of the
6 Attorney General is required
7 to be retained. In my view,
8 it is a person who has had no
9 contact from the Ministry or
10 otherwise."

11 And further down:

12 "To repeat, I'm saying it is
13 not necessary that the Crown
14 attorney go outside the
15 Ministry to obtain counsel
16 not presently engaged or
17 employed by the Ministry, but
18 it must be a person, as I
19 have detailed up to this
20 point, who has no involvement
21 in the trial before us."

22 And that is what occurred on
23 February 19th, and on February 20th, the next day,
24 at page 6693, Mr. Findlay makes certain
25 representations with respect to whether certain

1 witnesses, Cook and Laderoute, can read a
2 transcript of their respective evidence so they
3 will be able to read it over and refresh their
4 memory.

5 Mr. Murphy objects to it, and the
6 court says:

7 "Well, counsel doesn't have
8 to argue that. The short
9 answer is that on these
10 motions the Crown will be
11 represented by independent
12 counsel, and anything to do
13 with the motion should be
14 submitted by independent
15 counsel and not by Mr.
16 Findlay."

17 THE CHAIR: Where are you now,
18 please, Mr. Cherniak?

19 MR. CHERNIAK: I am sorry. At the
20 bottom of page 6695.

21 MR. PALIARE: Excuse me. Perhaps
22 you could assist me, at least. Is the passage
23 where Mr. Flanagan voluntarily says he is no longer
24 going to be counsel, but that he suggests that
25 independent counsel should come? Is that in the

1 material somewhere?

2 MR. CHERNIAK: I don't know. I
3 can't recollect that, but I will find out and I'll
4 let you know, and I will refer you to the relevant
5 passage, if you wish.

6 MR. PALIARE: Thank you. I think
7 it is beneficial for the panel to look at what Mr.
8 Flanagan said and that he voluntarily said he would
9 no longer act, and if he said that Justice Cosgrove
10 says he said that he was going to get independent
11 counsel, I think it is at least something that --

12 THE CHAIR: You will have your
13 opportunity to explain that, Mr. Paliare.

14 MR. PALIARE: It wasn't what I
15 said, sir. I asked where it was in the material.

16 THE CHAIR: I understand. You can
17 direct us to it.

18 MR. CHERNIAK: And I will make
19 that inquiry. I just can't answer that off the top
20 of my head, and I will make that inquiry and I will
21 advise the panel, and I will advise the panel where
22 the page references are, wherever they are.

23 The next pages in this tab deal
24 with matters December 23rd, 1998 when Mr. Humphrey
25 and Strosberg came in, and they are really out of

1 Ramsay's information that he
2 hasn't."

3 And Justice Cosgrove finds that
4 Mr. Ramsay is entitled to continue to respond, and
5 he finds that Mr. Findlay is able to continue as
6 assisting counsel, because no allegations have been
7 made with respect to Mr. Findlay's connection to
8 the complaint in respect of Mr. Flanagan.

9 Then what proceeds is a motion for
10 the disqualification of Mr. Findlay. The next
11 transcript is February 26th, 1998 for the
12 disqualification of Mr. Findlay, and Mr. Murphy
13 makes submissions.

14 You will see at the bottom of page
15 6890, Mr. Murphy has amended his notice of motion
16 to allege that he relies on the viva voce evidence
17 of Mr. Findlay. It wasn't in the notice of motion
18 before, but Mr. Murphy seeks to amend it; and Mr.
19 Murphy asks, for the purpose of at the very least
20 this voir dire, that Mr. Findlay be disqualified as
21 Crown on the same basis as Mr. Flanagan.

22 He says at the top of page 6891:

23 "This is my respectful
24 submission on the evidence of
25 outrage. The Crown attorney

1 interviewing a witness, a
2 police officer,
3 two-and-a-half years after
4 the fact."

5 And the judge says:

6 "I don't want to go to the
7 merits of the motion."

8 At the bottom of page 6891, Mr.
9 Murphy says:

10 "I'm going to ask to have Mr.
11 Findlay excused for the
12 purpose of the remainder of
13 this voir dire."

14 Mr. Ramsay, who is the new counsel
15 representing Mr. Flanagan, and I guess at this
16 point Mr. Findlay, as well, on this motion, he
17 says, "I am proceeding" -- this is the middle of
18 page 6892:

19 "I am proceeding on the basis
20 that Mr. Findlay is still on
21 the case until I'm told
22 otherwise, not that I have
23 anything much planned between
24 now and then except to plan
25 my own examination of

1 Constable Ball."

2 Mr. Murphy submits that there
3 should be no communication with Mr. Findlay, and
4 the court reviews the matter on page 6893, in the
5 middle, and recalls that counsel raised the point
6 that:

7 "I thought Mr. Flanagan in
8 reply said he would withdraw
9 and retain independent
10 counsel."

11 And that was Mr. Murphy:

12 "At this point, you simply
13 served the notice. You put
14 the court on notice you
15 intend to amend your notice
16 of motion. I am not sure
17 whether the court can prevent
18 you from doing that."

19 In any event, on page 6694, he
20 potentially raises the issue of whether Mr. Findlay
21 should be represented. The court says:

22 "We will adjourn until
23 tomorrow morning, and the
24 court's direction is that the
25 issue before the court of Mr.

1 Findlay's participation is a
2 matter that can be discussed
3 between Mr. Findlay and lead
4 counsel, but they should
5 refrain from further
6 discussion of the voir dire
7 on the issue before the
8 court."

9 Then on February 27th, 1998 is the
10 next tab, and it is apparent from Mr. Murphy's
11 comment that the issue is the question of Mr.
12 Findlay continuing to assist, and Mr. Murphy refers
13 to the finding of the court with respect to Mr.
14 Stewart and a finding that Mr. Ramsay could
15 continue. Then we will omit the argument that then
16 ensued on Mr. Murphy's motion, and we go to page
17 6910.

18 Mr. Murphy has been referring to a
19 variety of authorities, and the court on 6910
20 reviews where we are, and it's at line 20 the court
21 says:

22 "It seems as if what you are
23 doing is going to the
24 argument or the substantive
25 argument of whether or when

1 Mr. Findlay should or should
2 not be required to give
3 evidence, but is there not a
4 preliminary point before
5 that, whether Mr. Findlay
6 under those circumstances
7 should be represented today
8 as you make that argument by
9 independent counsel and
10 whether he should be in
11 court?"

12 Mr. Murphy says at page 6911,
13 about line 5:

14 "It is appropriate for Mr.
15 Findlay to either withdraw
16 and obtain independent
17 counsel or for the court to
18 direct him to do so. In
19 addition to that, in my
20 submission, they raise the
21 consequent issue of Mr.
22 Ramsay continuing on the
23 basis of the authority with
24 respect to counsel from the
25 same firm or associates which

1 we will argue. I commenced
2 argument with the reference
3 to the authorities because
4 Mr. Ramsay has relied upon
5 Mr. Findlay, and I'm
6 paraphrasing as his right
7 hand in this matter that his
8 independence is in question."

9 The court, at page 6914, reviews
10 the chronology with respect to Mr. Flanagan, and
11 then calls upon Mr. Ramsay at page 6915, and Mr.
12 Ramsay makes his submissions at page 6916 and he
13 says:

14 "The first submission is
15 whether Mr. Findlay will be
16 called as a witness.

17 "The Court: Well, I have
18 already been told by counsel
19 that that's a likelihood, so
20 I accept that there is an
21 intention on defence counsel
22 to call Mr. Findlay as a
23 witness.

24 "Mr. Ramsay: But he can't do
25 that as of right. Your

1 honour has to permit it. It
2 is within your honour's
3 discretion."

4 The court says:

5 "I'm not going to rule on
6 that until such time as I
7 have heard further evidence
8 of further people in these
9 proceedings."

10 Mr. Ramsay says:

11 "But I need to know whether
12 he's going to be on the case
13 with me or not before I
14 continue.

15 "The Court: Well, I would
16 suggest, based on the Crown's
17 practice already by Mr.
18 Flanagan, that Mr. Findlay
19 should withdraw, as did Mr.
20 Flanagan, and independent
21 counsel should be retained,
22 Mr. Ramsay, independent
23 counsel meaning by definition
24 was someone who has had, as
25 you, no previous dealings in

1 the case.

2 "Mr. Ramsay: That would

3 occasion some delay.

4 "The Court: That's been the

5 name of this case."

6 At the bottom of the page 6917,

7 Mr. Ramsay says:

8 "On what you have had heard,

9 there is no basis for

10 assuming that Mr. Findlay

11 will have any material or

12 necessary evidence."

13 And on page 6918, Mr. Ramsay says

14 that's a procedural argument. The court says:

15 "It is a procedural argument

16 which I will have to deal

17 with counsel representing Mr.

18 Findlay. He can't argue his

19 own motion unless you have

20 been retained by him to do

21 so."

22 Mr. Ramsay says:

23 "I'm Crown counsel, your

24 honour. I'm representing the

25 Crown to argue this motion."

1 "The Court: Well --

2 "Mr. Ramsay: I'm

3 independent.

4 "The Court: Are you going to

5 represent the motion as to

6 whether Mr. Findlay should be

7 subject to a compellability

8 in these proceedings?

9 Answer:

10 "Yes, I would intend to do

11 that.

12 "The Court: You are going to

13 represent him. Then I think

14 that Mr. Findlay should

15 withdraw as Mr. Flanagan."

16 And Mr. Ramsay says at the top of

17 page 6919:

18 "You don't want to hear from

19 me now as to whether Mr.

20 Findlay should be allowed

21 testify?

22 "The Court: No, that's a

23 substantive argument and I

24 don't wish to hear that now.

25 I wish to hear other

1 witnesses on that issue."

2 Mr. Ramsay says at page 6920, at

3 line 9:

4 "Your honour will understand
5 that what I was trying to get
6 was the ultimate question of
7 whether they can testify, Mr.
8 Flanagan and Mr. Findlay.

9 "The Court: Whether they are
10 compellable?

11 "Are tied up with my position
12 that without Mr. Findlay to
13 assist me on this motion, I
14 will be in a prejudiced
15 position, in a difficult
16 position at least, without
17 further opportunity to
18 prepare if I'm going to do it
19 by myself or with another
20 counsel."

21 The court at the bottom of 6920

22 says:

23 "The prejudice to which I
24 referred and which is in the
25 cases that were relied upon,

1 counsel, who purported to be
2 in your position previously,
3 Mr. Stewart, was to be
4 prejudiced to the accused,
5 not prejudiced to the Crown,
6 but I do understand that
7 counsel coming into this case
8 needs some time in order to
9 be properly prepared. I
10 understand that. That was
11 why, for example, when Mr.
12 Flanagan signalled to the
13 court that other Crown
14 counsel would argue the
15 motion, we adjourned, and
16 then Mr. Stewart appeared,
17 and after that time I learned
18 that he had indeed had
19 significant input into the
20 proposition in these
21 proceedings and we adjourned
22 for another period of time to
23 permit you to be prepared. I
24 also signalled to you that I
25 was concerned that you should

1 be assisted because of the
2 length of this trial and the
3 voluminous background,
4 exhibit history, and that was
5 one of the reasons why I
6 said, absent Mr. Findlay
7 being identified as a witness
8 in these proceedings, he
9 should continue. That
10 situation has now changed, so
11 that's where we are."

12 And then the court asks whether
13 Mr. Ramsay needs some more time. Mr. Ramsay says
14 that he can deal with certain witnesses at this
15 point.

16 The argument goes on on the basis
17 of certain cases, and at page 6925 the court makes,
18 in effect, a ruling at about line 13:

19 "The court has been given
20 notice that the defence
21 intends to call Mr. Findlay
22 and Mr. Flanagan. I have
23 indicated that it is not
24 necessary for defence counsel
25 to issue a subpoena. The

1 court is on notice as if a
2 subpoena has been issued.
3 The Crown has indicated they
4 wish to resist that subpoena,
5 and that will be the context
6 of the argument before the
7 court."

8 Then we go over to March 4th,
9 1998, and we have the motion by Mr. Ramsay to seek
10 the assistance of previous Crowns, and Mr. Ramsay
11 says at line 20 on page 7429:

12 "I will do it backwards. I
13 will tell you the reason why
14 I'm seeking relief, and then
15 I will tell you the relief I
16 am seeking. That is
17 essentially about the extent
18 of my submissions.

19 "At this point we've heard --
20 since the motion started
21 we've heard about four days
22 of evidence. It's been a
23 wide-ranging inquiry into
24 pretty much every aspect of
25 the case, and during the time

1 I have been here, for the
2 most part, without Mr.
3 Flanagan or Mr. Findlay.
4 There are two problems of
5 implication for the Crown as
6 a result of this. One is
7 that I don't have the benefit
8 of their advice; and, two, if
9 the trial does continue, they
10 won't have the benefit of
11 knowing what evidence has
12 been given, and a lot of this
13 evidence does have to do with
14 things that will be issues at
15 the trial.
16 "So I'm asking -- there are
17 three possible solutions that
18 I can think of which I'm
19 asking your honour to
20 consider."

21 And he gives those three
22 possibilities, and one of them is the limitation of
23 the motion. And at the top of page 7431:

24 "In the alternative, with
25 respect to Mr. Findlay,

1 renewing my request, and with
2 respect to Mr. Flanagan
3 making my request for the
4 first time that they be
5 permitted to assist me on the
6 motion."

7 And the court then calls on Mr.
8 Murphy, and he makes his submissions on that point
9 and, in effect, argues some kind of waiver, and
10 says at page 7432 at line 10:

11 "Having entered the fray, as
12 it were, in my submission it
13 is quite inappropriate for
14 Mr. Ramsay now, in effect, to
15 ask the court to revisit the
16 whole issue."

17 Mr. Murphy goes on to say on page
18 7433 that:

19 "It is inappropriate. What
20 you have, your honour, is the
21 Crown seeking the extent of
22 the seriousness of the
23 allegations being made in our
24 abuse of process motion. We
25 have heard four days of

1 evidence from Detective
2 Constable Ball, in my
3 submission, of a highly
4 disturbing character with
5 very serious implications not
6 only for this investigation,
7 but for the conduct of the
8 Crown attorneys involved."

9 At line 22:

10 "For my friend now to be
11 seeking to invite back Mr.
12 Flanagan and Mr. Findlay to
13 either be in the courtroom or
14 joining him at the counsel
15 table is not appropriate."

16 And Mr. Murphy goes on at some
17 length, and, at page 7437, Mr. Murphy reviews some
18 of the evidence. In the middle of the page, he
19 refers to a meeting on the September 10th,
20 presumably 1998, before the trial started, that Mr.
21 Flanagan -- this is about line 12, that:

22 "Mr. Flanagan we now know,
23 according to Detective
24 Constable Ball, was present.
25 Particulars of chronological

1 aspects of the investigation
2 were discussed in his
3 presence. Actions were taken
4 as a result, which resulted
5 in witnesses being revisited
6 the second, third and fourth
7 time, and, ultimately, as of
8 the four days before the
9 commencement of the jury
10 trial, resulted in Mr.
11 Findlay sitting down with
12 them and suddenly producing
13 in the form of a letter to
14 defence counsel that there
15 has been an invention and
16 fabrication of evidence that
17 wasn't there in the first
18 instance."

19 Page 7438, Mr. Murphy continues
20 his argument about the damage control for the
21 Ministry of the Attorney General and refers to the
22 allegation, which he puts forward as a fact at that
23 point, that Constable Laderoute committed a
24 criminal act, and Mr. Murphy goes on, again, at
25 some length at page 7442 and says about line 18:

1 "Mr. Ramsay had his chance to
2 take a moment and consider
3 his position. You gave him
4 that opportunity. The Crown
5 waited three days to have Mr.
6 Stewart show up and pass
7 himself off as independent."

8 And he argues at page 7443 that
9 the court has been hearing a litany of evidence
10 that she has been the victim of deliberate and
11 criminal conspiracy by the police investigators,
12 and Mr. Ramsay replies at the bottom of page 7444:

13 "Mr. Ramsay: Yes, your
14 honour. I have to make two
15 points. It has to do with
16 delay."

17 And he refers to the fact that
18 there has been a jury empanelled, and he says at
19 the top of page 7445 at line 10 that he is somewhat
20 at a disadvantage. He says at line 25:

21 "At this point, at least, I
22 have heard my friend just now
23 refer to the conduct of the
24 police. At this point I'm
25 submitting your honour is in

1 a position to rule on whether
2 Mr. Flanagan and Findlay
3 should be given evidence on
4 the voir dire. I'm repeating
5 myself."

6 And the court makes a ruling on
7 page 7446, at the top. The application to have Mr.
8 Flanagan and/or Findlay attend to be present in the
9 courtroom is denied by the court, and at page 7447
10 the court says at line 7:

11 "So the application will
12 continue as framed as
13 presented to the court in
14 terms of Mr. Flanagan or
15 Findlay re-attending or Mr.
16 Findlay continuing to assist
17 on the application that they,
18 in the alternative, be
19 permitted in the courtroom."

20 That is rejected, as well:

21 "They are potential
22 witnesses. Notices have been
23 served and the defence
24 intends to call them. So if
25 they are intended witnesses,

1 they should be excluded from
2 the evidence of other
3 witnesses preceding them and
4 there should be no exchange
5 on the issues before the
6 court between witnesses to be
7 called."

8 Page 7448 at line 10, Justice
9 Cosgrove says:

10 "I am prepared that if and
11 when Mr. Flanagan and Mr.
12 Findlay do testify, that they
13 be permitted to remain in
14 court after their evidence.
15 If they did that, it may be
16 in the process of the
17 argument of counsel, but the
18 objective of counsel, which
19 is to have them plugged in
20 but be available to them at
21 that time."

22 Then I move to March 5th, 1998,
23 and the argument at this point is on the
24 compellability of Mr. Findlay. And Mr. Ramsay is
25 arguing, and he refers, in the first paragraph of

1 his argument, to the test that the party must
2 establish the evidence as material and necessary
3 and he says that:

4 "The application with respect
5 to Mr. Findlay can be readily
6 determined simply with
7 respect to whether it is
8 necessary."

9 He expands on that at page 7570 at
10 line 10:

11 "In the case of Mr. Findlay,
12 it is really up to -- it's up
13 to the party that would call
14 him to establish why his
15 evidence is material and
16 necessary. All I can think
17 of is that he was present at
18 an interview of Mark Denis,
19 who was a police officer, and
20 a Mr. Marino --"

21 I believe that's another police
22 officer:

23 " -- in the presence of
24 Constable Mahoney and that
25 during these witness

1 preparation interviews, Mark
2 Denis said that he had seen
3 rolled up carpeting and that
4 he had not seen that before,
5 and that was a significant
6 enough factor to be disclosed
7 and it was immediately
8 disclosed."

9 I am sorry, I am wrong about that.
10 Mr. Marino is a lay witness:

11 "In the case of Mr. Marino,
12 he gave a description, a more
13 detailed description, than he
14 had given. That was then on
15 the record and that had to be
16 disclosed and it was
17 disclosed. Now, in those
18 circumstances, there is no
19 necessity at all for Mr.
20 Findlay to be called.
21 Subject to any comments I
22 might have about other
23 things, I can't think of
24 anything else in which Mr.
25 Findlay has knowledge of

1 anything that has to do with
2 this motion, knowledge in the
3 sense of knowledge as a
4 witness as opposed to
5 knowledge to having been
6 briefed as counsel second
7 hand or hearsay knowledge."

8 He then refers to certain
9 authorities, and at page 7572 at line 20, and all
10 Mr. Findlay could say presumably is that:

11 "Yes, I did interview these
12 two witnesses and this came
13 up, so I disclosed it. That
14 has nothing to do with what I
15 understand the motion is
16 about."

17 Then at page 7573, Mr. Ramsay asks
18 the court to weigh what is being asked for against
19 the prejudice to the prosecution of the trial
20 against the tiny, if any, probative value of the
21 evidence that he could give dealing with the issue
22 of necessity.

23 Mr. Murphy then begins his
24 argument and refers to the Morin Inquiry. The
25 members of the panel may or may not recall the

1 quite notorious public inquiry into what turned out
2 to be the wrongful conviction on Mr. Morin based,
3 in part, on problems with the forensic laboratory
4 of the Attorney General.

5 On page 7575, the court sets out
6 -- in fairness to Mr. Ramsay, to set out his view
7 of the comments with respect to the Morin trial,
8 which the judge does at some length. At page 7576,
9 I'm paraphrasing, but the judge refers to media
10 reports that were various cases investigated by
11 scientists. The court says at line 20:

12 "I insisted the Crown
13 inquire, in the context of
14 media reports, whether the
15 testing in this case fell in
16 the categories identified by
17 the scientists or government
18 officials dealing with the
19 forensic centre."

20 Mr. Murphy then continues at page
21 7577 with his argument, and if I can ask you to
22 turn to page 7584, Mr. Murphy is still arguing.
23 And the court says at line 10, after Mr. Murphy is
24 referring to the Laderoute cross-examination:

25 "The Court: Stop just a

1 minute, stop right there. I
2 raised the point on whether
3 we had established an
4 evidentiary basis with
5 respect to Officer Laderoute
6 and I have not had an answer
7 from counsel as to --"
8 "Mr. Murphy: I can answer
9 right now, the licence
10 plate."

11 And the court says:

12 "I don't want to talk about
13 the significance of the
14 evidence itself. I think
15 what I have to establish
16 first is whether both counsel
17 are satisfied that in terms
18 of an evidentiary basis for
19 this motion, whether we have
20 concluded the evidence of the
21 officer on the point."

22 Mr. Murphy says at the top of page

23 7585:

24 "The Crown should not be
25 permitted to now go back, in

1 the face of his admission
2 under cross-examination, to
3 an issue that was not new in
4 the cross-examination."

5 The court says at page 7585 at
6 line 8:

7 "Mr. Ramsay, do you see where
8 we are at this point?
9 "I would need a couple of
10 minutes to think about
11 whether I want to re-examine
12 Constable Laderoute and I see
13 that it's almost one
14 o'clock."

15 The court says:
16 "Putting it into context,
17 what the court is troubled by
18 is references now made in
19 argument to the area of
20 evidence which I have
21 signalled the court had some
22 difficulty as to the status
23 of that evidence before we
24 began argument. I therefore
25 concluded, obviously

1 erroneously, that that area
2 of the evidence would not be
3 relied upon by counsel in
4 argument on this motion, but
5 now that you purport to do
6 that, I think we have to
7 answer that question."

8 And the court says at page 7586:

9 "What I'm saying is that if
10 his evidence in front of the
11 jury is to be received as an
12 evidentiary basis for
13 argument on this motion, I
14 indicated that I said there
15 was a problem with that,
16 because his evidence before
17 the jury had not been
18 concluded. It was in
19 mid-cross-examination with
20 the option for
21 re-examination. I will leave
22 that issue with counsel."

23 And you may remember that I
24 referred yesterday to what happened after this with
25 respect to the finding about Laderoute. This is

1 the evidence that preceded what I read yesterday,
2 and you will see that in a moment. Page 7587, Mr.
3 Ramsay says:

4 "Thank you, your honour. I
5 would like to ask Constable
6 Laderoute some questions in
7 addition to what is on the
8 transcript. I should say
9 this. I should tell you two
10 things. One is Constable
11 Laderoute is out of the
12 country and won't be
13 available until next Tuesday.
14 He is scheduled to return
15 next Monday night. The other
16 thing I should say is I could
17 call him as part of my case
18 on the motion, but I don't
19 suppose it would make much
20 difference, but, yes, I would
21 like to ask him a couple of
22 questions in addition to the
23 evidence he gave on the
24 trial.

25 "The Court: When you are

1 referring to the motion, are
2 you referring to the motion
3 to attack the subpoena?"

4 Mr. Ramsay says:

5 "No, I mean the motion to
6 stay the trial.

7 "The main motion.

8 "Mr. Ramsey: The abuse of
9 process.

10 "The Court: All right. My
11 reservation about Constable
12 Laderoute was with respect to
13 your challenging the subpoena
14 to have Mr. Findlay give
15 evidence. Is it in that
16 context that you wish to call
17 Officer Laderoute?

18 Answer:

19 "No, it is not, your honour.

20 "The Court: So you are
21 content to proceed with the
22 motion?

23 "Mr. Ramsey: I am.

24 "The Court: So you are
25 content to proceed with the

1 evidence in its present
2 condition?"

3 Mr. Ramsey says "Yes". Then we
4 move over to page 7601 and we are still dealing
5 with the motion for the compellability of Mr.
6 Findlay. Mr. Murphy is making certain submissions,
7 as he says at line 18 or 20, about the omissions
8 and the suppressions by the Crown and the Crown's
9 duty.

10 He refers on page 7604 at the
11 bottom to the tunnel-vision syndrome with respect
12 to the Findlay matter. I won't bother reading the
13 entire passage, but Mr. Murphy's argument is the
14 fact that it could affect the conduct of the trial
15 is not a relevant argument.

16 Mr. Murphy continues at some
17 considerable length on this argument at page 7616.

18 At line 20, he says:

19 "Mr. Findlay on the 22nd
20 January of this year is
21 engaging in witness coaching,
22 or if he's not, why doesn't
23 he go back and look at the
24 synopses? We need him here
25 to explain who called the

1 meeting, why out of 105 Crown
2 witnesses on this case, why
3 two-and-a-half years after
4 the investigation, he
5 suddenly takes a statement of
6 Mark Denis, because he's
7 suddenly thrown out in the
8 form of a letter telling us
9 that suddenly he has
10 startling new evidence to
11 give us. Why is that
12 happening two-and-a-half
13 years later? Why is Findlay
14 sitting around for that
15 period of time? Who called
16 the meeting? How does Mr.
17 Denis remember these things?
18 Does Mr. Findlay have the
19 witness synopsis in front of
20 him?"

21 And he goes on to indicate the
22 kind of questions that he would like to ask Mr.
23 Findlay and says at the bottom of 7617 that:

24 "Mr. Findlay is necessary
25 because who else is going to

1 explain why out of these 105
2 witnesses these three get to
3 be re-interviewed?"

4 Mr. Murphy continues at page 7619
5 at about line 12:

6 "So all of this points
7 directly to Mr. Findlay and
8 it stinks to high heaven.
9 Anybody who'd give the smell
10 test would have to ask
11 themselves, even if Mr.
12 Findlay accepted the
13 completely remote and
14 unlikely scenario that Denis
15 and Marino could remember
16 these things two-and-a-half
17 years later --"

18 And he goes on, and he makes
19 reference at page 7620 to the September 10th
20 meeting, the witness preparation meeting with these
21 three witnesses, and goes on at the bottom of page
22 7620 as to why Mr. Findlay is necessary because of
23 the meeting four days before the trial.

24 And Mr. Murphy makes the argument
25 at the top of page 7621:

1 "I don't care how strongly
2 you make the case for, quote,
3 this is just the way the
4 Crowns do it. This is
5 completely legitimate. The
6 Crowns are allowed to prepare
7 the witnesses. This in no
8 way can be described as
9 acceptable or proper in any
10 way, shape, or form."

11 And at the bottom of 7622, Mr.

12 Murphy goes on:

13 "Mr. Findlay is compellable,
14 your honour. It goes on
15 beyond the convenience of the
16 Crown, the prejudice to the
17 administration. It is
18 prejudicial to the
19 administration of justice.
20 The Crown hasn't thrown open
21 the door and let the light
22 shine in on this. They're
23 proceeding along as if this
24 is all nothing. It strikes
25 me as inventions. It's

1 flights of fancy. This is
2 disgusting. The conduct of
3 the police can only be
4 described as disgusting.
5 Even in the merest, mildest,
6 most understated inference of
7 Crown involvement requires
8 that we hear from Mr. Findlay
9 and Mr. Flanagan."

10 Mr. Ramsay is then called upon for
11 reply, and at page 7623 he says:

12 "The question of whether Mr.
13 Findlay's testimony is
14 necessary or relevant."

15 And says at line 16:

16 "The defence has not met the
17 test of establishing his
18 evidence is material or
19 relevant and they must
20 establish both."

21 He makes the point at the bottom
22 of the page:

23 "I know -- I do recognize
24 that it as serious
25 allegations, but the point is

1 there is a difference between
2 serious allegations and
3 serious evidence, and the
4 evidentiary basis is the
5 basis upon which the motion
6 with respect to calling
7 counsel has been decided."

8 He goes on with his argument in
9 that vein on page 7624 on the basis that it is
10 simply a false leap to move from the allegation to
11 the disqualification. The court at the top of page
12 7625:

13 "On that point, counsel, I
14 learned yesterday, now that
15 you enter into it, that the
16 witness was a police witness
17 who had been signalled by the
18 defence to be a witness was
19 interviewed by you, and he
20 said that you told him the
21 purpose of his evidence had
22 to do with whether or not Mr.
23 Flanagan could be
24 compellable, whether Mr.
25 Flanagan could be required.

1 "Mr. Ramsay: He did say
2 that.

3 "The Court: He did say that.
4 So as far as you talk about
5 evidence, that's the evidence
6 I have and you are in an
7 unenviable position because,
8 you know, unless you want to
9 give evidence, I have to
10 accept that as the evidence.

11 The problem the court had
12 with that is that isn't what
13 the motion is before the
14 court. The motion before the
15 court in which the officer
16 was called was a motion for a
17 stay based on abuse of
18 process.

19 "Mr. Ramsay: Well, he also
20 said that I asked him -- I
21 asked him what happened at
22 the September 10th meeting.

23 "The Court: I'm sorry,
24 counsel, obviously there's no
25 point in arguing that. Go

1 ahead with your submissions.
2 "Mr. Ramsay: I don't mean to
3 be unresponsive.
4 "The Court: I did not hear
5 the officer say anything
6 about the motion for abuse of
7 process.
8 "Mr. Ramsay: No.
9 "The Court: I heard him say
10 he was told by you the motion
11 was to deal with whether the
12 Crown could be called or
13 compellable.
14 "Mr. Ramsay: That's what he
15 said.
16 "The Court: That's a
17 substratum of the issues that
18 are before the court.
19 "Ramsay: Yes.
20 "The Court: You may have
21 misinformed the officer:
22 "Mr. Ramsay: He may have
23 misunderstood."
24 Mr. Ramsay says he may have
25 misunderstood.

1 "The Court: You are in an
2 impossible position, because
3 you can't answer it.

4 "Mr. Ramsay: Well, I can't
5 tell you what went on in --

6 "The Court: No, you can't,
7 so let's go on to another
8 point.

9 "Mr. Ramsay: But I can tell
10 you that nothing he says in
11 evidence sounds like anything
12 other than routine witness
13 preparation, which is
14 demanded by standards of
15 competence of the profession.

16 "The Court: It sounded to
17 me, counsel, like a
18 significant error. It
19 sounded to me like a
20 significant misdirection, an
21 explanation to the officer
22 who was called on a motion
23 dealing with abuse of process
24 was told, according to his
25 words, that he was called on

1 a motion to deal with the
2 question of what happened at
3 the September 10th meeting at
4 Mr. Flanagan's house in the
5 context of whether he was a
6 compellable witness. That's
7 the way the court received
8 it."

9 This is the court at the bottom of
10 7627:

11 "And there are such different
12 consideration for the court.

13 I think the officer was
14 misguided. I can't take your
15 position."

16 On 7678:

17 "I can't be counsel. I can't
18 be Crown and do what Crown
19 has to do. All I deal with
20 is the evidence in front of
21 me, and that's the evidence
22 in front of me.

23 "Mr. Ramsay: I can make --

24 "The Court: And I am
25 concerned about the

1 evidence."

2 I am sure the panel has noted the
3 underlining and the explanation points in the
4 transcript.

5 Mr. Ramsay says at the middle of
6 page 7628:

7 "The submission being that
8 obviously it is a different
9 issue to the court, but it's
10 not necessarily of any
11 importance to the witness.
12 All the witness really is
13 concerned about is directing
14 his mind back to events which
15 he is going to be questioned.

16 It's really not for the
17 witness to decide to, you
18 know, what's going to happen
19 and what the result of all
20 this is.

21 "The Court: I don't accept
22 that, counsel.

23 "Mr. Ramsay: Well --

24 "The Court: The explanation
25 by you to the officer

1 advising him of the purpose
2 of his evidence and the
3 context in which it was to be
4 received, in my view, sets
5 perimeters --"

6 I think he means parameters:

7 " -- sets focus for the
8 officers' responses, and the
9 focus that you set was this
10 was a motion dealing with the
11 compellability of Mr.
12 Flanagan. It focussed on a
13 particular meeting. It did
14 not, for example, deal with
15 the issue which I examined
16 him on. It didn't deal with
17 the majority of the other
18 areas of cross-examination by
19 counsel on abuse of process.

20 The officer may have
21 received a disservice by
22 being told to focus on a
23 particular aspect of the
24 matter before the court
25 which, first of all, wasn't

1 the matter before the court."

2 That is the court's position, and

3 Mr. Ramsey says:

4 "I don't think I can be of
5 further assistance to the
6 court."

7 Then comes the portion that I read
8 to you yesterday from page 7629 with respect to the
9 Laderoute matter. I won't repeat that, because you
10 have already heard that.

11 You will see the ruling of Justice
12 Cosgrove on the matter, which I think I also
13 referred you to yesterday, and Justice Cosgrove
14 makes it clear what he's dealing with, and that's
15 important in terms of the issue of the recalling of
16 Constable Laderoute. You remember the exchange
17 that I just referred to. Justice Cosgrove says:

18 "Counsel on the application
19 to in effect challenge of
20 compellability of assisting
21 Crown attorney, Mr. Findlay
22 in this case --"

23 And he refers to what he has been
24 referred to. I have referred you to the ruling,
25 and the justice refers to the evidence of Officer

1 Laderoute and the fact that I referred you to
2 earlier that at the top of page 7639 that the court
3 has accepted that evidence on its face, that's
4 disturbing to the court in the context of the abuse
5 of process.

6 The panel will remember Mr.
7 Ramsay's request to be heard on that matter before
8 any finding was made following the justice's
9 comment on the earlier pages.

10 The ruling goes on for some pages,
11 which I won't take the time to read. It is there.

12 At page 7644, we are still in the ruling on the
13 compellability of Mr. Findlay in the middle of the
14 page, and Justice Cosgrove says:

15 "Well, I go back to the test
16 of whether -- on this
17 argument, whether the Crown
18 is a compellable witness. I
19 will go back to the standard
20 set by Mr. Justice Campbell.

21 Is there some evidence of
22 improper pressure or abuse of
23 process?

24 "I have answered that yes."

25 At page 7645, in the middle, the

1 court notes that he must consider relevance and
2 necessity. At page 7646, at the middle, line 17,
3 the justice refers to the argument of the Crown
4 that:

5 "There was an officer who was
6 a witness to the interview
7 process by Crown counsel. In
8 my view, the officer's
9 evidence is no substitute for
10 the evidence of Crown counsel
11 who, because of his
12 profession and training and
13 because of his responsibility
14 in presenting the case to the
15 court, would be in tune to
16 the significance of the
17 questions asked and the
18 circumstances under which the
19 interview occurred."

20 He says at the bottom of the page:

21 "In my view, the evidence of
22 the Crown attorney, Mr.
23 Findlay, isn't necessary in
24 the context of the evidence
25 complained of, the misconduct

1 9th, 1998 at page 7931 dealing with the
2 compellability of Mr. Flanagan. It appears that
3 Mr. Findlay has now given his evidence, and the
4 issue was the compellability of Mr. Flanagan. And
5 Mr. Ramsay has concluded his submissions.

6 Mr. Murphy makes his submissions
7 on that point and refers to the reasons that I have
8 earlier referred to, and says that the same applies
9 with force to the question of whether Mr. Flanagan
10 should be called, and, at page 7932 and 3, says he
11 wants to hear from Mr. Flanagan as to why the
12 meeting -- I believe it is the September 10th
13 meeting -- was called.

14 I think the evidence was that both
15 Mr. Flanagan and Mr. Findlay were there, or
16 certainly Flanagan knew about it, and the argument
17 goes on. At the bottom of page 7936, Mr. Murphy
18 concludes his argument by saying that:

19 "The evidence is loud and
20 clear it is necessary to hear
21 from Mr. Flanagan. "

22 And Mr. Ramsay does reply, and at
23 7952, and this is on March 10th -- I can't remember
24 whether it is the next day or not. Anyway, we are
25 on March 10th. At page 7952 Mr. Ramsay concludes:

1 "With respect to the other
2 events, while I made my
3 submissions on those, there
4 were other people present,
5 and the evidence, all it
6 amounts to is that at various
7 times he might have been
8 consulted about the case.
9 There was a meeting at his
10 house where he wanted to know
11 what the evidence was."

12 Speaking of Mr. Flanagan. Mr.
13 Murphy replies again at some length, and I won't
14 take you through the rather lengthy reply, which
15 goes on for a number pages.

16 At page 7963, Mr. Murphy is still
17 arguing, and at the bottom of the page in the
18 marked passage, Mr. Murphy makes the point about
19 Mr. Flanagan's duty as a prosecutor:

20 "There is an unpleasant and
21 disturbing inference that his
22 failure to confront Denis at
23 the time, which we know from
24 the Momy letter would have
25 been the appropriate course

1 of action, and his continuing
2 failure to re-interview Denis
3 is an inference left to the
4 court that it may have been
5 willfully blind to what he
6 has admitted knowing was a
7 significant departure."
8 "The Court: Is there
9 anything arising out of the
10 court's decision respecting
11 Mr. Findlay?"

12 And Mr. Murphy refers to there is
13 the meeting between the two Crowns -- this at line
14 20 of page 7964 -- Findlay and Flanagan sometime on
15 or after January 22nd of 1998:

16 "The necessity, in my
17 submission, is the same basis
18 as your honour makes in your
19 oral judgment. You can't
20 rely on an officer. There
21 was presumably no officer
22 present with Mr. Flanagan or
23 Mr. Findlay when the meeting
24 took place."

25 The ruling on this application

1 starts at page 7966, and his honour indicates that
2 he's making a ruling on the application by the
3 Crown to strike the subpoena on Flanagan. We
4 haven't got to the abuse motion. That judgment
5 came in the middle of March.

6 His honour goes on with a
7 chronology of events. On page 7968, he refers to
8 his ruling on the Findlay motion at about line 20,
9 the rule that Mr. Findlay was compellable, and
10 notes that Mr. Findlay testified at the conclusion
11 of his evidence. Justice Cosgrove says defence
12 signalled his intention to call the next senior
13 Crown attorney Mr. Curt Flanagan. He says:

14 "I adopt and incorporate my
15 reasons respecting the
16 compellability of Mr. Findlay
17 and these reasons pertaining
18 to the compellability of Mr.
19 Flanagan --"

20 And he talks about disquiet on the
21 disclosure issues. At page 7969 Justice Cosgrove
22 says:

23 "The court learns of the
24 evidence of assistant Crown
25 Findlay that although he made

1 disclosure by letter a week
2 before the trial of new
3 evidence, significantly
4 different evidence, by
5 Officer Denis that he was
6 bothered by Officer Denis's
7 change in evidence and rather
8 than confronting the officer,
9 the officer left and Mr.
10 Findlay consulted the senior
11 Crown, Mr. Flanagan."

12 And he refers at about line 8 on
13 page 7970 to the Crown's argument, and the court
14 continues in his reasons at length. And at page
15 7972, the court says:

16 "In the application for a
17 stay before me, the decisions
18 and actions of the police
19 complained of, especially in
20 the area of disclosure, taken
21 into consideration with the
22 directions and encouragement
23 of Mr. Findlay, the assisting
24 Crown, by the senior Crown
25 Mr. Flanagan, need to be

1 explained by senior Crown
2 Flanagan, who ultimately is
3 responsible for the
4 respective activities to
5 which I have made reference."

6 And he rules that Mr. Flanagan is
7 a compellable witness, and ultimately Mr. Flanagan
8 did indeed give evidence, as I recall it.

9 Now I am going to move on to the
10 events in September once the trial moved to Ottawa,
11 so perhaps this might be a convenient time to have
12 the morning break.

13 THE CHAIR: Thank you.

14 --- Recess at 10:52 a.m.

15 --- Upon resuming at 11:11 a.m.

16 MR. CHERNIAK: Panel, I am at
17 September 10th, 1998, and the first page is 1802,
18 and I have already read it in when I was dealing
19 with the Segal matters. Let me give you the page
20 references that have already been read in, and I
21 won't duplicate them, except maybe to get the
22 context of what I haven't read in.

23 I have read in pages 1802 to 1805,
24 pages 1817 to 1826 and 1841 and 42. As I say, I
25 won't duplicate those. They are in this section, I

1 believe, but I won't read them again.

2 The second excerpt starts at page
3 1817, and, as I say, I have read in to 1826, so I
4 will start, then, at 1827. This is all on
5 September 14th.

6 And just for the context, we were
7 dealing with Mr. Lindsay's submissions with respect
8 to the calling of certain Crowns.

9 THE CHAIR: This Mr. Lindsay was a
10 new Crown counsel?

11 MR. CHERNIAK: Yes, Mr. Lindsay is
12 the new Crown counsel called in to argue the
13 motions with respect to the calling of various
14 Crowns who were present at the August 20th, 1998
15 meeting. That's the issue.

16 And what is under consideration at
17 the point we are dealing with, starting in the
18 pages preceding 1827, is the motion with respect to
19 the calling of Mr. Berzins and Mr. Pelletier, both
20 senior Ottawa Crowns who were involved in the
21 August 20th meeting.

22 Mr. Murphy is in the process of
23 arguing at the bottom of page 1826 and going on to
24 1827, and he goes on at some length. If you look
25 at page 1828, we will get the gist of what he was

1 arguing at line 8:

2 "With respect to my friend's
3 submissions, your honour, a
4 bald assertion that Mr.
5 Berzins has no material or
6 relevant evidence to give in
7 my submission is unwarranted
8 on a review of the evidence
9 we heard last week from
10 Detective Bowmaster. It was
11 his evidence from August 18th
12 in this courtroom, under
13 oath, that it was Andy
14 Berzins who initially
15 requested an investigation of
16 Detective Inspector
17 MacCharles with respect to
18 the destruction of evidence
19 and the concealment of that
20 criminal act by junior
21 officers in the Cumberland
22 murder case."

23 And he refers to that evidence,
24 and at page 1832, at the top, Mr. Murphy speaks of
25 the question of the date on which Mr. Berzins

1 originally requested and sought from OPP
2 Superintendent Edgar the investigation of Lyle
3 MacCharles for matters that were not disclosed to
4 defence counsel on this case until the 12th of
5 August.

6 At page 1834, you will see what
7 the argument is as to why they are necessary. Mr.
8 Murphy talks about not just the substance of the
9 meeting and the substance of MacCharles and the
10 credibility issue, but the Crown conceded only on
11 September 12th or disclosed only on September 12th
12 that it goes to the issue of MacCharles' failure or
13 non-availability, failure to appear on pretrial
14 motions.

15 Secondly, he says the evidence of
16 Mr. Berzins has to do most importantly with the
17 terms of reference of the RCMP being involved, and
18 the court says at line 25:

19 "What I seem to recall in
20 that area of Bowmaster's
21 evidence was the first person
22 to raise the prospect of
23 enlargement --"

24 That would be enlargement to the
25 Elliott case:

1 " -- was Mr. Berzins."

2 And Mr. Murphy agrees, at the top
3 of page 1835:

4 "It was Berzins who was the
5 protagonist, as the terms of
6 reference expanded, with
7 respect to the RCMP's
8 investigation of MacCharles,
9 and if that doesn't meet the
10 threshold of relevance, I
11 don't know what does."

12 You will see at page 1836 in the
13 middle of the page, Mr. Murphy raises a whole list
14 of questions as to why Mr. Berzins is involved in
15 making the recommendation, what is the basis that
16 he is doing it and what does that say, at line 25,
17 about the Crown's decision to refer the case and
18 his involvement in it.

19 At page 1837, Mr. Murphy raises
20 the argument at line 15:

21 "The troubling concern,
22 because we have a Crown
23 vetting the conduct of one of
24 its chief investigators and
25 actively participating in a

1 process which at that meeting
2 we are told he and others are
3 presumably aware it's going
4 to result in a three- to
5 six-month delay in the
6 prosecution of Julia
7 Elliott."

8 Mr. Murphy deals at the bottom of
9 1838 with the contrary argument that Mr. Berzins
10 has said not to have -- neither he nor Mr.
11 Pelletier is said to have carriage of the case.

12 On page 1839, Mr. Murphy talks
13 about the disclosure of the decision made on August
14 20th at the meeting at which Mr. Berzins,
15 Pelletier, Detective Inspector Bowmaster, where I
16 stop to say he's already testified at the meeting,
17 and Deputy Superintendent Edgar were present. That
18 decision, according to Bowmaster, was reached two
19 days after we were in court.

20 Mr. Murphy goes on to say at the
21 bottom:

22 "And not only is it taken,
23 but the terms of reference at
24 the behest of Mr. Berzins are
25 expanded to include our case.

1 requirements of disclosure--"

2 At the top of the page:

3 " -- relevant to the
4 disclosure of when MacCharles
5 first became the subject of
6 an investigation by the OPP."

7 That would be in the Cumberland
8 matter earlier in 1998, and then the rationale of
9 the justice is starting at line 18:

10 "All of these matters
11 primarily deal with the
12 issues of simply information.
13 That information is
14 generated by and would appear
15 to be within the control of
16 Mr. Berzins, for some example
17 would not appear to have
18 shared with the Crown
19 attorney, Mr. Flanagan, in
20 this trial initially in
21 January and the court has
22 learned, as to the RCMP
23 involvement, was not
24 communicated to the present
25 Crown in this case until some

1 10 days or 12 days after a
2 decision was made to enlarge
3 the problems with Detective
4 Inspector MacCharles to
5 include his involvement in
6 this case, and therefore Mr.
7 Berzins is a proper witness
8 and should be called."

9 Mr. Berzins, if you turn to page
10 1848, was called, and I have read some of these
11 pages to you already. I have read pages 1843 to
12 1851, and so I won't read them again. Then we go
13 to October 15th, 1998.

14 MR. PALIARE: Mr. Cherniak, did
15 you say you had read --

16 MR. CHERNIAK: Sorry, no, I think
17 I misspoke myself. I am sorry, I was reading from
18 what I hadn't read, rather than what I read.

19 MR. PALIARE: I think you read 41
20 and 42.

21 MR. CHERNIAK: I hadn't read from
22 1841 -- I have read from 1843 on. I have read
23 part of that.

24 Mr. Berzins was actually called at
25 page 1848. Mr. Murphy suggests that Mr. McGarry,

1 who is the senior Crown in charge of the Elliott
2 prosecution, asks him to excuse himself. Mr.

3 McGarry says:

4 "Your honour, unless ordered
5 by the court, I have no
6 intention of excusing
7 myself."

8 The court so orders:

9 "The court has heard that Mr.
10 McGarry and Mr. Berzins have
11 shared areas of office space.
12 There is the issue of the
13 flow of communication between
14 Mr. Berzins and Mr. McGarry,
15 and under those
16 circumstances, I think Mr.
17 McGarry ought not to be in
18 court."

19 Mr. Berzins is cross-examined at
20 page 1850 and he says that he is the senior Crown
21 attorney in the jurisdiction, had been in that
22 position for 14 years, and Mr. Murphy asks him:

23 "Can you indicate which Crown
24 officers, if any, you have
25 had discussions about

1 of professional conduct,
2 which is to demonstrate some
3 civility to one another, I
4 can at least alert you to the
5 fact that if it is an
6 exercise that you are engaged
7 in, well, that is one point
8 that is not persuasive to the
9 court and arguments are not
10 persuasive to the court on
11 the issue of Mr. Cavanagh's
12 position. I will not repeat
13 except this one last time.
14 This is the third time I have
15 ruled that Mr. Cavanagh, in
16 the court's opinion, is
17 entitled to and properly
18 represents the Crown at this
19 point."

20 Mr. Cavanagh then goes on making
21 his argument to say that at line 25:
22 "If one subpoenas the Crown
23 attorney, there's miscarriage
24 in the case, knowing that it
25 will put him in a position

1 that he cannot then have
2 carriage of the motion once
3 you then -- not then walk
4 into court and say, I'm
5 surprised and shocked because
6 there is not a Crown that can
7 take carriage."

8 Then moving to page 3815, we are
9 still on October 15th, 1998. There is a police
10 officer in the witness stand. I can't remember
11 whether it was Bowmaster or Ball in the witness
12 stand at this point, who is being cross-examined.

13 I am not sure it matters which
14 one, but there is -- Mr. Murphy asks that the
15 witness be excused and makes some submissions about
16 the status of Mr. Cavanagh. Mr. Cavanagh, as you
17 will see at the top of page 3815, had objected to a
18 question to the police officer, and Mr. Murphy
19 submits at the middle of page 3816, line 12:

20 "I think Mr. Cavanagh should
21 do the appropriate thing and
22 withdraw as Crown counsel,
23 because he is not only in an
24 untenable conflict by his
25 conduct and frequently

1 cross-examination and when he
2 steps over the line and
3 invites hearsay, becomes
4 argumentative, becomes
5 insulting with the witness, I
6 have a duty to stand up and
7 object."

8 The court at page 3818 deals with
9 the question of overlap, and the overlap is dealing
10 with matters that would relate to the compelling of
11 Mr. McGarry and matters in the voir dire that would
12 not, and the discussion goes on about that matter.

13 I won't trouble the panel with it.

14 We turn to page 3822. Mr. Murphy
15 has been arguing about the questions that he was
16 *asking* -- it looks like it was Detective Inspector
17 Ball. And the court at the middle of the page,
18 3822, says:

19 "At this point, at this area
20 of the cross-examination of
21 the witness, in my view,
22 because of the overlap, I
23 think we cannot continue with
24 the witness, so there are two
25 options. One is have a Crown

1 substitute for Mr. Cavanagh."

2 And Mr. Cavanagh says at the top
3 of page 3823 that there is not a Crown familiar
4 with the case, and Mr. Murphy makes the submission
5 at page 3823 in the middle of the page that:

6 "The Crown, by its refusal to
7 do its duty, is dictating in
8 what order we are to call
9 evidence --"

10 And refers to his allegations of
11 perjury at about line 25. And at page 3824, Mr.
12 Murphy makes his point about the issue as to what
13 happened at the meeting of August the 20th, and the
14 court makes its comment at the bottom, starting at
15 the bottom of page 3824, and notes that at line 7:

16 "It would seem that the
17 result of that would be Mr.
18 Cavanagh excluded, absent
19 calling other witness where
20 there is no overlap, would
21 have to wait for the
22 substitute of the Crown for
23 Mr. Cavanagh to continue.
24 That might involve two or
25 three weeks until a

1 substitute Crown is named and
2 the like."

3 The court wants to take some time
4 to think about what the best way to proceed is.
5 Mr. Murphy argues at page 3827 at the top that he
6 doesn't think it appropriate either that Mr.
7 Cavanagh continue nor, in the alternative, that we
8 might continue with him as Crown for other
9 non-overlapping witnesses.

10 Mr. Cavanagh makes submissions
11 starting on page 3828, and the court, after hearing
12 from Mr. Cavanagh, says at the bottom of page 3828:

13 "The court's position has not
14 changed either. The court's
15 position is that Mr. Cavanagh
16 is competent to continue the
17 Crown representation in the
18 trial, except where there
19 were complaints of overlap.
20 There is a complaint of
21 overlap in respect to the
22 continuing cross-examination
23 of this witness, and
24 obviously that
25 cross-examination cannot

1 continue. There is no reason
2 why other witnesses with
3 non-overlap cannot be called
4 or any witness with overlap
5 intended to be called should
6 be called beginning tomorrow
7 morning at 10 o'clock."

8 I turn to November 12th, 1998, and
9 the issue here that is being argued by the new
10 Crown counsel, who has to deal with the issues that
11 Mr. Cavanagh cannot deal with, is Mr. Mitchell
12 Hoffman, and the issue is at this point the
13 compellability of Mr. Cavanagh as a witness.

14 And just for your notes, because
15 it takes a while to get there, the ultimate ruling
16 on Mr. Cavanagh is November 13th, 1998 at page
17 5889, which is further along in this volume.
18 Because it takes so long to get there, I'm simply
19 referring you to it now.

20 And Justice Cosgrove does find
21 that Mr. Cavanagh is compellable for a variety of
22 reasons, some of which are canvassed in the
23 argument that follows. That's where we are going
24 in the next series of pages. The argument is with
25 respect to Crown Cavanagh, and the ultimate ruling

1 is that he is compellable.

2 Mr. Hoffman comes in and makes his
3 argument, and he says that he adopts, in its
4 entirety, on page 5778, the earlier description of
5 the law by Mr. Thompson, who is arguing on the
6 issue of Pelletier and Berzins.

7 And Mr. Hoffman refers to that
8 argument, and then says at the bottom of page 5779
9 the following at line 27:

10 "To this I simply add, by way
11 of further submissions
12 dealing with the issue of
13 whether Mr. Cavanagh is
14 compellable, the court now
15 has approximately one week of
16 Mr. McGarry's full and
17 extensive evidence, full and
18 extensive cross-examination
19 by my friend, where I suggest
20 no stone was left turned --"

21 That means unturned:

22 " -- and I would further
23 respectfully submit that my
24 friend was given a great
25 latitude in the questioning

1 of Mr. McGarry and a great
2 number of issues were touched
3 on in considerable detail."

4 Then at the bottom of page 5781,
5 Mr. Hoffman is still arguing, line 25:

6 "Moving on to the next point,
7 page 71, involving the
8 submissions of Mr. Thompson
9 dealing with the issue
10 raised, that had been raised
11 by this court that's stated
12 prior by Mr. Murphy, namely,
13 the issue of considerable
14 amount of court time being
15 spent on the issue of when
16 the decision to involve the
17 RCMP took place. As I have
18 indicated before in a general
19 way, it may not have taken up
20 a great deal of time. I
21 believe at one point in the
22 transcript, I don't recall
23 the citation, your honour had
24 indicated that you had not
25 gone over and counted the

1 words to determine
2 percentage, but it was at
3 least a considerable concern
4 of the court."

5 And then Mr. Hoffman goes on to
6 deal with the witnesses who have already informed
7 the court about the events of August 20th.
8 Obviously this argument is on the question of
9 whether it is necessary to have any more evidence
10 on that point, and makes that point at the bottom
11 of page 5783 at line 25:

12 "So I submit the court may
13 wish to consider whether
14 there's more or less a basis
15 now, as compared to that
16 time, to compel Mr. Cavanagh,
17 and, if there's more of a
18 basis, is it sufficient to
19 meet the test as set out in
20 the law referred to by my
21 predecessors, Mr. Lindsay and
22 Mr. Thompson, especially
23 considering we have now heard
24 -- and I deal with the
25 necessity of Mr. Cavanagh's

1 evidence, in particular. We
2 have now heard from McGarry,
3 lead counsel and senior
4 counsel on this case, for
5 about a week."

6 And then at the middle of the
7 page:

8 "My overall submission will
9 be that the references to
10 Cavanagh are few and far
11 between in the McGarry
12 evidence, given your honour
13 was not compelled to find
14 Cavanagh compellable at the
15 time and decided the issue
16 would be dealt with after Mr.
17 McGarry's evidence was of
18 some import to what was said
19 about Mr. McGarry, what was
20 said about Mr. Cavanagh and
21 how his name and potential
22 evidence came up in Mr.
23 McGarry's cross-examination."

24 And Mr. Hoffman then reviews at
25 some length the involvement of Mr. Cavanagh in the

1 evidence of Mr. McGarry. At page 5790, I will read
2 you just one part of this argument, line 15:

3 "Mr. Murphy asked Mr. McGarry
4 the question to the effect:
5 'I'm asking you this because
6 last week Mr. Cavanagh
7 cross-examined Mr. MacCharles
8 about the collection of
9 evidence. Do you know why he
10 would do that?' And the
11 answer of Mr. McGarry was: 'I
12 don't know. You'd have to
13 ask him.' 'Did you discuss
14 this with Mr. Cavanagh?'
15 This is a question to
16 McGarry: 'Did you discuss
17 this with Mr. Cavanagh since
18 or before he became a witness
19 in this area of collection of
20 evidence?' The answer was
21 'no.'
22 "There was a question by your
23 honour to McGarry to the
24 effect that: 'Was Mr.
25 Cavanagh present at the

1 meeting where you said the
2 investigation should be
3 expanded?' Mr. McGarry's
4 answer was 'no'."

5 Then Mr. Hoffman goes on at page
6 5791 at line 12 about Mr. McGarry's evidence to
7 that point dealing with the August 20th, 1998
8 meeting. Mr. McGarry was thoroughly cross-examined
9 on that, so the argument goes. And Mr. Hoffman
10 argues:

11 "The defence is significantly
12 further from fulfilling its
13 burden of necessity given Mr.
14 McGarry's very extensive and
15 complete evidence. For
16 better or for worse, there is
17 the evidence before the court
18 of Mr. McGarry concerning why
19 the August 20th meeting was
20 not disclosed until September
21 3rd."

22 The court asks on page 5792:

23 "Was Mr. Cavanagh present at
24 the meeting of August 20th
25 when Detective Superintendent

1 Edgar spoke to Mr. McGarry?"

2 Mr. Hoffman says he believes that
3 he was.

4 And the court goes on at page
5 5793, in comments to Mr. Hoffman in his argument,
6 about the McGarry evidence and the fact that the
7 McGarry evidence and the evidence of Mr. Pelletier
8 about these meetings or this meeting was not the
9 same as to who was doing what and when the RCMP was
10 to be contacted.

11 The court goes on, on the next
12 page, to deal with the contradictions the court
13 seems to see between the Pelletier evidence and the
14 RCMP evidence with respect to the involvement of
15 the RCMP. The court notes at page 5795 on line 19
16 that:

17 "The evidence at this point
18 is confusing to the court and
19 leaves the court with the
20 court's expressed concern and
21 unease that if the senior
22 regional Crown and the senior
23 Crown on this case don't tell
24 the court the same thing,
25 what am I to make of that?

1 application for Mr. Cavanagh
2 to be compellable, because
3 the issue was so important of
4 the consequences, he wants an
5 adjournment until tomorrow."

6 The court then goes on, on page
7 5799 and following, to raise a number of issues for
8 Mr. Hoffman to consider over the adjournment, and
9 you will see that at the bottom of page 5799 -- and
10 it goes on at some length -- what the court wants
11 to know in the middle of page 5800, about line 10:

12 "It may be that the whole
13 discussion and evidence on
14 this voir dire on who has
15 authorized the OPP to make a
16 request of the RCMP, when was
17 that decision made, by whom,
18 when was it communicated to
19 the RCMP, when and who told
20 the Crown, either senior
21 Crown, regional Crown and now
22 more importantly Mr. McGarry
23 and Mr. Cavanagh in the case,
24 about the relationship
25 between the OPP and the RCMP.

1 It might be irrelevant. The
2 point is that it might be
3 argued that in a context of
4 credibility, the requirement
5 of disclosure by the Crown
6 the relevance has to do with
7 the issue of credibility and
8 the knowledge or decision of
9 the Crown on this acceptance
10 of credible or incredible,
11 question mark, credible Mr.
12 MacCharles."

13 The court goes on, and in the
14 middle of page 5801 at line 17:

15 "The point I'm making in
16 terms of what we are talking
17 about is the Crown obligation
18 to disclose."

19 And the court goes on, on page
20 5802 and following. The court is talking about his
21 impressions to that point of the evidence, and the
22 court says at 5803, at about line 14, these are
23 matters he wants Mr. Hoffman to consider:

24 " -- why it was the Crown was
25 having such great difficulty

1 getting chronology to the
2 court in a way in which those
3 people who are involved all
4 agreed? That's what caught
5 my attention, and I started
6 thinking, Well, it doesn't
7 matter if the OPP decides to
8 get the RCMP. If the RCMP
9 turned them down, it could be
10 argued what is important
11 about all that is here there
12 is a significant decision by
13 the Crown based on
14 information, a decision
15 that's been made. Why do we
16 wait for a couple of weeks?"

17 Then Mr. Hoffman makes some
18 observations on the court's comment starting at
19 page 5804. I won't trouble you with what they are
20 in detail, but he does make this point at page
21 5807, line 7, dealing with the August 20th meeting:

22 "But if I'm understanding
23 your honour's point that the
24 mere fact of the meeting,
25 whatever the decision was,

1 whether there was a decision
2 not to bring in an outside
3 agency -- to bring an outside
4 agency or whether no decision
5 was taken, that meeting alone
6 goes to credibility. I
7 certainly take that point
8 from the court and just say
9 the way things turned out it
10 is of limited significance.
11 It would have been of great
12 significance if it had never
13 before disclosed."

14 The court did adjourn until the
15 next day, and 5809 is the start of Mr. Murphy's
16 argument. Mr. Hoffman indicated that he would
17 either reply then or reply after hearing from Mr.
18 Murphy, and Mr. Murphy starts his submissions,
19 which go on for some time, at page 5809.

20 Mr. Murphy makes a number of
21 submissions and he refers to the evidence. At page
22 5810, he refers to a variety of evidence that he's
23 heard, and he submits, at about line 5 on 5810,
24 that all of the Crowns in the Ministry of the
25 Attorney General, from Assistant Deputy Attorney

1 General Murray Segal down, were all aware and
2 involved in the August 20th decision, and he says
3 that's borne out by the evidence of Mr. Berzins and
4 Mr. Pelletier.

5 And he points out on page 5811,
6 starting at line 3, that with respect to the August
7 20th meeting, all of the Crowns from top to bottom
8 in the hierarchy were involved in the decision of
9 August 20th. That's on the evidence, including the
10 subsequent evidence, of Bowmaster and McGarry.

11 Mr. Murphy goes on at length about
12 who knew what about when Detective Superintendent
13 Edgar, the senior OPP officer involved, drafted the
14 September -- this is at the bottom of the page --
15 drafted the September -- at the bottom of page
16 5811, drafted the September 25th memorandum with
17 respect to Commissioner Boniface's request to the
18 RCMP commissioner.

19 Mr. Murphy goes on at length about
20 that issue. Mr. Murphy goes on at 5812 and 5813 to
21 make the point that there were many people that
22 apparently knew about that decision.

23 Mr. Murphy makes the point at the
24 top of page 5815 that, in his view, line 7,
25 Detective Inspector Bowmaster deliberately misled

1 this court and committed perjury when he was
2 questioned about his notes of August 20th.

3 And you remember that deals with
4 the issue of the 3 o'clock and the 4 o'clock note
5 on that day.

6 At the bottom of page 5815, Mr.
7 Murphy talks about the apparent subterfuge by the
8 Crown and the police who were present at the
9 meeting. He refers again to the fact that nobody
10 took notes of the meeting. He refers to the
11 evidence.

12 Mr. Murphy page 5819 in the
13 middle, after referring again to the lying by
14 Detective Inspector Bowmaster, "It would be a
15 reasonable inference", about line 17:

16 " -- that there was a hope or
17 deliberate calculation by
18 those present at the meeting,
19 including Bowmaster, that the
20 defence would not pierce this
21 fraudulent veil of isolation
22 that Mr. Berzins wrote in
23 front of this court --"

24 And he accuses Mr. Berzins of
25 misleading the court. On 5820, at about line 15,

1 Mr. Murphy refers to the shroud of secrecy that
2 surrounded this decision. At line 25:

3 " -- the deliberate attempt
4 to conceal and the artificial
5 ostensible isolation that was
6 done for the sole purpose of
7 allowing Mr. McGarry,
8 allowing the Crown attorney
9 and the Ministry of the
10 Attorney General, to deny
11 knowledge on the part of
12 McGarry and Cavanagh."

13 That refers to the issue of why
14 McGarry and Cavanagh weren't notified of whatever
15 decision had been made until later in the piece.

16 Mr. Murphy goes on in that vein,
17 and on 5823 at the bottom he makes submissions
18 about the October 13th ruling with respect to Crown
19 McGarry, and Mr. Murphy then goes on to make a
20 number of points with respect to the ruling, which
21 are in the following pages.

22 Then at page 5827, following Mr.
23 Murphy's submissions about the earlier ruling, the
24 court says at the bottom of the page:

25 "While Mr. Hoffman did

1 identify in the record the
2 times when the issue was
3 dealt with by other people,
4 and I will repeat my
5 question, why in any one of
6 those one, two, three, four
7 occasions, which are occupied
8 in the transcript, provide
9 any time during those
10 exchanges before the court,
11 didn't Mr. Cavanagh or
12 McGarry rise and say: 'We
13 were at a meeting and learned
14 of the intention of the OPP
15 to have this case expanded to
16 include MacCharles?' Why?"

17 Mr. Murphy says that question
18 remains unanswered. Mr. Murphy then goes on at
19 considerable length, which I won't take the panel
20 to in detail, with respect to the basis upon which
21 Mr. McGarry was found compellable.

22 Page 5833, Mr. Murphy submits in
23 the middle of the page, line 12, that:

24 "Mr. Hoffman took a different
25 position from his

1 predecessors on the relevance
2 of the testimony of Mr.
3 Cavanagh on the basis that
4 he, Mr. Cavanagh, had
5 essentially little to add."

6 Mr. Murphy wants to know on page
7 5834, on line 10, why neither Mr. Cavanagh nor Mr.
8 McGarry alerted the court that Inspector Bowmaster
9 had either committed perjury or misled the court
10 about the notes.

11 At page 5837, Mr. Murphy deals at
12 the middle of the page with:

13 " -- the glaring
14 inconsistency between Mr.
15 McGarry's evidence and every
16 other witness as to whether
17 it was a decision that was
18 reached at the first August
19 20th meeting or, according to
20 Mr. McGarry, to ask the OPP
21 to ask the RCMP to
22 investigate MacCharles."

23 And the argument is that, at line
24 24, there's nobody other than Mr. McGarry. The
25 inference is obvious. He has to come up with some

1 explanation, and the only explanation, apart from
2 one that he offers, that he deliberately concealed
3 it.

4 Mr. Murphy goes on again, and then
5 at the bottom of page 5840, Mr. Murphy raises a new
6 issue, line 27:

7 "There is the issue of
8 whether Mr. Cavanagh was
9 previously involved or in
10 communication with
11 immigration officials
12 concerning this plan to
13 reactivate a detention order
14 in case the court ordered the
15 applicant's release."

16 He goes on to discuss that issue,
17 which, to fast forward, you will find mentioned in
18 the court's reasons.

19 Page 5841 in the middle, Mr.
20 Murphy raises the issue of whether Mr. McGarry and
21 Mr. Cavanagh continue to discuss the evidence
22 before the court after they had been subpoenaed,
23 either with each other or other witnesses,
24 including any of the subpoenaed police officers and
25 any other Crowns who had identified.

1 Mr. Murphy raises at line 20 the
2 delineation or division of shared Crown
3 responsibility for disclosure, and he goes on at
4 some length about who between McGarry and Cavanagh
5 had the obligations for disclosure.

6 And he raises a disclosure issue,
7 on page 5842, about the circumstances of the
8 purported witness statements obtained from Violet
9 and Christopher Pender. Those are relatives.
10 Violet Pender is the sister of the deceased, and I
11 think that Christopher Pender was a nephew.

12 Then there is the issue raised at
13 page 5843 of Cavanagh's knowledge or disavowed
14 knowledge by Mr. McGarry on why Constable Mahoney
15 was replaced. At the bottom of the page, Mr.
16 Murphy raises further areas:

17 " -- the basis upon which and
18 by whom -- by which Crown Mr.
19 McGarry or Mr. Cavanagh or
20 which officer. It was
21 decided that Constable Ball
22 and Churchill should have
23 permanent involvement."

24 At page 5844 at line 12, there is
25 the issue of the nature and extent of Mr. McGarry's

1 briefing of Mr. Cavanagh and McNally about the
2 Crown case. At line 24:

3 "The state of knowledge of
4 Mr. Cavanagh is certainly an
5 issue that remains, given
6 what Mr. McGarry has been
7 forced to admit and his
8 appalling lack of awareness
9 and knowledge of the case."

10 Over to page 5845 at line 13,
11 whether there was a joint or shared decision taken
12 by McGarry and Cavanagh with respect to production
13 of police officers' notes in the witness stand; and
14 at the bottom of the page, line 27, the extent of
15 Cavanagh's knowledge and involvement in the denial
16 of the existence of officers notes; at the bottom
17 of page 5846, line 24, which of either Crown
18 McGarry or Mr. Cavanagh or any other Crown has
19 taken the initiative or instructed Detective
20 Constable Walker to make these updates to Violet
21 Pender, Mr. Foster's brother, both of whom are
22 subpoenaed as Crown witnesses; which Crown is
23 directing this continued Crown-initiated contact.

24 Mr. Hoffman interjects to
25 indicate, at the middle of page 5847, what he's

1 told Constable Walker as to what she could tell the
2 family, and Mr. Murphy goes on at the bottom of the
3 page:

4 "Further, your honour, what
5 was the nature of this,
6 quote/quote, precis that Mr.
7 Cavanagh gave to Mr.
8 Pelletier and Mr. Berzins?"

9 At page 5848, about line 10:

10 "One has to query whether Mr.
11 Cavanagh, what precis he gave
12 to these two gentlemen who
13 were both witnesses on the
14 case and they were implicated
15 severely, along with
16 Assistant Deputy Attorney
17 General Segal, on the whole
18 issue of the decision of the
19 August 20th decision."

20 Mr. Murphy goes on at some length
21 to deal with other matters. Then he goes back to
22 the note question at page 5850 at line 23:

23 "-- the issue of Cavanagh's
24 involvement first in the
25 non-disclosure of those

1 that MacCharles was aware,
2 apparently, according to
3 MacCharles, that Laderoute
4 did not record the vehicle
5 plate number 301 H0M at the
6 RIDE stop."

7 At page 5857 in the middle of the
8 page, line 16, Cavanagh's non-disclosure of
9 information about the tracing of the June 21st,
10 1995 threatening phone calls to the victim's
11 residence to the so-called fax machine.

12 Mr. Murphy goes on to deal with
13 other areas of non-disclosure. At page 5358, he
14 talks about the fifteenth area, the failure to
15 disclose that certain constables had been charged
16 under the Police Services Act; page 5859, at the
17 top, line 5, Mr. Cavanagh's failure to disclose the
18 formal letter that was sent by the OPP commissioner
19 to the RCMP commissioner requesting the independent
20 investigation of MacCharles.

21 Over to page 5860, we have the
22 Immigration Canada issue raised again at line 7:
23 Mr. Cavanagh's failure to disclose the Crown's
24 ongoing conduct to Immigration Canada about the
25 applicant's immigration status.

1 Mr. Murphy concludes that there
2 are a number of inconsistencies. This is at page
3 5861 at line 13:

4 "The sufficient number of
5 inconsistencies,
6 contradictions and gaps in
7 the evidence of Mr. McGarry
8 with respect to all of the
9 above issues that the court
10 requires."

11 And he refers to the shared
12 responsibility for continuing disclosure. At page
13 5863, it says Mr. Humphrey, but I am sure it means
14 Mr. Hoffman. Mr. Humphrey didn't come on the scene
15 until about five weeks later, so I think there is
16 an error in the transcript. It must be Mr.
17 Hoffman.

18 Mr. Hoffman makes a reply on four
19 general points, and he says with respect to Mr.
20 McGarry at the middle of the page:

21 "There are issues that my
22 friend did not ask Mr.
23 McGarry about, and he could
24 have and didn't. In my
25 submission, the fact that Mr.

1 Cavanagh may be able to give
2 evidence in those areas
3 mitigates against the calling
4 of Mr. Cavanagh on the issue
5 of necessity."

6 And he goes on to deal with the
7 second point again on the issue of necessity. Then
8 at page 5864, his third point at line 15:

9 "If there are areas, as I
10 suggest there are, that my
11 friend suggests that Mr.
12 Cavanagh may have evidence
13 on, I would just ask the
14 court to consider the test
15 not being whether it would be
16 interesting to get Mr.
17 Cavanagh's views on
18 something, whether Mr.
19 Cavanagh should answer for
20 something, but the issue is,
21 based on evidence or
22 reasonable inference from
23 evidence, does this case rise
24 to the level of a real basis
25 of relevance that Mr.

1 Cavanagh's evidence as
2 opposed to something more
3 speculative? And again what
4 I keep coming back to is: Is
5 it necessary?"

6 Mr. Hoffman deals with his
7 conclusion at the middle of page 5865, and he says
8 at line 19:

9 "Is there sufficiency of
10 evidence and inference,
11 therefore, on which a finding
12 can be made that Mr. Cavanagh
13 is compellable?"

14 And he refers to the law that was
15 argued at an earlier time, and he goes on at some
16 length from the transcripts of the evidence of Mr.
17 Pelletier, which I won't refer the panel to at this
18 point.

19 Mr. Hoffman continues on page 5871
20 with reference to the McGarry evidence. This is in
21 the middle of the page, the McGarry evidence from
22 November 2nd, 1998, and he gives some examples of
23 what those answers are and refers at some length to
24 Mr. McGarry's cross-examination on some of the
25 relevant points.

1 He makes the point at page 5874,
2 where, at line 19, quoting from Mr. McGarry's
3 evidence:

4 "Mr. McGarry's said: 'Quite
5 frankly, sir, it didn't
6 matter to me if I'd been made
7 aware of the following
8 decision on August 20th. It
9 didn't matter to me whether
10 it was disclosed -- whether
11 disclosed it on August 20th
12 or September 1st.'"

13 Again, Mr. Hoffman continues:

14 "I'm not making comment on
15 that content of that answer;
16 simply there is an answer,
17 and it goes to the necessity
18 issue with respect to Mr.
19 Cavanagh."

20 Then at page 5876, Mr. Hoffman at
21 the middle of the page says:

22 "Neither Mr. Pelletier nor
23 Mr. McGarry, perhaps
24 independently, came to the
25 conclusion that the August

1 20th meeting had to be
2 disclosed right away. In
3 that respect, accepting the
4 court's point that it would
5 be relevant to the issue of
6 credibility whether or not
7 there was an investigation by
8 the OPP, requested by the
9 OPP, whatever the RCMP did,
10 just the fact of the August
11 20th meeting would have been
12 relevant. Accepting that
13 point, in my submission, it
14 is looking at the actions of
15 what Mr. Pelletier did and
16 what Mr. McGarry did in
17 retrospect is, I would
18 respectfully suggest, a
19 difficult issue."

20 Mr. Hoffman says at the top of
21 page 5877:

22 "Why is it relevant? What
23 exactly is it relevant to and
24 what is the propriety of
25 waiting from August 20th to

1 September 3rd until there is
2 something more formal or
3 whether there was a formal
4 decision on the 20th? That's
5 a matter I suggest perhaps
6 better left for argument on
7 the motion."

8 About line 20, Mr. Hoffman says:
9 "A point that I asked the
10 court to consider is the
11 rationale of the people at
12 the time for not disclosing
13 the August 20th meeting, the
14 rationale of it not being the
15 ultimate formal decision by
16 the commissioner of the OPP,
17 if I could sum it up that
18 way."

19 And Mr. Hoffman then goes on to
20 deal with the relevance. The court then makes some
21 interjections at page 5878 on the difference, as
22 the court appreciated it, between Mr. McGarry's
23 evidence and Mr. Pelletier's evidence, and Mr.
24 Hoffman responds to that.

25 At page 5881 at line 20, the court

1 refers to the earlier transcript of Mr. Pelletier
2 and contrasts it with what others have said, and
3 the court goes on at some length, at page 5882,
4 dealing with Mr. Pelletier's evidence, and at about
5 line 8 the court asks the question:

6 "What do I reason from that?
7 I reason that he's addressing
8 the future. I think what
9 he's saying is, 'I had a
10 conversation with McGarry and
11 I was signalling to him.
12 When we were told that it's
13 confirmed that the RCMP will
14 accept the invitation, then
15 you should let the defence
16 know about that."

17 The court says that is different
18 than what he said on the previous page. And the
19 court says at the bottom of the page:

20 "Nowhere is any suggestion
21 offered to the court --"

22 I am on page 5883 now:

23 " -- that what he was waiting
24 for was word that the OPP had
25 made a decision to make the

1 request."

2 And the court goes on, and Mr.
3 Hoffman makes a response to that with reference, in
4 some detail, to the evidence. And the court -- at
5 page 5886, the court makes another interjection at
6 line 8. The court says:

7 "I accept that and will
8 consider that."

9 And at the bottom of the page,
10 referring to Mr. McGarry's evidence at line 28:

11 "Maybe when Mr. McGarry said
12 it didn't make any difference
13 to him whether he told the
14 court it was on the 20th that
15 he knew the police had
16 decided, at least Detective
17 Superintendent Edgar of the
18 OPP had decided that the
19 police were going to make a
20 request of the RCMP. The
21 effect of the non-disclosure
22 contributed to a two-week
23 wait. And it was two days
24 after that discussion with
25 the court that Mr. Cavanagh

1 and Mr. McGarry participated
2 in the meeting when they were
3 advised of the fact that the
4 police were going to
5 formulate a request to the
6 RCMP. What has happened,
7 apart from anything else, is
8 the court hit a down time of
9 two weeks."

10 Mr. Hoffman responds to that. The
11 court then makes a further observation at page
12 5888, and at the bottom of the page, the court
13 says:

14 "I have problems with that
15 area of evidence. It could
16 be, for example, as you say,
17 relevant to other areas at
18 the end on the stay
19 application. I wonder if it
20 isn't logical that I
21 shouldn't ask a third person
22 who was in that meeting what
23 he heard people say. So I
24 may have another standard
25 where I wish to judge the

1 reliability, accuracy or
2 acceptability of what Mr.
3 McGarry has said."

4 And this is a person who the court
5 has ordered has had no contact with Mr. McGarry or
6 no contact with Mr. Pelletier, no contact with
7 Superintendent Edgar; that's of course Crown
8 Cavanagh.

9 The court recesses from 1:15 to
10 2:35, and Justice Cosgrove makes his ruling and I
11 will take you through parts of that. Justice
12 Cosgrove starts by reviewing some of the history
13 and dealing with his October 13th ruling with
14 respect to Crown McGarry.

15 He notes on page 5891 that he has
16 had the opportunity of the evidence of Mr. McGarry
17 -- this is at line 20 -- and other witnesses on the
18 continuation of the voir dire. He says:

19 "It was my thought, bearing
20 in mind the arguments that
21 were presented on the issue
22 of necessity, that
23 potentially the evidence of
24 Mr. McGarry would satisfy the
25 court's concern or interest

1 of the law with respect to
2 the components of necessity."

3 The court says at the middle of
4 page 5892:

5 "The evidence by Mr. McGarry,
6 in particular, from the point
7 of lack of disclosure of the
8 meeting by which he and
9 Cavanagh, Detective
10 Superintendent Edgar,
11 Inspector Bowmaster on the
12 20th of August has, rather
13 than satisfying the court,
14 raised addition questions,
15 for example, on the issue
16 given by McGarry as to why
17 the court was not advised
18 what witnesses were being
19 questioned on this point,
20 that in fact, Mr. McGarry and
21 Cavanagh had attended and
22 were aware of Superintendent
23 Edgar's decision to recommend
24 an extension of the RCMP
25 investigation in Cumberland

1 to this case, his explanation
2 being that he was awaiting a
3 more formal decision or a
4 decision by an authorized
5 person in the OPP, that in
6 fact a request would be made.
7 That explanation, when
8 juxtaposed with the evidence
9 of Crown Pelletier, presents
10 difficulties because of the
11 contradictions in the
12 evidence of Pelletier and
13 McGarry on that point."

14 He refers to certain discrepancies
15 in the evidence, and at line 22 on page 5893, the
16 court continues:

17 "These discrepancies in the
18 evidence on that point,
19 rather than satisfying the
20 court on this issue of
21 disclosure so far as the
22 factual basis is concerned,
23 the evidentiary basis, is one
24 of the reasons why the court
25 has concluded that the

1 evidence of Mr. Cavanagh was
2 a party to the meeting on the
3 20th is compellable and is
4 necessary that he should
5 testify."

6 And he continues at page 5994
7 about line 22:

8 "In my view, there is
9 continuing necessity for Mr.
10 Cavanagh to answer the
11 questions. Although he is
12 assisting the Crown, the
13 court has learned, as a
14 result of the examinations of
15 Mr. McGarry, that a lot of
16 work of Mr. McGarry and Mr.
17 Cavanagh is shared work in
18 the trial. There has been in
19 some respects a division of
20 labour."

21 Then the court says at page 5895,
22 about line 7:

23 "I want now to go on some of
24 the additional areas touched
25 upon by the defence as

1 requiring evidence by an
2 examination of Mr. Cavanagh.
3 The first additional one is:
4 When did Mr. Cavanagh become
5 aware that Inspector
6 MacCharles charged under the
7 Police Act? In the area of
8 shared responsibility to
9 which I referred, McGarry
10 indicated, for example, that
11 witness preparation,
12 responsibility for physical
13 exhibits, responsibility for
14 forensic studies were shared
15 areas of responsibility, but
16 the area of disclosure of
17 police notes was under the
18 responsibility of Mr.
19 Cavanagh. In this area, the
20 court was troubled by the
21 reluctance of the police to
22 produce notes."

23 The court goes on to deal with the
24 evidence with respect to notes, which I have
25 already read to the panel.

1 The court says at line 15, and
2 this is the administrative investigative issue:

3 "I would like to know whether
4 that is the general view of
5 other police officers or
6 whether Mr. Cavanagh is aware
7 of that distinction or is
8 aware of the reasons why
9 there has been this
10 disturbing reluctance of
11 police to make production of
12 notes when required to
13 produce them by Crown
14 counsel."

15 He goes on, with respect to the
16 note issue, on the bottom of the page, and at the
17 top of page 5897:

18 "Why that patent
19 contradiction was not
20 apparent to the Crown, who
21 simply conveyed the
22 communication of the police
23 that there were no notes
24 available to the officer."

25 At line 14, and this is page 5897:

1 "The court is also concerned
2 and believes the evidence of
3 Mr. Cavanagh is necessary to
4 understand the evidence
5 recently before the court on
6 the issue of Immigration
7 Canada recently issuing a
8 warrant or process to arrest
9 the accused before the court
10 should she be released from
11 her detention, for example,
12 as a result of a renewed bail
13 application."

14 Mr. McGarry indicates to the
15 court:

16 "The error of contact with
17 immigration authorities was
18 under the responsibility of
19 Mr. Cavanagh."

20 And the court goes on, on the next
21 page, to refer at the middle of the page to the
22 belief that there was an existing warrant and that
23 he -- and that must be Mr. Cavanagh -- would simply
24 draw to the attention of Immigration Canada that
25 there was a warrant outstanding.

1 And the court goes on on this
2 issue at page 5899:

3 "Mr. Cavanagh having
4 responsibility for contact
5 with Immigration Canada in
6 this area, which is a bit of
7 circus, might be seen as a
8 circus performance, except
9 that it is one with very
10 serious -- and has a bit of a
11 smell about it. I would like
12 to know from Mr. Cavanagh,
13 what is his knowledge of the
14 role that Immigration Canada
15 has played and is playing
16 with respect to its interest
17 in the status, the
18 immigration status, of the
19 accused to before the court.
20 I have raised some issues
21 that the court believes are
22 areas that warrant the
23 evidence of Mr. Cavanagh,
24 whose particulars were placed
25 off that evidence. In some

1 cases, there were other
2 people present or who had
3 knowledge and have testified,
4 as I have explained, Mr.
5 McGarry. In other ways,
6 there's only Mr. Cavanagh who
7 has any knowledge of the
8 Crown in those particular
9 areas."

10 On page 5900:

11 "By raising these matters, I
12 want to reiterate that these
13 are matters of interest to
14 the court. The court's
15 interest is not intended to
16 preempt questions by either
17 counsel in the examination of
18 Mr. Cavanagh. The practice
19 has been each that counsel
20 may cross-examine every
21 witness on the voir dire. As
22 I have signalled, if I feel
23 that matters are of concern
24 to the court -- that matters
25 that are of concern to the

1 court are answered by the
2 questions by counsel, then
3 all the better. On the other
4 hand, what I am doing is
5 signalling in advance that
6 those are areas I probably
7 would investigate with the
8 witness at the conclusion of
9 questions by counsel were
10 they not asked."

11 And that concludes that ruling,
12 and I will resume after the lunch break on November
13 19, 1998, if that's acceptable to the panel.

14 THE CHAIR: Thank you.

15 --- Luncheon recess at 12:30 p.m.

16 --- Upon resuming at 1:31 p.m.

17 THE CHAIR: Mr. Cherniak, are you
18 ready to proceed?

19 MR. CHERNIAK: Yes, thank you.
20 We were at page 6339 in Particular 2(C), and the
21 transcript of November 19, 1998.

22 As you know, McGarry testified
23 some time before this, and Mr. Cavanagh's cross-
24 examination concluded on November 16, as I
25 recollect the evidence.

1 evidence or not."

2 In the afternoon of November 19,
3 at page 6343, the court asks if Mr. Berzins is
4 available to testify, and he was available and, at
5 the bottom of page 6344, the questioning of Mr.
6 Berzins continues.

7 One of the significant things
8 about these next pages, at least initially, is that
9 the examination is entirely conducted at the
10 instance of and by Justice Cosgrove.

11 At the bottom of page 6344, the
12 Court says:

13 " You are still under oath.
14 I have a few questions, Mr.
15 Berzins, arising from your
16 previous evidence on this
17 voir dire, and I have the
18 transcript of those
19 proceedings before me. That
20 was Monday, September 14th. I
21 think what I will do, to give
22 the context, is perhaps read
23 a page prior to the area that
24 I have some inquiries
25 respecting; references to

1 questions by Mr. Murphy
2 pertaining to a meeting of
3 August 20th, and I'm looking
4 at page 33 of the
5 transcript."

6 The Court then reads some of the
7 transcripts, and Justice Cosgrove says at page
8 6346:

9 "Can you enlarge upon what it
10 was that you meant when you
11 indicated that "the history
12 of removal of prosecutors may
13 have had something to do with
14 that"?

15 THE WITNESS: We were aware
16 that a number of prosecutors
17 who had carriage of this case
18 had not been able to continue
19 because of them being called
20 as witnesses, or as a result
21 of various rulings of the
22 court."

23 The issue was why McGarry and
24 Cavanagh part of the August 20 meeting, and this is
25 what Berzins is replying to:

1 "And, as a result of that, it
2 was felt that we had to be
3 extra cautious to ensure that
4 this new team of prosecutors,
5 specifically Mr. Cavanagh and
6 Mr. McGarry, would not end up
7 being in the same situation
8 as had happened with Mr.
9 Flanagan and his assistant in
10 Brockville."

11 And he continues at the bottom of
12 page 6347:

13 "But, as you can appreciate,
14 it's very unusual for - for a
15 - for counsel in a case to
16 be - to end up being a
17 witness, and that's what we
18 wanted to avoid. I had no
19 problem with either one of
20 the three officers
21 potentially becoming
22 witnesses; that's part of the
23 - part of the expected."

24 The Court explores that further,
25 and on page 6349 Justice Cosgrove again reverts to

1 the meeting, and the issue of the involvement of
2 Superintendent Edgar.

3 At page 6350, the Court states:

4 "And in fact, did you not
5 have a preliminary meeting
6 with Mr. McGarry, or Messrs.
7 McGarry and Cavanagh, in
8 preparation for your meeting
9 with Superintendent Edgar?"

10 The witness says that he cannot
11 remember specifically, and at page 6352, Line 25,
12 the Court asks:

13 " -- was there discussion, in
14 conversation with the Crowns
15 in the Elliott case, that you
16 were being careful, as you
17 said, not to expose the
18 Crowns --

19 THE WITNESS: Right.

20 THE COURT: -- to the
21 potential of having to
22 testify?

23 THE WITNESS: Yes."

24 And on page 6353, Line 8, the
25 Court says:

1 "The objective of yourself
2 meeting with Mr. Pelletier,
3 alone with the officers,
4 excluding the Crowns from the
5 trials, was to, as you say,
6 isolate or to diminish the
7 prospect that there could be
8 those Crowns - the trial
9 Crowns - could be called as
10 witnesses to this type of
11 discussion?

12 THE WITNESS: Right."

13 Over to page 6354, the Court says:

14 " It wouldn't, therefore, be
15 a good idea for Mr. McGarry
16 or Mr. Cavanagh to be in
17 discussion with
18 Superintendent Edgar or with
19 Mr. - I'm sorry - Officer
20 Bowmaster or Grasman,
21 respecting this decision?

22 THE WITNESS: Your Honour,
23 you're - obviously, you want
24 me to be frank in my - in my
25 answers, and I will be frank

1 in my answers. And I - I
2 think that there would be
3 nothing wrong with that but,
4 I was aware, very much aware
5 that there - there have been
6 unusual practices in this
7 case of calling counsel,
8 which is an exceptional
9 practice which, in my 25
10 years as a prosecutor, I have
11 very, very rarely seen. And
12 - and I have certain views
13 about that, which I won't
14 express, but it's an unusual
15 practice, and I felt that in
16 this case, although it would
17 be proper for them to take
18 part in such discussions, I
19 felt that we didn't want to
20 expose them to the
21 possibility that once again,
22 they would be called - the
23 prosecutors would be called
24 as witnesses in this case.
25 These are the type of matters

1 where prosecutors are not
2 normally called as witnesses,
3 but events are happening in
4 this case that are not
5 happening as usually do in -
6 in normal trials."

7 The witness goes on at Line 10 of
8 page 6355:

9 "I felt that it will open
10 another door, which
11 reasonable counsel would -
12 would not - would find
13 another way to pursue but, in
14 this particular case, one had
15 to be ready for anything.

16 THE COURT: And to repeat,
17 that was information or an
18 opinion shared by Mr.

19 McGarry, as a result of your
20 previous discussions?

21 THE WITNESS: No, I
22 wouldn't say - I'm - I'm only
23 speaking as to my own opinion
24 and all I can say is that, in
25 my opinion, there would have

1 been nothing wrong with the
2 trial counsel taking part in
3 those discussions, but we
4 deliberately avoided that to
5 - to save them from being
6 witnesses and it was also not
7 necessary, in a sense that
8 both Mr. Pelletier and I were
9 available."

10 The questioning by Justice
11 Cosgrove goes on, and at the top of page 6357
12 Justice Cosgrove says:

13 "Well, in light of what
14 you've told me about being -
15 this being an unusual case,
16 where the Crown officers have
17 been called to testify - and
18 I can tell you, it's the
19 first in my 35 years of court
20 experience - I would have
21 thought that, in light of
22 that, and your discussion
23 with Mr. McGarry, that a
24 subsequent meeting and
25 discussion between Mr.

1 McGarry and the officers,
2 whom you've taken pains to
3 isolate or separate, would
4 then participate in a
5 subsequent meeting?

6 THE WITNESS: Your Honour,
7 with respect, I see nothing
8 wrong in that because -
9 because, just to - just to
10 try to explain: what we -
11 what we didn't want them to
12 take part in, McGarry and -
13 and the Cumberland Crowns,
14 was any type of - of back and
15 forth arguing, or asking, or
16 even directing the OPP with
17 respect to what to do about
18 the independent
19 investigation. In other
20 words, we didn't want them to
21 take part in that dialogue,
22 but once the decision had
23 been made and once the OPP
24 were saying that - that they
25 are going to seek an outside

1 force, well that's - I don't
2 see anything wrong with that
3 information being imparted to
4 them right away. I - I know
5 that I told the Cumberland
6 Crowns right away that that's
7 what had been decided, and
8 that's how it would proceed."

9 The questioning by the Court
10 proceeds, and at page 6360, Lines 9 and 10, asks:

11 "Can you tell me when you
12 became aware that
13 Superintendent Edgar's advice
14 or decision had been
15 confirmed by the - or
16 accepted by the OPP?"

17 The witness says that he cannot
18 put a date on it.

19 The questioning goes on by the
20 Court on the next few pages, and at page 6362,
21 Justice Cosgrove, at Line 22 asks the question:

22 "See, that was the question
23 that I'd asked Mr. Hoffman to
24 pose of Crowns: how you and
25 other Crowns, and other

1 police officers, what was the
2 scenario of the response?
3 When did people become aware
4 of what happened after the
5 meeting of the 20th? That
6 was why I asked either Mr.
7 Hoffman or Mr. McGarry to
8 inquire of you.

9 THE WITNESS: Yes. And -
10 and, Your Honour, just again
11 to put it in - in it's proper
12 context: after the meeting
13 of August the 20th, we were
14 assuming that Edgar's
15 recommendations would be
16 followed through, and he
17 would then convey his
18 position to the deputy
19 commissioner or commissioner,
20 there would be some kind of
21 meeting, and then they would
22 spend some time in trying to
23 locate the appropriate RCMP
24 people, and arriving at some
25 kind of agreement with them,

1 and that that process would
2 take - take place over the -
3 the few weeks that follow
4 August the 20th. That's -
5 that's the way I - the way I
6 saw it. And then, when I
7 came to testify on August the
8 4th - on September the 14th,
9 that formally, I had not been
10 yet advised that the RCMP
11 were, in fact, accepting the
12 case, but then shortly
13 afterwards, I became advised
14 of that."

15 And then the Court indicates at
16 the bottom of page 6363 that he will permit further
17 questions, but only questions pertaining to
18 questions that he has asked.

19 Mr. Murphy then proceeds and at
20 page 6372, there appears to be some argument at
21 that time.

22 On page 6374, we see what the
23 issue is, and it is the issue I referred to
24 earlier. Mr. Hoffman says at Line 10:

25 "All that being said, it's

1 the position of the Crown
2 that first, absent formal
3 application by counsel
4 pursuant to the general
5 division rules, although I
6 certainly recognize that this
7 court has indicated this is
8 of interest and this court
9 wishes to deal with it. But,
10 more importantly, I would
11 suggest, at this stage of the
12 proceedings, it would be
13 premature for this court to
14 either - for this court to
15 make a decision as to whether
16 trial counsel, in this very
17 lengthy and complex matter,
18 and not the first set of
19 trial counsel, should be
20 allowed to continue on the
21 trial proper, given that we
22 are just in the midst of
23 calling evidence on the
24 second renewal of the Charter
25 motion. And that this trial,

1 with this jury, has not - is
2 not about to begin, but my
3 point is, we still have
4 evidence to call. The
5 Crown's position is there are
6 still legal and factual
7 issues to be determined prior
8 to the court having the
9 necessary foundation to make
10 a decision as important, both
11 for the administration of
12 justice and for - and in a
13 practical sense, given the
14 fact that, obviously, other
15 counsel who are called in to
16 do the trial --" in effect
17 won't have the background
18 necessary, if I can
19 paraphrase.

20 At Line 10 on page 6375:

21 "Specifically, it's the
22 Crown's position that two
23 further items are required
24 before this court would be in
25 the best position to make

1 findings with respect to Mr.
2 Cavanagh and Mr. McGarry
3 being able to continue at
4 trial."

5 And a bit further down the page:

6 "The second specific area
7 that requires some conclusion
8 or resolution before this
9 court would be in the best
10 position to make a
11 determination about a serious
12 matter such as this, is
13 either a subpoena for Mr.
14 McGarry or Mr. Cavanagh, or
15 even the formal intention on
16 the record, by my friend,
17 indicating that Mr. McGarry
18 and Mr. Cavanagh would be
19 subpoenaed for the trial."

20 The argument continues, and on
21 page 6376, Mr. Hoffman makes the suggestion to the
22 court that this should be done after the conclusion
23 of the evidence on the motion argument, and the
24 ruling, and he says at the bottom of the page,
25 "That can't be determined at this point," and the

1 argument proceeds.

2 Mr. Hoffman reiterates this at
3 page 6379, at Line 22:

4 "And it's that - those
5 findings and those rulings
6 that I'm referring to that
7 are required, I would
8 respectfully suggest, before
9 Your Honour is in the best
10 position to rule on this
11 issue of Mr. McGarry and Mr.
12 Cavanagh staying on."

13 And he makes the same point at the
14 bottom of pages 6380 and 6381.

15 Mr. Hoffman's argument continues,
16 and at page 6384 Mr. Murphy refers to some
17 startling new information -- I won't bother with
18 that.

19 Moving to page 6395, Mr. Hoffman
20 concludes his submissions, and comments on when the
21 Court will be in a best position to decide the
22 position of counsel.

23 Mr. Murphy starts his argument on
24 page 6396, and goes on for some pages. If you go
25 to page 6400, Mr. Murphy states at Line 8:

1 "Mr. Cavanagh and Mr. McGarry
2 want to come back and purport
3 to come back and re?appear as
4 trial counsel, when issues
5 about non-disclosure that
6 they've testified about will
7 continue to be an issue
8 before the court, potentially
9 at least. The issue might
10 more simply be put like this,
11 Your Honour: How can the
12 court, if not defence counsel
13 - or vice-versa - how can
14 defence counsel, if not the
15 court trust Mr. McGarry and
16 Mr. Cavanagh on the simple
17 basis of the - one of the key
18 issues that's been dealt with
19 here and, in my submission,
20 not satisfactorily addressed
21 in their evidence - the fact
22 that they didn't disclose
23 information that affected the
24 proceedings on this voir
25 dire, if not on the overall

1 trial. So I think there's an
2 overwhelming shadow of a
3 breach of trust on the part
4 of both of them, and for them
5 to pretend to rise from the
6 ashes like phoenixes, to me,
7 is not going to serve the
8 administration of justice --"

9 At page 6401, Mr. Murphy submits
10 at Line 3:

11 "I know there's been offering
12 of personal opinions as to
13 the guilt of the accused; in
14 some cases, perhaps, elicited
15 in my questioning; in other
16 cases, volunteered. And I'm
17 speaking of Mr. McGarry, and
18 he has said, essentially,
19 verbatim, what Mr. Findlay
20 himself said, is: 'I would
21 not be prosecuting the case
22 if I did not believe that the
23 accused was guilty.' That,
24 in my submission, is
25 problematic if they're to

1 continue."

2 The argument goes on with further
3 accusations by Mr. Murphy on page 6403, and
4 ultimately, at page 6470, the Court makes the
5 ruling on this issue of the status of Crowns
6 McGarry and Cavanagh should not continue as counsel
7 at the trial.

8 He refers to the Notice of Motion
9 for a Stay, and the grounds of the application. On
10 page 6473, the Court refers to his earlier ruling
11 on March 16 and the breaches he found and, on page
12 6475, his rulings on May 27.

13 The court goes on about motions to
14 compel them, and he refers on page 6479 to the
15 argument today as to the status of the counsel, and
16 the Court then gives his decision, with reference
17 to the authorities at some length.

18 On page 6489, he comes to the
19 facts of the case and states:

20 "In this proceeding, in this
21 voir dire, Messrs. Cavanagh
22 and McGarry will testify. In
23 my view, clearly they cannot
24 continue in any manner
25 whatsoever with regard to the

1 continuation of these
2 proceedings."

3 He refers to the grounds in the
4 application as direct challenges to the conduct of
5 counsel, dealing with non-disclosure and the like.

6 At pages 6492 and 6493, the Court
7 continues to refer to the grounds in the Notice of
8 Motion, and he says at the bottom of page 6492,
9 referring to those grounds:

10 "And the following paragraph
11 (xx), all of which can be
12 seen in the context of
13 impeachment of credibility
14 and complaint or questioning
15 of conduct and judgment of
16 the Crowns. And, for those
17 reasons, the court rules that
18 Crowns Cavanagh and McGarry
19 may not continue as counsel
20 on this voir dire. I want to
21 deal with the two areas of
22 bail and trial together, for
23 general purposes. In the
24 Woodglen decision, I have
25 already referred to a number

1 of matters that should be
2 considered by the court, in
3 determining whether a person
4 can be a witness and counsel
5 at the same time, and one of
6 those was the likelihood that
7 the witness will be called.

8 I inquired of defence
9 counsel as to the likelihood
10 of calling the Crowns at the
11 trial. In addition there was
12 some exchange with regard to
13 the likelihood pertaining to
14 the bail issue, and the
15 answer was that there was a
16 likelihood. However, that is
17 not the end of the concern
18 for the court under that
19 heading, particularly when
20 the issue is compellability
21 of Crown in a criminal case.

22 Of course, what I am
23 referring to is that it is
24 not simply the likelihood
25 that the Crowns will be

1 called, but there is the hard
2 question of whether the Crown
3 will object or resist being
4 called and the fact of
5 whether defence will be
6 successful on the issue of
7 compellability necessity, of
8 course, which the court has
9 gone through with respect to
10 Mr. McGarry and Cavanagh on
11 this voir dire, and which the
12 court went through previously
13 on issues dealing with
14 previous Crowns in
15 Brockville. Crown counsel,
16 Mr. Hoffman, urged that it
17 would be premature for the
18 court to take a position on
19 the status of Mr. McGarry and
20 Mr. Cavanagh in these two
21 areas, bail and trial,
22 because I have not yet made a
23 ruling or rulings."

24 And on page 6495, Line 22:

25 "Further, there is an onus,

1 and it is accepted by counsel
2 for the accused, upon defence
3 to establish the necessity in
4 the context of the
5 authorities that have been
6 placed before the court and,
7 accordingly, an opportunity,
8 in my view, has to be
9 accorded to Messrs. McGarry
10 and Cavanagh on the issue of
11 compellability necessity in
12 the context of the issues
13 which will be before the
14 court on the bail hearing or
15 at trial. Counsel for the
16 accused argued that it was
17 obvious, he has argued, that
18 both counsel are compellable
19 in those situations and
20 placed some argument before
21 the court. However, that
22 argument, in my view, is
23 premature without, as I say,
24 the opportunity of the issues
25 in the context of those two

1 areas in the trial being
2 actually heard by the court."

3 The upshot of the ruling is at the
4 bottom of page 6498:

5 "In terms of the procedure
6 for vetting the status of
7 Messrs. McGarry and Cavanagh
8 for purposes of trial, I now
9 am directing that that will
10 be the concluding argument
11 before the court in the event
12 that the court orders that
13 the trial concludes at the
14 end of the voir dire dealing
15 with the stay application.
16 In other words, if the court
17 orders that the trial
18 continue, the last of the
19 pre-trial motions will be the
20 motion of the status of
21 Messrs. McGarry and Cavanagh
22 as counsel for the trial
23 proper."

24 There were some further decisions
25 following the November 19 ruling that occurred on

1 December 23, which will find at Tab E.

2 What happened after November 19 is
3 that Mr. Hoffman continued as Crown, and there was
4 some evidence from some of the officers dealing
5 with their notes.

6 On December 7, Superintendent
7 Edgar was examined again about the August 20
8 meeting, in the course of which the evidence showed
9 that Mr. Murphy alleged he committed perjury and
10 should be accountable.

11 On December 16, Mark Sandler of
12 the OPP attends, and Edgar's examination was
13 completed, and there was a break until December 23.

14 What I am asking you to refer to
15 now is Tab E, starting with page 7083 in Volume 46.

16 Mr. Hoffman introduces Mr.
17 Strosberg and Mr. Humphrey. Mr. Strosberg is a
18 prominent Ontario counsel who, at the time, was the
19 treasurer of the Law Society of Upper Canada, and
20 Mr. Humphrey was and is a highly experienced and
21 respected criminal defence counsel.

22 Mr. Strosberg, after being
23 introduced by Mr. Hoffman, tells the judge that he
24 and Mr. Humphrey have been retained by the Ministry
25 of the Attorney General, and that Mr. Segal,

1 assistant deputy minister, is the person
2 responsible for that retainer.

3 Advising them would be the
4 Honourable Sidney Robins, who was a retired justice
5 of the Ontario Court of Appeal, and was and is
6 senior counsel with the Goodmans law firm.

7 Mr. Strosberg begins:

8 "In terms of the procedure
9 for vetting the status of
10 Messrs. McGarry and Cavanagh
11 for purposes of trial, I now
12 am directing that that will
13 be the concluding argument
14 before the court in the event
15 that the court orders that
16 the trial concludes at the
17 end of the voir dire dealing
18 with the stay application.
19 In other words, if the court
20 orders that the trial
21 continue, the last of the
22 pre-trial motions will be the
23 motion of the status of
24 Messrs. McGarry and Cavanagh
25 as counsel for the trial

1 proper."

2 He indicates that neither he nor
3 Mr. Humphrey would be prosecuting the case, nor
4 will they appear on the bail application.

5 Mr. Strosberg, on page 7084,
6 states:

7 "I wanted Your Honour to
8 understand that it is - it's
9 unusual for the Crown to
10 retain counsel outside of an
11 independent the Crown
12 prosecution service. And Mr.
13 Humphrey and I both have -
14 are both independent of the
15 Crown, and this retainer has
16 been prompted, I want to
17 emphasize, by the rulings and
18 the comments that Your Honour
19 has made during the course of
20 this proceeding and it is -
21 it's for that reason that I
22 wanted Your Honour to
23 understand that, of course,
24 the Crown has an obligation
25 to deal with the very issues

1 that I have articulated on an
2 ongoing basis, but that this
3 will be a fresh approach to
4 it. And it's a fresh
5 approach that's been - and an
6 independent approach, that
7 has been prompted by the
8 rulings and, as I say, the
9 observations that I
10 understand that Your Honour
11 has made.

12 Mr. Strosberg then goes on to
13 outline the approach he intends to take, and at
14 page 7035, Justice Cosgrove observes that he wants
15 this trial to proceed in a workmanlike manner, and
16 Mr. Strosberg says that is his objective as well.

17 Mr. Strosberg says, at the bottom
18 of page 7086, after talking about the time it will
19 take for he and Mr. Humphrey to become briefed, at
20 Line 26:

21 "And the last matter that I
22 raise for Your Honour is that
23 we would like some direction
24 or ruling from Your Honour,
25 because we understand that

1 presumably, offer some advice
2 to the Crown and maybe to the
3 court. I can't recall, in my
4 experience, when this has
5 been done in the middle of a
6 trial --"

7 Mr. Strosberg addresses that
8 concern, and Justice Cosgrove says at the bottom of
9 page 7088:

10 "I certainly appreciate the
11 information that you've given
12 me and the motivation of the
13 Crown in making this step,
14 but there are a couple of
15 comments I have to make. In
16 our system, in the British
17 system, there's only one area
18 of the administration of
19 justice that has
20 traditionally been seen to be
21 independent, and that's the
22 judiciary. Now, there are,
23 in our system, of course,
24 we're getting into different
25 ideas about the way trials

1 are conducted, especially on
2 the civil side, where we have
3 alternate dispute resolution,
4 we have retired judges
5 offering services as an
6 alternate way of providing
7 resolution dispute, we have
8 lawyers hired from the bar to
9 assist in pretrials and all
10 of that, but there's only one
11 truly traditional and, in my
12 view, constitutionally
13 guaranteed independent branch
14 of the administration of
15 justice, and that's the
16 bench. You see, for example,
17 if I know and I accept the
18 intentions of the Crown and
19 the goodwill and the bone
20 fides of everything that you
21 have said, but to offer it on
22 the basis that I accept that,
23 for example, I should assume
24 that other lawyers, apart
25 from you and Mr. Humphrey,

1 with the Honourable Justice -
2 former Justice Robins
3 advising, that other lawyers
4 are truly independent, how do
5 I know that they're truly
6 independent, that their
7 cousin doesn't know somebody
8 else's cousin or they have
9 some connection with some
10 witness? It's been apparent
11 to the court through this
12 trial that what appears to be
13 the most innocuous of
14 relationships all of a sudden
15 becomes significant and
16 important. So I have some
17 misgivings, which I've just
18 expressed, about the notion
19 that you're presenting to the
20 court."

21 Mr. Strosberg replies to those
22 comments and says at page 7090:

23 "There's no doubt that the
24 judiciary is independent, and
25 I wasn't intending to suggest

1 by my remarks that Mr.
2 Humphrey and I would in any
3 way function in the same
4 manner of independence as the
5 judiciary."

6 And then at Line 24:

7 "And what Mr. Humphrey and I
8 will attempt to do is to meet
9 that longstanding tradition
10 and, to that extent, we are
11 independent of Crown counsel
12 who traditionally carry out
13 this function. And what Your
14 Honour must ask of Crown
15 counsel is that Crown counsel
16 do their job in a manner that
17 is independent of any
18 influences and perform their
19 function independent of any
20 influences. And that is what
21 it is that we will do, and
22 that is a function that's
23 independent of your function
24 as the judge who, ultimately,
25 is the arbiter and who is

1 truly independent of all
2 parties. There are - and so,
3 it is in that context that I
4 speak of independence."

5 Mr. Strosberg goes on to refer to
6 many examples of the Crown retaining outside
7 counsel to do functions that the Crown, and at Line
8 20 there is an exchange:

9 "THE COURT: Thank you. I
10 would ask whether, having
11 been retained, and the basis
12 of your retainer being
13 important, having been
14 explained to the court, I
15 would ask that the Crown, if
16 it hasn't, enlarge your
17 retainer to permit you to see
18 whether there are any
19 precedents for this in any
20 common law jurisdiction,
21 apart from our own.

22 MR. STROSBURG: Sorry, Your
23 Honour wishes us to do
24 research on the issue of --?

25 THE COURT: Whether there

1 is any reported precedent in
2 the common law jurisdiction
3 of independent, so-called
4 independent counsel being
5 retained midway through a
6 homicide trial."

7 Mr. Strosberg says he doesn't need
8 further instructions, and he will do what he can.

9 Mr. Murphy is asked to make
10 submissions on this issue, after Mr. Humphrey says
11 that he has nothing to add.

12 Mr. Murphy refers to some
13 correspondence he got from Mr. Strosberg on the
14 nature of the retainer, and the letter asks Mr.
15 Murphy whether he has any objection to the letter
16 being sent to Justice Cosgrove.

17 Mr. Murphy says that he wrote
18 back, and had several questions to ask of Mr.
19 Strosberg:

20 "Number one: On what basis
21 have you been retained by the
22 Ministry of the Attorney
23 General?

24 Number two: Who was involved
25 in the decision to refer this

1 matter to you for independent
2 review of the proceedings?
3 Three: As treasurer of the
4 Law Society, are you involved
5 in the administration of the
6 legal aid plan?

7 Four: Please explain whether
8 your role will include
9 advising the Crown with
10 respect to potential remedies
11 which may be available to
12 ensure that the public
13 interest is well served by a
14 timely and fair trial?"

15 Mr. Murphy then goes on with his
16 submissions, and says on page 7096 that he has
17 received no reply to his letter, Line 15:

18 "In my submission, he doesn't
19 have that standing, at least
20 - at the very least, until
21 it's clarified exactly what
22 he is. Is he an adviser? A
23 plenipotentiary? Is he an
24 agent? Is he counsel? Is he
25 counsel/adviser? What

1 exactly is his role? I don't
2 think it's lost on the court,
3 or anyone, who would observe
4 this independently, truly
5 independently, that Mr.
6 Strosberg is a barrister and
7 solicitor of some preeminence
8 in this province, if not in
9 this country. And the fact
10 that he is also treasurer of
11 the Law Society of Upper
12 Canada, in my submission,
13 raises serious concerns about
14 his independence, the
15 independence at least, that
16 he claims for himself, if not
17 for Mr. Humphrey as well.
18 The Law Society of Upper
19 Canada administers the legal
20 aid plan of Ontario, subject
21 as it is to devolution or
22 delegation of an independent
23 body or quasi-independent
24 body. Nevertheless, Mr.
25 Strosberg is the former chair

1 of the discipline committee
2 of the Law Society of Upper
3 Canada."

4 Mr. Murphy then goes on to note at
5 Line 15:

6 "We have asked for costs on
7 behalf of the Ontario legal
8 aid plan. I don't think one
9 can truly represent one's
10 self as being independent
11 when one is the presiding
12 officer of the law society
13 that administers and runs
14 that plan at present."

15 Then Mr. Murphy goes on to make
16 arguments about the independence of Mr. Strosberg,
17 at the top of page 7098:

18 "Given his position, given
19 his preeminence as a
20 barrister and in particular
21 what I submit is a conflict,
22 or at least one that
23 mitigates - or a situation, I
24 should say, that mitigates,
25 if not vitiates, any claim

1 that he makes to
2 independence, I have concerns
3 about the spectre of
4 intimidation of the
5 judiciary, and the
6 independence of this court by
7 the appearance of Mr.
8 Strosberg in this vague and
9 ambiguous form."

10 He continues in this vein at the
11 bottom of page 7098:

12 "The treasurer of the Law
13 Society shows up purportedly
14 as an independent counsel,
15 retained by the Crown, and
16 the message is clear: We're
17 going to recommend - we're
18 going to review the case with
19 a view to assessing the
20 reasonable prospect, or
21 whatever the term that was
22 used - I don't believe it's
23 the exact term from the Crown
24 manual - "the likelihood of
25 conviction", but it goes on

1 further and, in my
2 submission, it has that
3 intimidating overtone. At
4 least, it's a reasonable
5 inference, given the state of
6 this case and the number of
7 witnesses we've heard and, in
8 particular, the number of
9 Crown attorneys we've heard
10 give evidence, forming part
11 of this continuing abuse of
12 process voir dire. And the
13 spectre of interference with
14 the independence of the court
15 is certainly live, if not
16 overspilling into the area of
17 the independence of defence
18 counsel. So my concerns are,
19 in the most general sense,
20 why is the Crown playing fast
21 and loose with the definition
22 of itself in this
23 proceeding."

24 He continues and on page 7100, and
25 he says:

1 "I'd like to know where the
2 Order in Council was that
3 appointed him, since we are
4 in somewhat of a - presumably
5 unprecedented area. Mr.
6 Strosberg was also retained
7 by the federal justice
8 minister, Alan Rock, to
9 provide legal advice with
10 respect to the so-called
11 Airbus affair, and the
12 litigation between former
13 Prime Minister, Brian
14 Mulroney, and the Government
15 of Canada. As Your Honour is
16 well aware, I believe it
17 would be approximately two
18 weeks prior to the sending of
19 a letter by Kimberley Prost
20 to the government in
21 Switzerland - I believe it
22 was September 29th of 1995 -
23 Kimberley Prost wrote another
24 letter, to the government of
25 the Barbados - of Barbados.

1 And, in that letter, she made
2 representations concerning
3 matters that she had been
4 advised of by the police --"

5 On page 7101, he comments that:

6 "Mr. Strosberg can hardly be
7 described as independent, if
8 he's going to assess the
9 basis on which the Barbados
10 end of this case's
11 investigation was
12 precipitated --"

13 At the bottom of page 7101, Mr.
14 Murphy makes reference to Mr. Humphrey's position
15 as a respected criminal lawyer in Toronto, if not
16 the province and the country:

17 " -- but with respect to Mr.
18 Strosberg, he alluded to the
19 distinction, which I believe
20 he was saying was an
21 advantage, which is that the
22 Crown - the Crown has no
23 conception of winning or
24 losing, but fulfilling its
25 duty to uphold the

1 administration of justice.
2 That has been quoted often in
3 these proceedings; it's from
4 the Boucher case from Mr.
5 Justice Rand, of the Supreme
6 Court of Canada.
7 Unfortunately, Mr.
8 Strosberg's more notorious
9 motto is that "litigation is
10 war, and the weak go to the
11 wall". That's been quoted
12 repeatedly in the newspapers
13 with respect to Mr.
14 Strosberg, and I fail to see
15 how it dovetails in any way
16 or offers itself as an
17 advantage in any way to Mr.
18 Strosberg's claim that he is
19 somehow able to --" be
20 independent.

21 At page 7117, the issue of
22 communications is addressed by Mr. Murphy:

23 "The only other matter, Your
24 Honour - I don't wish to
25 preempt Mr. Strosberg or Mr.

1 Humphrey, or Mr. Hoffman -
2 the request about
3 communicating with Mr.
4 McGarry and Mr. Cavanagh, I
5 am steadfastly opposed to it.
6 I think it has already - in
7 fairness to Mr. Strosberg -
8 it's been canvassed before,
9 and he may not be aware of
10 it. The issue of them being
11 involved in any way in the
12 carriage of the motion that
13 they are witnesses on, in my
14 submission, is repugnant and
15 inconsistent with the whole
16 idea of why they were removed
17 as counsel for the balance of
18 the motion, and I don't think
19 that request should be
20 acceded to.

21 THE COURT: Mr. Hoffman -
22 or Mr. Strosberg.

23 MR. STROSBERG: Yes, Your
24 Honour. As I said to Your
25 Honour, I was aware of Your

1 Honour's order, that's why I
2 specifically asked Your
3 Honour to exempt Mr. Humphrey
4 and myself from that order.
5 It's not a question of
6 letting them have carriage of
7 the proceedings at all, it's
8 a question of obtaining from
9 them whatever information
10 they may have that would be
11 helpful to us to do the
12 assessments that we consider
13 that are necessary for us to
14 do and --

15 THE COURT: I have already
16 ruled, and I think it is a
17 matter of record, that the
18 court, on the one hand, can't
19 conclude that Mr. McGarry and
20 Mr. Cavanagh are not eligible
21 to continue as barristers on
22 the motion which gives rise
23 for your very reason to be
24 here, but, at the same time,
25 can be solicitors advising

1 barristers --

2 MR. STROSBERG: It's not a
3 question of me seeking their
4 advice. It's simply a
5 question of me obtaining from
6 them information, as Your
7 Honour, has --

8 THE COURT: Well then, they
9 are witnesses and you should
10 not - you should not talk to
11 them.

12 MR. STROSBERG: That's Your
13 Honour's ruling?

14 THE COURT: The order will
15 continue."

16 Mr. Humphrey then explains how he
17 intends to proceed.

18 The matter came on again before
19 Justice Cosgrove, and Justice Cosgrove's statement,
20 in part, is extracted at page 7754:

21 "As part of the presentation
22 to the court, the issue then
23 has arisen as to the nature
24 of the retention by the
25 Attorney General of counsel,

1 Mr. Humphrey and Mr.
2 Strosberg before the court.
3 There was some confusion as
4 argued by the accused's
5 counsel between initially as
6 to what the nature of the
7 retainer was or the authority
8 granted or the request made
9 of Mr. Humphrey and Mr.
10 Strosberg. I think that that
11 concern was well-founded. It
12 is significant, I believe, in
13 the context of the issue of,
14 for example, delay in this
15 trial. However, when Mr.
16 Strosberg, Mr. Humphrey did
17 appear to the court they
18 advised verbally what their
19 retainer and authority was;
20 that's a matter of record.
21 It has been reaffirmed by Mr.
22 Humphrey today and although
23 the authority to which he
24 resides, the decision of
25 Justice Campbell dealing with

1 this issue which is R. v.
2 Luz, 5 O.R. (3d) page 52.
3 Although Justice Campbell
4 says at page 60: 'Their
5 authority is ordinarily
6 presumed, subject to their
7 ability to adduce some
8 evidence of their authority
9 as counsel or agent if there
10 is any credible challenge to
11 their authority.' I would
12 observe that this is not an
13 ordinary case. It is a most
14 unusual case in many
15 respects. I've commented on
16 that in some of my rulings
17 thus far, however the issue
18 though I think is whether the
19 authority is challenged.
20 Counsel for the applicant
21 accused says there is no
22 challenge to the authority.
23 The issue is, it is urged,
24 the nature of the transfer of
25 authority or retention by

1 private counsel in the trial.
2 That, as I say, I am
3 satisfied is answered by the
4 representations by counsel
5 who have appeared and who
6 have repeated the nature of
7 their retainer today. All of
8 this, I add finally is
9 without prejudice and not in
10 any way to diminish the
11 ability that other aspects of
12 the retainer and the
13 situation to be argued as
14 urged in the amended
15 application for stay in the
16 context of diminished or
17 interference with the rights
18 of the accused to a fair
19 trial."

20 Some of what transpired on
21 December 23 is also relevant to particular 2(F),
22 which I will come to later, and which deals with
23 the various orders of non-communication.

24 That takes us to Tab E, particular
25 2(E): "Without a basis in the evidence, Justice

1 Cosgrove expressed concerns on numerous occasions
2 that Crown counsel was 'woodshedding' its
3 witnesses, and were attempting to tailor their
4 evidence, and ordered Crown counsel not to speak to
5 any of its witnesses, and Crown counsel were
6 ordered to testify, thereby denying the Crown the
7 ability to properly prepare its case."

8 I am at the first page at the tab,
9 which is from November 28, 1997.

10 MR. MACDONALD: I wonder if you
11 could explain a little more about the difference
12 between particular 2(E) and 2(F)? Is 2(E) a subset
13 of 2(F)?

14 MR. CHERNIAK: It is really a
15 subset that deals with specific comments the judge
16 made, in particular his approach to non-
17 communication.

18 It is difficult to put all of
19 these things in water-tight compartments.

20 What we have here at page 2692 is
21 an excerpt from the transcript of November 28,
22 1997, and Mr. Findlay is speaking and objecting to
23 Mr. Murphy's accusation that he was "nauseating the
24 court".

25 Mr. Murphy responds, and he says

1 at page 2693 that he stands by his comment, and Mr.
2 Findlay says:

3 "He is leveling an allegation
4 that I am a party to perjury,
5 that I am meeting with
6 witnesses and telling them
7 what to say. There is no
8 evidence of that. I am
9 allowed, as a Crown, to meet
10 with witnesses to review
11 their evidence. I would be
12 negligent for me not to do
13 so. There is no evidence
14 whatsoever, in my respectful
15 submission, to support
16 anything of that nature."

17 His Honour agrees with Mr. Findlay
18 and goes on to say that the objection Mr. Murphy
19 has made is usually dealt with by cross-
20 examination.

21 In the middle of page 2695, Line
22 14, he says:

23 "So I will ask Mr. Murphy not
24 to get into those areas of
25 argument. Those arguments

1 including Mr. Denis and Mr.
2 Marino, to the extent that
3 it's possible to impose that
4 -- superfluously perhaps,
5 given that there's already
6 been that kind of standard
7 standing order.

8 MR. RAMSAY: Well, just as
9 long as it's clear that I can
10 talk to them just in the
11 usual way of Crown Counsel
12 conducting witness
13 preparation interviews in the
14 presence of -- well, another
15 officer who --. of course, I
16 would find someone who has
17 not been a witness on these
18 proceedings.

19 MR. MURPHY: Well, it's kind
20 of the dog chasing of the
21 snake with a tail in its
22 mouth here. The fact is: Mr.
23 Denis, the issue of his being
24 re-interviewed, in my
25 submission, shouldn't become

1 bogged down in whether he's
2 re-interviewed or re-re-
3 interviewed again. It's a
4 live issue as to the fact
5 that the Crown Attorneys'
6 never did re-interview him
7 and I'm concerned at this
8 juncture; if the Crown does
9 what it did with Detective
10 Constable Churchill and gets
11 there first, so to speak, I'm
12 not sure -- we've gone over
13 this ground to some extent
14 before, but it may be
15 insurmountable to get
16 Constable Denis to be able to
17 not have been in some -- to
18 some extent tainted, if I can
19 put it that way, but I have a
20 concern with Mr. Ramsay
21 preempting Defence
22 application, as was the case
23 before, with Detective
24 Constable Churchill giving
25 some telegraphing or

1 signalling what the subject
2 matter of the voir dire is.
3 But again, it's an issue
4 where there is no property in
5 a witness and one has to
6 assume that there is going to
7 be some propriety, but I -- I
8 just alert the Court, as the
9 Court is already aware, the
10 issue of so-called witness
11 preparation is not a non-
12 contentious one. It's one of
13 the issues on this continuing
14 voir dire, so --"

15 And the Court says at the bottom
16 of that page 8501:

17 "The Court order that the
18 witnesses, Officer Denis, Mr.
19 Marino, and Mr. Larouche, be
20 cross-examined by Counsel on
21 a continuation of the voir
22 dire is in the context of the
23 abuse application and the
24 Court's expressed problems
25 with the state of the

1 evidence and the actions of
2 Crown Counsel to this point,
3 and I have made rulings on
4 the issue of proper
5 disclosure and breaches of
6 Sections 7 and 11(d) in the
7 context of the order of the
8 Court designed to cure
9 breaches of the accused's
10 rights in the past. The
11 Court's order is that with
12 respect to those three
13 persons, there will be no
14 contact prior to those three
15 witnesses giving evidence on
16 the issues which have already
17 been identified with respect
18 to their evidence before this
19 Court on this voir dire.
20 It's the Court's intention
21 that those witnesses be
22 subject to the same procedure
23 as other witnesses: for
24 example, other officers where
25 Defence first cross-examines

1 and then the Crown has the
2 opportunity of cross-
3 examination, but apart from
4 that, the Court's direction
5 is that there be no witness
6 preparation in respect of
7 those three particular
8 witnesses ordered to be in
9 attendance for examination on
10 this voir dire in this trial.
11 The Court's order with
12 respect to all other
13 witnesses who have testified,
14 of course, continues. I
15 don't think I have to
16 reinvent that order. The
17 order was that witnesses be
18 excluded and that there be no
19 communication between
20 witnesses who have testified
21 and those who will testify in
22 the future."

23 And on April 14, Justice Cosgrove
24 makes this ruling; this a lead-up to 2(F), which I
25 will come to next.

1 1998, and Mr. Cavanagh is making a submission at
2 the bottom of page 2536, Line 22:

3 "I just want to put on the
4 record, or not put on the
5 record but indicate to the
6 court that I had approached
7 Ms. Bair seeking pertinent
8 material and asking questions
9 about some of these matters
10 not in an attempt to preempt
11 defence, but because, as
12 counsel before the court, I,
13 myself, would be asking
14 questions and I would want
15 any relevant information and,
16 you know, if there's material
17 to be disclosed such as I was
18 provided with this morning, I
19 would want to disclose that
20 to my friend.

21 THE COURT: I am not sure
22 whether there is a formal
23 order by the court that
24 witnesses called on this voir
25 dire ought not to be

1 interviewed prior to their
2 giving evidence. I know that
3 Mr. Pelletier yesterday, I
4 thought, impressed the court
5 that - he made a point of not
6 discussing this case with
7 anybody else prior to coming
8 to court to be able to give
9 the court, if you want to
10 call it, a fresh,
11 undisturbed, uninterrupted
12 best response that he was
13 able. I prefer that. I don't
14 like Crown talking to Crown
15 when Crown are asked to come
16 into the witness box. But I
17 can't recall if I made that
18 order."

19 There is a discussion about that,
20 and at page 2539, Justice Cosgrove says:

21 "There will be an order of
22 the court that those
23 witnesses who are Crown
24 attorneys who have been
25 signalled, or whose names

1 appear in this notice of
2 motion, should not be - that
3 there should not be
4 communication from Crown in
5 this case with those other
6 Crown until such time as they
7 have testified in the trial.
8 I accept Mr. Cavanagh's
9 explanation that he was
10 motivated to produce this
11 material in an attempt to
12 perhaps expedite the process
13 of the court. There are
14 problems with that."

15 And then over to November 18, at
16 the bottom of page 6291, Mr. Hoffman says:

17 "And I'm assuming - and
18 partly what I'm looking at is
19 rule 10 of the Rules of
20 Professional Conduct, dealing
21 with communication with
22 witnesses. I'm assuming that
23 it would still be improper
24 for me to discuss this case
25 with Mr. Cavanagh,

1 specifically to seek - to
2 discuss with him the issue of
3 my cross-examination of him.
4 And I say that, looking at
5 rule 10, and I will - I have
6 another copy of it, I'll - In
7 any event, there's some
8 comments about - and this is
9 an unusual procedure, because
10 both counsel are cross-
11 examining the witness - but
12 at one point, in rule 10,
13 commentary 15, it talks
14 about: "Between completion
15 of the cross-examination and
16 commencement of
17 re?examination, the lawyer
18 who is going to re?examine
19 ought not to have any
20 discussion with respect to
21 the evidence that will be
22 dealt with on
23 re?examination." It seems
24 almost that's the position
25 that we're in, by analogy,

1 and it would still not be
2 proper for me to discuss this
3 matter with Mr. Cavanagh,
4 specifically any areas of
5 re?examination. I just
6 wanted to make sure that the
7 court is in agreement that I
8 still can't do that, because
9 I would hate to deprive
10 myself of that opportunity,
11 between today and tomorrow,
12 if I'm allowed to do it. I'm
13 assuming I'm not.

14 THE COURT: Your assumption
15 is correct.

16 MR. HOFFMAN: Okay.

17 THE COURT: That's the
18 assumption that I've worked
19 on, on all of the witnesses -
20 other Crown witnesses, who
21 are a more exact parallel,
22 and I indicated many months
23 ago, when Mr. Ramsay was in
24 your position, that
25 notwithstanding the fact that

1 that made - might be a
2 somewhat different approach
3 by the court, in view of the
4 fact there has been an
5 allegation of collusion and
6 illegality of Crowns in this
7 case with the police, and
8 because this is such a
9 sensitive issue, I felt that
10 Crown counsel, as officers of
11 the court, should be able to
12 come into the court without
13 the advantage of any
14 woodshedding in advance.

15 MR. HOFFMAN: I understand."

16 And the finally in this tab,
17 December 3; Mr. Hoffman asks the court upon
18 resuming in the morning:

19 "Am I permitted to talk to
20 Detective Superintendent
21 Edgar today before he comes
22 to testify tomorrow? I
23 suppose, if it was a
24 situation where it was a
25 defence witness adverse in

1 interest to the Crown, and I
2 was just going to cross-
3 examine him, my memory from
4 the rules of professional
5 conduct are that I could
6 contact him, but I thought of
7 asking, because I understand
8 it's a different situation.
9 Although it's a defence
10 witness, obviously, it's a
11 witness - not the typical
12 witness that someone calls."

13 The Court invites Mr. Murphy to
14 respond, and he doesn't know why Mr. Hoffman needs
15 to talk to Superintendent Edgar.

16 The Court, on page 6707, Line 15,
17 says:

18 "Well, that's my
19 recollection. I think the
20 practice has been that there
21 has not been a pre-
22 examination conference of the
23 witnesses on this motion,
24 which has to do with
25 sensitive issues of

1 disclosure knowledge. So
2 that, I think, has been - Mr.
3 Hoffman?

4 MR. HOFFMAN: Yes, that's
5 fine, Your Honour."

6 That brings us to the next tab, so
7 I wonder if this isn't a good time for a break?

8 THE CHAIR: Yes, that is fine.

9 --- Recess at 2:47 p.m.

10 --- Upon resuming at 3:02 p.m.

11 THE CHAIR: Are you ready, Mr.
12 Cherniak?

13 MR. CHERNIAK: Yes, thank you,
14 Chief Justice.

15 On October 13, 1998, page 6496 --
16 we are not into Tab F now, and this particular
17 deals with the denial of the ability of new Crown
18 counsel to prepare its case.

19 The first couple of pages deals
20 with the ability of Crown counsel to deal with his
21 police witnesses, and at page 6496 the Court says:

22 "If I had thought about it,
23 and had the argument been
24 placed before me yesterday, I
25 would have directed the Crown

1 to have no communication with
2 the investigating officer
3 because he was a material
4 witness on the matter."

5 And at page 6506 on the same day,
6 Constable Ball returns to the witness stand, and
7 they are still on the voir dire, and Justice
8 Cosgrove explains to the officer the process of the
9 voir dire and what his obligations are with respect
10 to excluding himself.

11 At the bottom of page 6505,
12 Justice Cosgrove says:

13 "On this particular motion,
14 there is a problem for the
15 Court. The problem is that
16 not only do you have the role
17 as the Investigating Officer
18 assisting the Crown, but you
19 are a potential witness on
20 the issue on this voir dire.
21 Under the circumstances, the
22 Court deems it inappropriate,
23 in light of the exclusion
24 order, that you should be
25 having any discussion with

1 any other person dealing with
2 the issue which is the
3 whereabouts of some
4 statements by Officer
5 Laderoute."

6 And then on page 7460, on March 4,
7 1998, Constable Churchill is being cross-examined
8 on the voir dire on the stay motion, and Churchill
9 is asked, at Line 3:

10 "Q. But you're telling me
11 today -- you just said to me,
12 "Did he specifically tell us
13 to go out and do things? No,
14 Sir, he didn't." How did you
15 know that? How did you know
16 that I was going to ask you
17 that?

18 A. Well, I guess Mr. Ramsay
19 must have asked me.

20 Q. He must have told you!

21 A. (No verbal response)

22 Q. Right?

23 A. (No verbal response)

24 Q. Right?

25 A. Well, he must have.

1 MR. MURPHY: Just a second,
2 please. Your Honour, I'm
3 wondering if I could have the
4 witness excused."

5 Mr. Murphy then makes arguments
6 about the independence of counsel, and he says:
7 "My friend has gone right to
8 work with Constable Churchill
9 for the express, explicit
10 purpose of defending Mr.
11 Flanagan's conduct, and the
12 first words out of this
13 witness's mouth, without any
14 prompting other than to ask
15 him if he can remember what
16 the circumstances of the
17 meeting were, -- he was, in
18 my submission, coached -- is
19 to -- is to say, "Did Mr.
20 Flanagan specifically tell us
21 to say anything? No, Sir, he
22 didn't."

23 He goes on to say that these
24 witnesses have been tainted, and says:
25 "And I don't think Mr. Ramsay

1 is independent anymore, and I
2 -- this underscores our
3 concern on the defence side
4 about the independence of the
5 Attorney General! We are
6 trying to get at the truth
7 here! We are not trying to
8 have the Crown continuing to
9 run interference for their
10 own misconduct!"

11 The Court, on page 7462, calls for
12 a response from Mr. Ramsay, and Mr. Ramsay says:

13 "Your Honour, it is a basic
14 principle of advocacy -- and
15 I think you even heard some
16 evidence from Constable Ball
17 on this -- that Counsel
18 calling a witness --

19 THE COURT: Well, please,
20 don't offer an expert officer
21 as anyone who is expert in
22 the profession to which you
23 belong and which is a noble,
24 honourable, long-time
25 profession, and of which, I

1 doubt, the officer really is
2 confident to offer any advice
3 about."

4 Mr. Ramsay continues on page 7663:

5 "There is such a thing as
6 witness preparation. Proper
7 witness preparation involves
8 the witness meeting with
9 Counsel who is to examine him
10 and being asked about his
11 evidence. The purpose of it
12 is so that Counsel can be
13 prepared by having some idea
14 what the answers to questions
15 will be, and so that the
16 witness can be prepared so
17 that he knows what he's going
18 to be asked about. The only
19 evidence before Your Honour
20 is that this is what
21 occurred; that Constable
22 Churchill was -- took part in
23 a standard witness
24 preparation interview, that
25 he was asked about the area

1 of evidence upon which it was
2 anticipated he'd be asked
3 about in court. Really, in
4 my submission, my learned
5 friend's -- his submission is
6 that he's entitled to both a
7 witness who has no idea what
8 he's supposed to be talking
9 about, or what he's going to
10 be asked about, and he's also
11 entitled to Crown Counsel who
12 has no idea what the witness
13 is going to say; and that, in
14 my submission, is simply
15 contrary to well established
16 procedure -- litigation
17 procedures that are well
18 known throughout the
19 profession. That's not
20 coaching a witness."

21 Mr. Ramsay then goes on to
22 describe what witness coaching is, and at Line 12:
23 "And, indeed, to expect Crown
24 Counsel not to prepare
25 himself, and to expect the

1 police officers to testify
2 without having any idea,
3 really is -- is saying that
4 he has a right to counsel who
5 is -- Crown Counsel who is
6 not living up to accepted
7 standards of competence in
8 his profession. And in my
9 submission, the submission
10 being put forth by my learned
11 friend is, quite simply,
12 untenable.

13 THE COURT: Mr. Murphy?

14 MR. MURPHY: There's a
15 conflict of interest that's
16 basic in this situation, in
17 my submission, Your Honour.
18 It's a conflict between Mr.
19 Ramsay's job, apparently
20 which he is to -- to do
21 damage control for Mr.
22 Flanagan and Mr. Findlay and
23 the Crown Attorneys of the
24 Ministry here in Brockville,
25 and more -- of greater

1 concern to me, is the fact
2 that he's conveniently over-
3 looking -- omitting reference
4 to the fact that this is a
5 defence Charter
6 application --"

7 He continues on page 7465:

8 "Detective Constable
9 Churchill has been headed off
10 at the pass. We have been
11 denied or deprived of his
12 independent evidence without
13 the benefit of being
14 signalled or telegraphed or,
15 in my submission, coached, if
16 only indirectly, but
17 certainly coached; he's
18 indicated in his evidence to
19 Your Honour already that he
20 "must have" -- Mr. Ramsay
21 "must have told me what I was
22 going to be asked on the
23 motion". He said, "he must
24 have told me". And in my
25 submission, quite apart from

1 the issue of what's proper
2 for Counsel to do with
3 respect to witness
4 preparation; this is witness
5 pre-emption. There's quite a
6 distinction, in my
7 submission."

8 At page 7467, after referring to
9 some other matters, Mr. Murphy says:

10 "I find the whole thing
11 odious. And I don't accept
12 my friend's pat response that
13 this is some sort of a -- of
14 a -- almost a trite aspect of
15 litigation. In my
16 submission, this crosses the
17 line and it -- and it
18 precludes and pre-empts full
19 answer and defence! Because
20 the answer is being provided
21 by the Crown to the witness
22 in advance of the motion.
23 Those are my submissions. And
24 finally, I think Mr. Ramsay
25 is completely dependent

1 counsel. He is dependent on
2 his masters at the Ministry
3 of the Attorney General, and
4 he is equally committed to
5 saving his -- his fellow
6 Crowns, Flanagan and Findlay,
7 and I think this demonstrates
8 that."

9 The judge refers to what the
10 situation is on a voir dire and says:

11 "Officer Churchill, who has
12 been called, to the Court's
13 impression has been -- in
14 answer to Defence questions,
15 has been responsive. He
16 appears to be doing his best
17 to present the facts as he
18 knows them. Mind you, he has
19 been encouraged by effective
20 cross-examination to go to
21 the facts, but by and large,
22 by comparison to other
23 witnesses in the trial, he
24 has been quite responsive.
25 The complaint that he has

1 been "coached", under the
2 circumstances related by him,
3 is not accepted by the Court.
4 What the Officer has said
5 is, "I was asked a question
6 and I gave an answer. I was
7 asked questions; I gave
8 answers." Admittedly, he gave
9 his answers in the context of
10 being advised of the purpose
11 for this hearing, and there
12 were areas of his involvement
13 in this case that he was
14 questioned on, but that's the
15 point. The evidence of the
16 Officer is, "I was asked
17 questions about particular
18 things and I gave my answers
19 to the inquiring counsel in
20 preparation for this motion."
21 That's not evidence of
22 "coaching", in my view.
23 Whether the Officer has been
24 assisted in a contextual way,
25 or subliminal messages have

1 been given to him by the
2 focus of Counsel, is always
3 problematic. Any discussion,
4 any meeting, any preparation,
5 -- it's always problematic
6 whether that's of assistance
7 to a particular witness. I
8 am not persuaded on what I
9 have seen thus far that it
10 has been of significance to
11 the testimony that I am
12 hearing from this particular
13 witness. On the issue of
14 whether it was wise or
15 acceptable for Counsel to
16 meet with the Officer and to
17 have narrowed and focused and
18 advised of the purpose of the
19 motion, and also then
20 focusing the Officer's
21 attention -- whether it was
22 wise of independent counsel,
23 in light of the allegations
24 of misconduct of other
25 counsel in similar

1 circumstances, gives the
2 Court some pause. However,
3 at this point, I am not
4 persuaded that the
5 preparation of the witness
6 was coaching or that Mr.
7 Ramsay does not present
8 himself in an independent
9 manner before the Court."

10 That takes us to page 7625, and
11 this is the next day, March 5, 1998.

12 The Court is addressing Mr. Ramsay
13 -- I am told that I already gave you this reference
14 at page 7636, a discussion between the Court and
15 Mr. Ramsay which was somewhat in contrast to the
16 position adopted by the judge the previous day.

17 So I have put this evidence in
18 already, and I will simply paraphrase it, because
19 you already heard it.

20 But Justice Cosgrove seems to take
21 quite a different position on March 5 than he did
22 on March 4, and the question of whether Mr. Ramsay
23 has acted properly with respect to what he told the
24 officer is in question.

25 It is in the course of this

1 exchange between Ramsay and the Court that the
2 Court makes the statement about the credibility of
3 Office Laderoute on page 7629, and then Mr. Ramsay
4 suggests that he should be allowed to argue that
5 matter.

6 I have given you this evidence
7 under another heading, so I won't repeat it.

8 I will take you now to the next
9 day, March 6, page 7685. Mr. Findlay has now been
10 ordered to testify, and is being cross-examined by
11 Mr. Murphy.

12 You will see at Line 25:

13 "Q. Now, before I go further
14 -- with respect to this voir
15 dire, you've been out of the
16 court for a number of days.
17 Has Mr. Ramsay -- From the
18 point at which you left the
19 court as Counsel for the
20 Crown, has Mr. Ramsay had
21 discussions with you
22 concerning this case?

23 A. On occasions he's asked
24 me questions as to the
25 significance of evidence,

1 what something was about.
2 For example, the condoms;
3 "Can you explain to me the
4 condoms in this case",
5 because he's not -- he had a
6 day and a half of prep time
7 before.
8 Q. So he was asking -- I
9 think initially you said for
10 the significance -- he wanted
11 you to explain the --
12 A. Well, yeah.
13 Q. -- significance?
14 A. Yeah, he'd ask -- I
15 remember a few occasions he
16 asked me about the case.
17 Q. This is after you had
18 left as Counsel?
19 A. That's right. To clear
20 up things. The one specific
21 thing I remember is he asked,
22 "Can you explain the condoms
23 in this case", because he was
24 confused as to what condoms
25 were what."

1 There were different condoms in
2 the apartment, and in the vicinity where the body
3 parts were found.

4 Mr. Findlay goes on to say on page
5 7686:

6 "A. He asked me -- He told
7 me that I was going to be
8 called as a witness.

9 Q. Yes?

10 A. And we had a discussion
11 about that.

12 Q. What did you discuss?

13 A. He asked me about my
14 interview with Marc Denis.

15 Q. How did he come to ask
16 you about that?

17 A. He --

18 Q. How did it come up?

19 A. Well, he said, "You're
20 going to be subpoenaed" and
21 -- and -- or, "You're going
22 to be testifying", and he
23 asked about the interview
24 with Marc Denis.

25 Q. That was the first thing

1 he said? The first --

2 A. I don't remember what the
3 first thing he said was. I
4 knew that was an issue
5 anyways because I was present
6 in court when that was -- you
7 crossed George Ball --

8 Q. Yes.

9 A. -- on that. It was a
10 brief discussion with Mr.
11 Ramsay yesterday, I'd say in
12 the range of 5 to 10 minutes.

13 Q. Okay.

14 A. 10 minutes at the
15 absolute most."

16 Mr. Murphy asks him what they
17 talked about, and he answers:

18 "A. Part of it was me
19 wanting to know, "Why do I
20 have to testify in this
21 case?"; I was pretty upset.

22 Q. Yes?

23 A. That took up some time.
24 And about the interview with
25 Marc Denis.

1 Q. What did he say about it?
2 A. He didn't say anything;
3 he asked me about it.
4 Q. What did he ask you?
5 A. `What happened'.
6 Q. What specifically did he
7 ask you?
8 A. I don't remember the
9 specific question. It was
10 along that nature. It was a
11 general open-ended question
12 along the lines of "What
13 happened in your interview
14 with Denis? Can you tell me
15 about your interview with
16 Denis?" --
17 Q. Well, did he -- Okay.
18 A. I can't get more -- It
19 was not a focused specific
20 question; it was an open
21 question and I answered it.
22 Q. Well, with respect, how
23 would he ask you a general
24 open-ended question with
25 respect to Mr. Denis if there

1 -- there's nothing,
2 presumably -- Mr. Denis is
3 one of many witnesses.
4 Right?

5 A. Yeah, but he's the one
6 that you're accusing me of
7 counselling perjury on.

8 Q. Is that what Mr. Ramsay
9 told you?

10 A. No, that's what I -- the
11 inference I drew from your
12 cross-examination of
13 Detective Constable Ball.

14 Q. Why do you offer that as
15 the only reasonable inference
16 from the cross-examination?

17 A. That's my opinion.
18 That's what I thought you
19 were trying to say; your
20 cross-examination of him and
21 also the comments that you
22 made to His Honour when Ball
23 was excused and just prior to
24 me leaving the courtroom.
25 That was my -- That's my

1 opinion, right or wrong."

2 The cross-examination goes on in
3 that vein for the next few pages, and at page 7693,
4 Mr. Findlay is cross-examined about the Marc Denis
5 interview:

6 "Q. Now, of those 105, how
7 is it that Marc Denis is one
8 of the ones that the Crown
9 has decided is --

10 A. Going to call?

11 Q. -- is going to be called?

12 A. In my opinion?

13 Q. Yes.

14 A. In my opinion, the reason
15 to call Marc Denis would be
16 -- is that he's one of the
17 officers, he's there with the
18 ride-along, Roch Dorion, at
19 the motor vehicle accident.

20 Q. Yes?

21 A. And what he would -- he'd
22 testify about the accused
23 person providing her name --

24 Q. Yes?

25 A. -- to him, --

1 Q. Yes?

2 A. -- him filling out a
3 motor vehicle accident report
4 where he put her name down.

5 Q. Yes?

6 A. Umm -- Her providing to
7 him the identification of the
8 deceased, Mr. Foster, his
9 driver's license, a photo,
10 and a paper," and the like.

11 Mr. Findlay is then asked about
12 how he knows what Mr. Denis's evidence is going to
13 be, and Mr. Findlay goes through that.

14 At page 7696, Mr. Findlay:

15 "A. Denis also would be
16 important at that time when
17 he's decided -- we're going
18 to call him as a witness,
19 because he -- as opposed to
20 Dorion, he actually had the
21 opportunity to look inside
22 the vehicle."

23 Then there is a recess, and Mr.
24 Murphy has some submissions before Mr. Findlay
25 comes back to court, and the submission is:

1 " -- after he had left the
2 court after the issue of his
3 potential compellability as a
4 witness came up, Your Honour
5 asked if..indeed, inquired as
6 to whether the issue of
7 independent counsel did not
8 at that point arise for Mr.
9 Findlay, and you directed
10 your question to myself and I
11 confirmed that I believed it
12 did at that point and then
13 you asked Mr. Ramsay if he
14 would like the opportunity,
15 in light of the fact that Mr.
16 Findlay was then indicated by
17 Defence as being somebody we
18 would call in light of the
19 evidence heard from Detective
20 Constable Ball at that point;
21 I distinctly recall, and I've
22 been checking with Mr.
23 Cadieux, my co-counsel, and
24 our notes, and my
25 recollection, Your Honour,

1 was that Mr. Ramsay was given
2 a direction by Your Honour
3 not to discuss the case with
4 Mr. Findlay, but that it was
5 permissible for them to
6 discuss the issue of
7 retaining independent
8 counsel."

9 Mr. Murphy also says at Line 19:
10 "And now, as with Detective
11 Constable Churchill, my
12 friend has apparently run
13 afoul of his independence,
14 again, in my submission at
15 least, by discussing with Mr.
16 Findlay, well past the point
17 -- yesterday, in fact -- well
18 past the point where there
19 could be any confusion in my
20 friend's mind, reasonably,
21 that he was to be having
22 discussions about the
23 evidence, about the case at
24 large, with Mr. Findlay."

25 Mr. Murphy continues in that vein,

1 and on page 7701:

2 "But indeed, in my
3 recollection, Your Honour,
4 there was no confusion or
5 ambiguity in Your Honour's
6 direction, and I'm asking if
7 we could get -- if Your
8 Honour requires it, I would
9 be requesting a transcript,
10 because what we have again,
11 in my submission, is the
12 preemption of the -- of a
13 witness by the Crown in a
14 manner, in my submission,
15 that violates the Court
16 order --"

17 And at page 7702:

18 "Mr. Ramsay, in my
19 submission, is not
20 independent. He should get
21 independent counsel; someone
22 who will avail themselves of
23 the fair opportunity the
24 Court has given to be
25 independent, to independently

1 carry the case."

2 And on page 7702:

3 "The right to make full
4 answer and defence by cross-
5 examining Mr. Findlay, in my
6 submission has been
7 compromised and prejudiced by
8 Mr. Ramsay continuing to
9 cross the line. He knows
10 that this issue has already
11 come up with Constable
12 Churchill, and Your Honour
13 indicated even before that
14 that you had continuing
15 concerns about the issue of
16 his independence and yet he,
17 in my submission, is running
18 roughshod over the dividing
19 line. And in this last
20 instance he's clearly gone
21 against what I recall, if I'm
22 not mistaken, and I stand
23 corrected if I am, but -- I
24 clearly recall Your Honour
25 directing that there be no

1 discussion of the case with
2 Mr. Findlay; that there could
3 be discussion with respect to
4 the logistics, as it were, of
5 getting independent counsel
6 or other counsel to assist,
7 and here we have Mr. Ramsay,
8 an officer of the court of
9 considerable experience,
10 apparently flaunting that
11 order, and I don't think he's
12 independent any more --"

13 The Court calls upon Mr. Ramsay to
14 respond, and Mr. Ramsay says:

15 "I recall at one point
16 shortly before we broke at
17 the end of the day, my
18 canvassing Mr. Findlay's
19 role, continuing role in the
20 proceedings, which was at
21 issue, and I recall being
22 told at that point that I
23 should restrict myself from
24 talking with him whether we--
25 whether he's -- should be

1 replaced by independent
2 counsel, and then we came
3 back and started to talk
4 about cases on counsel being
5 a witness and counsel in a
6 case, and then at that point
7 it was something like that
8 Mr. Findlay was excused as
9 counsel on the case, and
10 that's all I remember about
11 that. I have not been told
12 not to conduct witness
13 preparation interviews, and
14 as far as asking him about
15 the significance of an item
16 in the case, meaning the case
17 of guilt or innocence as
18 opposed to issues on the voir
19 dire, I certainly didn't take
20 anything that was said from
21 the bench as prohibiting me
22 from doing that, and indeed,
23 I don't see how I could be.
24 I mean, the idea is to
25 provide independent counsel,

1 not ignorant counsel. And
2 this question of whether I
3 need time to prepare -- well,
4 of course -- what does
5 preparation mean except
6 informing oneself about the
7 case, and there's really only
8 three sources. There's
9 transcripts of what's
10 happened in court, there's
11 the brief, -- well, four
12 sources -- there's police
13 officers, and there's Crown
14 Counsel; and the defence is
15 not entitled to have a Crown
16 Counsel sitting here who
17 knows nothing about the case
18 and about how issues on the
19 voir dire fit in with the
20 case in the sense of the case
21 of guilt or innocence. Now,
22 at this point -- and I mean,
23 any counsel, -- I mean, if
24 I'm replaced by another Crown
25 Counsel, the other Crown

1 Counsel is also going to have
2 to be briefed and is also
3 going to have to inform
4 himself as to what the case
5 is about, and there are only
6 certain ways to do that.
7 THE COURT: When the issue of
8 stay was first raised with
9 the Court it was done
10 verbally by Counsel for the
11 accused -- I am not calling
12 on you to reply right now,
13 Mr. Murphy.

14 The Court goes through some of the
15 history and notes at the bottom of page 7706:

16 " --the Court adjourned to
17 permit the Crown to contact
18 independent counsel. The
19 Court also permitted,
20 somewhere on the record, that
21 Mr. Findlay in the meantime
22 continue as assisting
23 counsel."

24 The court goes, at page 7707, to
25 the Stewart issue, and I referred the panel to that

1 evidence yesterday.

2 At page 7708, an adjournment is
3 granted to permit Mr. Ramsay:

4 " -- or whoever was going to
5 represent Mr. Flanagan, to
6 consult with Mr. Findlay to
7 prepare her or himself to
8 proceed with the stay motion.
9 Mr. Ramsay took that role,
10 adopted that role, and the
11 Court commenced the
12 application --"

13 At the top of page 7709:

14 "I have the transcript, and I
15 have the advantage over
16 Counsel, which I will not
17 take advantage of because I'm
18 going to adjourn this
19 application to permit them to
20 review the transcript which I
21 have in hand. I have the
22 transcript of what happened
23 at that time in these
24 proceedings. The issue of
25 Mr. Findlay's continuation

1 and of continuing to offer
2 advice in the face of the
3 request that he, following
4 Mr. Flanagan's precedent, be
5 represented by independent
6 counsel, was raised."

7 I believe the court is quoting
8 from an earlier transcript:

9 "Mr. Ramsay said: "Thank
10 you, Your Honour. Ten
11 o'clock is fine, Your
12 Honour. I just should let --
13 I just want to make sure that
14 there is no misunderstanding.
15 I am proceeding on the basis
16 that Mr. Findlay is still on
17 the case until I am told
18 otherwise. Now that --
19 Not that I have anything much
20 planned between now and then,
21 except perhaps to just plan
22 my own examination of D.C.
23 Ball, and that's all. I just
24 thought I should, out of
25 abundance of caution, mention

1 that."

2 At the bottom of page 7711:

3 "We will adjourn until
4 tomorrow morning, and the
5 Court's direction is that the
6 issue before the Court of Mr.
7 Findlay's participation is a
8 matter that can be
9 discussed between Mr. Findlay
10 and lead counsel, but they
11 should refrain from
12 further discussion of the
13 voir dire or the issue before
14 the Court."

15 Court resumes later that day, and
16 on page 7712, Mr. Ramsay is asked:

17 "THE COURT: Mr. Ramsay,
18 anything further on the
19 request and the matter
20 brought to the Court's
21 attention by Mr. Murphy?

22 MR. RAMSAY: Well, yes, I've
23 had a chance to read the
24 transcript.

25 THE COURT: Yes?

1 MR. RAMSAY: And it's clear
2 that I was asking whether,
3 pending a decision as to
4 whether Mr. Findlay would be
5 called, whether I could treat
6 him as counsel, and the
7 answer of the Court, with the
8 exception of the question of
9 Mr. Findlay's participation,
10 is obviously that I cannot.
11 "They should refrain from
12 further discussion of the
13 voir dire or the other before
14 the Court." Whether the
15 issue before the Court
16 includes the ultimate issue
17 of guilt or innocence is not
18 necessarily -- would not
19 necessarily be that clear,
20 but in any event, in the
21 context of the question,
22 obviously it means -- if I
23 can't treat him as Counsel,
24 that means he has to be
25 treated as a witness; and, of

1 course, it's more restricted,
2 what you can talk to a
3 witness about. There is no
4 reason why I would have taken
5 "refrain from further
6 discussion of the voir dire
7 or the issue before the
8 Court" to mean any -- refrain
9 from any such discussion.
10 The reason I wouldn't take it
11 that way is because the law
12 -- and as represented in the
13 case which I've provided to
14 Your Lordship and my learned
15 friend -- O'Callaghan v. The
16 Queen, 65 C.C.C. (2d), 459 --
17 a Judge has no jurisdiction
18 to order a witness to refrain
19 from communicating with
20 Counsel. In that case, Mr.
21 Justice Maloney of the High
22 Court of Justice of this
23 Province was deciding an
24 extraordinary remedy in a
25 case in which the Provincial

1 Judge at a preliminary
2 inquiry had made the usual
3 order excluding witnesses
4 and, in addition, told them
5 not to talk to Counsel for
6 the Crown or the accused.
7 Crown Counsel said, "Well",
8 that she would like to --
9 what did she say? She said:
10 'There may be things that
11 have come up in Officer
12 Schertzer's testimony that I
13 would like to check with
14 some people who observed some
15 of the things --' And the
16 Judge responded that no,
17 there was to be no -- there
18 was to be no change in his
19 order. Mr. Justice Maloney
20 quashed that order --"

21 He then goes on to discuss what
22 Justice Maloney said, and he quotes him referring
23 to a case called Arsenault, where he adopts
24 a statement of Mr. Justice Ritchie of the New
25 Brunswick Court of Appeal, and says:

1 "The rule as to non-
2 communication with
3 excluded witnesses does not,
4 in my view, preclude counsel
5 from conferring with such
6 witnesses after their
7 exclusion and before
8 taking the witness stand."
9 So, there was no reason for
10 me to assume that when Your
11 Honour said that, that he was
12 purporting to make an illegal
13 order. Not only would it
14 have been illegal, but it
15 would have been so highly
16 prejudicial to the Crown
17 that, really, you might as
18 well not have Crown Counsel
19 present. If Crown Counsel is
20 not allowed to speak to
21 witnesses and to seek
22 information from witnesses in
23 the usual way, then the --
24 there's just no way the Crown
25 can be represented by

1 competent counsel; counsel
2 who is doing anything other
3 than just being passively
4 watching the proceedings and
5 taking notes. So, in my
6 submission, there is no
7 evidence that anything has
8 been done in contravention of
9 Your Honour's order, assuming
10 that Your Honour --assuming
11 that the order is interpreted
12 the way I interpreted it. If
13 that was the wrong
14 interpretation, then the
15 order was illegal. Finally,
16 I just want to revisit the
17 issue of the question of
18 independent -- I hear
19 reference to the phrase
20 "independent counsel for Mr.
21 Findlay", or "independent
22 counsel for Mr. Flanagan". I
23 am Crown Counsel, and I am
24 Crown Counsel who had not had
25 previous involvement in this

1 particular case until I was
2 called down here the other
3 week. That's what I am: I am
4 a colleague of Mr. Findlay
5 and Mr. Flanagan, I work for
6 the same Ministry, and I
7 represent the same party.
8 Mr. Findlay and Mr. Flanagan
9 are not parties in these
10 proceedings. The Crown is,
11 and that's who I represent.
12 Of course, I'm also a
13 colleague, in the broader
14 sense, to my learned friends
15 opposite. But I am not
16 Counsel for Mr. Findlay and I
17 am not Counsel for Mr.
18 Flanagan. I don't think that
19 that's -- I don't think that
20 anyone is saying that I am,
21 but I -- I think, just to
22 make sure that the -- my role
23 is clear -- that's what it
24 is. I am representing the
25 Crown, and in that capacity,

1 I, or whoever represents the
2 Crown, has the right and the
3 duty to be briefed as to the
4 evidence and the issues in
5 the case, according to usual
6 procedures. So, those are my
7 submissions."

8 Mr. Murphy then goes on for some
9 length as to why this case is distinguishable, and
10 refers to certain other authorities, and the
11 suggestion that the trial judge made an illegal
12 order.

13 And the court, at the bottom of
14 page 7724, says:

15 "Mr. Murphy, you need not
16 continue in that vein. The
17 Court has satisfied that it
18 has the issue before it. I
19 would, though, appreciate
20 receiving a copy of the
21 decision of Justice Twaddle."

22 There is then a recess for ten
23 minutes, and Justice Cosgrove says:

24 "The additional argument or
25 submissions made by Counsel

1 for the Crown with respect to
2 the complaint of the
3 defendant's that Crown
4 Counsel interviewed Mr.
5 Findlay, the present witness,
6 contrary to the expressed
7 order of the Court, were
8 really summarized at the end
9 of his argument under three
10 areas. The first was that
11 there is no evidence that
12 any-thing has been done in
13 contravention of the order.
14 In my view, the best evidence
15 is that of the witness, Mr.
16 Findlay, who, in the Court's
17 view, contrary to the Court
18 order and contrary to the
19 order which he, himself, Mr.
20 Findlay, heard, as well as
21 Mr. Ramsay, -- Counsel were
22 instructed that there should
23 be no discussion between
24 Counsel with the exception of
25 the issue of whether Mr.

1 Findlay could be compellable
2 as a witness on this motion
3 for a stay. So, I disagree
4 with that first submission.
5 The second submission is that
6 the order of the Court in
7 those circumstances, which
8 was given at the conclusion
9 of the proceedings on
10 Thursday, February 26th, is
11 illegal. I disagree with
12 that argument by Counsel as
13 well. The order of the Court
14 was in the context of an
15 application for abuse of
16 process under the Charter.
17 It, in its main substance,
18 deals with allegations of
19 improper police conduct,
20 which, it is argued, has been
21 transmitted through to the
22 Crown, either knowingly or
23 unknowingly, reasonably or
24 negligently. The situation
25 before the Court, being a

1 Charter application, is
2 entirely distinguishable from
3 the case relied upon by Crown
4 Counsel of O'Callaghan v. The
5 Queen, 65 C.C.C. (2d), 459.
6 This is a decision of the
7 Ontario High Court of
8 Justice, but it is a decision
9 in review of a decision of
10 the Provincial jurisdiction.
11 It is, nonetheless, a
12 decision of the precursor of
13 this Court. It is
14 distinguishable."

15 Justice Cosgrove then refers to
16 the effect of the Charter, and on page 7728 he
17 refers to the fact that:

18 "In the case before the Court
19 on this motion, which has, as
20 its very root, an allegation
21 of abuse of process --"

22 And in the middle of the page
23 says:

24 "That being said, the Court
25 recognizes that Counsel may

1 legitimately have interpreted
2 the order in another way.
3 Counsel, finally, spoke of
4 his role as Counsel, as if
5 he, as Counsel before the
6 Court, is the same as Mr.
7 Flanagan before the Court;
8 that they are both Crown
9 Counsel, that they represent
10 a party. With respect, that
11 begs the issue, the real
12 issue. It ignores the fact
13 that it was Mr. Flanagan
14 himself who offered that
15 there should be independent
16 counsel with an objective
17 point of view to represent
18 the Crown on this motion for
19 a stay on the basis of an
20 abuse of process. It ignores
21 the fact that previous
22 counsel to Mr. Ramsay was
23 asked not to continue
24 because, in fact, he couldn't
25 meet that test of objectivity

1 which the Court said was
2 tested by previous exposure
3 to the history of the
4 proceedings in this case."

5 And further down:

6 "The issue before the Court
7 is whether, in view of the
8 actions of Mr. Ramsay
9 contrary to the express order
10 of this Court, whether he
11 should continue as
12 independent counsel on this
13 motion for abuse of process."

14 Justice Cosgrove then refers to
15 the Deslauriers case, and continues:

16 "In the present case, Mr.
17 Ramsay has offered an
18 explanation and an
19 interpretation and a belief
20 of the law contrary to the
21 Court's ruling."

22 The Court goes on to say at page
23 7731:

24 "I am embarrassed by the fact
25 that I have to make this

1 ruling in the face of what I
2 consider to be a blatant
3 disregard for the Court's
4 order, but the Court, because
5 of its concern that the trial
6 should proceed, that -- in
7 all of its manners, whether
8 by motion or by jury, or
9 whatever -- is not going to
10 require Mr. Ramsay to retire.
11 Finally, the Court recognizes
12 and repeats what Defence
13 Counsel has said. In this
14 case, the issue of the
15 evidence of Mr. Findlay and
16 Mr. Flanagan is entirely
17 different from the usual
18 situation. It is an unusual
19 situation. We are dealing
20 with Counsel; Counsel who, by
21 their oath, in addition to
22 their own moral codes, are
23 officers of this court and
24 are required to conduct
25 themselves in this court in

1 accordance with certain
2 codes, and I hope I can rely
3 upon those in the future."

4 I should note that the pages I
5 have just referred to, pages 7725 and 7731, are in
6 Mr. Paliare's brief under Tab 2(C).

7 I want to take you now to April
8 14, pages 117 and 118 -- I have read these pages,
9 but I will read them again because they follow in
10 context. This is from page 117:

11 "Yes, in the context of the
12 court's earlier comments, it
13 became very apparent to the
14 court in these proceedings
15 that time was of the essence,
16 that the only way in which,
17 in my view, there could be
18 any hope of any untutored
19 evidence before the court, it
20 had to be brought before the
21 court quickly, in view of the
22 fact that previous counsel,
23 Mr. Ramsay, paid no heed
24 whatsoever to the court's
25 rulings and directions, when

1 he found that he disagreed
2 with the court's order and
3 characterized it, in his own
4 mind, as illegal. So the
5 court was required to call
6 the evidence quickly, in view
7 of the actions of Crown
8 counsel."

9 We then fast forward to October 7,
10 1998. The issue here is whether, in view of the
11 motions with respect to the evidence of Mr.
12 McGarry, Mr. Cavanagh says at page 3306:

13 "Well, I would anticipate,
14 Your Honour, that the Crown
15 would be seeking some time in
16 order to instruct counsel to
17 appear on behalf of the Crown
18 to argue in relation to the
19 subpoenas or the intentions
20 to call Crown counsel who
21 have carriage of the case,
22 which is a significant
23 difference, as we learned in
24 the case law from Mr.
25 Lindsay, than the other Crown

1 counsel who testified as
2 witnesses in a matter before
3 Your Honour."

4 Mr. Murphy, at page 3308, raises
5 the issue as to whether the Crown will be retaining
6 independent counsel who:

7 " -- will be counsel who will
8 not be in a position where
9 they will be in a conflict as
10 it were, attempting to

11 justify the conduct of their
12 colleagues, and I think --

13 THE COURT: Or, described
14 another way by myself: Who
15 have no previous contact or
16 dealings with this case.

17 MR. MURPHY: Yes, sir.

18 MR. CAVANAGH: I hear Your
19 Honour, I'm - well, may I
20 ask the court's position with
21 regard to Mr. Lindsay, who
22 has had previous dealings in
23 terms of responding to
24 subpoenas in the matter?

25 THE COURT: Of course he

1 has been in court and he's
2 argued this issue with
3 respect to other counsel, but
4 has he had any contact or
5 dealings in the case prior to
6 that, or apart from that?

7 MR. CAVANAGH: No, none
8 that I'm aware of, Your
9 Honour.

10 THE COURT: Mr. Murphy.

11 MR. MURPHY: Well, he has
12 made representations of a
13 somewhat curious nature,
14 which we've already made
15 submissions on - I'm now
16 speaking of Mr. Lindsay - he
17 said that Mr. Pelletier and
18 Mr. Berzins --"

19 And there is some discussion about
20 that, and later that day, at page 3310, Mr. Crown
21 at Line 10:

22 "The position the Crown takes
23 is that it will oppose the
24 subpoenas which I anticipate
25 we will receive; that is,

1 myself and Mr. McGarry, and
2 we are asking for some time
3 to consider that."

4 Mr. Cavanagh raises the issue that
5 the decision may be far-reaching:

6 " -- I am sure the court is
7 well aware of this, of
8 course, is that this decision
9 may be very far reaching, in
10 the sense that if trial
11 Crowns testify and
12 credibility findings have to
13 be made by the court, then
14 this may have a bearing on
15 whether counsel can - that is
16 myself and Mr. McGarry - can
17 continue to act in the
18 matter, and they're serious
19 ramifications. Therefore, I
20 am asking for some time to
21 find counsel and have that
22 counsel attend before Your
23 Honour to make
24 representations."

25 And at Line 7:

1 "Well, I will be asking for
2 this afternoon to meet with
3 the regional director, who we
4 have given a precis of what
5 happened, but haven't talked
6 in depth to yet, with the
7 regional director Pelletier.

8 And I would believe any
9 counsel who came on would
10 require a day at least to be
11 brought up to speed, in terms
12 of, to responsively make
13 representations to the court
14 on the issue."

15 Mr. Murphy then says:

16 "The first issue, I think, is
17 a prospective witness - as
18 Mr. Cavanagh and/or Mr.
19 McGarry may be at this point
20 - them speaking to the
21 regional director of Crowns,
22 Mr. Pelletier, who is already
23 a witness, is problematic, in
24 my submission."

25 At the top of page 3312:

1 "in my submission, it is not
2 appropriate for the Crown to
3 give him a precis, because
4 that, in effect, is
5 communicating to a witness
6 who should properly be
7 remaining under an exclusion
8 order on this voir dire. I
9 am at a loss to understand
10 why - I guess it's part of
11 growing up in Eastern Ontario
12 - but why the good offices
13 of the Ministry of the
14 Attorney General seem to end
15 at the border between, I
16 guess it's around
17 Peterborough or whatever it
18 would be, but the east region
19 border, why the Crown would
20 not - given that Mr. Lindsay
21 himself previously
22 represented himself as
23 speaking on behalf of "the
24 Ministry", quote/unquote, I
25 am concerned that apparently

1 no attempt will be made, or
2 contact that should properly
3 be made, in my submission,
4 with the Ministry of the
5 Attorney General - perhaps
6 the Deputy Attorney General,
7 Mr. Segal, should be
8 contacted. And I say this
9 for the reason I have already
10 given, which is that Mr.
11 Pelletier is, in effect,
12 already involved as a witness
13 in this matter. Secondly,
14 Mr. Berzins, who is the
15 second player in this - the
16 second most senior Crown in
17 this region, he is also a
18 witness."

19 Mr. Murphy continues on page 3313:
20 "In addition, Your Honour, I
21 have a concern that what we
22 are seeing here unfold in a
23 shocking fashion, is the
24 complete and thorough
25 abdication of responsibility

1 on the part of, in the first
2 instance, the Ontario
3 Provincial Police. We have
4 witnessed the evidence or
5 heard the evidence of the
6 highest ranking criminal
7 investigation's officer,
8 Detective Superintendent
9 Edgar - if not the highest,
10 one of the highest -
11 attempting to foist
12 responsibility for the
13 decision to charge onto other
14 persons and to refer it away
15 to Crowns. We have police
16 pointing the finger at other
17 police and saying, 'No, it's
18 not my decision --'
19 THE COURT: No, you are
20 arguing the merits now. I
21 don't want to deal with the
22 merits. I want to deal with
23 the procedure.
24 MR. MURPHY: Well, I'm
25 concerned that the Crown -

1 MR. CAVANAGH: I used
2 "precis" not on this occasion
3 when I stood up, but before
4 indicating that when speaking
5 to Mr. Pelletier, I gave him
6 a precis of the situation.

7 THE COURT: You already
8 have?

9 MR. CAVANAGH: Yes, sir.
10 Yes, that if anyone from out
11 of the region or anyone who
12 has had no contact with the
13 case will presumably require
14 some time to be brought
15 abreast of the many
16 developments or will risk
17 standing here being accused
18 of, you know, being ignorant
19 of the matters which can be
20 of assistance to the court.
21 And so, if they are to
22 responsibly discharge their
23 duties, it is going to take
24 some time. So I think that
25 - my respectful submission to

1 Your Honour is that asking
2 from now until Friday morning
3 is a very minimum."

4 Mr. Cavanagh says October 7, 1998,
5 was a Wednesday.

6 Justice Cosgrove says:

7 "The court will, in view of
8 the seriousness of the
9 potential impact of the
10 relief on the motion, I guess
11 it is the Crown's motion to
12 resist a subpoena, I think
13 the Crown should have the
14 time requested, which is
15 until Friday morning to have
16 independent counsel appear to
17 represent Mr. Cavanagh on
18 this matter. I agree with
19 Mr. Murphy that Mr. Pelletier
20 and Mr. Berzins are witnesses
21 in this matter. As a matter
22 of fact, their evidence bears
23 directly on the point that
24 generated the subpoena to the
25 Crown before the court now.

1 They should have no further
2 dealings in this matter,
3 except Mr. Pelletier, as I
4 understand, has been advised
5 of the motion before the
6 court and counsel,
7 presumably, has advised that
8 --independent counsel are
9 requested. There should be
10 no further communication
11 except in that administrative
12 way.

13 MR. CAVANAGH: May I put
14 on the record, Your Honour,
15 that Mr. Berzins has been
16 advised as well.

17 THE COURT: Mr. Berzins as
18 well.

19 MR. CAVANAGH: Thank you.

20 THE COURT: So there
21 should be no contact with Mr.
22 Berzins or Mr. Pelletier
23 except insofar as their
24 responsibility as
25 administrators to find

1 alternate counsel; that is,
2 there should be no
3 communication between present
4 counsel and Mr. Berzins and
5 Mr. Pelletier about the
6 background of this matter.
7 In terms of independent
8 counsel, I do take the
9 opportunity to remind Mr.
10 Cavanagh, because you were
11 not on this case initially on
12 the first application or
13 subpoena to counsel from the
14 east region, counsel was sent
15 to represent Mr. Flanagan and
16 Mr. Findlay and he, as it
17 turns out, had been the
18 directing Crown, their
19 superior on the case, and we
20 lost, as I have said in my
21 rulings, a week or ten days
22 as a result of that. And
23 then Mr. Ramsay, who had no
24 dealings with it, apparently
25 - I say apparently, because

1 there were questions raised
2 about previous contact
3 between - certainly between
4 Mr. Ramsay and Detective
5 Inspector MacCharles. Mr.
6 Ramsay then attended and that
7 raised a further matter,
8 which was that, in the event
9 that the court granted the
10 request for subpoena or
11 rejected the challenge to the
12 subpoena, counsel who
13 appeared to represent counsel
14 on this matter should be
15 counsel who are in a position
16 to continue with the trial.
17 Otherwise, again, we will
18 have a repetition of a six-
19 week delay caused by the
20 Crown where, when Mr. Ramsay,
21 after the decision was made
22 by the court to hear Crown
23 counsel as witnesses, Mr.
24 Ramsay indicated he was not
25 authorized to continue with

1 the case and another delay
2 was occasioned."

3 At page 3322, Mr. Murphy raises
4 the issue of the conduct of MacCharles, and Mr.
5 Cavanagh says:

6 "Just on that point, Your
7 Honour, I think it should be
8 raised to the court that
9 there is, I suppose, somewhat
10 of a conflict, and I just put
11 that on the record. I stand
12 before the court now as
13 counsel, but also subject to
14 a subpoena which will be
15 served, and, therefore, as a
16 potential witness in the
17 matters before the court.

18 There is competing interests
19 here, because, in my view,
20 that is a conflict --

21 THE COURT: There is no
22 competing interests in the
23 court's view. The court has
24 been served with notice. Any
25 decision of the court to

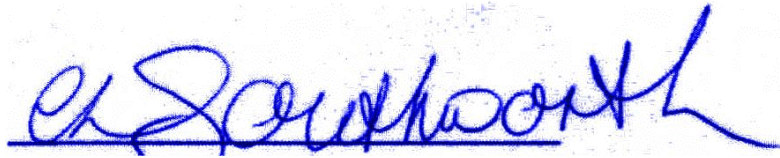
1 interrupt the proceedings at
2 this time would raise the
3 specter of prejudgment and
4 the court is not in no way at
5 all entering upon
6 consideration of the motion
7 in the matter which will be
8 argued on Friday next."

9 Perhaps this would be the
10 appropriate time to end, as it is now four o'clock.

11 THE CHAIR: Yes, we will resume
12 at 9:30.

13 --- Whereupon the hearing was adjourned
14 at 4:02 p.m., to be resumed at 9:30 a.m. on
15 Friday, September 5, 2008.

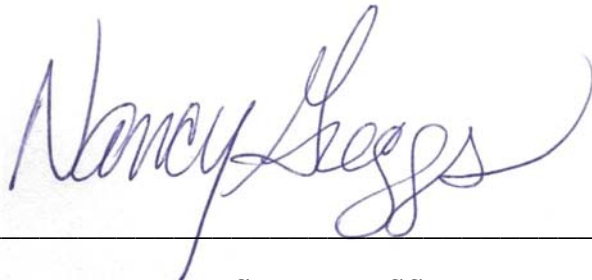
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Nancy Greggs, CCR