

**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 Friday, September 5, 2008 at 9:30 a.m.

\*\*\*\*\*

**APPEARANCES:**

Earl Cherniak, Q.C.  
Cynthia Kuehl

Chris Paliare  
Richard Stephenson  
Robert A. Centa

George K. Macintosh, Q.C.

Independent Counsel appointed  
pursuant to the *Complaints Procedure*

for The Honourable Paul Cosgrove

for the Inquiry Committee

(ii)

**INDEX**

|                                       | <b>PAGE</b> |
|---------------------------------------|-------------|
| Continued Submissions by Mr. Cherniak | 746         |

\*\*\*\*\*

1 Toronto, Ontario

2 --- Upon resuming on Friday, September 5, 2008

3 at 9:30 a.m.

4 THE CHAIR: If you can help me  
5 out, Mr. Cherniak, and just tell me again where  
6 that goes now that I have a copy.

7 MR. CHERNIAK: You do have them  
8 now?

9 THE CHAIR: Yes.

10 MR. CHERNIAK: Because we brought  
11 over extra copies, but they unfortunately weren't  
12 opened. Ms. Kuehl will remind me.

13 MS. KUEHL: Under tab 2A, there  
14 should be a sub-tab for a Constable Laderoute and  
15 they would go about three-quarters of the way back.

16 THE CHAIR: It is in the first  
17 volume, Exhibit 5?

18 MS. KUEHL: Yes. Exhibit 5,  
19 volume 1.

20 MR. CHERNIAK: In 2A there is a  
21 tab named Laderoute.

22 MS. CHOWN: The last segment of  
23 tab 2A appears -- at least in my book, starts with  
24 4113, and then skips to -- that's where the missing  
25 pages come in?

---

1 MR. CHERNIAK: I believe that is  
2 where it is.

3 MS. KUEHL: Yes, exactly. So it  
4 is the last section of 2A right before the tab 2B,  
5 and about three-quarters of the way through that  
6 tab there is an existing page 4113, but then the  
7 back is 4115, and these are the even numbered pages  
8 in that section.

9 HON. MACDONALD: 4117 we'll have  
10 to keep, because the back of that is page --

11 MS. KUEHL: Yes.

12 MR. NELLIGAN: I would be grateful  
13 if, at the break, you could come up to my volume  
14 and just put them in the right place.

15 MS. KUEHL: Absolutely. Can do.

16 MR. NELLIGAN: Thank you.

17 MR. CHERNIAK: Mr. Nelligan will  
18 be busy on his BlackBerry on the break, no doubt.

19 THE CHAIR: All right, Mr.  
20 Cherniak.

21 CONTINUED SUBMISSIONS BY MR. CHERNIAK:

22 MR. CHERNIAK: If the panel has  
23 Exhibit 6, volume 2 in front of you, I would like  
24 to go back to 2D. You will remember there was a  
25 discussion yesterday about where the idea of

---

1 independent counsel came from that Mr. Flanagan had  
2 raised. Mr. Paliare asked us to find those pages  
3 and we have handed them up. I can tell the panel  
4 where to insert those pages. If we turn to --

5 THE CHAIR: Just a minute, please.

6 MR. CHERNIAK: If we turn to  
7 Exhibit 2D -- and I read 2D yesterday -- these  
8 pages go right at the front of that tab. The date  
9 is February 17, 1998.

10 THE CHAIR: The date doesn't  
11 appear on these pages, but are they all the same  
12 date?

13 MR. CHERNIAK: They are all the  
14 same date, yes.

15 THE CHAIR: February 17th?

16 MR. CHERNIAK: February 17th,  
17 1998.

18 THE CHAIR: Thank you.

19 MR. CHERNIAK: I will just read  
20 some extracts for them so that the record is  
21 complete with respect to that tab. And starting at  
22 page 6625, Mr. Flanagan says at the middle of the  
23 page:

24 "As I understand it, Mr.  
25 Murphy brought a motion

---

1                   yesterday at 20 minutes to 5  
2                   o'clock having a motion to  
3                   have the Crown disqualified  
4                   from the trial because of a  
5                   theory of the defence."

6                   Over to 6626, Mr. Flanagan says,  
7                   starting at line 10:

8                   "Because of the abuse of  
9                   process motion as alleged by  
10                  counsel, I understand it that  
11                  he is alleging that the  
12                  police, in combination with  
13                  the Crown, got together to  
14                  tailor, for lack of a better  
15                  expression, to have witnesses  
16                  give certain evidence that of  
17                  course is completely denied,  
18                  but because it is framed that  
19                  way, it is going to require  
20                  the Crown. Because the Crown  
21                  is part of his motion, I have  
22                  to get independent counsel to  
23                  argue that motion."

24                  Then he says:

25                  "In relation to that, because

---

1 Mr. Murphy is cross-examining  
2 officers in relation to  
3 meetings with the Crown, I  
4 have to get counsel down to  
5 cross-examine the officers  
6 after Mr. Murphy. I'm  
7 talking about to address the  
8 issue."

9 Then over to page 6627, Mr.  
10 Flanagan says at about line 8 that he is in a  
11 position to have counsel down here to argue the  
12 motion on Thursday morning. At line 23, the court  
13 says -- about line 20, the court says:

14 "Are you therefore conceding  
15 that you will not continue in  
16 the trial?"

17 "Mr. Flanagan: No, sir, I am  
18 not. What I'm saying is  
19 because of the framing of the  
20 motion, I need counsel to  
21 argue the motion, is what I'm  
22 saying. I can advise your  
23 honour that the Crown will be  
24 -- I haven't been served with  
25 any subpoena, first of all.

---

1                   If that were to happen, the  
2                   Crown would be moving to  
3                   quash that subpoena."

4                   Then over to page 6628, Mr.  
5 Flanagan says at line 12, in answer to a question  
6 of the court:

7                   "The difficulty with that,  
8                   sir, is because of the  
9                   latitude and because of the  
10                  ballooning effect in relation  
11                  to the last statement of voir  
12                  dire, I cannot cross-examine  
13                  officers on meetings with the  
14                  Crown involving myself where  
15                  it is part of Mr. Murphy's  
16                  allegation. That's why I  
17                  need to get other counsel to  
18                  do it. It's like how can I  
19                  argue my own disqualification  
20                  motion? How can I  
21                  cross-examine an officer on a  
22                  meeting with myself?"

23                  "The Court: We'll assume  
24                  that counsel is retained to  
25                  argue these motions, then.

---



1 Do you want to get advice or  
2 have discussion with that  
3 counsel to decide whether the  
4 first order of business with  
5 new counsel should be a  
6 completion of the voir dire  
7 or whether there should be a  
8 voir dire continuing in the  
9 context of a larger motion?"  
10 "Mr. Flanagan: I have taken  
11 the liberty of already doing  
12 that. My preference would be  
13 to finish the voir dire,  
14 finish the witnesses, and  
15 then argue the motions."

16 And then Mr. Flanagan says that  
17 counsel will be available Thursday morning, this  
18 day being a Tuesday.

19 And then over to page 6633, Mr.  
20 Murphy makes some submissions about this issue and  
21 he says at line 20:

22 "I think it's so close to  
23 line right now, your honour,  
24 that I would be  
25 uncomfortable, if I were Mr.

---

1 Flanagan, in continuing,  
2 given what we've heard about  
3 this meeting and what came  
4 out of this meeting and what  
5 we know about all the other  
6 aspects of the Crown case,  
7 missing evidence, suppressed  
8 evidence, concealed evidence,  
9 fabricated evidence. If Mr.  
10 Flanagan feels comfortable  
11 continuing, that's a decision  
12 he can make, but as to  
13 continuing on in an abuse of  
14 process motion, if Mr.  
15 Flanagan comes close in the  
16 court's perspective to giving  
17 evidence on issues that he is  
18 involved in, that's  
19 precarious if he's got the  
20 decision to make."

21 And then Mr. Flanagan says -- I  
22 should read the part about Mr. Murphy. Murphy  
23 says:

24 "I object to him attempting  
25 to bring down other counsel,

---

1 in effect, so he can be an  
2 armchair quarterback."

3 Mr. Flanagan says at line 20:

4 "Counsel has raised two  
5 motions. One of them is an  
6 abuse of process motion, and  
7 the allegations by counsel on  
8 the abuse of process motion,  
9 they are alleging as a part  
10 of the abuse of process that  
11 police are in combination  
12 with Crown and have done  
13 certain things. Because  
14 witnesses or evidence would  
15 have to be heard on that  
16 motion and because of the  
17 allegation, it's obviously  
18 necessary to bring down  
19 independent counsel in order  
20 to address that."

21 Mr. Murphy indicates that:

22 "The Crown may or may not be  
23 a witness. That is a  
24 determination for this court  
25 to make.

---

1 "I have advised the court  
2 that if the Crown is served  
3 with a subpoena, the Crown  
4 will be moving to quash that  
5 subpoena. That is a separate  
6 argument. Even if the Crown  
7 is not a witness, your  
8 honour, to do the abuse of  
9 process, another counsel has  
10 to come down because of the  
11 nature of the allegations.  
12 That is, how can the Crown --  
13 I don't recognize the  
14 difficulty the Crown is in in  
15 this case, nor do I agree  
16 with Mr. Murphy's  
17 allegations. What I'm saying  
18 is that because of the  
19 allegations to go through the  
20 process, I can't argue my own  
21 motion or cross-examine the  
22 witnesses relating to -- That  
23 is why you need other counsel  
24 to come down to do it."

25 Mr. Murphy then goes on and makes

---

1 a variety of submissions referring to certain  
2 authorities, and after referring to those  
3 authorities, Mr. Murphy says at the bottom of page  
4 6639:

5 "I agree with your honour,  
6 however, that with respect to  
7 the motion that independent  
8 counsel has to be brought in.  
9 That doesn't necessarily  
10 determine, in my respectful  
11 view, whether the Crown can  
12 be disqualified from the  
13 trial. That is something  
14 your honour is going to have  
15 to decide at a later time."

16 The court on the next page asks  
17 the Crown if there is jurisprudence about whether a  
18 Crown can be represented on part of a trial and not  
19 all of a trial, and that's on page 6640. Mr.  
20 Flanagan says:

21 "I have jurisprudence  
22 indicating that the Crown  
23 doesn't become a witness just  
24 because the Crown meets with  
25 officers in relation to a

---

1 case."

2 Mr. Murphy then goes on with some  
3 argument, and at the bottom of page 6641 Mr.  
4 Flanagan says:

5 "May I say something else,  
6 your honour, just quickly?"

7 On 6642, Mr. Flanagan says:

8 "I don't disagree that I have  
9 to bring independent counsel  
10 in with respect to the  
11 motions, your honour. If  
12 your honour is considering  
13 whether the counsel should be  
14 disqualified in relation to  
15 that, then I'm asking your  
16 honour for independent  
17 counsel to address that as  
18 well."

19 Mr. Flanagan says at line 20:

20 "I agree with that. I agree  
21 also that on the motion I  
22 have to bring in independent  
23 counsel. I am not disputing  
24 that, but I don't see myself  
25 in a conflict with the trial,

---

1 but that's for your honour to  
2 determine."

3 Then we go to Thursday, February  
4 19th when Mr. Stewart comes in, and I have referred  
5 the panel to what happened when Mr. Stewart showed  
6 up. That brings me back to tab 2F. When I left  
7 off, I was going to start at page 4801 on November  
8 2nd, 1998. That's where I left off yesterday  
9 afternoon.

10 Mr. Hoffman is now on the scene,  
11 and Mr. Hoffman says -- at line 15, Mr. Hoffman  
12 says:

13 "I am prepared to proceed  
14 today --"

15 But he refers to the sheer volume  
16 of the material and that he hadn't heard of the  
17 case up to two weeks before. He goes on to say on  
18 page 4802, line 20, one of the things that he is  
19 asking the court to do having reviewed the  
20 transcripts is to limit irrelevant questions by  
21 counsel; and on page 4803, the second issue that he  
22 raises is the issue of disclosure, and he requests  
23 -- on line 20 on page 4803, he says:

24 "I am not sure if that  
25 imposes a heightened

---

1 disclosure obligation on  
2 counsel or simply is an  
3 emphasis of the normal  
4 disclosure duty. But, either  
5 way, out of an abundance of  
6 caution on my part I just  
7 request the opportunity to  
8 briefly outline my recent  
9 involvement in the case --"

10 And the court goes on to expand  
11 upon the circumstances that gave rise to the  
12 generation of the comment. The court says at the  
13 bottom of page 4803:

14 "It arose in circumstances  
15 where the court learned two  
16 or three weeks into a  
17 continuation of the voir dire  
18 on a renewed stay application  
19 that Mr. Cavanagh and Mr.  
20 McGarry met with officers,  
21 senior officers of the OPP,  
22 and were advised of their  
23 conclusion that they would be  
24 requesting RCMP investigation  
25 of Mr. MacCharles and I think

---



1 other persons --"

2 If you go down to line 10:

3 "-- And then, in particular,  
4 I recall Mr. McGarry, from  
5 the position that counsel now  
6 occupies, that is rising as  
7 counsel for the crown and  
8 presumably making argument  
9 but possibly as an officer of  
10 the court, saying verbally to  
11 the court 'I was formally  
12 advised of this development,  
13 that is of the involvement of  
14 the RCMP on such and such a  
15 date.' "It appears from what  
16 the court has just explained  
17 that what Mr. McGarry didn't  
18 say was 'and in addition to  
19 that, Your Honour, I was made  
20 aware verbally some two or  
21 three days or two or three  
22 weeks ago of that  
23 information.' and it was in  
24 that context that I felt that  
25 if counsel are taking the

---

1 opportunity of, in effect,  
2 putting evidence before the  
3 court as an officer of the  
4 court they have, in my  
5 opinion, an obligation to be  
6 candid and to place all of  
7 the information before the  
8 court."

9 Then Mr. Hoffman goes on at page  
10 4805, and continuing into page 4807, with his  
11 disclosure as to the contact that he had. Maybe I  
12 should start at bottom of page 4806. That is, the  
13 contact that he's had with Crown counsel, and he  
14 says at line 26:

15 "As I indicated, I did not  
16 attend the conference but I  
17 did see Mr. Cavanagh from  
18 time to time at the Lord  
19 Elgin Hotel or at meals at  
20 the conference, which I did  
21 attend, and occasionally I  
22 would ask him to obtain  
23 things for me such as  
24 transcripts or a copy of the  
25 indictment, Notices of

---

1 Motion, and so on he would  
2 provide them to me -- Then I  
3 met with Mr. Cavanagh  
4 yesterday morning, yesterday  
5 being Sunday, November 1st,  
6 again in the presence of  
7 Constable Walker, and as with  
8 Mr. McGarry we specifically  
9 agreed to limit out [sic]  
10 discussion to things that  
11 were not anticipated Mr.  
12 Cavanagh would testify about  
13 or Mr. McGarry would testify  
14 about -- Then I met with Mr.  
15 Cavanagh yesterday morning,  
16 yesterday being Sunday,  
17 November 1st, again in the  
18 presence of Constable Walker,  
19 and as with Mr. McGarry we  
20 specifically agreed to limit  
21 our discussion to things that  
22 were not anticipated Mr.  
23 Cavanagh would testify  
24 about --"

25 And the like, and then he goes on

---

1 to indicate what he spoke about with Mr. Cavanagh,  
2 "rulings or evidence, and those matters and also  
3 procedural matters".

4 The third and final issue at line  
5 22 that Mr. Hoffman raises with the court relates  
6 to:

7 "-- the court this morning  
8 relates to who I may discuss  
9 two things with, who I may  
10 discuss the evidence with  
11 that's heard today and,  
12 second, who I may discuss the  
13 case with in, to use a term  
14 that I have seen in the  
15 transcript, in an  
16 administrative or scheduling  
17 way."

18 And he goes on say that he is  
19 there at the request of regional director, Mr.  
20 Pelletier, so he wants to know the permissibility  
21 of contact with him and with Mr. Cavanagh. And at  
22 line 12 he says, page 4808

23 "I raise this, Your Honour,  
24 again out of an abundance of  
25 caution and also when

---

1 reviewing the October 7th  
2 transcript Your Honour  
3 indicated at page 63 of the  
4 transcript I have,  
5 approximately lines 12 to 20,  
6 in talking to Mr. Cavanagh  
7 and this was after some  
8 discussion, if this of any  
9 assistance, about a precis  
10 that Mr. Cavanagh, he used  
11 that word, about talking to  
12 people in the crown's office,  
13 and in any event, at page 63  
14 Your Honour indicated --  
15 "So there should be no  
16 contact with Mr. Berzins of  
17 [sic] Mr. Pelletier except  
18 insofar as their  
19 responsibility as  
20 administrators to find  
21 alternate counsel. That is,  
22 there should be no  
23 communication between present  
24 counsel and Mr. Berzins and  
25 Mr. Pelletier about the

---

1 background of the matter.'"

2 So the court asked Mr. Murphy for  
3 comments on those points. Mr. Murphy at the middle  
4 of page 4809, line 15, says it's unfortunate Mr.  
5 Hoffman has already spoken to Mr. Pelletier and to  
6 Mr. Cavanagh and to Mr. McGarry.

7 And Mr. Murphy says:

8 "-- it is a reasonable  
9 inference that they would  
10 have had to discuss the  
11 evidence because they sound  
12 like they're discussing  
13 matters --"

14 Mr. Murphy then goes on at some  
15 length, and Justice Cosgrove at page 4814 makes a  
16 ruling. And if I can turn to page 4815, line 6:

17 "From that point the court,  
18 as I say, had two additional  
19 requests for a revisiting of  
20 the motion: It was upon late  
21 disclosure and novel and  
22 dramatic disclosure by the  
23 crown in April, and then when  
24 the trial was set to commence  
25 for jury selection in August

---

1 past, there was, of course,  
2 then the disclosure by the  
3 crown of the involvement of  
4 the lead detective inspector  
5 and other officers in actions  
6 involving the Cumberland  
7 trial and -- the RCMP had  
8 been engaged to investigate  
9 potential wrongdoing in this  
10 trial in terms of,  
11 presumably, the investigation  
12 process or the process of the  
13 police to this point."

14 Then over at page 4818 at the  
15 bottom of page 4818 at line 30:

16 "In terms of what  
17 conversations have taken  
18 place to date, that is done.

19 I quite frankly now can't  
20 recall whether advice went  
21 that the witnesses Mr.  
22 McGarry and Mr. Cavanagh  
23 should not be contacted by  
24 Mr. Hoffman. In any event,  
25 the court has the advantage

---

1 at least of knowing that  
2 there has been discussion and  
3 there is a record of that,  
4 and that's been made  
5 available to defence. That,  
6 I understand, was the terms  
7 of reference for the  
8 engagement of Mr. Hoffman. He  
9 was to deal only at this  
10 point with Mr. McGarry and I  
11 don't think I have to comment  
12 any further on that third  
13 point raised by Mr. Hoffman  
14 now, except to say that if  
15 there are further discussions  
16 with Mr. Pelletier they have  
17 to do with the limited  
18 necessities of dealing with  
19 attendance at court,  
20 scheduling and the like."

21 Then if we can turn over to page  
22 6522 on November 23rd, 1998, Mr. Hoffman is still  
23 here. This is page 6522. Mr. Hoffman at the  
24 bottom of the page line 26 says:

25 "Your honour, the last point

---



1 I wish to raise results from  
2 your honour's ruling on  
3 Friday and I met briefly with  
4 Mr. Cavanagh and McGarry on  
5 Friday afternoon just to  
6 outline in a very brief  
7 way --"

8 Over to 6523:

9 "-- what your honour's ruling  
10 was. Constable Walker was  
11 there taking notes of the  
12 meeting and outlined your  
13 honour's ruling that related  
14 to them. Three questions  
15 came up during that meeting  
16 and I indicated to Mr.  
17 McGarry and Mr. Cavanagh that  
18 I would seek the court's  
19 guidance on, and I wish to do  
20 that in any event myself.  
21 "The first is whether when  
22 the transcript of your  
23 honour's ruling is prepared,  
24 whether Mr. McGarry and Mr.  
25 Cavanagh -- and I suppose I

---

1 should add Mr. Pelletier --  
2 can see the transcript of the  
3 ruling and whether they can  
4 see the transcripts that I  
5 have kept since I've been in  
6 court, and they've both been  
7 excluded. That's my first  
8 point of clarification.  
9 "The second I want to ask the  
10 court, is there any limit on  
11 the extent of contact and I  
12 can now have with Mr.  
13 Cavanagh and Mr. McGarry and  
14 Mr. Pelletier, and if there  
15 is, what is it?"  
16 And the third, it goes over 6524  
17 at line 2:  
18 "And so I suppose my question  
19 is, and again I say it may be  
20 answered by the first two  
21 points you dealt with, is  
22 your honour indicating that  
23 they can have no role  
24 whatsoever as in-court  
25 counsel conducting any part

---

1 of the stay motion."

2 And he repeats that question later  
3 on in the page.

4 Mr. Murphy takes the position at  
5 page 6525 at line 10 that these counsel, Mr.  
6 McGarry and Mr. Cavanagh, should in no way, shape  
7 or form have anything to do with the completion of  
8 the stay motion. At the bottom of the page, he  
9 says:

10 "They're in a conflict of the  
11 motion. That's to say  
12 nothing of the other  
13 unresolved issue or the  
14 reserved issues of a bail and  
15 trial."

16 At the top of page 6526, Mr.  
17 Murphy makes the point that he's concerned about is  
18 why the Ministry of the Attorney General seems to  
19 feel they can subvert this process of this voir  
20 dire by making their obvious discomfort and  
21 concerns about the paucity of trial Crowns being  
22 available a priority.

23 And then at line 20 on page 6526,  
24 the court asks this question of Mr. Murphy:

25 "Now, arising out of that and

---

1 working backwards towards the  
2 second question whether Mr.  
3 McGarry or Mr. Cavanagh or  
4 Mr. Pelletier should be  
5 committed to peruse a copy of  
6 the court's ruling--"

7 Mr. Murphy's position is:

8 "Absolutely not, your honour.  
9 The rationale is the same."

10 The discussion of that issue  
11 continues on the next page, and Mr. Hoffman at page  
12 6529 just reiterates that he wants the court's  
13 guidance at the top, and then the court's ruling  
14 starts on the middle of page 6529 and Justice  
15 Cosgrove says:

16 "When I made my ruling on  
17 Friday, I suppose it was in  
18 the context of the conflict  
19 between the witness being  
20 counsel at one and the same  
21 time in the same proceedings  
22 and for the reasons I gave, I  
23 said that I could not insofar  
24 as the continuation of the  
25 application for stay

---

1 proceedings, that Mr. McGarry  
2 and Mr. Cavanagh could not  
3 resume as counsel to make  
4 argument and that they could  
5 not resume as counsel to  
6 represent the Crown in terms  
7 of further witnesses, whether  
8 there were witnesses called  
9 by the defence or witnesses  
10 called by the Crown."

11 At line 10 on page 6530:

12 "I suppose that leaves open  
13 the issues and does invite an  
14 answer to the issues which  
15 Mr. Hoffman has raised,  
16 whether, for example, they  
17 can communicate with Mr.  
18 Hoffman about the court's  
19 decision or whether they can  
20 communicate with Mr. Hoffman  
21 or whoever might be Mr.  
22 Hoffman's replacement,  
23 whether they can communicate  
24 about the motion before the  
25 court.

26

---

1 "In my view, and my order is,  
2 they may not have any  
3 communication whatsoever with  
4 Mr. Hoffman or his successor.  
5 They should not directly or  
6 indirectly have communication  
7 with Mr. Hoffman or his  
8 successor. They may not have  
9 a copy of the court's ruling  
10 of Friday last. They are in  
11 the position of being  
12 witnesses on a live issue  
13 before the Court and in the  
14 context of the law to which  
15 the court made reference, I  
16 agree that potentially the  
17 whole objective of separating  
18 witnesses from counsel could  
19 be undermined by, not an  
20 in-court participation, but  
21 an out-of-court  
22 participation, by preparation  
23 of argument in response, for  
24 example, to this renewed  
25 application by Mr. McGarry or

---

1 Mr. Cavanagh, and then simply  
2 handing it to replacement  
3 counsel to argue. They are  
4 in that process combining  
5 their roles as witness and  
6 counsel, and that is what the  
7 law is intended to prohibit  
8 and was the basis of the  
9 court's decision on Friday  
10 last."

11 Over to page 6532 at the top, the  
12 ruling continues:

13 "What is the sense of the  
14 court order applying that  
15 principle if counsel, rather  
16 than acting as, for example,  
17 a barrister in court, puts on  
18 the robe of assisting counsel  
19 outside the court and simply  
20 briefs the barrister coming  
21 into court to present the  
22 brief prepared, contrary to  
23 the principles which I just  
24 have outlined. So there  
25 should be no communication."

---

1                   Mr. Hoffman then asks at the  
2 middle of the page, asking for an exception to  
3 that. It relates to the evidence of October 5th,  
4 1998 when Detective Superintendent Edgar was  
5 cross-examined by the defence. There was some  
6 discussion about cross-examination, and Mr. Hoffman  
7 refers to the transcript and line 24 of page 6533  
8 says:

9                   "In any event, it goes on--"  
10                  And Mr. Hoffman goes on:  
11                   "-- and it's determined that  
12                   that will be done another  
13                   day. So my question is:  
14                   Would the court consider  
15                   allowing an exception to the  
16                   ruling or comments that you  
17                   just made and allow me to  
18                   simply ask, even by way of --  
19                   I was considering doing it by  
20                   way of written form with a  
21                   copy to Mr. Murphy and the  
22                   response, if there is one  
23                   from Mr. McGarry, also a copy  
24                   to Mr. Murphy, just asking  
25                   Mr. McGarry what he meant by

---



1 'I will require the statement  
2 exhibits', and in what area  
3 he was considering asking  
4 further questions on, because  
5 I must say I'm not certain  
6 what he was considering. So  
7 that's my request."

8 And the court asks for a comment  
9 by Mr. Murphy who says:

10 "I don't have a problem with  
11 that."

12 And Justice Cosgrove makes a  
13 ruling on it at page 6535, and he says this:

14 "Defence counsel sees no  
15 reason to object to the  
16 request. Had he objected, I  
17 would not have granted the  
18 request.

19 "The reason I would not grant  
20 the request is, quite  
21 frankly, in principle I see  
22 no difference between this  
23 particular problem and all  
24 other challenges which are  
25 now downloaded on a

---

1 replacement counsel. And the  
2 reason I say that is that the  
3 Crown was invited months and  
4 months ago to have counsel  
5 who could continue in this  
6 case in order to avoid this  
7 very problem. But, in view  
8 of the fact that defence  
9 counsel does not object to  
10 it, the court will not object  
11 to the procedure that Mr.  
12 Hoffman has requested."

13 And then on page 6536, the  
14 discussion continues and Mr. Hoffman says at about  
15 line 11, after referring to the ruling dealing with  
16 Cavanagh and McGarry on the previous Friday, he  
17 says:

18 "I intend, absent any comment  
19 to the contrary, to similarly  
20 inform Mr. McGarry and Mr.  
21 Cavanagh of the highlight of  
22 the court's ruling in terms  
23 of what -- the highlights of  
24 the court's comments today in  
25 response to my questions so

---

1                   they can be aware, since they  
2                   are subject to the ruling  
3                   Friday and today, they can be  
4                   aware of what the court's  
5                   ruling or direction is."

6                   Justice Cosgrove calls on Mr.  
7                   Murphy, and Mr. Murphy says at the bottom of the  
8                   page, 6536:

9                   "I really don't have any  
10                  other response, because your  
11                  honour has made your ruling  
12                  very clear; non-communication  
13                  is the order, and I think Mr.  
14                  Hoffman should just conduct  
15                  himself accordingly and not  
16                  seek a further  
17                  clarification."

18                  Justice Cosgrove at the top of the  
19                  page 6537 says:

20                  "Mr. Hoffman, I understand  
21                  the question in conversation  
22                  with Mr. McGarry and Mr.  
23                  Cavanagh, the three issues  
24                  you posed were raised and  
25                  discussed and I have no

---

1 objection that you report  
2 back to them that the answer  
3 to all three questions is no.  
4 No contact. No  
5 communication. I have no  
6 problem with that, with the  
7 exception of the one we have  
8 just talked about."

9 The three questions refers to the  
10 three that Mr. Hoffman raised at the beginning of  
11 the discussion.

12 The next pages in this tab relate  
13 to the December 23rd matters that I have already  
14 referred the panel to, so I won't do that again.  
15 That's when Mr. Hoffman and Mr. Humphrey showed up.

16 MR. PALIARE: Mr. Strosberg.

17 MR. CHERNIAK: I am sorry, I beg  
18 your pardon. It is hard to forget Mr. Strosberg.

19 MR. PALIARE: I was listening to  
20 Mr. Cherniak talk about how Mr. Strosberg has this  
21 reputation in Ontario and across the country as  
22 being such a fabulous lawyer, and he is. I'm a big  
23 fan of Harvey Strosberg.

24 If you look at line 7, Mr. Hoffman  
25 introduces this eminent counsel as Harry Strosberg.

---

1 So he somehow hadn't heard of --

2 MR. CHERNIAK: Perhaps, in  
3 fairness, it could have been the reporter. The  
4 reporters occasionally make a mistake, not our  
5 reporters, of course.

6 HON. WACHOWICH: Tell Mr.  
7 Strosberg that Chief Justice Wachowich never heard  
8 of him either.

9 MR. CHERNIAK: If Chief Justice  
10 Wachowich never heard of him, he doesn't exist in  
11 Alberta.

12 I would ask the panel to bypass  
13 that group, because it is already there, and turn  
14 to March 1st, 1999 at page 7811. Mr. Humphrey, in  
15 the middle at line 12, is introducing Sheila Walsh,  
16 a Crown attorney from the Belleville Crown's  
17 office, who will be eventually -- is to eventually  
18 be the counsel on the trial, proper, In the event  
19 that Your Honour", Mr. Humphrey says:

20 "-- declines to grant a stay  
21 and there is in fact a trial  
22 proper on this matter."

23 "She has asked me", says Mr.  
24 Humphrey:

25 "-- to ask of Your Honour

---

1                   whether she is entitled to  
2                   communicate with the two  
3                   previous Crowns, Mr. McGarry  
4                   and Mr. Cavanagh. So I raise  
5                   that issue with Your Honour.

6                   It's my respectful  
7                   submission to Your Honour  
8                   that there is no reason why  
9                   she, as new Crown for the  
10                  trial proper, could not  
11                  communicate with either Mr.  
12                  McGarry or Mr. Cavanagh."

13                 And going to down line 9:

14                  "Ms. Walsh will be  
15                  representing the Crown not on  
16                  the motion, but rather on the  
17                  trial proper and, in my  
18                  respectful submission, that  
19                  concern simply does not apply  
20                  to her proposed involvement  
21                  in the case --"

22                 At line 22:

23                  "And all she is asking  
24                  through me, is that she have  
25                  the opportunity, as

---

1 necessary, to speak with  
2 Crowns McGarry and Cavanagh."  
3 "Do I take it then, that  
4 there has been a decision by  
5 the Crown that Mr. Cavanagh  
6 and Mr. McGarry are not  
7 asking to be Crown at trial?"

8 You may remember that was a matter  
9 that was left open.

10 Mr. Humphrey says:

11 "No, that's not my  
12 understanding. My  
13 understanding is that she  
14 will be coming in as the new  
15 lead Crown on the case. My  
16 understanding is that she  
17 might well ask Your Honour to  
18 allow Mr. Cavanagh to assist  
19 her in the prosecution of the  
20 case. As I understand it,  
21 Mr. McGarry will have no  
22 further involvement as a  
23 trial Crown, but Ms. Walsh  
24 will be requesting of Your  
25 Honour that Mr. Cavanagh be

---

1                   permitted to continue with  
2                   the prosecution as co-counsel  
3                   with her."

4                   The court asks for Mr. Murphy's  
5 submission, and Mr. Murphy says at the middle of  
6 the page 7814:

7                   "I don't think there should  
8                   be any communication with Mr.  
9                   McGarry and Mr. Cavanagh  
10                  until this whole issue -- the  
11                  whole stay thing has been  
12                  sorted out --"

13                  And he goes on at some length with  
14 his submissions on that point, and he says  
15 ultimately that he would like to respond to that at  
16 a later day, on Monday. That's at about line 20,  
17 on page 7815, and the court says at the bottom of  
18 page 7815 and the top of page 7816, about line 12,  
19 that:

20                  "And the court has already  
21                  made a ruling which I think  
22                  probably binds the court. I  
23                  need some time to go back and  
24                  look at that ruling."

25                  The court says, the next page,

---



1 that he will reserve the matter until Friday at 2  
2 o'clock.

3 If one turns to page 7820 on  
4 Friday, March 5th, 1999, the matter did resume, and  
5 Mr. Humphrey says at line 25:

6 "The second matter, if I may  
7 continue, your honour had  
8 quite helpfully indicated  
9 that an offer had been made  
10 in relation to a further  
11 pretrial."

12 And Mr. Humphrey says:

13 "I indicated that clearly I  
14 was, but that Sheila Walsh  
15 would have the ultimate say  
16 with respect to how the trial  
17 proper would go."

18 And then Mr. Humphrey on the next  
19 page refers to the question of the court's  
20 permission -- this is about line 8 -- to speak to  
21 Mr. McGarry and Mr. Flanagan in light of the fact  
22 they have been the two senior Crowns and had  
23 carriage of the prosecutions. And Mr. Humphrey  
24 points out that it would be for the purposes of  
25 instructing her so she could meaningfully take part

---

1 in the pretrial.

2 Mr. Justice Cosgrove says at the  
3 bottom of the page:

4 "If counsel are in agreement,  
5 then, to the extent you have  
6 indicated for the purpose of  
7 the discussion, Mr. Humphrey,  
8 I have no problem and I would  
9 order that."

10 So there was an agreement  
11 apparently on communication for the purposes of the  
12 pretrial.

13 The next extract that I wish to  
14 refer to is April 29th, 1999, and we are in Ottawa  
15 now. Mr. Murphy wants some time, as he points out  
16 on page 8962, with respect to what the issue was on  
17 that day. The court says on the next page, 8963,  
18 about line 12:

19 "Your preference would be  
20 that we not proceed today or  
21 tomorrow?"

22 Mr. Murphy says "Yes, sir." Mr.  
23 Humphrey indicates he's a little bit lost and notes  
24 that there was an adjournment to today's date, and  
25 Mr. Humphrey says at line 20 on page 8964:

---

1 "Well, in my respectful  
2 submission, there has to be  
3 some regularity to the  
4 proceedings and regularity  
5 requires that before argument  
6 commence, the evidence be  
7 completed."

8 Justice Cosgrove says:

9 "Well, you're on very thin  
10 ice, Mr. Humphrey, talking  
11 about regularity representing  
12 the Crown on this case. The  
13 court has on numerous  
14 occasions invited the Crown  
15 to adopt a regular procedure  
16 in terms of counsel appearing  
17 before this court, all  
18 without any success."

19 Mr. Humphrey responds by saying at  
20 page 8965 at about line 8 that it is unproductive  
21 to launch into days of argument and have the  
22 evidence resumed at some further point.

23 If I could return to page 9030 on  
24 June 21st, 1999, at line 12 Mr. Humphrey says:

25 "Your Honour, could I briefly

---

1 speak to one issue? -- You  
2 may have noticed that Ms.  
3 Walsh is in attendance,  
4 albeit ungowned, and I wish  
5 to briefly speak to the issue  
6 of the constraints on Ms.  
7 Walsh as counsel who has  
8 assumed carriage of the  
9 prosecution for the Crown on  
10 communicating with the  
11 previous Crowns on the case;  
12 that is, Messrs. Flanagan,  
13 Findlay and McGarry and  
14 Cavanagh.  
15 "Your Honour appreciates that  
16 there has been some  
17 discussion about that  
18 restriction on communication  
19 in relation to its impact on  
20 any further pretrial  
21 discussions that may take  
22 place. I have spoken with  
23 Ms. Walsh and Mr. Murphy and  
24 Mr. Meleras --"  
25 Murphy and Meleras are the

---



1 the court the Crown's written  
2 responses were replete with  
3 factual errors, clearly  
4 demonstrating that the new  
5 Crowns did not know the  
6 material facts of this case."

7 Then he refers to some matters  
8 that show that, in his view, the Crowns did not  
9 have sufficient knowledge of the proceeding. He  
10 concludes on the top of page 9776:

11 "One would have seen that it  
12 is clearly and seriously  
13 inaccurate and wrong, and  
14 appallingly so, on the part  
15 of the Crowns."

16 The court says:

17 "What is the connection  
18 between your argued point  
19 that the Crown doesn't know  
20 the case, the remedy sought  
21 or the allegation of  
22 prejudice to a fair trial?  
23 It seems to me that probably  
24 the inability of the Crown to  
25 know its case is to the

---



1 required in court next  
2 week.'"  
3 "He" being, I believe, Officer  
4 MacCharles:  
5 "-- 'call him Monday, may —  
6 maybe have a definite time.  
7 Bring all notes.' Then can  
8 you read what it says?  
9 "Answer: 'Leo advised he has  
10 no notes. He kept them  
11 electronically on computer,  
12 it crashed and he lost them  
13 all.'  
14 "Question: It says, 'all  
15 lost'.  
16 "Answer: That's what he told  
17 me.  
18 "Question: Now, sir, with  
19 the greatest of respect,  
20 maybe you haven't got the  
21 benefit of having been here  
22 for these proceedings and  
23 similar fact type of things,  
24 isn't this kind of a  
25 variation -- a police

---



1 officer's variation of the  
2 old 'the dog ate my homework'  
3 excuse that kids give to  
4 their parents or to their  
5 teachers?'"

6 Mr. Cavanagh objects to that. He  
7 says about line 20:

8 "-- seems to ask this officer  
9 to comment on something  
10 another officer has said and,  
11 in my respectful submission,  
12 again, it asks the officer to  
13 speculate: 'Is this a version  
14 of this or that?' If he  
15 knows something -- was he  
16 there when it crashed? Does  
17 he know about the crash?  
18 That kind of thing, I agree,  
19 that's proper, but otherwise  
20 we're into hearsay--  
21 "The Court: Well, I am glad  
22 you have made it a respectful  
23 submission, because my  
24 respectful answer is that  
25 your interruption is nothing

---

1 but an interruption and  
2 designed to interrupt the  
3 cross-examination. It has no  
4 merit, whatsoever. I would  
5 ask you to think carefully  
6 about your next interruption,  
7 Mr. Cavanagh. Please sit  
8 down."

9 Mr. Cavanagh says:  
10 "Your Honour, it is not my  
11 design to interrupt--  
12 "The Court: Please sit down,  
13 counsel."

14 And the cross-examination on that  
15 point proceeds.

16 Then on October 19th, 1998,  
17 Detective Constable Ball is in the witness box  
18 being cross-examined by Mr. Murphy, and Mr. Murphy  
19 asks him at line 13:

20 "Are you aware, sir, that  
21 Detective Inspector  
22 MacCharles is currently in a  
23 great deal of trouble, to put  
24 it lightly, considering the  
25 directions and instructions

---

1 he gave to junior officers in  
2 another case?"

3 The witness says:

4 "Are you talking about Toy?"

5 And Toy means the Toy/Cumberland  
6 case.

7 "Question: Yeah. I'll show  
8 you--

9 "Answer: Okay. Well, let's  
10 see the whole thing before we  
11 start talking about Toy."

12 Mr. Murphy then offers the witness  
13 a picture. Mr. Cavanagh objects. The witness  
14 says, "I don't want to see the picture." Mr.  
15 Murphy says, "I'm showing you a picture."

16 Mr. Cavanagh says:

17 "I wonder if I can make the  
18 objection --":

19 "The Court: Mr. Cavanagh.

20 "Mr. Murphy: Just for the  
21 record, Mr. Ball has thrown  
22 the newspaper on the ground,  
23 Your Honour, and that should  
24 be on the record, as far as  
25 his demeanour, before my

---

1 friend proceeds with his  
2 objection.

3 "Mr. Cavanagh: Thank you.  
4 My friend is approaching a  
5 witness in the stand with a  
6 newspaper report of what's  
7 going on in another courtroom  
8 and purporting to ask  
9 questions about the newspaper  
10 report."

11 The witness is excluded. Mr.

12 Murphy says:

13 "For the record, Your Honour,  
14 the witness has picked up the  
15 newspaper that he just threw  
16 on the floor and he's now  
17 looking back and about to  
18 speak but he's turned around  
19 and left now."

20 Mr. Cavanagh continues after the  
21 witness is excused:

22 "Thank you, Your Honour. It  
23 seems to me in the last ten  
24 minutes the whole -- what is  
25 supposed to be cross-

---

1 examination has deteriorated  
2 to argument, questioning  
3 which is going nowhere and  
4 spinning its wheels. My  
5 friend on the point on which  
6 I've risen, is approaching a  
7 witness with a newspaper,  
8 purporting to ask questions  
9 about newspaper reporting  
10 about something.

11 "The Court: What's wrong  
12 with that?

13 "Mr. Cavanagh: Well, in my  
14 respectful submission, we  
15 don't approach witnesses and  
16 ask them their opinion of  
17 newspaper reporting. I know  
18 that the newspaper -- I've  
19 heard, in any event, that the  
20 newspaper reporters have made  
21 mistakes in that courtroom --

22 This witness comes to the  
23 court to testify as to what  
24 he has knowledge of, not to  
25 have his opinion solicited

---

1 about, in my respectful  
2 submission, the quality of  
3 reporting, or the stories  
4 that are being reported in  
5 the newspaper. If he knows  
6 something about it, my friend  
7 can ask him his knowledge,  
8 and if it's relevant, the  
9 court can hear more about it,  
10 but to start reading  
11 newspaper accounts to him  
12 seems to me to be highly  
13 improper."

14 "The Court: I suppose  
15 eventually we might learn  
16 what the officer knows about  
17 it, if the Crown doesn't keep  
18 interrupting without any  
19 justification.

20 "Proper cross-examination is  
21 to produce material and to  
22 inquire whether a witness  
23 knows anything about it.  
24 There's nothing more or less  
25 than that that has been

---

1 offered to this witness.

2 "Mr. Cavanagh: Thank you,

3 Your Honour."

4 Justice Cosgrove:

5 "Mr. Cavanagh, your argument

6 is totally without foundation

7 and totally erroneous and one

8 that is so blatantly without

9 merit, I wonder why you

10 rise--

11 "Mr. Cavanagh: I rise, Your

12 Honour, because he's

13 approaching him--

14 "The Court: That's

15 rhetorical. Please sit down,

16 Mr. Cavanagh.

17 "Mr. Cavanagh: Well, Your

18 Honour --"

19 The court cuts him off. On page

20 4050:

21 "The court: You're abusing

22 the court, Mr. Cavanagh.

23 Please sit down.

24 "Mr. Cavanagh: I'm not

25 abusing the court, Your

---

1 Honour, but you said that I  
2 keep rising--

3 "The Court: I have ruled  
4 that you are abusing the  
5 court, Mr. Cavanagh. Please  
6 sit down.

7 "Mr. Cavanagh: I have risen  
8 once this afternoon."

9 And the witness returns and he is  
10 cross-examined on the newspaper report, and the  
11 witness indicates why he didn't want to look at the  
12 newspaper, a picture of Lyle MacCharles. "I know  
13 what he looks like, I've known him for a number of  
14 years", he says.

15 Then the question goes on, and on  
16 page 4052 the question is at line 9:

17 "Have you read his August  
18 11th statement concerning the  
19 gun incident in Project Toy?

20 "Answer: No. No, I have  
21 not, sir.

22 "Question: Could I have that  
23 exhibit, please."

24 Mr. Cavanagh says:

25 "Well, objection. If he

---



1                   hasn't read it, Your Honour,  
2                   are we going to present this  
3                   officer with all the evidence  
4                   against Mr. MacCharles and  
5                   ask him his opinion?  
6                   "The Court: Yes. Please sit  
7                   down, Mr. Cavanagh. That's  
8                   exactly what we are going to  
9                   do. Counsel is going to  
10                  produce a document in the  
11                  context of the questions  
12                  which have been asked and the  
13                  answer which has just been  
14                  given by the officer and give  
15                  him an opportunity of reading  
16                  a statement by the officer  
17                  whom he obviously holds in  
18                  high regard."

19                                 And then he goes on. I now get to  
20                  the first, particular 1, which deals with Crown  
21                  Ramsay at an earlier occasion, February 26th, 1998.

22                  And on page 6750, Officer Ball was being  
23                  cross-examined on the voir dire which he started  
24                  some days before that, and he's asked at the bottom  
25                  of page 6751 why he was at the -- I think it was

---

1 the Crown's office in Brockville on February 19th.  
2 That's at the bottom of page 6751.

3 And there is a question of a  
4 discussion with a stenographer by the name of Joan  
5 Davies at page 6752, and the discussion goes on  
6 that it is with regard to a computer disk with  
7 regard to statements.

8 At page 6754, just to get the  
9 context, after Mr. Ramsay's objection, at line 15,  
10 the question is:

11 "Mr. Flanagan told you to  
12 bring in the diskette; is  
13 that correct?

14 "Answer: Yes.

15 "Question: When did he tell  
16 you that?

17 "Answer: I'm not sure."

18 And the witness says, "I am not  
19 sure."

20 There is a discussion on page 6755  
21 about the fact that he has been excluded from  
22 giving evidence, which means that he hasn't heard  
23 the evidence of this clerk, Joan Davies.

24 There is a discussion about  
25 whether the witness knows whether he chose to

---

1 exclude himself or whether he was excluded by the  
2 court, and that discussion goes on for a couple of  
3 pages.

4 At page 6759, the witness says  
5 that he was told not discuss his evidence with any  
6 persons at about lines 9 and 10. On line 11:

7 "The very next day in the  
8 Crown's office, you were  
9 giving a diskette with  
10 witness statements arising  
11 from the voir dire from which  
12 you were excluded, you're  
13 giving a diskette of witness  
14 statements to Ms. Davies,  
15 correct?

16 "Answer: Yes.

17 "Question: How did you know  
18 to do that?

19 "Answer: I was told to look  
20 for a statement in a  
21 particular file by Mr.  
22 Flanagan.

23 "Question: What else did he  
24 tell you?

25 "Answer: That's it. That's

---

1 all I knew."

2 "Which ones?", at the bottom of  
3 the page:

4 "He was interested in the  
5 file relating to Constable  
6 Laderoute, the file with  
7 statements."

8 Then at the middle of page 6760:

9 "Question: When he came to  
10 the Crown's office, had you  
11 talked to anybody prior to  
12 coming back the following  
13 morning after being excluded?

14 Did you talk, for example,  
15 to Detective Sergeant Cook?

16 "Answer: No, I have not."

17 And then Mr. Murphy says at about  
18 line 23:

19 "Because the evidence, sir,  
20 that we've heard from Ms.  
21 Davis is that you, at one  
22 point after coming -- that  
23 you basically approached her,  
24 handed her the diskette, and  
25 then subsequently she heard

---

1                   you giving directions to  
2                   somebody on the computer as  
3                   to where the location of the  
4                   statements were.

5                   "Answer: Is the question me  
6                   giving directions on the  
7                   computer?

8                   "Question: You were telling  
9                   someone in the Crown's office  
10                  words to the effect that,  
11                  'Those two statements are on  
12                  that diskette'. That was her  
13                  evidence under oath."

14                 The witness says, "It wasn't me".

15                 "Question: It wasn't you?

16                 "Answer: Not when it comes  
17                 to computers. As far as  
18                 what's on that diskette,  
19                 maybe she knows. I don't."

20                 And the witness says at the middle  
21 of the page:

22                   "I can't recall any  
23                   conversation with her,  
24                   certainly not a conversation  
25                   with her."

---

1                   And the cross-examination goes on  
2 on that point for some time. At the top page of  
3 6762, the witness says:

4                   "Well, I don't know the  
5 circumstances, and in fact I  
6 don't know whether she heard  
7 a voice in another room  
8 perhaps talking about it. I  
9 certainly didn't say that."

10                   In the middle of the page, the  
11 witness says again:

12                   "I don't recall saying that."

13                   Maybe I'll read the whole question  
14 at line 12:

15                   "Question: So your evidence  
16 under oath is that you  
17 certainly didn't say anything  
18 to anyone with respect to the  
19 effect -- the words to the  
20 effect that the two  
21 statements being sought or  
22 statements being sought were  
23 actually on that diskette?

24                   "Answer: I don't recall  
25 saying that. No, I don't.

---

1 "Question: And your evidence  
2 is that she's mistaken about  
3 that?

4 "Answer: Well, obviously.

5 "Question: Why is it  
6 obvious?

7 "Answer: Because I don't  
8 recall."

9 Mr. Ramsay interjects:

10 "Because he just said it,  
11 your honour. With respect,  
12 this is going beyond  
13 cross-examination. The  
14 question is repetitive.  
15 Therefore the answer is  
16 repetitive. And if every  
17 time the witness uses the  
18 word 'obviously' we're going  
19 to get into another  
20 irrelevant line of inquiry,  
21 the voir dire will not be  
22 able to be conducted in good  
23 order. So, I object to that  
24 question.

25 "The Court: The objection is

---

1                   overruled. The main issue in  
2                   this voir dire is  
3                   credibility. I find nothing  
4                   objectionable about the  
5                   question. Please go ahead."

6                   The witness is then cross-examined  
7                   again, and he repeats over the next few pages that  
8                   he does not recall saying it. For instance, line  
9                   19 on page 6764, the question is:

10                   "Question: 'I don't recall  
11                   saying it' means that it's  
12                   possible that you did say it.

13                   "Answer: No.

14                   "Question. Right.

15                   "Answer: No, because I  
16                   didn't say it.

17                   "Question: Well, how can--

18                   "Answer: I don't -- I don't  
19                   recall. I don't recall any  
20                   conversation like that.

21                   Perhaps I should have said  
22                   that."

23                   The cross-examination goes on, and  
24                   then at the top of page 6766, line 6:

25                   "Question: And, sir, her

---



1 evidence is that you then  
2 went out to indicate verbally  
3 to somebody that the  
4 statements being sought, the  
5 Laderoute statements, were  
6 contained on that diskette.  
7 That's her evidence under  
8 oath.

9 "Answer: That's fine.  
10 That's her evidence. My  
11 evidence is I never said  
12 that. I gave her a  
13 diskette."

14 Then the cross-examination of Mr.  
15 Murphy continues, and the witness is asked at the  
16 bottom of 6773 -- the issue is about Ms. Davies  
17 being at court, and the witness says the issue -- I  
18 suppose I should refer to the middle of 6763.

19 This is a question about the  
20 attendance of Ms. Davies, I believe, at court, and  
21 the witness says at line 24:

22 "Yes, I do now that you tell  
23 me. The phone call was  
24 placed to Perth Detachment  
25 and I told her -- I was

---

1 instructed that she would be  
2 called as a witness; I called  
3 her and told her she'd  
4 probably have to appear as a  
5 witness.

6 "Question: Sir, are you  
7 lying under oath here today?

8 "Answer: No, I'm not.

9 "Question: How is it -- then  
10 I ask you how is it you know  
11 to come -- that you knew Ms.  
12 Davies was coming, you come  
13 up with some story, 'I knew  
14 this, I knew this.'?"

15 And the question goes on. In the  
16 middle of the page, line 17:

17 "Question: How did you know  
18 to phone her? Why did you  
19 phone her?

20 "Answer: That she would  
21 probably be called as a  
22 witness.

23 "Question: How did you know  
24 that?

25 "Answer: I'm not sure how I

---

1 knew that.

2 "Question: Sir, are you  
3 lying about this today?

4 "Answer: No, I'm not.

5 "Question: Under oath.  
6 We're talking about something  
7 that happened two weeks ago,  
8 on the biggest case,  
9 probably, that you've ever  
10 been involved in. Right?"

11 And there is a discussion about  
12 whether this is or is not the biggest case he's  
13 involved in. He's attempted to be cross-examined  
14 about an ongoing case that he says might be bigger,  
15 and the court at page 6776 says at about line 12:

16 "That's enough of that area  
17 of cross-examination."

18 Over to page 6778, Mr. Ball is  
19 still being cross-examined at line 9:

20 "Question: Sir, why are you  
21 making contact with a witness  
22 on a voir dire when you're  
23 expressly told not to do  
24 that?

25 "Answer: I was told not to

---

1 discuss any evidence. I  
2 called the witness and simply  
3 told her she may appear as a  
4 witness, not to worry about  
5 it, to go to tell the truth.

6 I approached her in the  
7 Crown's office when she  
8 arrived with Sergeant Cook, I  
9 believe, and gave her a  
10 diskette.

11 "Question: Why?

12 "Answer: Because we were  
13 looking for a statement.

14 "Question: A statement  
15 pertaining to Ron Laderoute,  
16 right?

17 "Answer: Yes, that's my  
18 understanding."

19 This matter continues to be  
20 pursued on page 6779 at line 19:

21 "Question: How did you know  
22 she was going to be called?

23 "Answer: Because she had the  
24 diskettes. She was the  
25 person that was responsible

---

1 and we were looking for  
2 Laderoute's statement, which  
3 I assumed were on diskettes.  
4 "Question: How did you know  
5 we were looking for  
6 Laderoute's statement if you  
7 were excused?  
8 "Answer: I was told by the  
9 Crown attorney to look for  
10 Laderoute's file.  
11 "Question: While you were  
12 excluded?  
13 "Answer: I don't know. Yes,  
14 I guess that would be  
15 -- that's correct. Probably  
16 in the initial stages when he  
17 was giving his evidence.  
18 "Question: Sir, you talked  
19 to her about her giving  
20 evidence, right?  
21 "Answer: Didn't talk about  
22 giving evidence."  
23 Then in the middle of the page:  
24 "Question: The very next  
25 morning you walk up to her

---

1 without any prompting and you  
2 hand her a diskette on the  
3 very issue that we're having  
4 a voir dire about?

5 "Answer: So what's that  
6 saying? I talked to her.

7 "Question: You tell me."

8 The witness continues that:

9 "She may be called here to  
10 give evidence, don't worry go  
11 before the court, tell the  
12 truth. The next morning I  
13 walked up and handed her a  
14 diskette.

15 "Question: And then  
16 according to her you're  
17 pointing out to somebody and  
18 indicating somebody there's  
19 another statement on that  
20 diskette. You're directing  
21 traffic, basically.

22 "Answer: According to her.

23 "Question: So she's lying  
24 then?"

25 "Mr. Ramsay: No, I object,

---

1                   your honour. That's not a  
2                   proper question. It is not  
3                   within the competence of one  
4                   witness to comment on whether  
5                   another witness is lying."  
6                   "The Court: That's a  
7                   frivolous objection, counsel,  
8                   if I've ever heard one.  
9                   Please go ahead. You are  
10                  interrupting the  
11                  cross-examination, and if you  
12                  continue in this fashion, I  
13                  will have to instruct you not  
14                  to interrupt at all. Please  
15                  be more judicious in your  
16                  interruptions."

17                  That concludes that aspect of the  
18                  particular.

19                  Then we go to the second  
20                  sub-particular dealing with certain notes.

21                  THE CHAIR: 2G(ii)?

22                  MR. CHERNIAK: Yes, I'm in 2G(ii),  
23                  little "ii", and this is March 23rd, 1998, page  
24                  8738. Constable Denis is being cross-examined on  
25                  the voir dire, and remember there was an issue of

---

1 whether there was or was not some carpeting in the  
2 Foster vehicle. Mr. Murphy is cross-examining him.

3 Mr. Denis, at page 8739 he is  
4 asked if he has his notebook with him, sir. He  
5 says:

6 "No, I didn't I didn't really  
7 take any notes that night.  
8 It was just an accident. Ms.  
9 Elliott driving the car had  
10 been in an accident. I've  
11 got a copy of the accident  
12 report, the top sheet, which  
13 I took that night."

14 And there's a discussion about the  
15 notes. The court advises that:

16 "We'll adjourn the  
17 application so that Mr. Denis  
18 can bring his notebooks."

19 Mr. Ramsay says:

20 "He hasn't brought his  
21 notebook in which he didn't  
22 make notes."

23 And there is a discussion about  
24 that, and the court says on page 8741 that:

25 "The court has told the Crown

---



1                   that officers coming here  
2                   should bring their notes."

3                   And the officer is told to bring  
4 his notes and the subpoena. Mr. Murphy points out  
5 that the -- there is a discussion about the notes.  
6                   There is an adjournment until the afternoon.

7                   The witness says at page 8744 at  
8 the bottom that indeed he does have some notes.  
9 And Mr. Murphy's question is:

10                   "Why would you tell us this  
11 morning under oath that you  
12 didn't?

13                   "Answer: I thought I did. I  
14 had checked and thought I'd  
15 gone over all the places  
16 where the notes would be and  
17 I didn't see any."

18                   And he says that was in September  
19 of 1995. Then at the bottom of page 8745, Mr.  
20 Murphy says:

21                   "Can I see your notebook  
22 entry, please, for August of  
23 1995, the 18th?"

24                   Mr. Murphy says:

25                   "I'm just going to look at

---



1                   And it does. Then later on that  
2 day, March 23rd, 1998, at page 8793, about line 13,  
3 Mr. Murphy says line 15:

4                   "One second, please, your  
5 honour. Could we take the  
6 afternoon break now?"

7                   The court says:

8                   "Yes. I'm going to take a  
9 break, but I also want Mr.  
10 Ramsay to have an opportunity  
11 to look at the notes. If you  
12 want to take the opportunity,  
13 if no one else is looking at  
14 them, you can take a look at  
15 them now."

16                   Then we are back to the trial.  
17 This is particular 3 that deals with the -- and the  
18 burden of number 3 is that there was an objection  
19 by defence counsel that Crown Cavanagh  
20 misrepresented certain facts in submission, and  
21 Justice Cosgrove, the particular goes on to say  
22 aligned himself with defence counsel saying we have  
23 a distinct problem and that counsel was  
24 misinformed, and that a further review of the  
25 evidence will be humbling for Mr. Cavanagh.

---

1                   What this tab shows is that the  
2 evidence was indeed as Mr. Cavanagh had said. I  
3 will try to deal with this in sequence. We are on  
4 November 12th, 1997. I want to get the right  
5 reference here.

6                   I think what would be useful is if  
7 I went to what the court said at the end, what the  
8 exchange was at the end of this evidence, and then  
9 I will come back to the actual evidence on the  
10 point. So I would like the panel to turn to page  
11 1146, which is near the end of this tab 2, or three  
12 pages from end of this sub-tab.

13                   THE CHAIR: Just so I can try and  
14 follow this, Mr. Cherniak, the first page at tab  
15 2D(iii) is November 12th, 1997?

16                   MR. CHERNIAK: Yes.

17                   THE CHAIR: And you are now  
18 directing us to submissions of Mr. Cavanagh on May  
19 20th --

20                   MR. CHERNIAK: I am, but it  
21 relates to the evidence that goes before this  
22 point, and the evidence is on a variety of dates.  
23 If I can start at the bottom of page 1145, this  
24 deals with the issue of the phone calls to Mr.  
25 Foster's residence in the weeks or months prior to

---

1 the homicide, and at the bottom at about line 19 on  
2 page 1145, Mr. Cavanagh is arguing -- this is on  
3 May 20th, 1998.

4 "If I can move on, please, to  
5 next allegation, which is at  
6 page 65 of the Crown factum,  
7 which is that the police  
8 failed to adequately  
9 investigate the source of a  
10 threatening phone call made  
11 to Mr. Foster June 21st,  
12 1995. This is an application  
13 that was made at paragraphs  
14 14 and 15 of the renewed  
15 notice of application, and  
16 the pertinent facts we have  
17 them are that Mr. Foster made  
18 a complaint of an unwanted  
19 call on June 21st, 1995 at  
20 3:54 a.m., and my friend, Mr.  
21 Murphy -- my friend is about  
22 to misstate the evidence. I  
23 have read his factum and I  
24 put the court on notice this  
25 is unacceptable. The whole

---

1 thrust is --"

2 It says it is not unwanted. The  
3 defence put that spin on it. And Mr. Murphy claims  
4 that the Crowns don't know the facts of the case  
5 and have no right to stand in front of this court  
6 and tell the court things that are simply not true.

7 Mr. Cavanagh is called on. Mr.  
8 Cavanagh says:

9 "Again, as I say, the  
10 complaint was made of an  
11 unwanted call, I believe --  
12 "The Court: No, I would  
13 appreciate you responding to  
14 the objection."

15 Mr. Cavanagh says:

16 "I'm sorry that you misstate  
17 the evidence, as described as  
18 spinning, as described as  
19 unwanted."

20 Mr. Cavanagh says:

21 "Well, in my respectful  
22 submission I don't, because  
23 that was what my friend read  
24 in, as I recall it, in Mr.  
25 Constable Kemp's notes that

---

1 he responded to an unwanted  
2 phone call.

3 "The Court: If it is the  
4 description of the phone call  
5 as unwanted is the basis for  
6 the Crown's argument on this,  
7 you might as well go to  
8 another area of your  
9 argument, because in my  
10 opinion you totally  
11 misunderstand and  
12 misrepresent the facts as the  
13 description of this call on  
14 the evidence at this trial."

15 "Thank you, Your Honour", Mr.

16 Cavanagh says:

17 "I would like to make further  
18 submissions. The incident  
19 report became Exhibit P on  
20 the voir dire before your  
21 honour and was, of course,  
22 one of the pieces of evidence  
23 which the court will refer to  
24 with regard to telephone  
25 calls. And what that says is

---

1                   that at 3:54 a.m. on 21st of  
2                   June 1995, Mr. Foster would  
3                   like to speak to an officer  
4                   with respect to a problem  
5                   with phone calls which  
6                   occurred approximately at  
7                   2:30 a.m. Howard and Kemp  
8                   attended the Foster  
9                   residence. Foster advised  
10                  that he had a number of  
11                  operations in the past, and a  
12                  few months ago started  
13                  getting phone calls at all  
14                  times of day. A few nights  
15                  ago, he started getting phone  
16                  calls between 2:15 and 2:45.  
17                  Nothing is said. Did push  
18                  star 69. The operator  
19                  advised that the last number,  
20                  613-247-6009, so called this  
21                  number and got a recording  
22                  advising that the number was  
23                  not in service."  
24                                 This is all from the officer's  
25 notes, I believe:

---



1                    "'Foster said he did not know  
2                    this number. Foster went on  
3                    about problems with  
4                    neighbours that occurred two  
5                    or three years ago and had  
6                    nothing to do with calls.  
7                    Foster was advised that be  
8                    passed on to Kemptville  
9                    KPD --"

10                    He means Kemptville police  
11                    department. And about line 8, on page 1148, Mr.  
12                    Cavanagh goes on:

13                    "That is the report generated  
14                    by the officer who actually  
15                    attended at the scene. He  
16                    said that is his information  
17                    from Mr. Foster that nothing  
18                    is said in the course of  
19                    these phone calls. The  
20                    trace, as your honour has  
21                    heard in most recent  
22                    evidence, was successfully  
23                    completed of the call made at  
24                    2:39 a.m., and record would  
25                    have been made by Bell. That

---

1 record was never retrieved by  
2 police. Constable Churchill  
3 which cross-examined by my  
4 friend and he stated he had  
5 read an OMPAC report, that he  
6 read this report --"

7 That's the report that Mr.  
8 Cavanagh just read in:

9 "-- that he read that report  
10 on the 24th August 1995. It  
11 was in that cross-examination  
12 that the word 'threatening'  
13 came from Mr. Murphy  
14 initially and not from  
15 Constable --"

16 Mr. Murphy interjects:

17 "Your honour, there was a  
18 voir dire in November of last  
19 year and if my friend to  
20 stand before this court can  
21 suggest that this emanates  
22 from me is preposterous and  
23 it is professional  
24 misconduct. In my  
25 submission, he should stop

---

1 right now. He doesn't know  
2 what he is talking."

3 Mr. Cavanagh says:

4 "Your honour, with respect I  
5 can only refer to the  
6 evidence I have read. I am  
7 referring to that evidence.  
8 I can see who used the word  
9 'threatening" in the  
10 examinations."

11 Mr. Murphy says:

12 "I'm talking about a prior  
13 voir dire in which this  
14 rendition that we get from  
15 the Crown, that dissociates  
16 itself apparently from  
17 previous lies, because that's  
18 what we are dealing with,  
19 your honour, is a  
20 misrepresentation of the case  
21 and a misrepresentation of  
22 the evidence."

23 The court says:

24 "Mr. Murphy, it's bona fide  
25 if he wants to resist in

---

1 his --"

2 Mr. Murphy says, "Thank you."

3 The court goes on:

4 "-- mistake. Go ahead. I  
5 will give you the opportunity  
6 of going back to that  
7 material, which may be  
8 humbling, but it's more than  
9 that. I am inclined to agree  
10 Mr. Murphy would have a  
11 distinct -- but then  
12 obviously take him as in good  
13 faith. Go ahead, Mr.  
14 Cavanagh."

15 Mr. Cavanagh says:

16 "Thank you, your honour. I  
17 have no wish to persist if  
18 the court perceives that  
19 there is a true problem."  
20 "The Court: There is a true  
21 problem. You are  
22 misinformed. You are unaware  
23 of the real state of the  
24 evidence."

25 So that's the exchange and the

---



1 the break I inserted those pages for you. I have  
2 left the paper clip on them so you can identify  
3 them.

4 MR. NELLIGAN: That will be  
5 helpful.

6 MR. CHERNIAK: I'm going back now  
7 in this tab to the actual evidence, the issue being  
8 whether Mr. Cavanagh did or did not misstate the  
9 evidence by referring to these phone calls as  
10 unwanted.

11 THE CHAIR: Just before you do  
12 that, Mr. Cherniak, the question about the factum,  
13 the Crown's factum?

14 MR. CHERNIAK: Yes, I'm sorry. I  
15 should have addressed that. In Ontario, we call  
16 almost everything a factum. Apparently there is a  
17 cultural difference between Ontario and other parts  
18 of the country.

19 THE CHAIR: It is a written  
20 submission or a brief or a memorandum or --

21 MR. CHERNIAK: If you are in the  
22 Federal Court, they are called something else, but  
23 factum is generally in use here. It doesn't have a  
24 particular connotation.

25 THE CHAIR: Thank you.

---







1 out more information and get  
2 your hands on every piece of  
3 information in the --  
4 "Mr. Findlay: That --  
5 "Question: -- police's  
6 possession?  
7 "Mr. Findlay: That's the  
8 same question, Your Honour,  
9 and it's the third time now,  
10 in my respectful  
11 submission, --"

12 Earlier, Mr. Murphy had tried to  
13 have this officer declared a hostile witness and  
14 the judge had disallowed that.

15 Then we go to Officer Kemp's  
16 evidence on November 14th, 1997 a couple of days  
17 later, and Officer Kemp was the officer that  
18 actually responded to the call. At the top of  
19 1737, Officer Kemp says:

20 "I recall going to that  
21 apartment. I believe it was  
22 prior to me attending that  
23 residence. I was asked  
24 regarding the incident that I  
25 attended at Foster's

---

1 residence."

2 And he said he had been there once  
3 before at the bottom of the page, and then on the  
4 top of 1738, Mr. Murphy says:

5 "What time on June 21st,  
6 1995?"

7 "Answer: I attended at 4:05  
8 a.m. Mr. Foster called our  
9 Perth communication centre--"

10 That's obviously what PCC is:

11 "-- requesting to speak to an  
12 officer. I was a little  
13 confused as to why he was  
14 calling OPP, because it's in  
15 the Town of Kemptville. I  
16 subsequently attended at 4:05  
17 a.m. Mr. Foster stated that  
18 on several occasions he had  
19 several operations of late  
20 and was starting to get his  
21 health. Apparently for the  
22 last few months he had been  
23 get some kind of phone calls,  
24 and when he answered, there  
25 would be nobody there or

---



1 -- I said, 'As far as the  
2 phone-calls goes, this has  
3 nothing to do with these  
4 phone-calls that you are  
5 reporting' --"

6 And the officer says he spoke to  
7 someone at the Town of Kempville, and then at the  
8 bottom of 1741 Officer Kemp says -- the question  
9 is:

10 "Did he question why he had  
11 been referred to the O.P.P.?"

12 "Answer: He asked me why and  
13 I said, 'I have no idea'.

14 "Question: Okay.

15 "Answer: He wasn't --  
16 certainly didn't appear upset  
17 by the phone-calls. I had  
18 more -- He wasn't stating  
19 anything that he was  
20 concerned about; he just  
21 simply wished to report  
22 them."

23 Then on November 14th, Mr. Findlay  
24 cross-examined him on this point at the bottom of  
25 the page line 25:

---

1 "And you said to Mr. Murphy  
2 that Mr. Foster, in his  
3 consequence with you, you  
4 concluded that he did not  
5 appear to be upset by the  
6 phone calls. Is that  
7 correct?  
8 "Answer: No. Like, he  
9 wasn't --  
10 "Question: Sorry?  
11 "Answer: He wasn't to me.  
12 He didn't appear upset by  
13 them, just curious as to why  
14 they were -- where they were  
15 coming from.  
16 "Question: All right. You  
17 come to speak to him, and as  
18 I understand from your notes  
19 and what you said to Mr.  
20 Murphy, when you first speak  
21 to him, the first thing he  
22 talks about is not even the  
23 phone call. He talks about  
24 his health. Is that correct?  
25 "Answer: Yes.

---

1 "Question: After he talks  
2 about that, then he mentions  
3 something about phone calls,  
4 getting these hang-up phone  
5 calls. Is that correct?"

6 And then he goes on to say that he  
7 then gets his ear chewed about the neighbours. And  
8 at line 22:

9 "So your conversation with  
10 him is -- information about  
11 the phone calls is just a  
12 small part of it?

13 "Answer: Yes.

14 "Question: He obviously  
15 didn't appear to be a person  
16 who was afraid or anything of  
17 that nature?

18 "Answer: Nothing. He didn't  
19 say anything that would  
20 indicate he had concern for  
21 his life or fear for his  
22 life.

23 "Question: Okay.

24 "Answer: As a result of  
25 these phone calls, they were

---

1 just a nuisance phone call."

2 Then we go to March 4th, 1998, the  
3 cross-examination of Officer Churchill. He is one  
4 of the investigating officers of the OPP, and he is  
5 being questioned about the carpet. Then at the  
6 bottom of page 7474, he is being cross-examined  
7 about notes with respect to what Kemp says about  
8 his attendance with Mr. Foster:

9 "Does he give you a date for  
10 that attendance on the  
11 occurrence report?"

12 That discussion goes on about  
13 that, and then the examination goes on at the  
14 bottom page 7475:

15 "Question: Okay. And he  
16 indicates that he saw P.C.  
17 Wheeler at 7:50 hours and  
18 advised him of this call from  
19 Mr. Foster. Right?"

20 "He" being Officer Kemp:

21 "Answer: Yes, that's  
22 correct.

23 "Question: Did you read the  
24 occurrence report? Did you  
25 find it on OMPAC?"

---

1 "Answer: Yes.

2 "Question: And was it with  
3 respect to threatening phone-  
4 calls?

5 "Answer: Yes, I believe it  
6 was.

7 "Question: And did it  
8 indicate a number in that  
9 report that had been traced,  
10 that you recall --

11 "Answer: Ahh, I don't recall  
12 without reading the -- the  
13 occurrence."

14 So then we see the actual  
15 exhibits, and you will see the first one is the OPP  
16 Perth Detachment. It is an occurrence report of  
17 the call at 3:54 a.m. on June 21st, 1995. You will  
18 see under the heading "Call Taker Larry Kemp" and  
19 "Remarks":

20 "PCC advised Larry Foster  
21 would like to speak to an  
22 officer re unwanted phone  
23 calls."

24 And then we have the general  
25 occurrence report from Officer Kemp, and that

---



1 reads:

2 "PC Howard and Kemp attended  
3 Foster residence. Foster  
4 advised he has a number of  
5 operations in the last while  
6 and a few months ago started  
7 getting phone calls at all  
8 times of the day and a few  
9 nights ago started getting  
10 phone calls between 2:15 and  
11 2:45 nothing is said. Pushed  
12 star 69 and the operator  
13 advised the last number was  
14 613-247 6009. So called this  
15 number and got a recording  
16 advising the number was not  
17 in service. Foster stated he  
18 did not know this number.  
19 Foster then went on about  
20 problems with neighbours that  
21 occurred up to three years  
22 ago and had nothing to do  
23 with the calls."

24 And it goes on. There is another  
25 page, I guess, about Mr. Foster, and then the next

---

1 tab we have the officer's actual notebook for June  
2 1995, which was an exhibit, and you will see the  
3 marked portion is what the officer wrote down. I  
4 will read it as best as I can:

5 "Has had several operations  
6 lately and is just getting  
7 health back and about a few  
8 months ago started getting  
9 phone calls and there would  
10 be nobody there, and last few  
11 nights call would be 2:15,  
12 2:45. I'm not sure how long  
13 it would be, so pushed star  
14 69 and operator said call  
15 came and gives the number.  
16 Called number and got  
17 recording not in service.  
18 Said is Ottawa Centre. Told  
19 him would give this to the  
20 town because he lives in the  
21 Town of Kempville."

22 And then it goes on, and the other  
23 matters deal with the complaints about the  
24 neighbours.

25 Then we go to May 20th, 1998,

---

1 which is where I started, and you will see, just to  
2 review, that Mr. Cavanagh at the bottom of 1145  
3 said:

4 "And the pertinent facts, as  
5 we have them, are that Mr.  
6 Foster made a complaint of an  
7 unwanted call on June 21st,  
8 1995 at 3:54 a.m. and my  
9 friend --"

10 And that's when Mr. Murphy says  
11 Mr. Cavanagh is spinning on it.

12 And the court says at line 23 on  
13 page 1146:

14 "The Court: That you misstate  
15 the evidence by describing it  
16 and spinning it, as  
17 described, as unwanted."

18 The court goes on to say:

19 "If the description of the  
20 phone call as unwanted is the  
21 basis for the Crown argument  
22 on this, you might as well go  
23 to another area of your  
24 argument, because, in my  
25 opinion, you totally

---

1                                   misunderstand and  
2                                   misrepresent the facts as a  
3                                   description of this call on  
4                                   the evidence in this trial."

5                                   If we can go to the next sub-tab,  
6 of 3G, September 25th, 1998, there is an issue over  
7 the subpoenas to Cooper and Bair, who are the  
8 Crowns in the Cumberland/Toy prosecution.

9                                   Mr. Cavanagh is making some  
10 submissions as to whether the subpoena should be  
11 quashed for Mr. Cooper, and he makes the comment at  
12 page 2516 on the necessity issue, at the bottom of  
13 line 20, that there are police officers who can  
14 testify to the issues of the Grasman investigation,  
15 and Mr. Cavanagh goes on in his submissions.

16                                   THE CHAIR: Just a minute, please,  
17 Mr. Cherniak.

18                                   MR. CHERNIAK: I was at page 2515.

19                                   THE CHAIR: You have gone on to  
20 the next tab at 2G(iv)?

21                                   MR. CHERNIAK: Yes, I'm sorry. I  
22 finished G(iii) and I'm on the next tab at G(iv).  
23 I have read in pages 2515 to 2519 under particular  
24 2(b), so I'm just briefly reviewing what is there  
25 for the context.

---



1 matter of Mallory and  
2 Stewart, and I met Ms. Bair  
3 and she provided me with that  
4 letter -- I've given a copy  
5 of that to my friend and I  
6 had asked Ms. Bair, when she  
7 would first have indicated to  
8 police that the Crowns on the  
9 Cumberland prosecution felt  
10 that Mr. MacCharles would be  
11 under suspicion --"

12 He indicates that he just provided  
13 that to Mr. Murphy, and Mr. Murphy then talks about  
14 the disclosure and makes an objection to it as has  
15 the Crown actually has given evidence. And Mr.  
16 Murphy complains on page 2529, at about line 8,  
17 wondering why Mr. Cavanagh is passing evidence  
18 through himself from Ms. Bair when he knows that  
19 she is subpoenaed.

20 Mr. Murphy goes on with his  
21 complaints through to page 2531 about the various  
22 matters with respect to disclosure, starting at  
23 line 15 and his complaints about Mr. Berzins, and  
24 the court at the bottom of page 2532 questions Mr.  
25 Cavanagh:

---

1 "Are you advising the court  
2 that Mr. Berzins asked you to  
3 advise the court that he has  
4 searched for a letter, has  
5 been unable to find a letter  
6 signed by him, but that he  
7 has instructed you to offer  
8 to the court a document dated  
9 January 13th, 1997 -- that he  
10 might have been referring  
11 to?"

12 Mr. Cavanagh says no, and there is  
13 a discussion that goes on about the letter that Mr.  
14 Cavanagh sought, and Mr. Cavanagh then says at page  
15 2534:

16 "In respect of the other  
17 matter, when I received the  
18 subpoenas last night, I think  
19 about 5 p.m. from my friend,  
20 they included a request for  
21 pertinent documentation and I  
22 spoke to Ms. Bair -- I can't  
23 recall my exact question --  
24 it was that they would have  
25 conveyed, that is, any -- the

---

1 Crowns would have conveyed to  
2 Grasman that MacCharles, that  
3 they were suspicious of  
4 MacCharles --"

5 "The Court: Are you now  
6 offering--

7 "This is at the middle of the  
8 page:

9 "Are you now offering that  
10 what you're doing is  
11 providing, in advance to  
12 those people who were  
13 subpoenaed, some information  
14 that they were going to bring  
15 with them or might be  
16 relevant to their evidence?

17 "Mr. Cavanagh: Yes, I was  
18 asking them questions about  
19 relevant issues.

20 "The Court: Well, that's a  
21 little bit difficult for the  
22 court because, in a sense,  
23 what you've done is preempted  
24 the cross-examination of  
25 those witnesses.

---



1 "Mr. Cavanagh: Well, that  
2 certainly wasn't my intention,  
3 Your Honour.

4 "The Court: But that's what,  
5 in effect though, appears  
6 what has happened. You've  
7 interpreted what you thought  
8 defence counsel was going to  
9 inquire of them and asked  
10 those questions, taken  
11 information from them and  
12 walked into the court and  
13 handed the court the  
14 information. That's totally  
15 irregular.

16 "Mr. Cavanagh: I didn't hand  
17 the court the information,  
18 Your Honour, I gave it to my  
19 friend as disclosure because  
20 I understand it to be  
21 relevant and I asked for  
22 that --

23 "The Court: Well, you can  
24 assume that information given  
25 to defence in this matter, by

---

1 way of disclosure, is  
2 probably going to come to the  
3 court. I don't know of any  
4 that hasn't yet.  
5 "Mr. Cavanagh: Right. I  
6 take Your Honour's point. But  
7 I didn't -- Your Honour  
8 indicated I provided it to  
9 the court, I didn't. I'm  
10 obliged to give any relevant  
11 information which comes into  
12 my hands to Mr. Murphy,  
13 defence counsel on the  
14 matter, and I provided it to  
15 him.  
16 "The Court: So then I go  
17 back to the -- but there are  
18 two points that arise from  
19 that. In effect, what you've  
20 done is, perhaps out of the  
21 best of intentions in  
22 response to a subpoena, made  
23 disclosure in advance of  
24 witnesses testifying. In  
25 addition to that, I think

---

1                   that you have preempted in  
2                   some way the cross-  
3                   examination of those  
4                   witnesses on the documents by  
5                   alerting them to certain  
6                   areas that were relevant. So  
7                   that's the court's concern at  
8                   this point. What becomes of  
9                   the disclosure, which you've  
10                  now provided to defence, is  
11                  something for defence. As I  
12                  began by saying, disclosure  
13                  to defence, defence needs  
14                  some time to try to  
15                  understand what the  
16                  disclosure is and what the  
17                  significance of it is, but  
18                  you have, in my view, placed  
19                  yourself in between defence  
20                  counsel and his opportunity  
21                  to cross-examine witnesses  
22                  and you ought not to do that  
23                  in the future, all out of  
24                  apparently the best of  
25                  motives."

---

1                   I have read in already, under  
2 particular 2(e), I think, pages 2536 to 2539. I  
3 simply will paraphrase that Mr. Cavanagh wanted to  
4 put some matters on the record, and the court at  
5 2537 iterated the witnesses called on the voir dire  
6 should not be interviewed prior to giving evidence,  
7 and at line 12:

8                   "I don't like Crowns talking  
9                   to Crowns when they come into  
10                  the witness box."

11                  Mr. Cavanagh makes his explanation  
12 at 2538, and the ruling of the court is at 2539  
13 that there should be no communication from Crown in  
14 this case with other Crowns, until such time as  
15 they have testified in the trial.

16                  The last particular under this  
17 heading is 2G(v), and the burden of that particular  
18 is that this relates to a ruling given by the court  
19 on a hearsay objection.

20                  Mr. Cavanagh, I believe, is doing  
21 the examination here of MacCharles on November 5th,  
22 1998, and the relevant question would start on page  
23 5377 at about line 14:

24                  "Now, Mr. Murphy suggested to  
25                  you at page 99 of the October

---

1 26th transcript that perhaps  
2 Steven Foster might have said  
3 something about Ms. Elliott  
4 being a prostitute, to you,  
5 and you indicated that you  
6 didn't have that - recall any  
7 such information from him?

8 "Answer: Sir, I --

9 "Question: Right?

10 "Answer: I'm afraid I can't  
11 help you there, sir.

12 "Question: In the brief  
13 there is also a statement  
14 from a Violet Pender."

15 And just to remind the panel,

16 Violet Pender is the victim's sister:

17 "This is dated September 5th,  
18 but it involves a story Larry  
19 - that the deceased Lawrence  
20 Foster told of receiving a  
21 body rub from her, a massage  
22 from her in the parlour in  
23 which she was wearing nothing  
24 but --"

25 Mr. Murphy objects:

---

1 "Your Honour, this is  
2 completely hearsay and it's  
3 completely - if the Penders  
4 were here and this is  
5 hearsay."

6 Mr. Murphy makes his objection on  
7 page 5378:

8 "-- he's going to try to  
9 bring in hearsay from Mrs.  
10 Pender, who can't be  
11 described as anything but  
12 hostile towards the accused,  
13 with respect to he's putting  
14 this in front of Your  
15 Honour --"

16 And the court says at line 25:

17 "Well, that's why he's paid,  
18 to help his case."

19 Mr. Murphy says it is not amusing;  
20 it is highly prejudicial.

21 The court, page 5379, at about  
22 line 12, says:

23 "Well, that's the area that  
24 is of concern to the court.  
25 Is it proper for counsel to

---

1 ask a witness something about  
2 something that happened that  
3 isn't in evidence before the  
4 court? What's the basis for  
5 the information which would  
6 be the introduction to the  
7 question, which I've already  
8 surmised what it's going to  
9 be.

10 "Mr. Cavanagh: What's the  
11 basis?

12 "The Court: What's the basis  
13 for that?

14 "Mr. Cavanagh: The basis is  
15 a statement from Ms. Pender,  
16 Your Honour.

17 "The Court: And has that  
18 been disclosed?"

19 "Oh, yes", Mr. Cavanagh says.

20 Mr. Cavanagh says at the top of

21 page 5380:

22 "I'm not going to read it,  
23 I'm just giving you the date  
24 -- 5 September 1995."

25 And Mr. Murphy objects again:

---

1 "Mr. Cavanagh is now  
2 attempting to do, which is to  
3 put a prejudicial slander  
4 against the accused based on  
5 hearsay. It's hearsay from  
6 her secondhand from someone  
7 else."

8 Mr. Murphy, at about line 22 on  
9 page 5381, says:

10 "So, Mr. Cavanagh, with a  
11 smirk on his face, thinks  
12 this is all very amusing. It  
13 is a slander and it is  
14 prejudicial and I don't think  
15 it's an appropriate  
16 question."

17 At the bottom of the page:

18 "The Court: Well, the court  
19 has been alerted to the  
20 pitfalls of the slanderous  
21 question now being placed,  
22 but I already know what it is  
23 in my mind because I  
24 suspected that's what Mr.  
25 Cavanagh was trying to do in

---



1 the first place. But, in the  
2 final analysis, I seem to  
3 recall that I say to juries  
4 that it isn't the question,  
5 it's the answer, and so go  
6 ahead with the question and  
7 I'll be interested in the  
8 answer.

9 "Mr. Cavanagh: Yes. I might  
10 say, Your Honour, that it's  
11 not hearsay unless it's  
12 introduced for the truth. If  
13 it is introduced for the  
14 basis of the officer's belief  
15 then it's not going in for  
16 the prohibited hearsay  
17 purpose.

18 "The Court: I have, for  
19 fifteen years as a judge,  
20 rejected that explanation or  
21 argument by every crown  
22 counsel who has put it before  
23 me, and I have never been  
24 overruled by the Court of  
25 Appeal on my interpretation,

---

1                   so you're not doing very well  
2                   with that argument, Mr.  
3                   Cavanagh."

4                   And the examination goes on. If  
5 we go 2(h), at 2(h) the particular is:

6                   "Justice Cosgrove refused to  
7                   allow Crown Ramsay to bring a  
8                   motion to recuse Justice  
9                   Cosgrove on the basis that  
10                  different Crowns would be  
11                  taking over, even though the  
12                  Crown was, at that time,  
13                  represented by Crown Ramsay."

14                  The panel may recall that there  
15 had been a motion earlier for a mistrial on March  
16 6th, 1998. That was following the Laderoute  
17 incident that I read to you. I believe that was by  
18 Crown Ramsay.

19                  And, just for your notes, you will  
20 find that at page 7650 in the March 6th, 1998  
21 evidence. I won't take you back to that, but there  
22 had been a motion for mistrial, which was refused  
23 by the judge on that date.

24                  Here we are on April 8th, 1998 in  
25 Ottawa, and the court notes that:

---

1 "This is in effect a  
2 scheduling continuation for  
3 the trial set for Tuesday of  
4 next week."

5 The court notes that there is a  
6 new prosecution team, including himself, James  
7 Cavanagh, Jessica McNally. Mr. Ramsay is there.  
8 He has been the counsel up to that time, as the  
9 panel knows:

10 "Thank you, Your Honour.  
11 Well, I understood that  
12 before we got to that point,  
13 there might be some further  
14 submissions by the defence,  
15 based on the evidence which  
16 was heard in Brockville  
17 during the last few days of  
18 the proceedings. And, after  
19 that, I intend to make a  
20 motion to ask Your Honour to  
21 recuse himself and appoint a  
22 new trial judge. And then I  
23 would have thought that at  
24 that point perhaps, Mr.  
25 McGarry would -- I would be

---

1 finished and Mr. McGarry  
2 would be taking over and I  
3 believe his first item of  
4 business will be to ask for  
5 an adjournment."

6 Mr. Murphy submissions and he says  
7 at the bottom of page 2 -- these are the first  
8 pages in the Ottawa transcript, bottom of page 2,  
9 top of page 3:

10 "My understanding -- the  
11 understanding of defence  
12 counsel this morning was that  
13 this was indeed a conference  
14 of sorts to discuss the  
15 scheduling of the trial.  
16 I'm not sure if Your Honour  
17 wishes my submissions on the  
18 adjournment application or --  
19 I'm taken aback by the  
20 recusal notification that's  
21 being given here for the  
22 first time. I'm also  
23 somewhat at a loss to  
24 determine who exactly is in  
25 charge of the Crown's case--"

---

1                   He notes later on on the page that  
2 he is opposed to any adjournment. Mr. Ramsay says  
3 in the middle of page 5:

4                   "Well, Your Honour, the last  
5 day, when we were in  
6 Brockville, we finished  
7 hearing four witnesses, at  
8 which point my learned friend  
9 said that there would be a  
10 renewed motion based on the  
11 evidence of these witnesses.  
12 Now, with great respect, if  
13 there is to be a motion, I  
14 take it that's a motion to  
15 stay the proceedings. That  
16 has to be determined.  
17 There's no point in  
18 scheduling a trial or  
19 deciding on procedures until  
20 we know whether a trial is  
21 going to take place.  
22 "Now, that motion would be  
23 based on the evidence called  
24 during the first phase of the  
25 motion and, presumably, the

---

1 second phase of the motion,  
2 all of which I was present  
3 for, during which I  
4 represented the Crown, and I  
5 am here prepared to argue  
6 that, if there is any such  
7 renewed motion, based on this  
8 additional evidence which was  
9 called with Your Honour's  
10 leave after that."

11 The court says:

12 "Well, the difficulty with  
13 that argument is that in the  
14 -- in my reasons responding  
15 to the motion for a stay, I  
16 said that the application for  
17 a stay could be renewed at  
18 any time, any time during the  
19 trial; the day after the jury  
20 is called, two days after the  
21 jury is called."

22 And he notes that it might have  
23 been useful to have a Crown who was instructed and  
24 prepared to continue with the trial:

25 "-- in the event that the

---

1 court granted the application  
2 that the original Crown  
3 should not continue -- that  
4 hasn't happened."

5 And he notes that two other Crown  
6 were offered and only had restricted restrictions.

7 "Mr. Ramsay: I do. But,  
8 with respect, Your Honour,  
9 the -- Your Honour is aware  
10 of why Mr. Flanagan and Mr.  
11 Findlay were removed from the  
12 motion, and why they've been  
13 replaced as prosecutors for  
14 the case. And it is not, in  
15 my submission, an orderly or  
16 proper, or fair way to deal  
17 with this motion, by allowing  
18 it to be made at any time.

19 If there are grounds for the  
20 motion--

21 "The Court: Counsel, please,  
22 do not continue further. The  
23 court has made its order.  
24 Whether you think it's fair  
25 or not isn't the point."

---

1                   The discussion goes on, and then  
2 on page 8 Mr. Ramsay says, at about line 12:

3                   "Well, you don't want me to  
4 stand here and argue with  
5 you, Your Honour.

6                   "The Court: No. No. No.  
7 I have -- the court has been  
8 advised that a new  
9 prosecution team was assigned  
10 on March 27th and, under the  
11 circumstances, I want to hear  
12 from the new prosecution  
13 team. They should be here.

14                   "Mr. Ramsay: All right.  
15 Yes. Well, they're prepared  
16 to come at the appropriate  
17 time, so I can have them come  
18 in.

19                   "I do -- I would like to make  
20 my motion --

21                   "The Court: No, I will not  
22 receive a motion from you,  
23 counsel. If that motion --  
24 if there's a motion to be  
25 brought, if there's any

---



1                   business to be placed before  
2                   this court, it should be the  
3                   new prosecution team that the  
4                   court has been advised is now  
5                   in place."

6                   I have also got a reference to the  
7                   evidence a year or so later at March 8th, 1999 on  
8                   page 7885. Mr. Murphy makes this submission at  
9                   about line 12:

10                   "What did Mr. Ramsay do when  
11                   he came to town, on the heels  
12                   of Your Honour's order of  
13                   March 16th of this year,  
14                   relocating the trial, issuing  
15                   a number of other orders with  
16                   respect to specific remedies,  
17                   what did he do when he rose  
18                   before the court on April the  
19                   8th? He asked for Your  
20                   Honour to recuse yourself  
21                   because of bias. He said  
22                   that he was going to bring  
23                   that motion and he never did,  
24                   it was abandoned --"  
25                   "The Court: No, the motion

---

1 was not abandoned. I  
2 declined to hear Mr. Ramsay,  
3 because I had been told by  
4 letter, two weeks before  
5 that, that the new Crowns on  
6 the case were in place -- Mr.  
7 McGarry and Mr. Cavanagh, and  
8 they were assisted by a  
9 further Crown -- and  
10 unbeknownst to them, and as a  
11 surprise to the court, on the  
12 8th of April Mr. Ramsay,  
13 purporting to represent the  
14 Crown, stood and indicated  
15 that he wanted to move a  
16 motion that I recuse, after  
17 he had advised that there  
18 were other Crown pursuing the  
19 case, and I declined to hear  
20 his application. I mean, I  
21 declined to hear a second  
22 application to recuse."

23 Mr. Murphy says, "That is  
24 correct."

25 "The Court: And what was

---

1                   baffling to the court, and  
2                   remains baffling to the  
3                   court, is how the new Crowns,  
4                   who advised the court in  
5                   writing that they were now  
6                   authorized to represent the  
7                   Crown in this prosecution,  
8                   now --"

9                   "How, I guess:  
10                  "-- they were unaware that  
11                  Mr. Ramsay was coming into  
12                  court ahead of them to make  
13                  that motion. I have not  
14                  learned, to this day, who  
15                  authorized Mr. Ramsay to come  
16                  to court to propose a motion  
17                  for recusal. It sounds as if  
18                  there is somebody in charge  
19                  in the Crown's office, but I  
20                  haven't been told who that  
21                  person is."

22                  Mr. Murphy goes on to refer to  
23                  what Mr. Cavanagh has said about who gives him  
24                  instructions, and he says at about line 24 on page  
25                  7887 --

---

1                   MR. PALIARE: Excuse me, Mr.  
2 Cherniak, are you going to skip over the bottom  
3 paragraph of 7886 as to what really happened after  
4 McGarry shows up?

5                   MR. CHERNIAK: I'm happy to read  
6 it, counsel. There are some additional pages, I  
7 believe, on this issue in Mr. Paliare's brief, the  
8 fifth volume at tab 2, and he has the additional  
9 pages from what occurred on the April 8th. I  
10 should perhaps refer to those before I go on.

11                   If you turn to that exhibit,  
12 that's tab H of Exhibit 8, I believe, 8 or 9. It  
13 is the small volume.

14                   MR. PALIARE: You will see, for  
15 example, that where the pink sheet comes in at  
16 -- the end of what my friend had been referring to  
17 was page 8, and there is a recess at the bottom  
18 that says, "Recess 10:00 a.m.", where Mr. Cherniak  
19 had been, and that our first page is that same  
20 page, and then it's what occurs after the recess.

21                   MR. CHERNIAK: I should have  
22 referred you to that. I just didn't have it in my  
23 notes that that is where that was, so I will do  
24 that now. If you could look at tab H in the small  
25 volume of the evidence exhibits, at 10:25 a.m. Mr.

---

1 McGarry comes in and introduces himself and Ms.  
2 McNally and Mr. Cavanagh.

3                   The court makes a ruling, and he  
4 notes the material in the application about the new  
5 prosecution team and the history of the matter;  
6 and, at the bottom of page 33, that the new  
7 prosecution team was not assigned until March 27th.

8                   He reviews the history with  
9 respect to the evidence of the Crowns. Then at the  
10 bottom of page 36, at the conclusion of the court's  
11 ruling on the stay motion, the court was advised  
12 that Mr. Ramsay was not in a position to continue  
13 with the trial. New counsel would have to be  
14 appointed.

15                   I have already touched upon the  
16 motion then by Mr. Ramsay that the trial be  
17 adjourned to the end of April, and the court made  
18 its ruling. He notes, in addition to that, at the  
19 bottom of the page:

20                                   "Mr. McGarry argued, as well,  
21                                   that he would need time to  
22                                   interview witnesses and to  
23                                   prepare for a continuation of  
24                                   the trial, which he urged was  
25                                   not possible --"

---

1 Justice Cosgrove says:

2 "I do take to heart the  
3 argument by Crown that there  
4 are many interests to be  
5 accommodated--"

6 He says at the bottom of the page:

7 "Out of abundant caution, the  
8 court, therefore, will grant  
9 yet a further adjournment to  
10 the Crown, to permit new  
11 counsel to prepare for  
12 continuation of the trial.

13 The jury selection, however,  
14 will continue --"

15 At page 40, the court goes back to  
16 Mr. Ramsay's appearance at the bottom of page 40:

17 "The court was advised by Mr.  
18 Ramsay that the Crown wished  
19 to present a motion to  
20 recuse; that should be order  
21 of first business, and then  
22 the court would as well like  
23 to canvass with counsel  
24 matters which were initially  
25 set for today's return --"

---

1 I am not sure anything else is  
2 necessary to read. I am sorry, I should have read  
3 what Mr. McGarry said. Mr. McGarry says at the top  
4 of page 41:

5 "With regard to Mr. Ramsay's  
6 motion, that was something  
7 that he was, as I understand  
8 it, instructed to do as part  
9 of his involvement in the  
10 pretrial motions. I  
11 understand -- I've had a  
12 brief discussion with him  
13 this morning -- I'm certainly  
14 not continuing that motion at  
15 this time."

16 That's what happened on that day.  
17 Then some of that is reviewed on March 8th, 1999  
18 in the passages that I have referred to.

19 Mr. Paliare wanted me to refer the  
20 bottom of 7876.

21 THE CHAIR: Which tab?

22 MR. CHERNIAK: Back at tab 2H. We  
23 are bottom of 7886. At the bottom of page 7886,  
24 Mr. Murphy says:

25 "Thank you, your honour,

---





1 make a reasonable inference  
2 that there is a continuing  
3 animus on the part of the  
4 Crown which totally belies  
5 its formal representations  
6 and submissions to the court,  
7 that Your Honour is biased  
8 against the Crown. Now, the  
9 application that Mr. Ramsay  
10 -- that you would not hear  
11 from Mr. Ramsay was, in  
12 effect, abandoned by Mr. --  
13 formally abandoned by Mr.  
14 McGarry when he appeared in  
15 stead, subsequently within  
16 minutes, but in my  
17 submission, it continues to  
18 be the guiding principle or  
19 underlying premise of the  
20 Crown's conduct of itself in  
21 this prosecution, carrying on  
22 through to the present."

23 Mr. Murphy goes on in that vein.

24 He says at page 7889, line 7:

25 "I think it's a reasonable

---

1 inference, Your Honour, that  
2 one of the remedies the Crown  
3 had in the back of its mind  
4 was to have you removed.  
5 It's certainly the evidence  
6 of Mr. Cavanagh that he  
7 discussed this with Murray  
8 Segal."

9 The court deals with that issue at  
10 page 7891, and at about line 9 the court says:

11 "It could mean that the Crown  
12 intends to bring another  
13 application that the court  
14 recuse itself. And the court  
15 can only respond to actions  
16 of the Crown as they arise.  
17 So I don't see that as being  
18 nefarious or that it  
19 necessarily is indicative of  
20 animus. The Crown, whoever  
21 is giving advice to the  
22 Crown, or whoever the Crown  
23 is by time, has an  
24 obligation. The Crown,  
25 corporately, has an

---

1 obligation to use its best  
2 advice, talents, efforts,  
3 etcetera, to discharge its  
4 duty, and one of those could  
5 be recusal. I can think of  
6 two or three others that  
7 might -- that we haven't  
8 heard about, or could happen  
9 in this trial, but -- so I'm  
10 not quite as -- I'm  
11 indicating to counsel I  
12 observed that and thought  
13 that that was a possibility  
14 but I don't necessarily  
15 attribute it to an animus of  
16 the Crown."

17 That concludes the discussion  
18 under 2H.

19 We move now to 2I. The first  
20 portion of 2I I believe has already been read.  
21 This is the issues dealing with Officer Laderoute  
22 and the submissions by Mr. Ramsay.

23 It includes the ruling on the  
24 motion for mistrial that I adverted to earlier that  
25 was made in March of 1998. I have read that to

---

1 you, so I won't review it again.

2                   Number 2 in this tab deals with a  
3 statement by the court. It is fairly short. This  
4 is April 14th, 1998. Mr. McGarry is in place, as  
5 we know, and the issue is jury selection. Mr.  
6 Murphy says at the bottom of the page that:

7                   "Defence is opposed to  
8                   proceeding with the jury  
9                   selection today."

10                   Mr. Murphy says:

11                   "This morning I received, on  
12                   my desk at my office, a  
13                   letter from Mr. McGarry,  
14                   dated April 8th, enclosing  
15                   two witness statements from  
16                   Violet Pender, the sister of  
17                   Lawrence Foster, who was  
18                   present throughout virtually  
19                   every day of the abuse of  
20                   motion -- abuse of process  
21                   voir dire, and her statement  
22                   taken on April 6th, 1998, by  
23                   Detective Constable Alarie,  
24                   and another statement dated  
25                   April the 6th, as well, from

---

1 the victim's nephew, and  
2 Valerie (sic) Pender's son,  
3 Christopher. And the gist of  
4 those statements, Your  
5 Honour, are with respect to  
6 furnishing an explanation."

7 Mr. Murphy says that these are  
8 will-says type versions of the statements. He was  
9 not anticipating this this morning, and Mr. Murphy  
10 makes some comments. And at the middle of the page  
11 56, Mr. Murphy says that:

12 "-- defence counsel is  
13 bringing its application, at  
14 this juncture, prior to the  
15 selection of a second jury,  
16 to renew our application --  
17 for a stay of the  
18 prosecution --"

19 The panel will recall that the  
20 motion had been dismissed in mid-March. Mr. Murphy  
21 outlines the matters in his application, and he  
22 relies on the two statements of April 6th that are  
23 on the very issues -- this is at the bottom of page  
24 57. He says:

25 "Your Honour, the proof is in

---

1 the pudding. The two  
2 statements of April 6th are  
3 on the very issues that arose  
4 on the voir dire for abuse of  
5 process. They are highly  
6 suspicious, with respect, not  
7 only to the circumstances in  
8 which they were elicited --"

9 Then there is discussion that goes  
10 on, and then we have further discussion on this  
11 point at page 84 on the same day. The statements  
12 are put forward. The disclosure statements are put  
13 forward to the judge, and there has been discussion  
14 about them and Mr. Murphy says at page 84:

15 "Then there's a statement of  
16 Mr. Pender."

17 That's the nephew:

18 "We have no disclosure about  
19 the circumstances of the  
20 interview, and I'll get to  
21 the relevance to the March  
22 31st attendance by Mr.  
23 Flanagan at the meeting with  
24 the Crowns."

25 Mr. Murphy reads the statement

---

1 from the nephew, Christopher Pender, and refers to  
2 issues that have regard to this T-shirt that Mr.  
3 Foster was alleged have had and there was an issue  
4 about whether -- as I recollect the evidence,  
5 whether Ms. Elliott did or did not have such -- was  
6 seen wearing a similar T-shirt, as I recall it.

7                   The statement is read, I think, in  
8 its entirety. Mr. Murphy goes on at page 86:

9                   "Now, Violet Pender was  
10                   principally involved in  
11                   pretrial discussions, just as  
12                   Mr. Flanagan and Mr. Stewart  
13                   were -- Your Honour will also  
14                   remember that Violet Pender  
15                   was present throughout almost  
16                   virtually every day of the  
17                   abuse of process voir dire,  
18                   heard evidence on the abuse  
19                   of process voir dire, indeed  
20                   she's referring to the  
21                   evidence in detail with  
22                   respect to the Bugs Bunny t-  
23                   shirt. This statement is  
24                   obtained on April 6th of '98,  
25                   the meeting with Mr. Flanagan

---

1 is on March 31st."

2 Mr. Murphy goes on about the  
3 significance of the T-shirt. Mr. Cavanagh says at  
4 page 127. This is the next day. Mr. Cavanagh  
5 says:

6 "Thank you. I'm just -- I  
7 wanted to ascertain whether  
8 all the grounds for the  
9 motion we are about to embark  
10 upon are contained within  
11 this document --"

12 That is the notice of motion for a  
13 stay:

14 "-- and whether there's  
15 anything further that the  
16 Crown should be alerted to  
17 before witnesses are  
18 examined.

19 "The Court: Well, the court  
20 was alerted yesterday, and we  
21 dealt with that yesterday,  
22 that there's a so-called new  
23 ground, which is the  
24 spectacular evidence brought  
25 -- notice of which was given

---



1 to defence by the Crown  
2 yesterday, and that and the  
3 evidence itself and the  
4 manner in which it has been  
5 prepared was raised by  
6 defence counsel as an  
7 additional ground. We will  
8 call that the 't-shirt  
9 incident', for lack of any  
10 better description. So that  
11 is, the 't-shirt incident',  
12 being a new incident, is one  
13 of the grounds that the court  
14 was alerted to as being an  
15 additional grounds for the  
16 relief sought in the notice  
17 of motion, or in the  
18 application."

19 That completes the second branch  
20 of tab I. The third branch deals with the  
21 examination of Constable Nooyen, and you have  
22 already heard at an earlier occasion -- read  
23 virtually all of the pages with respect to Officer  
24 Nooyen, and I won't read that again.

25 You have seen that in 2A there is

---



1 August has, rather than  
2 satisfying the court, raised  
3 concerns, raised additional  
4 questions. For example, on  
5 the issue given by Mr.  
6 McGarry as to why the court  
7 was not advised, when  
8 witnesses were being  
9 questioned on this point  
10 that, in fact, Mr. McGarry  
11 and Mr. Cavanagh had attended  
12 and were aware of  
13 Superintendent Edgar's  
14 decision to recommend an  
15 extension of the RCMP  
16 investigation in Cumberland  
17 to this case, his explanation  
18 being that he was awaiting a  
19 more formal decision or a  
20 decision by an authorized  
21 person--"

22 He says when juxtaposed with the  
23 evidence of Crown Pelletier, that presents  
24 difficulties:

25 "Secondly, on the aspect of

---

1 the arrangements for the  
2 meeting, there's the  
3 contradiction in the evidence  
4 as to how the meeting came  
5 about --"

6 And he refers to the discrepancies  
7 as:

8 "-- one of the reasons one of  
9 the reasons why the court has  
10 concluded that the evidence  
11 of Mr. Cavanagh, who was a  
12 party to that meeting on the  
13 20th, is compellable --"

14 The court says:

15 "-- I want to add that the  
16 questions which I detailed in  
17 my rulings -- when I spoke of  
18 the Crown on those pages, it  
19 could include either Mr.  
20 McGarry or Mr. Cavanagh."

21 On page 5894:

22 "I did say, though, that for  
23 the time being I was  
24 directing that Mr. McGarry  
25 answer those questions. In

---

1 my view, there is a  
2 continuing necessity for Mr.  
3 Cavanagh to answer the  
4 questions. -- I want to now  
5 go to some of the additional  
6 areas touched upon by defence  
7 as requiring evidence by an  
8 examination of Mr. Cavanagh."

9 He refers on page 5896 to the  
10 evidence of Staff Sergeant Scobie, who offered his  
11 interpretation of the responsibility of the request  
12 by the Crown. He refers to the Immigration Canada  
13 issue. I think I referred you to some of this  
14 order on the earlier day.

15 The court goes on to say, and I  
16 think I have read this earlier, at 5899:

17 "I have raised some issues  
18 that the court believes are  
19 areas that warrant the  
20 evidence of Mr. Cavanagh --  
21 In other ways, it is only Mr.  
22 Cavanagh who has any  
23 knowledge of the Crown in  
24 those particular areas."

25 He concludes, and I have read the

---

1 whole of this paragraph I think earlier:

2                               "-- what I am doing is  
3                               signalling in advance that  
4                               those are areas that I  
5                               probably would investigate  
6                               with the witness --"

7                               And if we go on to particular 2K,  
8 2K deals with a different matter. I wonder whether  
9 it would be convenient before we go to 2K, which is  
10 an unrelated incident, whether this might be a  
11 convenient time to adjourn rather than break that  
12 up?

13                               THE CHAIR: All right. 1:30?

14                               MR. CHERNIAK: 1:30, thanks.

15 --- Luncheon recess at 12:23 p.m.

16 --- Upon resuming at 1:30 p.m.

17                               MR. CHERNIAK: I think I'm at  
18 particular 2K, which is, for lack of a better word,  
19 the Radek Bonk incident.

20                               And just to give you the  
21 background, Mr. Cavanagh, who at the time that this  
22 arose in March of 1999 had been disqualified  
23 because he was a witness on the voir dire, was  
24 brought to court to explain statements that were  
25 attributed to him following the withdrawal of a

---

1 prosecution that Mr. Cavanagh was doing of an  
2 impaired driving charge against one Radek Bonk, who  
3 was -- and I'm not sure whether he still is -- a  
4 prominent player with the Ottawa Senators.

5                   The court ruled it was a perfectly  
6 relevant inquiry, and I want to refer the panel to  
7 some of the extracts of evidence that relate to  
8 that. This is on March 22nd, 1999 at page 7184.

9                   Mr. Murphy rises on that occasion  
10 to bring to the court's attention a statement at  
11 about line 22 on the page by Mr. James Cavanagh in  
12 the Friday, March 19th Ottawa Sun. The court  
13 indicates that he had read it. Mr. Humphrey says  
14 on page 8175:

15                   "I have no idea what my  
16 friend is getting into but,  
17 you know, aren't we really  
18 here to deal with the three  
19 notices of application for a  
20 stay and to hear argument  
21 on --

22                   "The Court: I would warrant,  
23 Mr. Humphrey, that there is a  
24 connection. Mr. Cavanagh is  
25 Crown on this case, there are

---

1 issues in this case which  
2 deal with, not only with Mr.  
3 Cavanagh's status as Crown,  
4 but his status and his  
5 credibility as a witness.  
6 The case that he's talking  
7 about was headlined in the  
8 Ottawa Citizen and I mean  
9 literally that, and there was  
10 a picture of the officer  
11 involved and the case that --  
12 the gist was that the Crown  
13 withdrew charges because of  
14 police misconduct, and I  
15 suspect that that is going to  
16 be the parallel or the point  
17 of contact or interest that  
18 Mr. Murphy is going to talk  
19 about. But I'm not sure, we  
20 really haven't heard him, but  
21 I can tell you that as I read  
22 my morning paper with my cup  
23 of coffee, I fully expected  
24 Mr. Murphy would rise and  
25 raise this issue.

---



1 "Mr. Humphrey: Well,  
2 shouldn't he do so by leading  
3 evidence, Your Honour? Isn't  
4 that the way, with respect,  
5 these proceedings should  
6 proceed? If he wants further  
7 evidence to be led, he should  
8 indicate to Your Honour that  
9 he has further evidence to  
10 lead and if there's --  
11 "The Court: Well, he may do  
12 that in his submissions to  
13 me. I haven't heard what  
14 he's going to say. He's  
15 begun by telling me that this  
16 matter came to his attention  
17 via the newspaper and the  
18 Internet and I simply  
19 interjected to say that I  
20 read it with my cup of coffee  
21 one morning last week --"  
22 "Mr. Humphrey: Well, but  
23 with respect we're working  
24 backwards, Your Honour. In  
25 my respectful submission,

---

1 when Mr. Murphy stands to say  
2 something he should tell Your  
3 Honour he has a plan in mind  
4 "The Court: With respect,  
5 counsel, when it has to do  
6 with the conduct and the  
7 public conduct of counsel  
8 before this court who stand  
9 before me as you do as  
10 officers of this court, I am  
11 interested and I want to hear  
12 what he has to say. Please  
13 be seated.

14 "Mr. Humphrey: Well, if I  
15 could just please finish,  
16 Your Honour, and I do say  
17 please --

18 "The Court: Yes.

19 "Mr. Humphrey: In my  
20 respectful submissions, one  
21 of the problems with these  
22 proceedings is that Mr.  
23 Murphy is constantly standing  
24 up and just relating  
25 information to the court and

---

1                   it's not clear what his  
2                   purpose is in doing so.  If,  
3                   for example, he wishes to  
4                   lead further evidence then,  
5                   in my respectful submission,  
6                   the proper procedure is to  
7                   indicate he has further  
8                   evidence to lead and then if  
9                   there's some issue as to  
10                  whether or not he should be  
11                  permitted to do that at this  
12                  stage, then he can lay out  
13                  for Your Honour the basis on  
14                  which he feels he ought to be  
15                  entitled to lead further  
16                  evidence.  But, in my  
17                  respectful submission, it's  
18                  just not proper procedure for  
19                  counsel to simply stand up  
20                  and start throwing  
21                  information from the  
22                  newspaper before the court  
23                  before either Your Honour, or  
24                  I as opposing counsel, knows  
25                  what his ultimate objective

---

1 is, and that's all I'm  
2 submitting before Your  
3 Honour; before the  
4 information is thrown before  
5 the court, there should be  
6 some indication as to what  
7 the purpose behind it is.  
8 "The Court: Yes, I  
9 appreciate your observations  
10 and I appreciate that,  
11 because you're not local  
12 counsel, you would not be  
13 expected or you might not  
14 think that you would have  
15 information that is so-called  
16 local information in papers  
17 in eastern Ontario, and  
18 secondly, you also are new to  
19 the case. But, having said  
20 that, you have filed close to  
21 300 pages of research  
22 material on the file. The  
23 court wants to hear what it  
24 is that Mr. Murphy wishes to  
25 bring to the court's

---

1 attention with respect to the  
2 issue of Mr. Cavanagh. On  
3 the question of whether the  
4 court would accept anything  
5 he says as evidence, the  
6 court is always mindful of  
7 that and I fully expect that  
8 the court would invite  
9 submissions on the issue of  
10 whether anything that comes  
11 by way of submissions can  
12 fall into the category as  
13 evidence for purposes of  
14 decision making --"

15 And Mr. Murphy says at the bottom  
16 of page 8178 that:

17 "I suppose to satisfy the  
18 rigid standards that my  
19 friend is imposing, I'm going  
20 to call Mr. Cavanagh to the  
21 witness stand and, if  
22 necessary, I can now provide  
23 the basis on which I'm doing  
24 that by way of a reference to  
25 these statements that are

---

1 attributed to him in the  
2 newspaper."

3 Mr. Murphy then goes on to relate  
4 the statements on page 8179:

5 "This is a story, as Your  
6 Honour has indicated to do  
7 with a criminal investigation  
8 and impaired driving charges  
9 and the prosecution there of  
10 Radek Bonk, a hockey player  
11 with the Ottawa Senators NHL  
12 team. -- dated Friday, March  
13 19th, 1999."

14 The headline apparently is  
15 "Officer's Testimony Sinks Crown":

16 "'RADEK Bonk's impaired-  
17 driving charges have been  
18 dropped amid shocking  
19 allegations that the  
20 arresting officer  
21 'manufactured evidence --'"

22 And refers to the court's finding  
23 that:

24 "'No one should have to come  
25 to court and face charges

---

1 based on manufactured  
2 evidence--'"

3 And the story goes on to review  
4 some of the evidence and the interview with the  
5 defence lawyer, Bill Carroll, about his comments on  
6 it. Then on page 8181 at the middle of the page,  
7 Mr. Murphy quotes from what is attributed to Crown  
8 Attorney James Cavanagh:

9 "Assistant Crown attorney  
10 James Cavanagh would only say  
11 in court that Moore's  
12 testimony was so rife with  
13 contradictions that he had no  
14 chance of winning the case.  
15 The clincher came on March 1  
16 when Sgt. Peter Cox revealed  
17 Moore had initially told him  
18 Bonk wasn't in his parked 4x4  
19 on Bridle Path Rd. in Kanata  
20 when she arrived on the  
21 scene. The 'unexpected piece  
22 of new information-- prompted  
23 Cavanagh to seek a two-week  
24 adjournment that ended with  
25 the dismissal of the

---

1 charges.' "

2 There are some more notations on  
3 the evidence. At the bottom of the page:

4 "Cavanagh said yesterday he  
5 had never before handled a  
6 case that featured both  
7 discrepancies in an officer's  
8 testimony and contradictions  
9 from a fellow officer. 'It's  
10 very rare,' he said. 'In this  
11 instance it was fatal to the  
12 case.' "

13 Mr. Murphy then goes on, after  
14 quoting some authorities on abuse of process, at  
15 the bottom of page 8183:

16 "Well, the connection here,  
17 the relevance is simple and  
18 straightforward, in my  
19 submission. Mr. Cavanagh is  
20 misrepresenting facts to the  
21 court that he knows to be  
22 otherwise. He is saying  
23 here, Your Honour --"

24 "Here" being the newspaper:

25 "-- if this quotation is

---



1 accurate, that he has never  
2 before handled a case that  
3 featured both discrepancies  
4 in an officer's testimony and  
5 contradictions from a fellow  
6 officer. Now, that either  
7 means that he is a bald-faced  
8 liar, but if one accords him  
9 the deference that is owed to  
10 an officer of the court and a  
11 Crown attorney, we must  
12 presume that he simply fails  
13 to appreciate the  
14 significance of the evidence  
15 that he himself has been  
16 present for in this court on  
17 our case. I'm leaving aside  
18 other cases in which Mr.  
19 Cavanagh's conduct has been  
20 raised as a question mark  
21 before the court, very recent  
22 cases. I'm talking about our  
23 case. For Mr. Cavanagh to  
24 make this assertion in the  
25 newspapers about the Bonk

---

1 case, for him to say that he  
2 personally has never handled  
3 any other such case and to  
4 cite the specific criteria  
5 that makes it unique in his  
6 -- or rare in this instance,  
7 in his recollection, in my  
8 submission, speaks to wilful  
9 blindness and tunnel vision,  
10 if not a misstatement and a  
11 deliberately misleading  
12 statement about this case by  
13 direct implication.

14 "It goes to his suitability  
15 as a Crown to continue as a  
16 trial Crown on this case and,  
17 more pointedly, Your Honour,  
18 it speaks to the likelihood  
19 that the misconduct  
20 complained of which, to be  
21 fair, has not yet been ruled  
22 on by this court, but the  
23 instances of Crown  
24 misconduct, the instances of  
25 discrepancies in testimony

---

1 and fabricated or  
2 manufactured evidence that  
3 have been found as a fact by  
4 this court are going to  
5 continue because the Crown  
6 attorney, Mr. Cavanagh, who  
7 presumably will resume as  
8 trial Crown if this matter is  
9 allowed to proceed to a  
10 trial --"

11 And there is reference to Ms.  
12 Walsh and Mr. Cavanagh's assisting her. The court  
13 notes:

14 "-- No decision has been made  
15 by the court on that issue."

16 Mr. Murphy continues on page 8186  
17 to refer to his view of the attitude -- this is  
18 about line 8, the attitude, tunnel vision and  
19 honesty, integrity of Mr. Cavanagh, and refers near  
20 the bottom of the page to the Laderoute evidence.  
21 And Mr. Humphrey, on page 8187, wants to know if  
22 Mr. Murphy has gone to the trouble of obtaining a  
23 transcript of what was said in court on the matter,  
24 because all we have so far is the newspaper.

25 The bottom of page 8187, Mr.

---

1 Murphy says:

2 "I'm not talking about what  
3 he said in court. I don't  
4 know what he said in court.  
5 I'm talking about what he  
6 says to a representative of  
7 the Ottawa Sun, knowing --  
8 presumably knowing it's going  
9 to be published. And  
10 obviously, to be fair to him,  
11 we'd like to ascertain  
12 whether the statement is  
13 accurate --"

14 Then Mr. Humphrey says at the  
15 bottom of the page:

16 "If he's saying that that's  
17 not in issue and the only  
18 concern is what was said to  
19 the Ottawa Citizen, then all  
20 Your Honour need consider--  
21 "The Court: No, I understand  
22 him to say that it may be  
23 both. That, number one, he  
24 complains it was made to the  
25 world at large and we yet

---



1 the charge --  
2 "The Court: No, please, Mr.  
3 Murphy. That's not at all --  
4 you're not at all on point,  
5 Mr. Humphrey. You've missed  
6 the gist of Mr. Murphy's  
7 argument and you've glossed  
8 over five or seven minutes of  
9 his presentation when he said  
10 that the basis for -- that is  
11 Mr. Cavanagh to the reporter  
12 -- for the case not  
13 proceeding was that it was  
14 misconduct of the police and  
15 it was misconduct of a kind  
16 that he had never seen  
17 before, whereas this court on  
18 the 18th of March (sic) of  
19 last year and on the 16th of  
20 May (sic) has found 20  
21 examples of misconduct of  
22 police that parallel, if not  
23 exceed the misconduct which  
24 is reported in the newspaper  
25 report; that's what he

---

1                                   complains of, that  
2                                   statement."

3                                   Mr. Humphrey then submits on page  
4 8190 that they should have an opportunity to obtain  
5 a transcript of the proceedings in Bonk so the  
6 court can a make a determination as to whether, in  
7 the context of this case, a case had been made for  
8 having Mr. Cavanagh recalled to give evidence on  
9 the issues Mr. Murphy seeks to give evidence on.

10                                  On page 8191, Justice Cosgrove  
11 indicates that there are different ways of  
12 approaching the matter and says at line 11:

13                                    "So his evidence could, in my  
14 view, could be relevant,  
15 without deciding the issue,  
16 to both the stay application  
17 and the motion as to whether  
18 he should continue as Crown.

19                                    I agree with that."

20                                  Mr. Humphrey says:

21                                    "Well, if it's Your Honour's  
22 conclusion that his evidence  
23 is relevant, then--

24                                  They have to deal with whether  
25 it's appropriate to interrupt argument to hear

---

1 further evidence.

2 The court says at 8192:

3 I have not made up my mind.  
4 I will be inviting Mr. Murphy  
5 to respond to the point that  
6 you have just made. I have  
7 not made up my mind --"

8 Mr. Humphrey says it will be  
9 disruptive. Page 8193, the court says at line 20:

10 "I will settle that matter  
11 right now. I would not  
12 entertain the recalling of  
13 Mr. Cavanagh on the points  
14 that you have raised without  
15 first having available to  
16 myself and to counsel a  
17 transcript of the proceedings  
18 dealing with Mr. Bonk."

19 At 8194, Mr. Murphy says:

20 "Mr. Cavanagh's credibility  
21 is in issue. He's testified  
22 -- I'm not saying you can  
23 necessarily draw an adverse  
24 -- I'm simply saying his  
25 credibility becomes an

---



1                   issue --"

2                   And the court recesses to give  
3 counsel an opportunity to consider their position.

4       That's on 8196. The argument proceeds at 8198.

5       Mr. Humphrey says first at the top of 8198:

6                   "-- this issue came up some  
7                   time around 11 o'clock this  
8                   morning when I, for the first  
9                   time, heard of this  
10                  article --"

11                 At the bottom of the page:

12                  "-- it's my respectful  
13                  submission that we should  
14                  proceed in this fashion: We  
15                  should proceed with the  
16                  continuation of the argument  
17                  as scheduled. When we get  
18                  the transcripts, Mr. Murphy  
19                  and I can review them and, if  
20                  Mr. Murphy wants to apply to  
21                  Your Honour for a ruling that  
22                  Mr. Cavanagh be recalled, we  
23                  can deal with the issue  
24                  then --"

25                 Mr. Murphy responds at some

---



1 if I've heard the word  
2 'unique'."

3 On page 8205 at line 12, the court  
4 says:

5 "I'm going to cut this short.  
6 I believe that the issue of  
7 the reliability and the  
8 questions arising, or which  
9 are flagged as a result of  
10 the publication of comments  
11 attributed -- I say  
12 'attributed' to Mr. Cavanagh,  
13 are significant enough that  
14 the court wishes to see the  
15 transcript and, after seeing  
16 the transcript, will invite  
17 further comment."

18 I guess later on March 22nd, 1999,  
19 at page 8213, Mr. Murphy says:

20 "We've been provided with the  
21 transcript of Mr. Cavanagh's  
22 submissions withdrawing or  
23 requesting the dismissal of  
24 the Bonk charges. I think it  
25 confirms, Your Honour, that

---

1                   there is nothing approaching  
2                   -- perhaps there's something  
3                   approaching but not getting  
4                   to the quotation that is --  
5                   excuse me -- the comments  
6                   imputed to Mr. Cavanagh by  
7                   Richard Roik in his article  
8                   in the second last and last  
9                   paragraphs, being that  
10                   'Cavanagh said yesterday he  
11                   had never handled a case'--"

12                   Et cetera. Mr. Murphy goes on at  
13 some length in regard to Mr. Carroll's comments, I  
14 guess, in the transcript, Mr. Carroll being Mr.  
15 Bonk's defence lawyer and there is a review of the  
16 transcript, and there is a review, I believe, on  
17 page 8216, of what Mr. Cavanagh says.

18                   I will read that. This is from  
19 the transcript in the middle of page 8216:

20                   "'When I last spoke to the  
21                   court I had intended to call  
22                   Sergeant Cox to give his  
23                   evidence on the record. I  
24                   have decided that, given it  
25                   was my decision, no matter

---

1                   what was said to withdraw the  
2                   matter that that was not  
3                   necessary and I am comforted  
4                   in that in the sense that he  
5                   has said what he said not  
6                   only to me but to Mr.  
7                   Carroll, so he said the  
8                   information I had given to  
9                   the court, to two officers of  
10                  the court, and that is now  
11                  before Your Honour.' "

12                  Mr. Cavanagh goes on:

13                         "'I appreciate indeed that  
14                         there may be explanations for  
15                         the various discrepancies and  
16                         I don't wish to wade into the  
17                         contradiction but in my view  
18                         it is clear that there would  
19                         be no reasonable prospect,  
20                         the evidence is so weakened  
21                         by this last development --'  
22                         '-- that there would be no  
23                         possibility of a conviction  
24                         of Mr. Bonk on these  
25                         charges.' "

---

1                   Mr. Cavanagh goes on at the bottom  
2 8217 to say on the transcript:

3                   "'I understand that the  
4                   Ontario Provincial Police  
5                   will review the handling of  
6                   this matter and all the  
7                   developments I've mentioned  
8                   and those are all the  
9                   comments that I have for the  
10                  court at this time. I'm  
11                  asking that the charge be  
12                  dismissed.'"

13                  Mr. Murphy then goes on at length  
14 at page 8219. In the middle, Mr. Murphy says:

15                  "-- I anticipate my friend  
16                  may suggest, well, that -- as  
17                  Mr. Carroll does, that issue  
18                  is for another court to  
19                  decide, but I think this  
20                  touches on Mr. Cavanagh's  
21                  comment to the press insofar  
22                  as he is suggesting to the  
23                  world at large through that  
24                  reporter that his is a case,  
25                  this Bonk case is unique in

---

1 his experience, and when one  
2 puts that together with the  
3 gloss that he has introduced  
4 to an admission of perjury, I  
5 think one can infer a  
6 complete lack of appreciation  
7 of the evidence in both that  
8 case and our case, the  
9 seriousness of it, the  
10 impropriety of it --"

11 Mr. Humphrey says at page 8220,  
12 about the middle of the page, about line 23, that  
13 he has had an opportunity to review the transcript.

14 He says:

15 "-- maybe I missed something,  
16 but my friend repeatedly  
17 refers to an admission of  
18 perjury and I've missed it.  
19 I don't understand who he's  
20 saying admitted to perjury.  
21 I don't understand that to be  
22 the evidence of the officer  
23 at all, that wasn't a  
24 concession made by the Crown.  
25 The Crown's concession was

---

1 that in light of all the  
2 discrepancies and frailties  
3 and flaws in Officer Moore's  
4 evidence and in light of the  
5 contradictory evidence that  
6 would be offered by Sergeant  
7 Cox, the Crown recognized  
8 there was no reasonable  
9 prospect of conviction --"

10 On page 8222, Mr. Humphrey says:

11 "So in my respectful  
12 submission, there's something  
13 -- simply nothing arising  
14 from the transcript before  
15 Your Honour in the Bonk  
16 proceedings that calls into  
17 question the propriety of the  
18 conduct by Mr. Cavanagh or  
19 his general approach to  
20 criminal prosecutions.

21 In my respectful submission,  
22 with respect to comments he  
23 may have made to the reporter  
24 for the Ottawa Sun, it's not  
25 necessary at this stage in

---



1 the proceedings to interrupt  
2 the proceedings, now being  
3 two plus days into argument,  
4 to hear some further evidence  
5 on what I respectfully submit  
6 is a remote issue at best."

7 Mr. Murphy then responds, and he  
8 says, among other things, at page 8224, line 5, a  
9 simply preposterous suggestion:

10 "-- preposterous to suggest  
11 that the fabrication of  
12 evidence by OPP officers is a  
13 remote issue in any way --"

14 Justice Cosgrove on page 8225  
15 rules:

16 "The court agrees that Mr.  
17 Cavanagh should be recalled  
18 to respond to cross-  
19 examination dealing with  
20 alleged comments, published  
21 comments dealing with the  
22 Bonk decision."

23 Mr. Cavanagh is called the same  
24 day, March 22nd, and Mr. Murphy cross-examines him  
25 as to whether he was the Crown on the Radek Bonk

---

1 case; and he is shown a copy of the article in the  
2 Sun and he is asked to comment what the article  
3 says. Mr. Cavanagh says:

4 "I don't know if it ever  
5 reached that standard line."

6 This is at line 7 on page 8228:

7 "I was a little surprised to  
8 see the line that the  
9 courtroom was told that Moore  
10 was lying."

11 He says at line 17:

12 "-- that's not the case -- I  
13 know I never told Mr. Roik  
14 that, and I know I told him  
15 something different. So  
16 that, I guess, would be  
17 inaccurate."

18 And then at the top of page 8229,  
19 he is referred to the part of the article that says  
20 he has never before handled a case that featured  
21 both discrepancies in an officer's testimony and  
22 contradictions from a fellow officer. Mr. Cavanagh  
23 says:

24 "I'm not sure if I used the  
25 word 'never'."

---



1 never handled a case before  
2 that featured both  
3 discrepancies in an officer's  
4 testimony and contradictions  
5 from a fellow officer?  
6 "Answer: Yes, to put it that  
7 bluntly, that would be  
8 inaccurate, yes, because I  
9 said more to Mr. Roik than  
10 that."

11 He expands on that at line 18:

12 "A large percentage of  
13 criminal cases involve  
14 discrepancies in an officer's  
15 testimony that are elicited  
16 in cross-examination.  
17 Contradictions from a fellow  
18 officer? A large percentage  
19 of criminal cases include  
20 contradictions from a fellow  
21 officer on various points,  
22 whether the points are  
23 central or not is -- may vary  
24 with the cases."

25 He expands on that again, and he

---

1 says at the top of page 8231:

2 "The combination of  
3 circumstances I had in the  
4 Bonk case I've never had in  
5 ten years or thereabouts of  
6 prosecuting criminal cases,  
7 and that's what made it  
8 rare."

9 Mr. Cavanagh expands at length on  
10 why that was, and I won't take the panel to that.

11 He reiterates again on page 8232 at line 19:

12 "Well, it's not even that  
13 rare for there to be  
14 discrepancies in an officer's  
15 testimony and contradictions  
16 from a fellow officer in  
17 terms of you may have a  
18 breath tech who sees red eyes  
19 and the investigating officer  
20 makes no note of red eyes."

21 And the like. And at page 8233,  
22 after questioning at line 13 about the unique  
23 factors and the rare case, the answer is at line  
24 23:

25 "I'm saying that the decision

---

1 was made on the merits of  
2 this case, that in order to  
3 fully understand the  
4 decision, you would have to  
5 read the transcript in this  
6 case --"

7 Meaning Bonk:

8 "-- and also consider the  
9 information that was received  
10 from the supervising officer,  
11 Sergeant Cox."

12 Then over to page 8235 at about  
13 line 2, Mr. Murphy puts into him the Elliott case:

14 "What about Ron Laderoute in  
15 the Elliott case?"

16 Mr. Cavanagh says:

17 "What about it?"

18 "Question: Isn't that a case  
19 where there's discrepancies  
20 in Laderoute's testimony?"

21 And he sets out what that is. At  
22 the top of page 8236:

23 "Question: -- doesn't that  
24 parallel this case?"

25 "Answer: No, I don't -- I

---

1 didn't see any parallel, as a  
2 matter of fact.

3 "Question: You don't see  
4 there being a parallel in the  
5 fabrication or manufacturing  
6 of evidence by Ron Laderoute  
7 and the fabrication or  
8 manufacturing of evidence by  
9 Katrina Moore?

10 "Answer: Yeah, again,  
11 manufacturing of evidence was  
12 the word, the decision of the  
13 court as it were, Judge  
14 Wright, it was not the  
15 language of the Crown."

16 Then at the bottom of the page,  
17 about line 23:

18 "Question: Would you be  
19 comfortable putting Katerina  
20 Moore --"

21 She was a witness in Bonk, a  
22 police officer:

23 "-- on the witness stand on  
24 the basis that defence  
25 counsel would be able to

---

1 cross-examine her and have  
2 the opportunity to expose her  
3 fabrications?

4 "Well, it depends -- No, let  
5 me answer. In any given  
6 case, I think you have to  
7 look at the status of each  
8 witness and in prosecuting  
9 criminal cases you may often  
10 have witnesses of unsavory  
11 character, you may often have  
12 witnesses who have lied to  
13 the police --"

14 And skipping down a couple of  
15 lines:

16 "In Katrina Moore -- the  
17 difference between -- the  
18 significant difference which  
19 I would see between that case  
20 and this is that Katrina  
21 Moore was essentially the  
22 Crown's case and here there  
23 are a large combination of  
24 pieces of evidence which fit  
25 together and point towards

---



1 the guilt of the accused, and  
2 if one witness' evidence is  
3 unsatisfactory on a single  
4 point, as the court has found  
5 and as the Crown may not  
6 agree, you know, speaking  
7 frankly, that would in no way  
8 mandate the type of action  
9 that was taken in the Bonk  
10 case."

11 There is a re-examination the last  
12 couple pages in the tab. The date is obviously  
13 wrong. It should be March 23rd, 1999, and it says  
14 so on the page. Mr. Humphrey cross-examines Mr.  
15 Cavanagh:

16 "Question: As I understand  
17 your evidence of yesterday,  
18 it is that officer Moore was  
19 the central Crown witness in  
20 that prosecution?

21 "Answer: Yes.

22 "Question: She was the  
23 arresting officer?

24 "Answer: Yes.

25 And he goes on about her position.

---

1 And at the bottom of page 8265,

2 line 24:

3 "So, in that sense, it was  
4 appreciated by the trial  
5 Crown that there were  
6 discrepancies in the various  
7 notes and reports prepared by  
8 the officer before the  
9 officer was called as a  
10 witness?

11 "Answer: Yes.

12 "Question: And is it your  
13 understanding that the Crown  
14 called Officer Moore none the  
15 less, with the view that it  
16 was for the trial judge to  
17 weigh those discrepancies and  
18 decide what weight, if any,  
19 should be attached to the  
20 evidence of the officer?

21 "Answer: That's correct.

22 "Question: And then the  
23 situation changed at trial,  
24 when Sergeant Cox came  
25 forward with his

---

1 contradictory account. Is  
2 that correct?  
3 "Answer: That's correct.  
4 I'd spoke to the Crown who  
5 had carriage as the trial  
6 began, back at the time, and  
7 we had discussions, even at  
8 that time, about how poor her  
9 evidence was. But, she  
10 didn't, of course, couldn't  
11 have anticipated, being in  
12 the box, being subject to  
13 cross-examination. So, the  
14 weakness of the actual  
15 testimony occurred after the  
16 trial began, and then in  
17 addition to that, as you just  
18 mentioned, was the  
19 thunderbolt from Cox, as it  
20 were.  
21 "Question: And the  
22 combination of those  
23 circumstances, the Crown  
24 being unimpressed with the  
25 evidence presented in court

---

1 by Officer Moore, and the  
2 further information coming  
3 from Sergeant Cox,  
4 precipitated a reassessment  
5 by the Crown of its case. Is  
6 that correct?

7 "Answer: That's correct."

8 At the bottom of the page:

9 "And after assessing all the  
10 circumstances you've  
11 described, you exercised your  
12 discretion to withdraw the  
13 charge, after concluding that  
14 the Crown did not have a  
15 reasonable prospect of  
16 conviction. Is that right?

17 "Answer: That is right,  
18 except that I invited the  
19 court to dismiss rather than  
20 withdraw."

21 At the top of the next page 8267:

22 "And that's because you were  
23 mid-trial?

24 "Answer: Precisely.

25 "Question: Now, if I could

---

1                   move away from the Radick  
2                   Bonk case and just ask you  
3                   one question about your  
4                   approach as a Crown  
5                   prosecutor. As a Crown  
6                   prosecutor, would you ever,  
7                   knowingly, lead evidence that  
8                   you knew to be false?

9                   "Answer: No."

10                   So ended the Radek Bonk incident.

11                   I am going now to particular 2L, and this deals  
12                   with an intervention by Justice Cosgrove in the  
13                   evidence of Crown counsel Cooper. He was a Crown  
14                   counsel with respect to the Cumberland matter.

15                   If I could ask the panel to remove  
16                   the first page, 285, it really has no place in this  
17                   particular. I am not sure why it is there.

18                   THE CHAIR: Does it belong  
19                   anywhere else?

20                   MR. CHERNIAK: I will consider  
21                   that. I think it may be relevant to an earlier  
22                   particular. It certainly isn't with respect to  
23                   this. If I wish to put it in somewhere else, I  
24                   will do so. I would ask you now to remove it and  
25                   maybe just hold on to it, and I will consider

---

1 whether I want to put it in anywhere else and I  
2 haven't done that yet.

3 We are in September 25th, 1998,  
4 back in 1998. At page 2592, Crown Cooper is being  
5 cross-examined by Cavanagh and he's asked at the  
6 top of page 2592:

7 "Can you just explain what  
8 you meant by that  
9 distinction, please, in that  
10 question?

11 "Answer: When this cross-  
12 examination was taking place,  
13 on the 15th of September, Ms.  
14 Mulligan --"

15 That would be another Crown  
16 prosecutor. I'm sorry, She must have been a  
17 defence:

18 "-- but she was permitted to  
19 cross by us -- permitted by  
20 us to cross.

21 "Question: Yes.

22 "Answer: And we were hearing  
23 -- Ms. Bair and I were  
24 hearing, for the first time,  
25 that this was some sort of

---

1 internal investigation, which  
2 seemed to be some sort of  
3 lesser -- investigation of a  
4 lesser god, so to speak, than  
5 what we had requested. And  
6 frankly, Ms. Bair was livid  
7 at the answers she was  
8 hearing, and I eventually, at  
9 about 4 o'clock, had to ask  
10 for five minutes so that Ms.  
11 Bair could -- I wouldn't say  
12 give me instructions, because  
13 I don't take instructions --  
14 but she could apprise me of  
15 her opinion, after which I  
16 became slightly more  
17 aggressive in my cross-  
18 examination. Not nearly as  
19 aggressive as Ms. Bair would  
20 have had me be if she was  
21 putting the words in my  
22 mouth, however, we were both  
23 astounded that this seven  
24 month long investigation  
25 that, in our opinion, should

---

1                   have taken a month, was some  
2                   sort of lesser investigation  
3                   than what we had requested.  
4                   And this was the very first  
5                   time we had heard a) that it  
6                   was branded internal; and b)  
7                   that internal meant something  
8                   less than a real  
9                   investigation.  
10                  "Question: And you learned  
11                  that from the mouth of  
12                  Detective Inspector Grasman  
13                  as he testified on the stand  
14                  that day?"

15                                 You have heard Detective Inspector  
16                  Grasman was the OPP officer assigned to investigate  
17                  the conduct of MacCharles in the Cumberland/Toy  
18                  case.

19                                 Mr. Murphy asked for permission to  
20                  ask another question. I think Mr. Cavanagh had in  
21                  effect done a re-examination in the form of a  
22                  cross-examination, and Mr. Cavanagh says:

23   "I'd allow my friend to ask  
24   the question and I can object  
25   or not if--

---



1 "The Court: Pardon me?

2 "Mr. Cavanagh: --and then I  
3 would object or not, if we  
4 could proceed that way.

5 "The Court: Yes. I assume  
6 you were going to ask the  
7 same question I was going to  
8 ask, but--

9 "Mr. Murphy: Well, maybe  
10 Your Honour can ask it, and  
11 if it is, I won't.

12 "The Court: All right.

13 That's a real challenge.

14 We'll see whether we are  
15 reading one another's mind.

16 "When did, to your knowledge,  
17 was Detective Inspector  
18 MacCharles substituted by  
19 someone else in this case?"

20 The witness goes on and gives an  
21 answer about that, and I won't take the time to  
22 read the entire answer. And the end of the answer  
23 is at line 18:

24 "I was quite shocked when  
25 MacCharles said that in the

---

1 course of the witness  
2 preparation, and related that  
3 in front of him to Edgar.

4 "Later that day, Edgar  
5 removed MacCharles for health  
6 reasons.

7 "The Court: Did I read your  
8 mind, Mr. Murphy?

9 "Mr. Murphy: Yes. I guess I  
10 have a question to follow up,  
11 which might be equally  
12 predictable --

13 "The Court: I just wanted to  
14 know that I had read your  
15 mind. Go ahead and do the  
16 follow up."

17 And Mr. Murphy does his follow up.

18 I am going to leave particular 2M  
19 at this point. Ms. Kuehl and I want to review the  
20 tab over the weekend and see if we can shorten it,  
21 and I think if we are going to use it at all, there  
22 may be something omitted from it. So I'm going to  
23 pass over it for now and come back to it next week,  
24 which will bring us into book 3, which I believe is  
25 Exhibit 6.

---







1 of that investigation,  
2 whether it's merely a sham or  
3 a pretext or an artifice or a  
4 subterfuge is certainly  
5 before the court."

6 Over the next page:

7 "It is a key and central  
8 element and issue in the  
9 abuse of process voir dire.  
10 And the Crown, who is now  
11 suggesting that this somehow  
12 tangential or implying that  
13 it is, at the very least, is  
14 clearly implicated further,  
15 in my submission, because  
16 we're now hearing evidence,  
17 at least in a preliminary  
18 fashion, that Detective  
19 Inspector Bowmaster and other  
20 members of the hierarchy of  
21 the OPP have been in touch  
22 with the investigation, the  
23 so-called independent  
24 investigation since its  
25 inception."

---

1                   And Mr. Murphy goes on in that  
2 vein and why that might be so. I will be coming  
3 later to certain circumstances with respect to the  
4 draft report. I think it already happened at this  
5 time, but he says at the bottom of page 8371 -- Mr.  
6 Murphy says:

7                   "So, I'd like to hear from  
8                   Inspector Nugent and the  
9                   disclosure issue continues as  
10                  well. We haven't been  
11                  provided with finished  
12                  completed statements. The  
13                  Constable has indicated that  
14                  statements were obtained, and  
15                  we haven't been provided with  
16                  them. And Sheilia Walsh met  
17                  with her on the 16th -- which  
18                  is the day after my  
19                  disclosure request was  
20                  basically stonewalled. And  
21                  we still haven't got them.  
22                  This is Tobias and Dukas,  
23                  it's a continuing pattern of  
24                  concealment and non-  
25                  disclosure."

---





1 to be seem to be, in any way  
2 interfering with or  
3 influencing the RCMP  
4 investigation.  
5 "The other observation that  
6 has to be made is, the Crown  
7 is not seeking to have the  
8 prosecution of Ms. Elliott  
9 adjourned pending the  
10 investigation by the RCMP  
11 into the activities of Lyle  
12 McCharles, and others  
13 involved in both project Toy  
14 and the Foster homicide.  
15 "The Court: On the other  
16 hand, the applicant is not  
17 arguing for an adjournment  
18 either, but rather is arguing  
19 that so-called independent  
20 investigation is a sham. And  
21 of a character consistent  
22 with its criticism of either  
23 incompetence or collusion of  
24 the Crown and Police in a  
25 unfair prosecution of the

---

1 accused.

2 "Mr. Humphrey: I appreciate

3 that's an allegation that's

4 been made, and on foot for

5 some time. And the concern

6 about the involvement of

7 Detective Inspector

8 Bowmaster, and officer

9 Churchill in compiling a list

10 of potential witnesses to be

11 interviewed, that's something

12 that's been known for some

13 period of time, and through

14 January and February, and

15 right up into the early part

16 of March before the evidence

17 was completed in this matter,

18 Mr. Murphy had ample

19 opportunity if he wanted to

20 further investigate that

21 matter, to make inquiries, as

22 to whether that interfered

23 with the independence of the

24 investigation being conducted

25 by the RCMP.

---

1 "The Court: Well, I guess he  
2 wanted to give them time in  
3 order to start their so-  
4 called independent, so-called  
5 independent investigation.  
6 But in any event, you began  
7 by saying he's entitled to  
8 make the request for  
9 disclosure which he has done.

10 And I believe that there's  
11 enough on record that the  
12 court should hear from  
13 Officer Nugent."

14 Who was the RCMP officer involved  
15 in I think leading the investigation:

16 "The circumstance before the  
17 court is almost not  
18 understandable, how, on the  
19 one hand, some witnesses have  
20 been interviewed, but other  
21 witnesses aren't interviewed,  
22 because you can't interview  
23 witnesses. It's almost non-  
24 rationale. So, there's  
25 enough on the face of it that

---

1 I believe that the officer  
2 should be called, in light of  
3 the allegations originally in  
4 the material by counsel for  
5 the accused, and the retort  
6 by my Crown counsel that  
7 there's no evidence, no  
8 evidentiary basis to  
9 criticize the so-called  
10 independence. I think the  
11 court should hear that  
12 witness."

13 That's all I want to read from  
14 that day, and then we go to March 29th, 1999 and  
15 Nugent is called. The court makes an observation  
16 at the top of page 8633 about the nature of the  
17 production that has been made and how that can be  
18 dealt with. Mr. Humphrey says at page 8634:

19 "I'm just raising a fairly  
20 narrow practical problem and  
21 that is that if the inspector  
22 is going to call back to his  
23 office in the hope that  
24 someone is there, can go  
25 through the file and locate

---

1                   what's required, there are  
2                   practical concerns about  
3                   that."

4                   And Mr. Humphrey goes on about  
5   that:

6                   "The Court: The other  
7                   alternative is to have the  
8                   officer bring all the files  
9                   with him, which I thought he  
10                  was really asked to do at the  
11                  outset when he was asked to  
12                  come as a witness in this  
13                  case, instead of having him  
14                  going out and taking a peek  
15                  at his file and telling the  
16                  court what he's going to let  
17                  the court see and what he's  
18                  not going to let the court  
19                  see. Maybe that's what I  
20                  should do is, when he returns  
21                  at noon, we might take a  
22                  little longer break and I'll  
23                  ask him to return to his  
24                  office and just in case bring  
25                  all of the files and then we

---

1 can discuss whether there's  
2 some of it we should look at  
3 or not some of it that we  
4 shouldn't look at. Because,  
5 I -- I can see that there's a  
6 problem about the distinction  
7 as to what is relevant in  
8 that file to this case. The  
9 officer has drawn a  
10 distinction between his  
11 investigation with respect to  
12 Toy but, on the other hand,  
13 as you've just indicated, it  
14 was the Crown itself that  
15 produced the letters from the  
16 two subordinate officers --  
17 Snider, the so-called  
18 acknowledgment or confession  
19 by Inspector MacCharles,  
20 which obviously had to do  
21 with the Toy matter, but were  
22 produced by the Crown in this  
23 case. So how is it now that  
24 the officer has decided in  
25 his mind that things with the

---

1 Toy matter are not germane to  
2 this case?

3 "Mr. Humphrey: Well, the  
4 officer is conducting an  
5 independent police  
6 investigation. He has no  
7 involvement in making  
8 disclosure, either in  
9 relation to the  
10 Toy/Cumberland matter or with  
11 respect to this matter.

12 "The Court: Yes.

13 "Mr. Humphrey: That's the  
14 whole idea of him conducting  
15 an independent police  
16 investigation is that he is  
17 out there and while he may  
18 have some contact with OPP  
19 officers involved with both  
20 cases, or Crowns involved  
21 with both cases, either to  
22 get background information or  
23 to get information on the  
24 status of the non-  
25 communication order

---

1                   respecting witnesses and  
2                   potential witnesses, he is  
3                   still out there conducting  
4                   his own investigation and, in  
5                   the ordinary course, ongoing  
6                   disclosure wouldn't be  
7                   provided either in the  
8                   Toy/Cumberland case or in  
9                   this case in relation to an  
10                  ongoing investigation.

11                  And the court goes on to say:

12                         "Well, except the precedent  
13                         has already been set."

14                  The discussion goes on to the next  
15                  page at about line 20.  Maybe I'll start earlier,  
16                  line 12:

17                         "The Court:  Well, I invited  
18                         him to do that three or four  
19                         months ago but he hasn't  
20                         taken the court up on the  
21                         invitation to talk to  
22                         counsel.

23                         "Mr. Humphrey:  Well, that  
24                         was in relation to the non-  
25                         communication ban involving

---



1 witnesses.

2 "The Court: Yes, yes.

3 "Mr. Humphrey: No, I  
4 appreciate -- I appreciate  
5 that, and I'm familiar with  
6 that record. I'm talking  
7 about a somewhat different  
8 issue which is whether now  
9 that he's a witness and is  
10 being asked questions about  
11 the progress of an ongoing  
12 investigation, whether there  
13 comes a point when there's  
14 some sensitive material that  
15 he feels as an investigator  
16 ought not to be disclosed at  
17 this point.

18 "The Court: But if he is a  
19 so-called independent  
20 investigator that's surely up  
21 to him, not to the Crown, nor  
22 to defence, nor--"

23 That's all I want to read with  
24 respect to that aspect.

25 The next tab relates to a similar

---

1 issue, and that is the conduct of the judge with  
2 respect to the RCMP investigation that the court:

3                               "-- all of its investigative  
4                               notes, during the course of  
5                               the investigation itself, be  
6                               produced for review and  
7                               inspection by the court,  
8                               notwithstanding the limited  
9                               relevance of the evidence --"

10                              The police had at that point.

11                              Before I start on that rather long  
12 group, the panel might want to have an earlier  
13 break. I am going to do my best to shorten what  
14 I'm going to read from this next, because it may be  
15 rather long for the point I want to make.

16                              THE CHAIR: All right. We will  
17 take our break.

18 --- Recess at 2:28 p.m.

19 --- Upon resuming at 2:45 p.m.

20                              THE CHAIR: Mr. Cherniak.

21                              MR. CHERNIAK: I am sorry.

22                              THE CHAIR: Yes, go ahead.

23                              MR. CHERNIAK: There are two  
24 preliminary things if I could. Number 1, I will do  
25 my best not to provide an early recess again,

---

1 because I see it interfered with the tea and cookie  
2 schedule, and the last thing I want to do is  
3 interfere with the panel's tea and cookie schedule.

4                   The second thing is that since I  
5 am usually a fairly soft-spoken person and later in  
6 the day I might even be more soft spoken, if the  
7 panel has any trouble hearing me, please interrupt  
8 me and ask me to speak up. I would be grateful.

9                   THE CHAIR: Thank you.

10                  MR. CHERNIAK: The third thing is,  
11 with respect to this particular 2(o), Ms. Kuehl  
12 reminds me, as I should have remembered myself,  
13 that much of what is here is relevant, as well, to  
14 particular 6, and it won't be necessary to repeat  
15 when I get to particular 6. And particular 6 I  
16 remind the panel is this:

17                   "The totality of the evidence  
18                   and the conduct of the  
19                   proceedings supported the  
20                   observation by the Court of  
21                   Appeal that due to the  
22                   failure of Justice Cosgrove  
23                   to control the proceedings,  
24                   quote, on occasion the  
25                   proceedings seemed to

---

1                   resemble nothing so much as a  
2                   wide-ranging commission of  
3                   inquiry into matters that  
4                   were wholly irrelevant to the  
5                   criminal trial."

6                   I will be submitting at the  
7                   appropriate time that there are matters throughout  
8                   the evidence that I am reading that could fall into  
9                   that particular and not just what I have extracted  
10                  in number 6.

11                  MR. PALIARE: And the panel has my  
12                  position with respect to the views of the Court of  
13                  Appeal, which we will deal with later, but I just  
14                  wanted to rise on that point.

15                  MR. CHERNIAK: If I can then come  
16                  to particular 2(o), we have October 5th, 1998, we  
17                  have Superintendent Edgar, who was in charge,  
18                  although not the investigator, in the RCMP  
19                  investigation.

20                  THE CHAIR: In your cast of  
21                  characters, Mr. Cherniak, it describes him as a  
22                  senior OPP officer.

23                  MR. CHERNIAK: I am sorry. Of  
24                  course that is right. He is a senior OPP officer  
25                  and I misspoke myself.

---

1 THE CHAIR: Thank you.

2 MR. CHERNIAK: I thought to  
3 myself, as I was saying it, that doesn't sound  
4 right.

5 He was the one that made, I guess  
6 along with the OPP commissioner, the decision that  
7 resulted in the RCMP being called in, and at page  
8 3060 the court requires this at line 10:

9 "I would like to inquire of  
10 the Superintendent if he  
11 could obtain a copy of the  
12 terms of reference, and I am  
13 going to provide him with a  
14 copy of my decisions on the  
15 stay applications, one in  
16 March, and I guess the next  
17 one was May, and have him  
18 review those. And simply my  
19 question will be: Whether  
20 having read my decisions,  
21 whether there is anything  
22 that he would add or delete  
23 from the terms of reference?"

24 At page 3061 at the bottom of the  
25 page, the court makes that request to the

---

1 superintendent. At page 3061 at line 14, the court  
2 says:

3 "What I'm interested in is on  
4 what basis the terms of  
5 reference were drawn and  
6 whether in those terms of  
7 reference any reliance was  
8 placed upon the findings of  
9 the court to this point. And  
10 so what I am dealing with is  
11 history, not with  
12 projections."

13 Then we go over to March 29th,  
14 1999, and we have Nugent. I can't remember  
15 Nugent's rank, but he is the RCMP officer that I  
16 believe is in charge of the investigation with a  
17 number of other officers involved, as well. Page  
18 8640, the court says to -- I guess it is to Mr.  
19 Humphrey -- yes, Mr. Humphrey, at line 23:

20 "And you were not in this  
21 court when the court, out of  
22 exasperation, watched two, if  
23 not three officers come to  
24 the court, and they travelled  
25 from Ottawa to Brockville,

---

1 and they were asked to  
2 produce their notes and they  
3 were officers who had at  
4 least five years' experience  
5 -- quite frankly, I was quite  
6 surprised that they would do  
7 that and the court simply  
8 adjourned while they went and  
9 got their notes.

10 Mr. Humphrey responds to that.

11 Then Officer Nugent is in the box. The witness was  
12 out, and at the bottom of 8641, this is the court  
13 at line 22:

14 "Inspector Nugent, we took a  
15 brief adjournment because the  
16 court was concerned and  
17 interested to have the  
18 document, a letter that was  
19 referred to, made available  
20 for counsel's perusal and  
21 potentially for presentation  
22 to the court. Did you have  
23 an opportunity to, in the  
24 break, speak to someone in  
25 -- with the police to have

---

1                   that document presented to  
2                   the court?

3                   "The Witness:  Yes, I did,  
4                   Your Honour."

5                   And then the witness is asked who  
6 he spoke to, and with respect to the Elliott  
7 investigation at line 12, the witness says:

8                   "For the most part, Your  
9                   Honour, I was alone during  
10                  -- for much of the Elliott  
11                  investigation.  Constable  
12                  Rivard was appointed to it at  
13                  the latter -- during October,  
14                  I believe.

15                  "The Court:  Have there been  
16                  other officers who have  
17                  assisted you in this  
18                  investigation?

19                  "The Witness:  No, Your  
20                  Honour.

21                  Then at page 8643, the witness is  
22 asked by the court in line 23:

23                  "Can you tell me what is the  
24                  extent of the record for the,  
25                  both the Toy and the Elliott

---



1 investigation?

2 "The Witness: There's a  
3 single filing cabinet. I  
4 believe it has four drawers.

5 "The Court: Yes.

6 "The Witness: I suspect a  
7 single one is devoted to the  
8 Project Toy investigation and  
9 there are several -- I would  
10 have to actually look at it,  
11 Your Honour, to be more  
12 -- more precise, but there  
13 are several file folders --"

14 The court asks whether there are  
15 transcripts similarly there, and the court goes on  
16 questioning him about the extent of the dedication.

17 At the bottom of page 8645,  
18 Justice Cosgrove says:

19 "But I would like to have --  
20 what I am directing you to do  
21 is to return to your office  
22 and to place all of the  
23 material, apart from the  
24 transcripts, in the  
25 investigation, both for Toy,

---

1 the Toy aspect and for the  
2 Elliott aspect into a  
3 container and to have that  
4 returned with you to the  
5 court.

6 "And I think -- I think what  
7 we will do is we will break  
8 until 2 o'clock and I'd ask  
9 that you return with that  
10 material for a continuation  
11 of the cross-examination --"

12 There are questions of Mr.  
13 Humphrey that I won't take you to that relate to  
14 something in the newspapers. Then the witness  
15 returns to court at 11:15 a.m. on page 8648.

16 Justice Cosgrove:

17 "Detective, it occurred that  
18 with having the file here and  
19 potentially with work being  
20 done on the investigation,  
21 there might be some  
22 complications. What I wanted  
23 to do is to indicate to you  
24 that when the file is here or  
25 as you bring the file, if

---



1 to access to the  
2 investigative file."

3 And he says that Ms. Proulx has  
4 dashed off to put her gown on. Shortly after that,  
5 Ms. Proulx is there representing the Department of  
6 Justice, and Mr. Humphrey says line 25 on 8650:

7 "What happened, Your Honour,  
8 is after we broke, the  
9 witness asked me whether he  
10 should get the entire file or  
11 just the file minus the  
12 transcripts, and I indicated  
13 that I thought your order was  
14 clear that the file without  
15 the transcripts was what the  
16 court was requiring. He then  
17 raised a concern about  
18 whether documents would  
19 simply be produced or whether  
20 they would be reviewed in  
21 some fashion by the Crown  
22 before being produced. At  
23 that point I indicated that,  
24 given the unique nature of  
25 these proceedings and the

---

1 independent investigation  
2 that he's conducting, that I  
3 was not in a position and  
4 would not provide him with  
5 legal advice.  
6 "Now, the officer  
7 subsequently called me, I  
8 believe it was maybe around  
9 11:30, 11:35 this morning,  
10 and indicated that he'd  
11 spoken to someone with legal  
12 training within the RCMP and  
13 as a result of that thought  
14 that there might be an  
15 application under s. 37 of  
16 the Canada Evidence Act to  
17 refuse or decline disclosure  
18 based on a public interest,  
19 and I told the officer that I  
20 would disclose the  
21 conversation he and I had  
22 with my friends, Mr. Murphy  
23 and Meleras, which I did --"  
24 Mr. Murphy says the officer  
25 intended to appear at two o'clock with intention to

---

1 have counsel. Ms. Proulx showed up, introduced  
2 herself.

3 Mr. Humphrey says on page 8652 her  
4 indication was that:

5 "-- I believe her indication  
6 was that it's premature to  
7 say that one will be  
8 brought --"

9 That's with respect to a Section  
10 37 application:

11 "-- it's premature to say  
12 that one will be brought, it  
13 may well be a circumstance  
14 where disclosure can be made  
15 with proper editing, and then  
16 that raises the whole issue  
17 as to who would get involved  
18 in the editing."

19 The court asked for submissions  
20 from Mr. Murphy. Eventually, Ms. Proulx makes  
21 comments starting at page 8655 and gives the  
22 background of her involvement starting at 1:15 of  
23 that afternoon, and makes reference to the section  
24 37 application and says that she is:

25 "-- not entirely sure at this

---

1 point if what's being asked  
2 is disclosure by way of paper  
3 copies of the entire contents  
4 of the file or of --"

5 I am sorry, I have got these out  
6 of order, because in my copy, at least, the 8655  
7 and 8654 are transposed. So 8654 should be read  
8 before 8655, and I apologize I didn't pick that up  
9 when I was reviewing this.

10 8654 has the note that Mr. Murphy  
11 was speaking about, which is the letter of, I  
12 think, November -- referred to in the witness notes  
13 sometime in November.

14 MR. PALIARE: I think it is  
15 November 26th.

16 MR. CHERNIAK: November the 26th,  
17 yes.

18 MR. PALIARE: The page before.

19 MR. CHERNIAK: Justice Cosgrove  
20 says:

21 "And following that -- and  
22 this is, for the court's  
23 benefit, as well as Ms.  
24 Proulx, it was then that we  
25 got into discussion as to

---

1                   whether, rather than having  
2                   to have the officer send for  
3                   material to his office--"

4                   Then Ms. Proulx says at 8655:

5                   "By way of background, I can  
6                   indicate that the officer  
7                   contacted our office -- I  
8                   spoke to him briefly over the  
9                   telephone and I confess that  
10                  I know precious little--"

11                  There is a question of a section  
12 37 application, which she says is a process of last  
13 resort. She talked with the officer as to whether  
14 there could be editing done. Then the court asks  
15 her about the letter from Crown Cooper to his  
16 superiors, and Ms. Proulx says there has been no  
17 time to discuss that letter.

18                  And the court asks her at the  
19 middle of 8657 if she's employed by the Minister of  
20 Justice. Ms. Proulx says:

21                  "That's right. The federal  
22                  department of justice."

23                  "The Court: And you have  
24                  been authorized to provide  
25                  legal advice on behalf of the

---



1                   minister of justice to the  
2                   witness?"

3                   Ms. Proulx explains her difficulty  
4 that they are not lawyers for the RCMP. She is not  
5 purporting to appear for the officer in a  
6 solicitor-client capacity at this point. She says  
7 she is here as a friend of the court and would like  
8 the opportunity to gather more information about  
9 what the involvement is and to speak to officials  
10 at the department.

11                   Then the court says at page 8659:  
12                   "Well, before we deal with  
13                   the larger issue or issues as  
14                   to what role Ms. Proulx will  
15                   be playing, if any, before  
16                   the court, I'm concerned, to  
17                   safeguard the integrity of  
18                   the letter to which is  
19                   referred, and the reason I  
20                   say that is that this case  
21                   has been -- is one where  
22                   important documents have  
23                   been, for lack of more  
24                   accurate description, not  
25                   available to the court when

---



1 Nugent spoke to you about  
2 that letter this morning?  
3 "Cst. Leminski: Yes, he did,  
4 Your Honour."

5 And the letter is then provided to  
6 the inspector. Page 8663, the court says:

7 "Inspector, I understand from  
8 comments by Miss Proulx that  
9 there may be -- that you have  
10 contacted her or counsel in  
11 the Department of Justice  
12 seeking some legal advice."

13 Justice Cosgrove wants to ensure  
14 the safekeeping of the document, and asks the  
15 registrar of the court to take that document and  
16 place it in a sealed envelope and not to be opened  
17 except by order of the court. Ms. Proulx asks on  
18 the next page:

19 "Can I take it, Your Honour,  
20 that any disclosure would of  
21 course be subject to  
22 necessary editing, if and  
23 when that subject arose?  
24 "The Court: No, you can't  
25 take that, because your

---

1 question really signals that  
2 you'll have to do some more  
3 research on the background of  
4 this matter."

5 Ms. Proulx makes some submissions  
6 about that with respect to the relevant law, and  
7 she is asked, at the bottom of page 8664, whether  
8 the usual -- the typical process -- she refers to,  
9 from line 20 on, that are made for unsealing, that  
10 is:

11 "-- first subject to Crown  
12 editing which is, of course,  
13 reviewable by the trial judge  
14 who has finally the ultimate  
15 say --"

16 She says at the bottom of the  
17 page:

18 "I suppose what I'm asking  
19 Your Honour is whether your  
20 order contemplates some sort  
21 of a similar process.

22 "The Court: No. No, my  
23 order doesn't even consider  
24 any of that material for a  
25 number of reasons. First of

---

1 all, I don't know what your  
2 status is before the court,  
3 so I don't know why I want to  
4 get into matters where I'm  
5 not even sure that counsel  
6 are going to be representing  
7 the witness. Secondly, I  
8 think that when you do have  
9 status or there is someone  
10 here who can advise the court  
11 that they're representing the  
12 witness, then at that time I  
13 think I can go into the  
14 issues of the nature of what  
15 is going to happen to the  
16 document. All I'm doing now  
17 is, without knowing at all  
18 what the document is, is  
19 safekeeping it in the court's  
20 possession in the interim.

21 Ms. Proulx says on page 8668, in  
22 answer to the question from the court at about line  
23 17, that she's not asking for any adjournment at  
24 that time, because she doesn't have any standing.  
25 She is simply going to observe. When the time is

---



1 before you answer the  
2 question, you can do that.

3 "The Witness: Yes, Your  
4 Honour, because I don't  
5 remember the -- I've had a  
6 couple of very brief  
7 conversations with her this  
8 afternoon, so I'm not sure --

9 "The Court: Well, I'll go  
10 over it again. Let me see if  
11 I have the time.

12 "The Witness: Was that as I  
13 was coming into the  
14 courtroom?

15 "The Court: Yes.

16 "The Witness: Yes, Your  
17 Honour, I believe I remember  
18 that.

19 "The Court: Yes. Now, you  
20 can either tell me what your  
21 best recollection --"

22 This is the court on page 8699:

23 "Now, you can either tell me  
24 what your best recollection  
25 of what that conversation was

---

1 or you can have a discussion  
2 with Miss Proulx before you  
3 answer the question,  
4 whichever you prefer.

5 "The Witness: I would  
6 discuss it with Miss Proulx  
7 first, Your Honour, please."

8 I guess that happened, and the  
9 witness says:

10 "Your Honour, I very briefly  
11 spoke with Miss Proulx in  
12 that instance and she  
13 indicated to me that I should  
14 bring it to the attention to  
15 the court -- of the court if  
16 I were uncomfortable that the  
17 defence question was going  
18 into areas that were -- that  
19 were currently under  
20 investigation."

21 Mr. Murphy's cross-examination  
22 continues, and then we are still in the  
23 cross-examination of Inspector Nugent by Mr.  
24 Murphy. He is asked at line 7:

25 "Are you aware -- would it

---



1 concern you to know that  
2 there are, in fact, no other  
3 witnesses who saw Miss  
4 Elliott -- you can connect  
5 Miss Elliott to the victim's  
6 vehicle by way of a licence  
7 plate entry that Laderoute  
8 informs Mr. Ball about,  
9 according to his  
10 information?"

11 We are still at March 29th:

12 "Answer: If it would concern  
13 me?

14 "Question: Yes.

15 "Answer: Not having any  
16 -- any standing in the  
17 investigation, I haven't had  
18 any part in the  
19 investigation, no, it doesn't  
20 really concern me.

21 Mr. Murphy makes some submissions  
22 about the integrity of the contents of the RCMP  
23 file. This is about line 25:

24 "-- that the whole file,  
25 subject to the exigencies of

---

1 the investigation, which  
2 could be addressed by  
3 photocopying and making  
4 duplicates, should be sealed  
5 pending the determination of  
6 this matter, if indeed all of  
7 the file has been brought  
8 here intact in the first  
9 instance, but that is kind of  
10 a logical place to stop  
11 today, because any further  
12 questions will obviously  
13 touch on that, as well as the  
14 issue of the letter."

15 There is some further discussion  
16 about the letter by Mr. Murphy. Mr. Murphy has  
17 some questions about the letter in the middle of  
18 page 8712, and he says about line 19:

19 "So I just wanted to advise  
20 the court of that but, at  
21 this point, I think we're at  
22 the juncture where the RCMP  
23 is not disclosing half of the  
24 file and all of the attendant  
25 problems that go with that."

---

1 Mr. Humphrey says:  
2 "Well, Your Honour, firstly,  
3 the RCMP is not disclosing  
4 the file because they're  
5 conducting an investigation  
6 and Your Honour has on many  
7 occasions made the  
8 observation that you have the  
9 advantage over me, in that I  
10 am something of a newcomer to  
11 the proceedings, but having  
12 said that, in my respectful  
13 submission, there's no basis  
14 for a concern that the court  
15 has to take under seal the  
16 entire contents of the  
17 current investigative file of  
18 the RCMP in relation to these  
19 matters.  
20 "In my respectful submission,  
21 the officers ought to  
22 maintain the integrity of  
23 their investigative file,  
24 ought to be entitled to, may  
25 resort to and make reference

---

1 to the contents of their file  
2 for the purposes of  
3 undertaking an investigation  
4 and there would have to be  
5 some significant evidence  
6 that the integrity of the  
7 file was about to be  
8 compromised before it should  
9 raise sufficient concern for  
10 the court to seal the  
11 investigative file."

12 Mr. Murphy says:

13 "It just goes back to the  
14 whole issue of the initial  
15 letter from Mr. McGarry,  
16 September 3rd, advising us of  
17 the referral of this case --"

18 Mr. Murphy says at the bottom of  
19 the page:

20 "I think it's a matter of  
21 serious doubt whether one can  
22 describe anything associated  
23 with this as either an  
24 investigation or an  
25 independent one and the

---

1 concern that has to be  
2 uppermost in the court's mind  
3 is the possibility of  
4 obstruction of justice by  
5 members of the RCMP and, to  
6 paraphrase Mr. McGarry in  
7 reverse: I don't think I'd  
8 be the only person who would  
9 think that -- would consider  
10 the possibility that the RCMP  
11 would engage in a coverup.  
12 I'm concerned about that very  
13 seriously. This witness, by  
14 the submissions of counsel  
15 for the federal Crown, who is  
16 implicated in some degree as  
17 I've already indicated in the  
18 abuse of process motion, has  
19 identified this person as  
20 having called her and being  
21 very distressed and indeed it  
22 may be distress for a number  
23 of reasons that may have  
24 nothing to do with the  
25 contents of the file, but I

---

1 think to simply entrust it to  
2 the offices of this so-called  
3 independent investigation is,  
4 in my submission, courting  
5 disaster and a further  
6 possibility to have further  
7 loss of evidence and of  
8 material and relevant  
9 evidence and, at worst, the  
10 spectre of further coverup  
11 and further obstruction of  
12 justice, and I think there's  
13 a prima facie body of  
14 evidence before the court now  
15 to indicate that this  
16 independent investigation  
17 doesn't even deserve  
18 quotation marks. It's a sham  
19 and a travesty and a  
20 continuing conspiracy which  
21 may attract criminal  
22 overtones, given the extent  
23 to which senior justice  
24 officials in this province  
25 have actively misled the

---

1 court."

2 On the next page, Justice Cosgrove  
3 gives his ruling:

4 "I am not ruling on whether  
5 the investigation is  
6 independent or whether it's  
7 an investigation, whether  
8 it's competent, whether it's  
9 a cover-up or anything of  
10 that ilk. What I am  
11 concerned about is the  
12 integrity of the file to  
13 which this officer has  
14 referred. When I say  
15 'concern', what I mean by  
16 that is that I am nervous  
17 that, for whatever reason,  
18 and they may be valid, bona  
19 fide and legal reasons why  
20 the officer is chary about  
21 sharing information with the  
22 court. Obviously, we've  
23 learned, for example, that  
24 Miss Proulx said that he  
25 called being excited about

---

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

something.

"Secondly, I am perplexed by the fact that the officer didn't bring the file to have it handy to take out whatever he agreed could be seen. I don't know why he didn't do that.

"Thirdly, I don't know why, having in the last couple of days gone through the issue of production, why the officer would say, 'oh, I don't have that letter today, it's in the file, but I can get somebody to get it.'

"And fourthly, I am perplexed by the officer's evidence that he said, 'I was told by Officer Walker that the presiding judge in a homicide case requested certain information.' He was then invited to come to court. He is an officer who is in

---



1 charge of an investigation of  
2 an officer, or officers in  
3 the context of their role  
4 vis-a-vis the evidence of two  
5 homicides, and with that, the  
6 officer didn't have time to  
7 go to his office to get his  
8 original file. Rather, he  
9 phoned somebody else in the  
10 office to get the  
11 information, relied upon that  
12 person, who, I'm not sure was  
13 up to speed on the relevance  
14 of the various documentation  
15 in the file. Detective  
16 Inspector Nugent said that  
17 one officer was helping him  
18 in one area and another  
19 officer recently had come in  
20 to help him on the Elliott  
21 matter, and I am not  
22 confident that the person  
23 that he asked -- whether it  
24 was Leminski, the constable  
25 before the court today or

---

1 not, I'm not sure, but I  
2 don't know how he could with  
3 confidence feel that some  
4 other person would be able to  
5 go through a file that is  
6 somewhat complicated,  
7 determine relevance and  
8 extract from the file with  
9 any feel that the matter was  
10 being competently addressed,  
11 have that then produced to  
12 him to bring to court. I am  
13 perplexed by the officer's  
14 procedures.

15 "I am going to ask the  
16 officer to come back in court  
17 and I am going to ask whether  
18 he requires the file between  
19 now and tomorrow morning, and  
20 if he doesn't, I am going to  
21 have the file remain with the  
22 court."

23 Officer Nugent Inspector Nugent  
24 indeed returns, and he is asked by the court at the  
25 middle of page 8718:

---

1 "And can you tell me whether  
2 either of those will require  
3 reference to the file which  
4 Constable Leminski has with  
5 him today?

6 "The Witness: Yes, Your  
7 Honour, that would be  
8 ongoing.

9 "The Court: Will they be  
10 required to look at that file  
11 tomorrow morning?

12 "The Witness: I could make  
13 it available tomorrow  
14 morning, I think, Your  
15 Honour. Currently, Constable  
16 Rivard is on a course -- It  
17 doesn't relate directly to  
18 the investigation, but  
19 Constable Leminski is more  
20 actively involved --"

21 The court says at the bottom of  
22 page 8718:

23 "Well, there may be a  
24 requirement that he be here  
25 tomorrow, so he can't be both

---

1 places -- I am going to ask  
2 that Constable Leminski lodge  
3 the file with the court  
4 overnight, under court seal,  
5 and that it be made available  
6 tomorrow. In the meantime,  
7 you may or may not have an  
8 opportunity to explore with  
9 counsel certain concerns that  
10 you have with the process."

11 The court requires and Constable  
12 Leminski to attend, and the court says at the  
13 bottom 8719:

14 "Would you then speak to  
15 Constable Leminski and have  
16 him produce to you -- it  
17 might be convenient if you  
18 could have whatever is the  
19 so-called file transferred to  
20 one suitcase or briefcase. I  
21 don't know whether the whole  
22 file takes up one or two."

23 The witness says, "I helped to  
24 bring those files", et cetera, on the next page.  
25 Mr. Humphrey, on page 8720 about line 20, refers to

---

1 Ms. Proulx and potential for legal advice.

2 Then the court resumes at 4:30 at  
3 page 8722. Mr. Murphy makes some submissions that  
4 are unrelated.

5 Then we have Tuesday, March 30th  
6 in the morning and Ms. Proulx is back. She says:

7 "Good morning, Your Honour.

8 -- my name is Chantal

9 Proulx, I appear for the  
10 Attorney General of Canada.

11 "Following my brief

12 representations before Your

13 Honour yesterday, I did have

14 an opportunity to speak to

15 the officer, both last night

16 and this morning, and I can

17 indicate at this point that I

18 am prepared to appear on his

19 behalf in these

20 proceedings --"

21 Ms. Proulx indicates that she has

22 some information, but there's obviously a lot she

23 doesn't know, and she has had an opportunity to

24 review the letter that was sealed. And she says on

25 page 8727 at line 6:

---

1 "Those comments having been  
2 made, I can indicate that the  
3 position I am taking this  
4 morning, upon reflection, is  
5 that all of these records  
6 -- and by that I mean the  
7 letter and the balance of the  
8 file, of which, of course,  
9 the letter is an integral  
10 component -- are records  
11 which have been and continue  
12 to be third party records.  
13 And that, for that reason,  
14 they are not or should not be  
15 the subject matter of  
16 Stinchcombe disclosure, as  
17 that term is defined in that  
18 case."

19 She notes that they have been  
20 brought to court and that nothing further has been  
21 done with them except the sealing order. Then  
22 there is a discussion between Ms. Proulx and the  
23 court and a reference to the O'Connor case. Ms.  
24 Proulx is asked at line 19 on page 8728:

25 "-- are you taking the

---

1 position then that anything  
2 that the officer has produced  
3 or agreed to produce thus far  
4 ought to be retracted,  
5 because now of these  
6 instructions?  
7 "Ms. Proulx: My  
8 understanding of what the  
9 officer said -- now, I  
10 haven't read the transcripts  
11 -- my understanding from the  
12 officer is that when asked  
13 about the letter, he  
14 originally indicated words to  
15 the effect that he didn't  
16 believe he had a problem with  
17 it and that he thought he  
18 could get a copy of it, he  
19 didn't have a problem  
20 producing it to the court.  
21 He also indicated that his  
22 recollection -- he indicated  
23 he wanted to get advice --"  
24 This is page 8729:  
25 "-- my understanding from him

---

1 was that upon reflection,  
2 having initially indicated  
3 that he would bring it court,  
4 that he later thought about  
5 it and thought he should get  
6 some advice --"

7 Justice Cosgrove makes a ruling on  
8 page 8779:

9 "The court is satisfied on  
10 the basis of the argument of  
11 O'Connor that a legitimate  
12 argument can be made that the  
13 RCMP in this case is a third  
14 party, this is a third party  
15 record; that is, the letter  
16 falls in that category, the  
17 file falls in that category."

18 At line 20:

19 "I am satisfied on the basis  
20 of the disclosed content of  
21 the letter by the witness in  
22 the stand and in his notes  
23 that the content of the  
24 letter is relevant to these  
25 proceedings. It has to do

---



1 with the issue of reliability  
2 of a number of witnesses,  
3 including Mr. MacCharles, who  
4 have testified in the  
5 proceeding and on that basis  
6 the court is satisfied that  
7 the first step or process in  
8 O'Connor has been satisfied.  
9 I will now take that letter,  
10 Madam Registrar, and open it  
11 and peruse it and I intend to  
12 do that in the judge's  
13 office --"

14 The court comes back after doing  
15 so, and Justice Cosgrove refers to the procedures  
16 set out in the O'Connor case at some length. He  
17 says at the bottom of page 8783:

18 "It's in that context that  
19 before I make a final  
20 decision I want to return to  
21 the court and to inquire  
22 whether Ms. Proulx has any  
23 further argument on the issue  
24 of the balancing process. I  
25 wasn't sure, for example,

---

1                   whether you were saving your  
2                   argument dealing with  
3                   privilege and so-called  
4                   interest of the police in  
5                   investigations etcetera, was  
6                   something that you were  
7                   reserving --"

8                   And Ms. Proulx suggests that the  
9                   matter be put over until later on.

10                   Then on page 8795 on March 30th,  
11                   the same day, obviously a few pages later, Justice  
12                   Cosgrove makes another ruling. He refers again to  
13                   O'Connor, and at page 8796 he holds:

14                   "In my view, the production  
15                   of the letter is necessary  
16                   for the accused to assist in  
17                   full answer and defence. The  
18                   letter deals with very  
19                   important issues raised on  
20                   the stay application as a  
21                   result of the disclosure by  
22                   the Crown of impropriety of  
23                   Officers MacCharles,  
24                   Dougherty and Snider. It is  
25                   germane to the investigation

---

1 complaint by counsel --"

2 He goes on in that vein. At the  
3 bottom of the page:

4 "This letter deals with many  
5 of the allegations of  
6 impropriety that the court  
7 has heard evidence of  
8 respecting Mr. MacCharles."

9 The court considers, on page 8797,  
10 the dangers of prejudice to the proper  
11 administration of justice, privacy rights.

12 He says at page 8799 at the top:

13 "In some sense, as I have  
14 talked about that by my  
15 observation that the non-  
16 production of the document in  
17 my view could significantly  
18 undermine the proper  
19 administration of justice in  
20 the context of production in  
21 a proceeding seeking the  
22 remedy of a stay on the  
23 grounds of abuse of process -  
24 -"

25 He refers to some other factors,

---

1 and he says at the top of page 8800:

2                               "-- I think calls for its  
3                               production and consideration  
4                               by counsel for the accused,  
5                               because of that context. So  
6                               the court has reached the  
7                               decision that on the basis of  
8                               the objections and the  
9                               request that this matter be  
10                              considered as a third party  
11                              production issue, the court  
12                              on that basis has come to the  
13                              conclusion that on that basis  
14                              the letter should be  
15                              produced--"

16                              Ms. Proulx says on page 8800 that  
17 she's not claiming any further privilege, and she  
18 notes very carefully that this is not a blanket  
19 position, at the bottom of page 8800, that only in  
20 this particular case this document will be  
21 disclosed.

22                              Then Mr. Humphrey is asked to make  
23 submissions. He has none. Mr. Murphy makes some  
24 submissions. Ms. Proulx at page 8803 makes a  
25 submission in about the middle of the page:

---

1 "In terms of the process I  
2 suppose what I'd like to do  
3 is renew my application from  
4 this morning that the file be  
5 returned to the officer."

6 And she refers to the O'Connor  
7 test and refers to the ruling on the letter. Ms.  
8 Proulx says on page 8804 at about line 7, "As I  
9 indicated this morning" -- maybe I will start at  
10 line 3:

11 "And one can simply not  
12 assume likely relevance on  
13 the basis of the fact that  
14 there is an issue and that  
15 something in there might be  
16 directly relevant to it. A  
17 lot of what's in there may  
18 well not be and, in my  
19 submission, the next step is  
20 to order the file returned to  
21 the officer.

22 "As I indicated this morning,  
23 Your Honour has expressed a  
24 concern with respect to the  
25 integrity of the documents, I

---

1 am certainly quite prepared  
2 to make a copy or have a copy  
3 made of that file so that it  
4 can be preserved by the court  
5 in the event that that is a  
6 live concern of Your  
7 Honour's, but in my  
8 submission, there is a real  
9 interest in this  
10 investigation not being  
11 brought to an abrupt halt by  
12 the entire investigative file  
13 sitting in the courthouse for  
14 what might be a considerable  
15 length of time --"

16 And the court calls on Mr.  
17 Humphrey, and Mr. Humphrey talks about the issue of  
18 relevance and makes a submission that Mr. Murphy  
19 should have to establish a basis of relevance for  
20 pursuing the matter. Mr. Humphrey indicates that:  
21 "-- and Your Honour at that  
22 time didn't feel it was  
23 necessary to hear submissions  
24 from Mr. Murphy. That, in my  
25 respectful submission, is an

---

1 appropriate requirement at  
2 this point, that Ms. Proulx  
3 is correct that what should  
4 be demonstrated first by the  
5 applicant is that there is  
6 likely relevance to a  
7 material issue on the  
8 application --"

9 Mr. Murphy is then asked to make  
10 submissions, and he does so at some considerable  
11 length in his own personal style. And he speaks,  
12 for instance, of MacCharles being a major league  
13 felon. That's at page 8807 at the top, and at the  
14 bottom of page 8807 Mr. Murphy speaks of:

15 "-- an abuse of process by  
16 the criminal conduct of a  
17 police officer, a senior OPP  
18 investigator and the almost  
19 comedic sequence of events  
20 that's ensued since he made  
21 his confession which was  
22 eight months ago--"

23 And refers to the fact that Mr.  
24 Strosberg hasn't showed up again on page 8808, and  
25 he makes the point -- at the top of 8809, Mr.

---

1 Murphy says at about line 6 that:

2 "If this is a truly  
3 independent investigation,  
4 why is Inspector Nugent in  
5 regular frequent ongoing  
6 contact with the people who  
7 are responsible for  
8 commissioning the  
9 investigation?"

10 Mr. Murphy thinks he is perhaps  
11 too understated and refers at the bottom of the  
12 page and refers to the:

13 "-- risk that still exists  
14 that my friends, as officers  
15 of the Crown, are completely  
16 ignoring. They're completely  
17 ignoring the possibility of  
18 perjury, obstruction of  
19 justice, misleading the  
20 court."

21 Mr. Murphy goes on at the bottom  
22 of the page:

23 "These officers of the Crown  
24 have apparently decided that  
25 they get to decide what the

---



1 court will hear about. They  
2 get to withhold vital  
3 information. They get to  
4 decide, in the interest of  
5 whatever priorities or agenda  
6 they're going by, that they  
7 can basically lie and  
8 stonewall everybody, and my  
9 friends from Toronto, from  
10 the Ministry of the Attorney  
11 General and the federal  
12 department of justice are  
13 saying nothing about that.  
14 That, to me, is a telling  
15 omission."

16 I just pause to say here that the  
17 one thing that Mr. Murphy didn't answer was Mr.  
18 Humphrey's argument about the necessity for there  
19 being some evidence. The judge, following those  
20 submissions by Mr. Murphy, calls upon Ms. Proulx,  
21 and Ms. Proulx says on page 8810:

22 "I can assure my friend that  
23 the subtlety of his point  
24 wasn't lost on me now or  
25 earlier in his submissions.

---

1 I have never disputed that  
2 the officer's credibility is  
3 relevant to his application  
4 for abuse of process. I  
5 don't dispute that now. What  
6 I'm saying is that relevance  
7 of the content of the file  
8 cannot be assumed on the  
9 basis that the issue is  
10 germane. The contents of the  
11 file is something that has to  
12 be looked at individually and  
13 separately and when I came  
14 here this morning I invited  
15 Your Honour to order that the  
16 file be returned to the  
17 officer so as we may go  
18 through the process in  
19 O'Connor, the first stage  
20 involves the preparation if  
21 appropriate, if necessary,  
22 and in my submission this is  
23 a perfect case for it, of  
24 summaries of what the  
25 contents are."

---

1 Justice Cosgrove:

2 "No, I think you totally  
3 misunderstand, misapprehend  
4 and misread O'Connor."

5 MR. PALIARE: But she also goes on  
6 to say this is a perfect case for it. That's the  
7 application of O'Connor.

8 MR. CHERNIAK: I'm sorry, "in my  
9 submission", yes.

10 "-- and in my submission this  
11 is a perfect case for it, of  
12 summaries of what the  
13 contents are.

14 "The Court: No, I think you  
15 totally misunderstand,  
16 misapprehend and misread  
17 O'Connor. O'Connor doesn't  
18 provide as step 1-a, prior to  
19 step 1 that the Crown will  
20 read the third party's  
21 material. That's silly.

22 "Ms. Proulx: I'm not  
23 suggesting that it's a  
24 mandatory process, Your  
25 Honour. I'm suggesting that

---

1 it's an option.

2 "The Court: It's an option  
3 this court won't exercise in  
4 the context of the issue  
5 before the court which is  
6 abuse of process."

7 And the court says at line 15:

8 "I asked you to reply to Mr.  
9 Murphy on the issue of the  
10 production of the file."

11 Ms. Proulx has nothing more to  
12 submit. Justice Cosgrove at the bottom page 8811  
13 says:

14 "I am satisfied on the basis  
15 of what the court has heard  
16 in this application since the  
17 Crown made production of  
18 information that identified  
19 the potential impropriety of  
20 actions of officers in a  
21 parallel case that the  
22 material which is in this  
23 file which has been referred  
24 to many times by Inspector  
25 Nugent is likely relevant to

---

1 the issue before the court  
2 which is the stay  
3 application. And I include  
4 in that not only the remedy  
5 in a stay application of  
6 granting a stay but of all of  
7 the nuances under that of the  
8 issues which the court has to  
9 consider which is the  
10 potential of some remedy  
11 offered by the court less  
12 than a stay. And what I mean  
13 by that is the court has  
14 already on the stay  
15 application devised a remedy  
16 which had to do with further  
17 testing of evidence --"

18 And his honour goes in that vein,  
19 and says at the bottom of the page:

20 "-- we are nowhere near to  
21 considering because all of  
22 the evidence isn't in but I  
23 am satisfied that of the  
24 material by Inspector Nugent  
25 that it's likely relevant to

---

1 the proceeding, otherwise I  
2 couldn't understand why he'd  
3 gather it in a file. His  
4 mandate was to investigate  
5 the allegations. If he's out  
6 investigating irrelevant  
7 evidence, or gathering an  
8 irrelevant file, I would be  
9 surprised. I say that in the  
10 context of the last paragraph  
11 by the Crowns Bair, Cooper  
12 and Dandyk in the letter  
13 which I've ordered to be  
14 produced which is a letter  
15 signed by those three Crown  
16 attorneys who say:  
17 "'In conclusion, on the basis  
18 the current internal  
19 investigations --'  
20 "-- which investigation the  
21 RCMP and the witness,  
22 Inspector Nugent, before me  
23 has re-instituted in a so-  
24 called independent fashion --  
25 "'-- we have concerns with

---

1                   respect to the following  
2                   sections of the Criminal  
3                   Code --"

4                   And the letter lists a number of  
5 sections of the Criminal Code. Page 8814 at line  
6 17:

7                   "I agree with the Crowns in  
8                   charge of the prosecution in  
9                   August of last year that the  
10                  evidence surrounding those  
11                  potential concerns with  
12                  respect to the three  
13                  officers; Lyle MacCharles,  
14                  Gary Dougherty and George  
15                  Snider, should be  
16                  investigated, and it was  
17                  proper that this information  
18                  be produced to the counsel  
19                  for the accused."

20                  This is the middle of page 8815:

21                  "So the court is satisfied  
22                  that the first step in the  
23                  O'Connor application which I  
24                  have, in the absence of a  
25                  formal application, have

---

1                   embarked upon as a result of  
2                   submissions by counsel today,  
3                   the first test has been  
4                   satisfied --"

5                   At line 24:

6                    "In terms of the file being  
7                   available for continuing work  
8                   by the investigators, the  
9                   file will be available to  
10                  them here at the court  
11                  through the services of the  
12                  registrar at any time and I  
13                  can either now direct that a  
14                  copy of the complete file be  
15                  made and left with the court  
16                  and the originals returned to  
17                  the police or I can offer the  
18                  officers that, if they have  
19                  need of the file, that it is  
20                  here and available to them at  
21                  any time, I guess, that this  
22                  building is open.

23                  "The court now, according to  
24                  O'Connor, will be required to  
25                  review the file and to

---



1                   consider the various  
2                   arguments with respect to the  
3                   weighing or balancing process  
4                   in step two, and I guess I  
5                   will have to do that on a  
6                   document by document basis."

7                   And then there goes on to a  
8                   discussion with the court of how to maintain the  
9                   document. Ms. Proulx makes a further submission at  
10                  page 8819. She says at the top:

11                   "Thank you, sir. I do want  
12                   an opportunity to address  
13                   Your Honour with respect to  
14                   your comments about the file  
15                   and what process the officers  
16                   will have to have access to  
17                   it. My request is that a  
18                   copy be made immediately. I  
19                   have some concerns about the  
20                   alternative Your Honour  
21                   suggested which is that  
22                   access be provided. And the  
23                   main reason is that I'm given  
24                   to understand that there are  
25                   documents contained in that

---

1 that raise real and  
2 significant privilege  
3 concerns for various reasons.  
4 Not only related to ongoing  
5 investigations, but to other  
6 areas of concern, such as  
7 informer privilege, and that  
8 there is a real and  
9 substantial danger on the  
10 basis of those documents of  
11 prejudice.

12 "The Court: Well, it's  
13 difficult to accept your  
14 submissions without hearing  
15 evidence to substantiate  
16 those submissions. I don't  
17 know that I can really have  
18 any way of gauging how to  
19 respond to it, without there  
20 being evidence of what you're  
21 now introducing by way of  
22 evidence to the court.

23 "Ms. Proulx: Well, I'm  
24 certainly prepared to call  
25 the officer who is here to

---

1 give Your Honour some  
2 indication of that."

3 Inspector Nugent gives some  
4 evidence about that starting at page 8820. He  
5 indicates to the court -- it is about line 20. The  
6 court reminds Ms. Proulx that she should not lead  
7 the witness. The witness says at the bottom of the  
8 page:

9 "The file is composed of  
10 interview reports, day to day  
11 notes taken by the various  
12 investigators, notes to  
13 comrades to conversations.  
14 Certain documents concerning  
15 exhibits and interviews. I  
16 could go on.

17 "Question: Could you please.

18 "Answer: Statements  
19 themselves would be involved.

20 "Question: And sir, do you  
21 have any concerns with  
22 respect to the contents of  
23 those documents and their  
24 production?

25 "Answer: Yes, I do.

---

1 "Question: And what is that?

2 "Answer: I have a number of  
3 concerns about the documents  
4 being released from our  
5 custody."

6 And he lists some of those  
7 concerns. They come from other agencies. He  
8 explains what he means by that. He is asked if  
9 there is anything else, and the witness says:

10 "Yes, there is an interview  
11 report there and the actual  
12 proceedings -- the transcript  
13 of an interview that would  
14 cause me concern for the  
15 safety of the person who was  
16 interviewed.

17 "Question: And is there  
18 anything else, sir?

19 "Answer: There are  
20 developments within the  
21 context of the investigation  
22 that I would not want  
23 divulged to the people who  
24 are being investigated and  
25 the--

---

1 "Question: And sir, what's  
2 the reason for that?

3 "Answer: It's just -- just a  
4 question of strategy, if you  
5 will. I would rather keep  
6 the details of the  
7 investigation within the  
8 investigative team for the  
9 moment so that no one that  
10 I'm about to interview  
11 anticipates what I'm going to  
12 be talking about and prepares  
13 answers in advance. -- There  
14 are a number of -- of  
15 documents that were received  
16 from the Ontario Provincial  
17 Police that I would be not  
18 comfortable with -- with  
19 making public --"

20 And he explains why that is. Mr.  
21 Humphrey then asks some questions on the issue  
22 about how big they are, and he says there's about  
23 15 inches of paper.

24 Mr. Murphy then cross-examines.  
25 The question is at the bottom of the page:

---

1 "Would you agree with me that  
2 everything you've described  
3 in the last five minutes of  
4 your evidence would suggest  
5 that it's not so much an  
6 independent investigation, as  
7 one that's entirely almost in  
8 many critical aspects  
9 dependent on the permission  
10 of the OPP to disclose  
11 information, correct?  
12 "Answer: I don't agree that  
13 that takes away from the  
14 investigation's independence.  
15 "Question: You're basically  
16 beholden to the OPP as to  
17 what you do with that  
18 information, right?  
19 "Answer: No, sir, I'm in the  
20 possession of documents that  
21 belong to another agency that  
22 I haven't been specifically  
23 authorized to release to  
24 anyone."

25 The cross-examination goes on. I

---

1 won't take you through any more of it. The witness  
2 is excused and Ms. Proulx makes some further  
3 submissions at page 8827 in the middle of the page:

4 "I'm using a somewhat casual  
5 expression, but I simply  
6 cannot see that it is  
7 appropriate in terms of the  
8 ongoing nature of the  
9 investigation or of the  
10 contents of the file that  
11 these officers be required to  
12 attend during court office  
13 hours and that the court  
14 office itself be turned into  
15 some sort of a drop-in centre  
16 for the officers to come and  
17 request their documents.

18 "In my submission, it's  
19 appropriate and necessary for  
20 the effective conduct of the  
21 investigation, and having  
22 regard to the security  
23 concerns, that the file be  
24 ordered copied immediately  
25 and a copy turned over to the

---

1 officers -- at least if Your  
2 Honour wants to retain the  
3 original, which I assume you  
4 do -- but, in my submission,  
5 it's appropriate to order  
6 that the file be copied at  
7 this point --"

8 Mr. Humphrey says it is not his  
9 brief. This is page 8828:

10 "-- it's probably undoubtedly  
11 plain to Your Honour that in  
12 whatever fashion the court  
13 retains a copy, that every  
14 available precaution be taken  
15 to ensure that the file is  
16 kept secure."

17 Justice Cosgrove makes a ruling  
18 asking Officer Nugent to begin duplication of the  
19 file so the original could be returned to officer  
20 today. And he makes a provision for the copy with  
21 the court to be sealed.

22 Justice Cosgrove says he will  
23 consider overnight whether he should consider the  
24 second stage of the O'Connor procedure.

25 The matter resumes on March 31st

---



1 the next day, and at page 8854 the ruling is made  
2 and Justice Cosgrove says:

3 "Counsel has risen to raise  
4 an issue with respect to the  
5 request for disclosure and  
6 the court then on  
7 representation from counsel  
8 for the inspector who had  
9 various documents which were  
10 in part the subject of the  
11 request argued that the  
12 documents being third party,  
13 necessitated an O'Connor  
14 treatment of the issue and we  
15 spent yesterday in that  
16 process. As a result of that  
17 the court ruled, following  
18 the court's appreciation of  
19 the O'Connor process that a  
20 certain document should be  
21 produced which has been  
22 produced --"

23 Justice Cosgrove refers to the  
24 submissions about the integrity of the ongoing  
25 investigation, and he says that he has given some

---

1 thought to that overnight and that, at a minimum,  
2 this court should view and entertain this process,  
3 and at line 13 there should be a voir dire into the  
4 O'Connor process and request for production.

5                   And his honour deals with the  
6 protections that are necessary for the file left  
7 with the court, and the court goes on to deal at  
8 some length with how the security concerns should  
9 be dealt with in the next few pages.

10                   Then the matter goes over to June  
11 24th, 1999. I should be able to finish this by  
12 four o'clock, I hope. June 24th, 1999 is about the  
13 time that the report is actually forthcoming from  
14 the RCMP. Justice Cosgrove makes a ruling at 9052  
15 that the process that the court will follow with  
16 respect to the report itself -- this is the RCMP  
17 report:

18                   "On the issue of the report  
19                   itself, there is no claim for  
20                   privilege by the federal  
21                   Crown."

22                   He is alerted to the fact there is  
23 a concern by the provincial Crown, and the court  
24 refers to the jurisprudence with respect to  
25 O'Connor and, at 9054, the wide discretion that the

---

1 court has as to procedure. He goes on in that  
2 vein. He calls a recess.

3 Certain submissions are made,  
4 starting at page 9057, as to the process, and Mr.  
5 Humphrey -- if we go to page 9061, after some  
6 submissions made by Mr. Murphy, Mr. Humphrey says  
7 at line 22:

8 "Yes, if I could just rise in  
9 response to the last comment  
10 by Mr. Murphy.

11 "Your Honour may recall that  
12 when Inspector Nugent was in  
13 the witness box, he did  
14 testify to concerns around  
15 the safety of protected  
16 witnesses and he did raise  
17 this issue respecting  
18 concerns about maintaining  
19 confidentiality --"

20 And Mr. Humphrey makes some  
21 submissions in the middle of page 9062 about the  
22 safety of individual protected witnesses, and makes  
23 a submission about the procedure at the bottom of  
24 9062.

25 The court says at the top of 9603,

---

1 about line 5:

2 "-- that is helpful.

3 "The court certainly will  
4 take the comments of Mr.  
5 Humphrey, which appear to  
6 convey concerns of Crowns  
7 Bair and Cooper into  
8 account."

9 And then on page 9066, the court  
10 says about line 18:

11 "I intend then to proceed on  
12 an in camera hearing on a  
13 claim of privilege under s.  
14 37 by Ms. Proulx --"

15 And then the next page we have  
16 here are the pages of 9025 on June 25th. There is  
17 a ruling by Justice Cosgrove that reviews the  
18 evidence of Inspector Nugent and the RCMP mandate.  
19 He refers to the argument on page 9069:

20 "Yesterday I entertained  
21 argument by counsel for  
22 Inspector Nugent with respect  
23 to the issue of disclosure of  
24 content of the file and of  
25 the report which is in two

---

1 parts, that is, the report of  
2 Inspector Nugent who this  
3 week has produced so-called  
4 final reports in an operation  
5 or an investigation entitled  
6 for identification purposes  
7 as Project Audition."

8 The court goes on to say:

9 "My remarks this morning is  
10 my decision with respect to  
11 disclosure to this point with  
12 respect to the file and to  
13 the reports."

14

15 The top of page 9070:

16 "Insofar as the production  
17 for discussion argument and  
18 consideration with respect to  
19 submissions by counsel for  
20 Inspector Nugent, my decision  
21 is that the reports -- shall  
22 be produced."

23 And he makes some comments about  
24 the details with respect to that order.

25 Page 9071, with respect to the

---



1 Cumberland matter."

2 Following that ruling, Mr.

3 Humphrey makes certain other submissions on page

4 9077. Mr. Humphrey, at the bottom at line 25:

5 "If I might just rise first  
6 on the issue. I have spoken  
7 with Ms. Bair and Mr. Cooper  
8 about these matters and one  
9 thing they indicate to me is  
10 that they've endeavoured to  
11 be very careful in  
12 Toy/Cumberland in providing  
13 disclosure, but they've  
14 indicated to me that mistakes  
15 have been made which have  
16 resulted in one or more  
17 witnesses having to be moved.

18 And they indicate to me that  
19 Sergeant Heather Lamarche is  
20 the OPP officer who is the  
21 officer with primary  
22 responsibility -- to ensure  
23 that nothing that could  
24 compromise protected  
25 witnesses is inadvertently

---

1 disclosed --"

2 Mr. Humphrey notes in the middle  
3 of the page the sensitive nature of the  
4 investigation. Mr. Murphy comments on that. He  
5 notes that it is purportedly an independent  
6 investigation. Mr. Murphy makes a submission at  
7 the top of page 9079:

8 "-- it is asking, in effect,  
9 the wolves to guard the hen  
10 house to allow that type of  
11 collaboration. It would be  
12 nothing more than a self-  
13 serving damage control  
14 exercise in my submission.  
15 "The OPP, if nothing else, it  
16 completely pierces,  
17 obliterates, destroys the  
18 pretense of objectivity and  
19 independence in this  
20 investigation that the final  
21 product should then be  
22 returned to the lead  
23 investigator on Project Toy  
24 who is as involved in the  
25 investigation perhaps as

---



1 anyone -- So I oppose that  
2 vehemently.

3 "I had serious concerns and  
4 I'm just restating for the  
5 record that Crowns Bair and  
6 Cooper shouldn't be allowed  
7 within a hundred miles of  
8 this process. They have  
9 misled the court in their  
10 evidence, in my respectful  
11 submission, and they are not  
12 simply to be trusted. That  
13 would be my comment with  
14 respect to that."

15  
16 Mr. Humphrey responds to that  
17 submission. Justice Cosgrove makes a ruling and  
18 indicates at the bottom of page 9080 that he has to  
19 balance things, such as fairness to the accused, in  
20 the context of a fair trial.

21 He says at 9081:

22 "Apart from anything that has  
23 been said by counsel, I find,  
24 for example, that to release  
25 these reports to witnesses in

---

1 the procedure is somewhat  
2 unusual. Potentially Crowns  
3 Cooper and Bair could be  
4 witnesses again on this voir  
5 dire or witnesses in the  
6 trial and I am now releasing  
7 information to them, which  
8 I'd prefer not to do. On  
9 the other hand, I've  
10 attempted to restrict the  
11 areas where concern has been  
12 expressed and I have made no  
13 decisions on the voir dire in  
14 the area, allegations have  
15 been made, they are there  
16 before the court, I have made  
17 no decision because I haven't  
18 heard argument."

19 Then he refers to the fact that  
20 this may give him a safety valve. He refers to the  
21 procedure that he adopts.

22 There is further argument by Ms.  
23 Proulx and Mr. Humphrey and Mr. Murphy that I won't  
24 take the court through. Then the matter comes back  
25 on July the 2nd, and I believe this is Mr. Humphrey

---

1 who is speaking at the top of 9102. He says that  
2 Murphy objected to him having any contact with  
3 Inspector Nugent and refers to how his honour dealt  
4 with that.

5 And the court says at the bottom:

6 "Have you discussed with Ms.  
7 Proulx when you expect to  
8 have this information?"

9 And Ms. Proulx is there, as well,  
10 and Ms. Proulx makes some representations with  
11 respect to what is in the Project Audition file and  
12 she reiterates, page 9105, that she doesn't expect  
13 that there will be privilege issues.

14 The discussion goes on and I won't  
15 take the panel's time to read it. Mr. Murphy makes  
16 submissions starting at page 9108, and at the  
17 bottom of the page 9109 he complains that the delay  
18 is becoming ridiculous and he says:

19 "Presumably if the  
20 investigators showed up  
21 they'd bring the statements  
22 with them and they could  
23 simply hand them over. Why  
24 we're being told we have to  
25 subpoena them or bring an

---

1 O'Connor application is  
2 beyond my understanding.  
3 "The Court: Ms. Proulx, are  
4 you aware that some of the  
5 interviews were taken in  
6 writing?"

7 And she says she would have to  
8 make some inquiries. She makes further submissions  
9 about the O'Connor process. Mr. Murphy makes his  
10 submissions, and Mr. Humphrey rises on page 9112  
11 and make comments of some things said by Mr.

12 Murphy:

13 "He intimated that the  
14 request for the attendance of  
15 the assisting investigators  
16 was made in his letter of  
17 Monday. Just so the record  
18 is clear, that request was  
19 made for the first time in  
20 his letter of Wednesday June  
21 the 30th --"

22 Which was faxed out that day. And  
23 Mr. Humphrey reads the letter that Mr. Murphy sent  
24 as to what he wanted done and who he wanted there  
25 for July 2nd:

---

1 "That's it. Now, Mr. Murphy  
2 suggests that one wouldn't  
3 have to be prescient to  
4 understand that as a request  
5 that they attend and that  
6 they bring the file,  
7 including any interviews with  
8 them. Well, in my respectful  
9 submission, if that's what  
10 Mr. Murphy wanted, he should  
11 have so indicated and if he'd  
12 done it in a timely fashion  
13 we could have had those  
14 individuals here, more  
15 importantly we could have had  
16 the file here and Mr. Murphy  
17 could have continued with the  
18 ongoing O'Connor application.  
19 "The Court: No, counsel, I  
20 find your submissions lacking  
21 in perspective. The  
22 perspective being that we're  
23 well down the road in this  
24 trial, production has been an  
25 issue throughout. Defence

---

1 asked for the background for  
2 these reports, it's not  
3 complicated, and why he'd  
4 have to go through all of  
5 this to, and the runaround he  
6 got from counsel, 'I haven't  
7 got it, I haven't got it', or  
8 'somebody's not here and I  
9 don't know what she's going  
10 to say'. In light what's  
11 happened in the last few  
12 weeks, you've missed the  
13 point entirely. I won't  
14 accept and don't accept that  
15 defence counsel has done  
16 anything inappropriate.  
17 Defence counsel has attempted  
18 to respond to what, in my  
19 view, is an inappropriate  
20 unconcern of the federal  
21 Crown machinery to the  
22 significance of the time  
23 factor involved in this  
24 matter. And I would have  
25 thought that in light of, for

---

1 example, my calling a senior  
2 administrative Crown from the  
3 federal government when Ms.  
4 Proulx wasn't available  
5 previously --"

6 I think that refers to Eugene  
7 Williams, and I will come to that matter in due  
8 course:

9 "I would have thought that  
10 she would have been available  
11 to answer a defence response  
12 in this matter, on standby.  
13 So I don't want to hear  
14 anything further about she  
15 did he did, he said, what  
16 said. It's very simple:  
17 where are the reports? Why  
18 aren't they here? That is  
19 the only thing that the court  
20 is concerned about.

21 "Mr. Humphrey: Well,  
22 speaking on behalf of the  
23 provincial Crown, the only  
24 Crown I'm here representing--

25 "The Court: Yes.

---

1 "Mr. Humphrey: --it's my  
2 intention to, as Mr. Murphy  
3 puts it, collaborate with the  
4 federal Crown representing  
5 the RCMP.  
6 "The Court: Well, it's my  
7 order, so I don't need your  
8 collaboration, counsel.  
9 "Mr. Humphrey: Well, if I  
10 can just finish, Your  
11 Honour --  
12 "The Court: Yes.  
13 "Mr. Humphrey: -- and  
14 indicate what my intention  
15 is.  
16 "The Court: Yes.  
17 "Mr. Humphrey: Okay. It's  
18 my intention to do that and  
19 to as quickly as possible --  
20 "The Court: Yes.  
21 "Mr. Humphrey: -- gain  
22 possession of the  
23 investigative file of the  
24 RCMP in relation to this  
25 case, what has been described

---



1 by the RCMP as the Foster  
2 homicide investigation and as  
3 soon as I receive production  
4 of it, I will discharge the  
5 Crown's obligations to make  
6 timely disclosure.  
7 "The Court: Well, I will  
8 assist you with your  
9 collaboration, because I  
10 order that the file and the  
11 officers who had anything to  
12 do with the collaboration of  
13 the file be present in this  
14 court at 10 o'clock on Monday  
15 morning. That means that I  
16 want all of the written  
17 interviews or any written  
18 interviews, all of the  
19 original transcripts which  
20 defence has requested and  
21 we'll all collaborate on  
22 Monday morning and see if we  
23 can find a photocopy machine  
24 somewhere in this building  
25 Monday morning. And over the

---

1                   weekend, if Ms. Proulx, in  
2                   reviewing that material or  
3                   today with the officer feel  
4                   that there are issues of  
5                   privilege, they can be raised  
6                   on Monday morning."

7                   That concludes what I want to read  
8                   with respect to that tab. I see it is past four  
9                   o'clock, so perhaps this will be a convenient time  
10                  to adjourn for the weekend.

11                  THE CHAIR: All right. Monday  
12                  morning, 9:30.

13                  MR. CHERNIAK: I am sure we all  
14                  can't wait.

15                  --- Whereupon the proceedings adjourned  
16                  at 4:04 p.m. to resume on Monday, September 8,  
17                  2008 at 9:30 a.m.

---

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

---

Catherine Southworth, Computer-Aided Transcription