

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 Tuesday, September 9, 2008 at 9:30 a.m.

CONDENSED TRANSCRIPT WITH INDEX

APPEARANCES:

Earl Cherniak, Q.C.
Cynthia Kuehl

Independent Counsel appointed
pursuant to the *Complaints Procedure*

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for the Inquiry Committee

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1 Toronto, Ontario

2 --- Upon resuming on Tuesday, September 9, 2008 at

3 9:30 a.m.

4 MS. KUEHL: Good morning. You
5 will recall yesterday that Mr. Cherniak read out an
6 apology that Mr. Murphy made following the exchange
7 at the end of tab 3 and before 3A, and we undertook
8 to provide the pages.

9 And so that is what is currently
10 being handed out and it can be inserted in your
11 binder at the very back of tab 3 before the sub-tab
12 A.

13 THE CHAIR: In volume?

14 MS. KUEHL: In volume 3.

15 THE CHAIR: Just give the
16 reference again, tab 3?

17 MS. KUEHL: Tab 3 at the very
18 back, right before 3A.

19 THE CHAIR: Thank you. Mr.
20 Cherniak.

21 CONTINUED SUBMISSIONS BY MR. CHERNIAK:

22 MR. CHERNIAK: Good morning,
23 members of the panel. We are in the sub-tabs under
24 particular 3 which, just to remind the panel, is
25 the particular that says that:

1 "Justice Cosgrove failed or
2 refused to control the trial
3 process and, in particular,
4 allowed defence counsel to
5 make unfounded, egregious
6 allegations against the
7 Crown, the police, and
8 others."

9 And it deals with the failure to
10 sanction or caution defence counsel and the like.

11 We are now in particular 3(c),
12 which reads, it's short:

13 "Justice Cosgrove failed to
14 intervene during an abusive
15 cross-examination of Bell
16 Canada employees, despite the
17 request of Crown counsel to
18 do so."

19 Just a little bit of background
20 here. The issue, and you heard a bit of it, was
21 the Bell Canada records of the so-called, to use
22 that term, "abusive". You remember the discussion
23 as to whether the call was or was not abusive in
24 the evidence of the police officers, but there were
25 calls in June of 1995 -- I am sorry, threatening.

1 The issue was whether they were threatening.

2 The calls were in June of 1995.

3 Mr. Foster apparently had one of these -- he had
4 something that he paid \$5 a month for that he could
5 press star-57, I think it was, and a record would
6 be made of what the call was. There were four --

7 HON. WACHOWICH: Who was it that
8 had that?

9 MR. CHERNIAK: Mr. Foster. This
10 was in June of 1995. Because I guess he'd had some
11 of these calls, he had purchased this ability from
12 Bell. There was an issue as to whether there were
13 or were not Bell records available of all of this,
14 and there were four, at least four, Bell employees
15 of various levels that were called.

16 This particular deals with, I
17 think, the examination of the last of them, a Mr.
18 Roche. I will be coming to what occurred in some
19 of the others in later particulars, but prior to
20 Mr. Roche being called, there had been a Ms.
21 Everard, who was a reasonably junior employee in
22 the Bell records office in Ottawa, and then there
23 was a Francine LeDuc who was called, and some of
24 these were recalled.

25 Then there was a Mr. Gauthier who

1 was called, and then ultimately Mr. Roche was
2 called. I will be dealing with particulars that
3 involve the evidence of LeDuc and Gauthier.

4 THE CHAIR: Mr. Cherniak, can I
5 ask what the significance of this evidence was?
6 This is called on the voir dire?

7 MR. CHERNIAK: It was called on
8 the voir dire. I guess the idea was that the
9 defence wanted to show that Mr. Foster had enemies
10 who would make what they called a threatening call.

11 As you will see, the evidence
12 called on how long Bell kept records, and what
13 those records were and what these records showed,
14 and what Mr. Foster's telephone records -- it went
15 on and on and on at great length.

16 This was one of the matters that
17 the Court of Appeal commented on about, in many
18 ways, this trial turned to an inquiry. When I come
19 to some of that evidence dealing with other
20 particulars and at the end, on the particular that
21 deals -- particular 6 deals with the matter of this
22 voir dire turning into an inquiry and irrelevant
23 matters, you will see that.

24 MR. PALIARE: Excuse me, Mr.
25 Cherniak. My understanding, Chief Justice Finch,

1 is that this evidence with respect to Bell, and we
2 will track it down, was initially called by the
3 Crown and not by the defence.

4 MR. CHERNIAK: That may well be.
5 The police did an investigation, in part. There
6 were these calls, and it may well be that they
7 called to show what the records actually showed,
8 and they did call the police officers with respect
9 to that issue.

10 The inquiry, as I recollect it
11 from reading from the evidence, I can tell you it
12 is not the most interesting evidence I have ever
13 read. The issue was that there is a point at which
14 Bell no longer keeps the records unless they are
15 instructed to do so by the police, and I guess they
16 didn't have the records for some of what Mr. Murphy
17 wanted.

18 There was a long inquiry as to why
19 that was, and, as we will see in a later matter,
20 Justice Cosgrove at one point said he simply didn't
21 believe the Bell people. We will come to that.

22 THE CHAIR: The explanation is
23 helpful. I didn't want to get us off on a
24 sidetrack. I have a better sense of it now.

25 MR. CHERNIAK: I haven't told you

1 have is the star-57 trace."

2 And the witness goes on to deal
3 with the question of how long the records are kept,
4 the star-57 trace.

5 On page 840, the witness gives a
6 long answer to the court about the star-57 matter.

7 On the next page, the examination by Mr. Cadieux,
8 who is Mr. Murphy's co-counsel, continues, and on
9 page 842, for instance, he is asked about whether
10 he has knowledge about the records being kept for
11 six months only. That's about line 9.

12 And the witness goes on to deal
13 with why the records are or are not kept for more
14 than six months. The witness is asked to make some
15 inquiries over the break.

16 If you turn to page 851, the
17 witness has made some inquiries over the break.
18 What is going on here is that the number that was
19 apparently -- they were able to determine what
20 number had called Mr. Foster.

21 You remember from the police
22 officer's evidence there was a number that he took
23 down. The issue here is, by this time, somebody
24 else had that number, and it turned out to be some
25 Bell-related company, and the issue was how that

1 happened. Mr. Roche has been making inquiries
2 about this Bell Sigma, and there is a company
3 called ISM, as to how that could have happened.

4 The witness at page 854, about
5 line 15, he agrees to make inquiries about certain
6 information with the CRTC, and he says he will try
7 to make those inquiries at about line 15.

8 Then moving over to the bottom of
9 page 856, the discussion goes back, at about line
10 26, to this Bell Sigma issue; and the witness says
11 at the middle of page 857 that a part of Bell Sigma
12 became ISM, and ISM has the number. And the
13 witness is asked at about line 22:

14 "Question: Is this a
15 coincidence, sir?

16 "Answer: Totally."

17 And the question is that:

18 " --that Bell Sigma, who
19 basically oversees CMSCOT,
20 who has the computer
21 information that's supposed
22 to keep the call trace for
23 six months -- that phone
24 number should be in there, or
25 should have been in there --

1 is it a happy coincidence
2 that it's also the company
3 that now has this number?

4 "Answer: It's, to the best
5 of my knowledge, totally a
6 coincidence."

7 At the top of page 858:

8 "Question: Totally a
9 coincidence. And it's not an
10 effort to mislead defence
11 counsel --"

12 Then the witness at the bottom of
13 page 859 is asked about his security clearance, and
14 he gives that answer he is top secret, which, as we
15 will see later, is not the top. I think there is
16 something above that, but I'm not sure it matters.

17 At page 861, there is a discussion
18 about the difference between star-57 and star-69.
19 Mr. Roche had been cross-examined for some pages,
20 some number of pages that I read -- I'm not sure
21 where it starts, but some 30 pages that I have just
22 gone through, by Mr. Cadieux.

23 Mr. Cadieux says on page 864:

24 "Those are my questions, Your
25 Honour, but I believe Mr.

1 Murphy has a question or
2 two."

3 Mr. Murphy says:

4 "Just one question, Your
5 Honour."

6 And Mr. Murphy starts his
7 cross-examination with a question at line 19:

8 "Question: Now, with
9 everything you've said, could
10 you tell me, or tell His
11 Honour, tell this court, what
12 you think the odds are that
13 the same telephone number
14 that we're told by a police
15 officer, on June the 21st
16 of 1995, was traced by star-
17 69 ..."

18 That 247-6009:

19 "-- it was determined to be
20 that number by that police
21 officer, and recorded in his
22 notes at that time ... What
23 are the odds that that
24 number, which was apparently
25 billed, and we know now was

1 billed successfully, that
2 that same subscriber had a
3 successful call trace put on
4 his call --"

5 At the top page 65:

6 "That same number, that's
7 recorded in that notebook,
8 materializes two-and-a-half
9 years later as a telephone
10 number belonging to a
11 subsidiary of Bell Canada?"

12 There is an objection about
13 whether it is a subsidiary or not. Then Mr. Murphy
14 goes on at page 866 with the same question
15 basically that he asked earlier, and he asked the
16 witness to explain the coincidence and how, and the
17 witness goes on to explain the coincidence that the
18 247 exchange in Ottawa, I'm paraphrasing, has only
19 got so many numbers and a company or resident
20 asking for it gets one of those numbers.

21 I guess we can all assume that the
22 247 exchange has only got 999 numbers, or maybe
23 1,000 numbers in it. And the witness says at the
24 top of 867:

25 " -- but I do know that we're

1 talking hundreds of telephone
2 numbers are being used."

3 Mr. Murphy says:

4 "You said Bell gives out
5 millions of phone numbers,
6 right?"

7 And the witness is allowed to
8 complete his answer. At line 15 he says:

9 "While we do give them out
10 every - I believe we have
11 seven million subscribers -
12 so to that extent, yes.
13 What numbers we would give
14 out to someone living in a
15 certain area from a central
16 office, we would give him the
17 numbers that are available in
18 that central office, so it
19 becomes much smaller.

20 "MR. MURPHY: Question: What
21 are you talking about? Does
22 that have any relationship,
23 in astronomical terms of
24 measurable distance, does
25 that answer have any

1 proximity to what I asked
2 you?

3 "Answer: I think so.

4 "Question: I asked you, sir:
5 How does Mr. Foster trace a
6 phone number, on June
7 the 21st of 1995, that ends
8 up, two-and-a-half year
9 later, showing up at ISM as
10 one of their phone numbers?
11 I'm not interested in hearing
12 your equivocations."

13 Mr. Cavanagh objects, and Mr.

14 Cavanagh says:

15 "Mr. Murphy and Mr. Cadieux
16 have been insulting to this
17 gentleman throughout the
18 afternoon. Your Honour has
19 listened to his demeanour
20 throughout the afternoon.
21 This man is trying to be of
22 assistance to the court ...
23 He's come over, he's tried to
24 be of assistance, and he's
25 suffered abuse at the hands

1 of these two gentlemen
2 throughout the afternoon.
3 "Your Honour, it's
4 intolerable that persons who
5 come to the court to try and
6 assist the court receive that
7 abuse, that mockery, from
8 counsel. They have a duty,
9 as officers of the court, to
10 be courteous to witnesses
11 that come before the court.
12 If a witness invites, in some
13 way, harsh treatment by
14 counsel, that can occur.
15 But, in my respectful
16 submission, Your Honour has
17 heard it throughout the
18 afternoon, Mr. Roche has done
19 nothing but try and answer
20 the questions of these
21 counsel, try to get the
22 information that he was
23 directed to yesterday, and
24 tried, over the course of the
25 15-minute break this

1 afternoon, to get further
2 information to assist both
3 the court and the inquiries
4 of defence. And now, to be
5 subjected to suggesting that
6 he's equivocating, when he's
7 trying to give an answer to
8 explain how local area
9 numbers are assigned, is
10 terribly unfair to the
11 witness and, in my respectful
12 submission, I'm asking the
13 court to direct Mr. Murphy to
14 stop abusing this witness."

15 Mr. Murphy responds:

16 "I think Mr. Cavanagh,
17 understandably, is a little
18 over the top on this one,
19 Your Honour.

20 "This whole issue, and this
21 inquiry about this number -
22 and I'll speak in front of
23 the witness - I don't think
24 there's anything that's going
25 to affect his demeanour at

1 this point, or change it, at
2 least. This is all a line of
3 inquiry that's as a result of
4 the Crown delving into this
5 on reply. I think it's fair,
6 given that this witness's own
7 employees apparently see fit
8 to evade service and indeed,
9 the authority of the
10 subpoena, that my impatience
11 with his non-responsive
12 answers is completely
13 appropriate.

14 "I strongly object to the
15 adjective or the term that
16 I'm abusing, and that
17 Mr. Cadieux has been abusing
18 this witness. We're dealing
19 with people who are
20 presumably - witnesses who
21 are presumably intelligent
22 and, otherwise, Bell would
23 not have developed and
24 prospered to the extent that
25 it has as a big corporation.

1 I think Mr. Roche is playing
2 this absent-minded professor
3 routine a little bit too
4 well, in my submission, and
5 it's perfectly acceptable, in
6 cross-examination, too rein
7 him in, in an attempt to have
8 him answer the questions.
9 "He still hasn't answered
10 directly how this amazing set
11 of coincidental circumstances
12 could have arisen, and the
13 implication is obvious, and
14 he knows it's obvious. He's
15 the front man here for Bell
16 corporate security. He's
17 the - I don't know what his
18 business card says, but this
19 is a corporation where
20 somebody, who calls
21 themselves a staff manager on
22 a business card, then
23 testifies, with a straight
24 face, that they don't have
25 any staff working for them.

1 "I don't think I can be
2 fairly accused by the Crown,
3 especially when this is their
4 reply evidence that got us
5 into this. I don't think
6 that defence can be properly
7 respectfully accused of
8 abusing the witness. I think
9 what is an abuse is the
10 arrogance of Bell Canada and
11 its employees, and its legal
12 counsel, believing that this
13 is some sort of a trifling
14 matter that doesn't require a
15 serious response, and I think
16 most of Mr. Roche's answers
17 can be, I think, fairly
18 described as double-talk and
19 equivocal, and I don't have
20 any other questions for him.
21 "The Court: I am not going
22 to comment on the last
23 submissions by Crown or
24 defence. They obviously are
25 of a different point of view.

1 "I agree with some of what
2 has been said by defence
3 counsel, and not all of it on
4 the particular point."

5 The court goes on at the bottom of
6 the page, line 28:

7 "And so I am going to ask the
8 witness, again, to see
9 whether, in fact, I did
10 understand the answer. If he
11 could take one more - make
12 one more attempt at
13 explaining the coincident
14 thing which, in fairness to
15 the witness, was put with the
16 preface of: Could you - do
17 you understand the
18 mathematics of chance? And
19 that's getting into an area
20 that goes beyond my expertise
21 ... but I read about it ...
22 and I want you to repeat the
23 answer --"

24 And so on. The witness does go on
25 and he again gives the evidence. That's what

1 occurred on that occasion.

2 If I could turn now to 3D, 3D
3 deals with the issue of altercation between the
4 defence counsel and son of the victim, Steven
5 Foster, and what occurred when Steven Foster came
6 with his lawyer.

7 I am going to read the parts that
8 deal with the incident, as well, because Steven
9 Foster was, in effect, threatened with a contempt
10 charge, and this evidence is relevant to the part
11 of the particulars that deal with the threats of a
12 contempt.

13 There are really two aspects that
14 I am presenting here, the circumstances of the
15 contempt issue involving Mr. Foster and the way
16 that Mr. Murphy dealt with Mr. Foster's counsel.

17 Mr. Murphy comes into the office
18 on May 20th, 1998 -- we are back in 1998 now -- and
19 makes a statement to the court about what occurred
20 in the cafeteria between him and Steven Foster, and
21 I am going to read what happened.

22 I simply observe here that there
23 is no allegation in this case of any physical
24 contact. Mr. Murphy describes what occurred in
25 this way at line 16:

26

1 "I was buying coffee for Mr.
2 Cadieux and myself at the
3 cash register in the
4 cafeteria downstairs on the
5 first floor and, as I was
6 about to leave with the
7 coffee, I hear a voice to my
8 immediate right within about
9 two feet, asking me, 'have I
10 been a smart ass all my
11 life', and something else - I
12 didn't quite get all of it -
13 and I looked and it was
14 Steven Foster, who, Your
15 Honour will know, is a Crown
16 witness on this case, the son
17 of the victim. And I looked
18 at him, I was quite startled.
19 His tone was somewhat
20 aggressive, I would even say
21 it was menacing. I'm not
22 going to engaged in machismo
23 here; I found it unsettling
24 that he spoke to me at all.
25 I turned immediately and

1 indicated to him that I didn't
2 wish him to speak to me any
3 further and that, if he
4 attempted to do so, I would
5 contact court security, at
6 which point his words to me
7 were: 'Fuck you', which he
8 repeated a second time, 'fuck
9 you'. And then finally, as
10 he went away and I repeated
11 the fact that - I repeated
12 out loud, for the benefit of
13 other counsel who were
14 present, what he had told me
15 and who he was. I know there
16 were other senior counsel
17 present, one of whom I
18 indicated that he was a
19 witness to what happened and,
20 at that point, I indicated to
21 Mr. Foster a third time that
22 if he was going to speak to
23 me again I would contact
24 court security."

25 Then Mr. Foster goes on to mention

1 that police Constable Mahoney was there.

2 He says at line 24:

3 "Mr. Foster then resumed his
4 seat next to Violet Pender,
5 who, Your Honour will know,
6 is the witness who testified
7 that she's not close to
8 Steven in any way, and that's
9 the end of the incident."

10 Mr. Murphy goes on to say that Mr.
11 Foster has made no secret of his animosity against
12 the accused, and he refers to his evidence in
13 cross-examination in Brockville when he was called
14 as a witness as to what he had thought of Ms.
15 Elliott.

16 Mr. Murphy asks the court, at
17 about line 12, to exclude Mr. Foster from the
18 courtroom and that he be admonished. He goes on to
19 complain about the conduct of the police officer
20 who was, he said, a witness.

21 On page 1188, Mr. McGarry says at
22 line 10:

23 "With regard to what happened
24 downstairs, Your Honour, I
25 don't know what happened, I

1 there was a confrontation of
2 some sort."

3 And then the court says on page
4 1190 at line 5:

5 Is Mr. Steven Foster in the court?

6 "Yes, sir, I want to advise
7 you that you should retain
8 counsel. The court is
9 contemplating inquiring
10 whether you have acted in
11 contempt of this court.
12 There are ... could be
13 certain sanctions imposed by
14 the court if the court finds
15 that there was contempt of
16 court, in the face of the
17 court and, under the
18 circumstances, I think that
19 you should discuss this
20 matter with counsel, and it's
21 a matter that I will deal
22 with tomorrow morning at
23 9:30."

24 The next morning, Mr. Foster shows
25 up with a lawyer named Tennant. Mr. Tennant is

1 asked by the court at about line 15:

2 "Mr. Tennant, have you had an
3 opportunity of discussing
4 with Mr. Foster the reason
5 why the court requested that
6 he obtain counsel services?

7 "Mr. Tennant: I have
8 certainly heard his version
9 of the incident that occurred
10 yesterday, Your Honour. And
11 it would be my submission
12 that it was an incident of
13 very minor nature and should
14 be below the level which
15 would draw the attention of
16 the court. In fact, it is
17 probably a matter that
18 properly should not have been
19 reported to Your Honour."

20 Mr. Tennant says at the top of
21 page 1227 that he wants "to give this court the
22 version of events that Mr. Foster related to me".

23 Justice Cosgrove:

24 "I will permit you to make
25 those representations so that

1 I have then heard from two
2 officers of the court what
3 was the alleged nature of the
4 incident."

5 Mr. Tennant then gives what he was
6 told by Mr. Foster. He said that it was not a --
7 "confrontation is too strong. They crossed paths;
8 it was inadvertent, and he says in the middle of
9 the page:

10 "It was certainly inadvertent
11 - an inadvertent crossing of
12 paths so far as Mr. Foster is
13 concerned. He is a
14 relatively sophisticated
15 person and is sensitive to
16 the nature of a criminal
17 trial where there is an
18 adversarial process and some
19 people are in one camp and
20 some in another. And he is
21 sensitive to the fact that he
22 should avoid, if possible,
23 inadvertent crossings of
24 paths with someone in the
25 opposing camp. So it was

1 truly inadvertent on his
2 part.
3 "It was simply he and Mr.
4 Murphy approached the same
5 point or the same spot from
6 oblique angles and were about
7 to step into the same spot.
8 Mr. Murphy, according to Mr.
9 Foster, made a facial gesture
10 to which Mr. Foster took
11 exception. Mr. Foster said a
12 few unfortunate, regrettable
13 words, but privately, not
14 loudly. Mr. Murphy very
15 loudly required Mr. Foster to
16 get away from him. Mr.
17 Foster did signal with the
18 appropriate signal that he
19 did not wish to engage in a
20 fight by stepping back ever
21 so slightly and turning ever
22 so slightly ..."

23 Mr. Tennant goes on to say that
24 this would take place in about five seconds. At
25 line 15:

1 "Mr. Foster did continue to
2 turn and to return to the
3 table where his relatives
4 were seated. Mr. Murphy
5 continued to address Mr.
6 Foster in a loud voice and, I
7 suppose for every word Mr.
8 Foster said, Mr. Murphy
9 probably said 25 or more, and
10 in a much louder voice. Mr.
11 Murphy also stepped ever so
12 slightly toward Mr.
13 Foster ..."

14 And Mr. Tennant goes on with his
15 explanation. Mr. Murphy stands up in the middle of
16 Mr. Tennant's presentation and repeats the words
17 that were said, and the court says to Mr. Murphy:

18 "No, no. Please sit down.
19 Sit down, Mr. Murphy. You're
20 interrupting counsel."

21 Mr. Tennant goes on with his
22 explanation. Justice Cosgrove at the bottom of the
23 page says that he has already observed the
24 relationship between Mr. Murphy and Mr. Foster, and
25 Justice Cosgrove says:

1 "It is not my intention to
2 engage in argument at this
3 time."

4 This is at the top of 1230:
5 "I simply want to give
6 counsel the opportunity of
7 relating to the court what
8 information --"

9 And Mr. Tennant again submits that
10 it was a trivial matter which should have been
11 concluded after five seconds.

12 The court asks Mr. Murphy, for the
13 benefit of Mr. Tennant, to repeat the version of
14 events, and Mr. Murphy does go on at the bottom of
15 the page to repeat his version of events and reply
16 to Mr. Tennant's submission, which he does at the
17 top of page 1231. He says, Mr. Foster approached
18 him:

19 "This is not two men in a bar
20 butting chests against each
21 other."

22 Then Mr. Murphy goes on at about
23 line 12:

24 "I can also advise Your
25 Honour that Mr. Tennant may

1 tell the court he has little
2 knowledge of this matter - he
3 was subpoenaed as a witness
4 in this matter in December of
5 last year."

6 I think he must mean Mr. Foster.

7 I don't think Mr. Tennant was:

8 "For him to stand before Your
9 Honour as a civil
10 practitioner - I'm not sure
11 what the extent of his
12 criminal practice is - but
13 for him to stand before this
14 court and somehow suggest
15 that this doesn't warrant
16 reporting to Your Honour, in
17 my submission, is a comment
18 of great concern. Perhaps
19 he'll never find himself in a
20 situation where he's defence
21 counsel..."

22 The court says to Mr. Murphy:

23 "Would you listen, counsel,
24 to the court, please."

25 I think at the bottom of the page,

1 we have the court speaking, not Mr. Murphy:

2 "The court asked if you would
3 relate to the court the
4 incidents that occurred --"

5 Mr. Murphy goes on and gives his
6 explanation of what is heard again. Then at page
7 1233, notwithstanding what his honour had told him,
8 he says:

9 "Now, if Mr. Tennant with a
10 straight face, as an officer
11 of the court, can
12 characterize that as me not
13 desisting, as if I'm somehow
14 engaged in a barroom brawl
15 and I'm escalating it, that
16 is completely unfounded and
17 he's perhaps guilty of
18 nothing more than believing
19 what his client expediently
20 tells him."

21 Then he goes on with his
22 explanation. At line 22, he says:

23 "Now, I'm in the position now,
24 Your Honour, where I have to
25 tell the court my version of

1 what happened and Mr. Foster
2 is basically lying to his own
3 counsel about what happened
4 or his own counsel is putting
5 a spin on what happened.
6 "He's trying to gloss over
7 something and suggest that
8 it's an equivocal situation
9 where two adults are engaged
10 in some trivial machismo
11 contest, and that's not what
12 happened at all. And it's
13 not trivial when counsel on a
14 serious criminal case in the
15 courts are accosted by
16 members of the victim's
17 family. That's not trivial
18 at all and it's ridiculous
19 for Mr. Tennant to stand
20 before the court and say that
21 it is, and to say that it
22 doesn't warrant reporting it.
23 "This is a victim driven
24 prosecution, that's certainly
25 clear on the evidence. We

1 heard Mr. Foster describe the
2 accused, without any
3 invitation from counsel in
4 front of the jury, as being
5 trash. Confirming that his
6 initial view of her is that
7 she's a market hooker. He's a
8 racist, in my submission,
9 that's a reasonable..."

10 Mr. Foster interjects:

11 "... that's a reasonable
12 inference for the court to
13 make. And he's belligerent.
14 I think the court can
15 reasonably infer that from
16 his conduct yesterday. And
17 for Mr. Tennant to stand in
18 front of this court and
19 suggest that I somehow
20 escalated it or that I failed
21 to desist ... Normally, he
22 said, my behaviour could be
23 characterized as aggressive.
24 All I did, Your Honour, was
25 raise my voice so that people

1 in the immediate vicinity..."

2 Et cetera. At the bottom of the

3 page:

4 "Now, if my friend is
5 seriously going to suggest
6 that this was some sort of an
7 escalation or an invitation
8 or some sort of pre-
9 assaultive behaviour, then
10 he's sadly mistaken, because
11 Mr. Foster is lying to him.
12 And it's quite clear why he
13 would, because he's in
14 serious trouble. He's
15 interfering with the
16 administration of justice.
17 He's approaching defence
18 counsel on a murder case in
19 which he is understandably
20 quite emotionally involved
21 and evidentially involved as
22 a witness. He's involving
23 himself by interfering with
24 the proper conduct of the
25 trial by attempting to

1 intimidate defence counsel;
2 that's what he's doing.
3 "Now, if Mr. Tennant is
4 seriously going to say that
5 that is a trivial matter that
6 doesn't warrant reporting, he
7 should be reported to the Law
8 Society for that. It is a
9 ridiculous proposition and he
10 knows better."

11 Mr. Murphy then goes on to talk
12 about the witnesses that he has and complains about
13 Officer Mahoney. At line 28 at the bottom of the
14 page:

15 "The security of the courts
16 and of the administration of
17 justice is an important one
18 and for Mr. Tennant to stand
19 here - he's not a criminal
20 practitioner - for him to - I
21 mean clearly, if he is,
22 that's an irresponsible
23 comment. But he may be
24 forgiven because he's a real
25 estate practitioner

1 out of the version of facts
2 that are offered by Mr.
3 Murphy?

4 "Mr. Tennant: Your Honour,
5 even on the version given by
6 Mr. Murphy, the exchange was
7 one of gestures and words.
8 There does not appear to be
9 in his statement any
10 suggestion of, say, the
11 criminal offence of assault."

12 And he goes on to compare the
13 physical size. Justice Cosgrove makes a ruling on
14 the matter at the bottom page 1237. Justice
15 Cosgrove says:

16 "On the version of the facts
17 as counsel has invited me to
18 observe, on the version of
19 the facts as reported to the
20 court by Mr. Murphy, the
21 court disagrees with counsel
22 for Mr. Foster that this is a
23 trivial matter. This is a
24 serious matter. The court
25 disagrees that there is any

1 significance that, as it
2 seems to be significant to
3 counsel for Mr. Foster that
4 it was a private - there were
5 private words spoken rather
6 than public. That has
7 nothing to do with the nature
8 of the occasion insofar as
9 the court is concerned. The
10 observation that it was
11 simply gestures and words and
12 there was no suggestion of
13 the criminal offence of
14 assault, probably confirms
15 that counsel doesn't practice
16 criminal law because of
17 course there needn't be any
18 touching to form a basis for
19 offences of assault or other
20 offences of the Criminal
21 Code. So counsel in my view,
22 for Mr. Foster, totally
23 misses the point and the
24 complaint and the matter
25 before the court."

1 The court then goes on to recite
2 some various matters from the Canadian Judicial
3 Council dealing with issues of contempt, and makes
4 a finding, at the bottom of 1239, that since the
5 matter was in the precinct of the court, that the
6 incident was in the face of the court.

7 At page 1240 at line 20, he refers
8 to the sentence that is open to him, which include
9 jail, fine, injunction, and he goes on to say:

10 "I am not going to proceed
11 with this matter as a formal
12 contempt process. I repeat
13 that, on the basis of the
14 information and the
15 allegations by counsel for
16 the accused, the court views
17 the allegations as serious.
18 They are not trivial. They
19 have nothing to do with civil
20 proceedings, they have
21 nothing to do with words
22 rather than actions, they
23 have nothing to do with the
24 size of people. They have to
25 do with the interference of

1 counsel in the process of a
2 criminal trial, and they are
3 matters that are considered
4 to be serious by the court."

5 At the bottom of the page, Justice
6 Cosgrove advises Mr. Foster to refrain from any
7 communication whatsoever in the future with any
8 counsel for Ms. Elliott.

9 On page 1242, Justice Cosgrove
10 says to Mr. Tennant at line 14:

11 "I would encourage that you
12 use your office to underline
13 the gravity of the matter
14 which is before the court,
15 notwithstanding the opinion
16 you earlier expressed to the
17 court."

18 That was how Justice Cosgrove
19 dealt with both the incident and the statements
20 that Mr. Murphy made about Mr. Tennant.

21 Then I come to particular 3(e).
22 This deals with a complaint by Crown counsel
23 McGarry that Mr. Murphy was maligning his character
24 and what Justice Cosgrove did about that.

25 We are on September 10th, 1998

1 now, and this is shortly after the trial resumed in
2 September and follows the events of August the
3 20th. The stay motion has been renewed following
4 the September 3rd revelation about the RCMP
5 investigation, and Mr. Murphy is making submissions
6 about all the people that he wants to call as
7 witnesses, including police officers and Crown
8 attorneys.

9 He gives at the bottom of page
10 1771 the matters that he wishes to examine them on.

11 It is clearly with respect to the August 20th
12 matters. We can see, from page 773, he is talking
13 about the various police officers, Grasman and
14 Crowns Pelletier and Berzins that he wants to have.

15 You see at page 1774, in the
16 middle, the issue is at about line 14:

17 " -- when Mr. McGarry was
18 advised of the recommendation
19 to expand - not only to have
20 the RCMP conduct the inquiry,
21 but to include an
22 investigation of MacCharles'
23 involvement --"

24 Mr. Murphy goes on at some length
25 about that. At page 1778, Mr. McGarry responds and

1 he talks about Dr. Li, and I will come back to Dr.
2 Li in due course. Mr. Murphy says at the bottom of
3 page, line 24:

4 "With regard to my friend's
5 other witnesses, I think he
6 should serve subpoenas on
7 whoever he wants to call. I
8 am, a) reluctant to be the
9 bearer of information from
10 Mr. Murphy to anybody, for
11 obvious reasons --"

12 He anticipates that some of these
13 people may retain counsel to resist the subpoenas.

14 Then the court goes on to deal with the question
15 of the jury and what should happen with respect to
16 the jury.

17 At page 1782 at the middle, line
18 14, the question is what Mr. Murphy's position will
19 be as to whether jury selection -- whether jury
20 selection should proceed. Mr. Murphy answers that
21 with a reference to the various complications and
22 what might happen if he picks a jury panel, and he
23 makes the observation on page 1783 he wonders why
24 the Crown doesn't stay the proceedings itself, and
25 complains about the Attorney General's department.

1 this prosecution is -- can be
2 mired with the kind of
3 corruption that -- we're only
4 seeing, even if it's the
5 upper third of the
6 iceberg..."

7 Line 20:

8 "If I say, let's go ahead
9 with the jury selection, am I
10 condemning Julia Elliott to
11 the course of injustice that
12 Lyle MacCharles and all of
13 the others who are complicit
14 in this criminal conspiracy
15 are hoping will be the
16 outcome? The coverup of all
17 -- what has been
18 euphemistically understated
19 as malfeasance or misfeasance
20 or indiscretion."

21 He raises the question at the top
22 of page 1795:

23 "Are we now becoming parties
24 to her wrongful conviction?"

25 By "we", he means defence counsel.

1 And he goes on:

2 "This is a miscarriage. The
3 carriage master is the
4 Attorney General, and we're
5 being asked: Do we want to
6 get the train rolling again?

7 In my submission, it puts
8 defence counsel in an
9 impossible situation.
10 Certainly, the accused
11 doesn't want to spend the
12 next -- another further 12
13 months waiting to get a fair
14 trial."

15 At line 13:

16 "We're going to be accused by
17 the Crown of trying to avoid
18 the jury. But I would say
19 this about that: - now I'm
20 starting to sound like
21 Richard Nixon -- I'd say
22 this, Your Honour, about that
23 objection or that sniggering
24 attitude: We had a jury.
25 Through no fault of the

1 accused, that jury is now
2 gone. So I'm simply saying
3 that for us to -- for
4 anything we say to oppose a
5 jury, to be held up as some
6 evidence of our fear of being
7 in front of the jury, I can
8 tell Your Honour, for the
9 record, we were in front of a
10 jury and within the first
11 four days of evidence, the
12 Crown's case was exposed
13 right to its roots as being
14 an abuse of process."

15 Mr. Murphy then goes on to give
16 evidence about phone calls he's getting and
17 information from Barbados. Justice Cosgrove, at
18 the top of page 1786, stops him, but Mr. Murphy
19 won't be stopped and says at line 7 that:

20 " --that the police have been
21 allowed to have another shot
22 at it, and that, in my
23 submission -- and I won't go
24 further on that -- it weighs
25 so heavily on the defence,

1 and if we tell Your Honour
2 today, no, we want to delay
3 the jury again, I mean, we
4 look -- we're damned if we do
5 and we're damned if we don't!
6 And what I find most
7 objectionable about this, is
8 that the Crown attorney's
9 office is in the position of
10 being able to make that
11 accusation, when it's the
12 Crown and the police who are
13 causing the delays and the
14 complications in the jury
15 process. When it's the Crown
16 and the police who are
17 responsible for the
18 miscarriage of justice which
19 is being exposed as it
20 unfolds.

21 "I don't think we want to
22 find ourselves in the same
23 situation as in Donald
24 Marshall's case, or David
25 Milgaard's case, or Guy Paul

1 Morin's case, or
2 unfortunately an increasing
3 number of similar cases where
4 we go through a jury
5 selection and we go through a
6 jury trial only to find this
7 stuff out after the fact."

8 The court calls on Mr. McGarry at
9 the top of page 1787:

10 "Mr. McGarry, on the issue of
11 the jury empanelment?"

12 Mr. McGarry says:

13 " -- sometimes, I appear to
14 be saying these things -- I
15 just want to make it clear
16 it's for the record, so that
17 there's no doubt that I'm
18 acquiescing."

19 I think he means he was not
20 acquiescing:

21 "I always recall Sir Thomas
22 Moore, I think it was, who
23 was accused at one point or
24 another that silence
25 indicates acquiescence and,

1 of course, that's not the
2 case."

3 He says the Crown is not agreeing
4 by not responding about Mr. Murphy's position.

5 Justice Cosgrove says:

6 "Well, I can assist the Crown
7 with that. In my ruling on
8 the stay, the second
9 application for a stay, I
10 ruled that all of the delay
11 up to that point was the
12 responsibility of the -- rest
13 with the Crown."

14 Justice Cosgrove says:

15 "Yes. In my view, all of the
16 delays since that date to
17 this time is the
18 responsibility of the Crown,
19 and I make that as a finding.
20 "Mr. McGarry: Well, Your
21 Honour, I don't know, with
22 respect, that you are in a
23 position to make that finding
24 in the absence of a motion
25 for delay and in the matter

1 of evidence being called from
2 both sides.
3 "The Court: I have. I have
4 made that patent observation
5 that on this stay, the reason
6 for not proceeding with the
7 trial, patently, by the
8 material in front of the
9 court, is attributable to the
10 Crown. And whether you agree
11 or anybody else agrees or
12 disagrees will be for another
13 time and another place, but
14 that is the court's opinion
15 at this point. Please go on.
16 "Mr. McGarry: Then I guess
17 if a motion is brought to
18 stay, there is little point
19 in the Crown arguing it on
20 that issue.
21 "The Court: No. The
22 question of whether the stay
23 -- whether the time involved
24 attributable to the Crown is
25 reasonable under the

1 circumstance has to go into
2 the hopper, together with
3 five or ten other
4 considerations on the stay
5 application. I have not had
6 an application -- there is no
7 request for a stay at this
8 point. I am making a finding
9 of fact, that is what I am
10 doing."

11 I think Justice Cosgrove was
12 wrong, because, as he says on the next page, there
13 was indeed an application for a stay.

14 Mr. McGarry, at the top of page
15 1789, line 8, his view is that we should be picking
16 a jury next week and starting the evidence, and the
17 court says, and it seems to be a contradiction to
18 what he said on the previous page at line 12:

19 "Now, you've just enlarged
20 the whole discussion and you
21 say 'and call the evidence'.

22 Of course, I can't. I am in
23 the middle of an application
24 to stay."

25 Mr. McGarry says that what he

1 meant was that in the event:

2 " -- you can't deal with the
3 motion right then, there's no
4 reason why we can't adjourn
5 the motion and continue with
6 the trial and restart the
7 motion when it's convenient."

8 Mr. McGarry says at the bottom of
9 the page:

10 " -- the other matters that
11 my friend has raised, Your
12 Honour, that deal with other
13 issues, I'm not going to
14 respond to them now. If and
15 when there is an appropriate
16 forum to respond to them, I
17 will. However, it gets
18 harder and harder. I can
19 tell you that the Crown is
20 not in the habit of staying
21 proceedings against people
22 who are guilty of murder, and
23 I am confident I can prove
24 this woman guilty of murder
25 and, therefore, I would not

1 be staying these
2 proceedings."

3 The panel may remember -- and I
4 will just give you for your notes that Justice
5 Cosgrove made findings in his September 7th ruling
6 about what Mr. McGarry said. My notes say
7 paragraph 38 and paragraph 138 of his September 7th
8 rulings.

9 You may recollect the Court of
10 Appeal commented on those findings and this
11 evidence at paragraphs 149 and 154 of its reasons,
12 and I won't take you to those. They are there.

13 Mr. McGarry goes on to say:

14 "I can tell you, sir, that in
15 my view, my friend
16 miss-characterizes this as a
17 conviction train. There is
18 also, on this track, an
19 acquittal train, and if the
20 Crown - if evidence, as he
21 keeps saying is so weak and
22 so bad, he would be taking
23 his acquittal train out of
24 the station. But the reality
25 is, Your Honour, it has no

1 wheels."

2 Ms. Kuehl reminds me that the stay
3 application that was pending at this point was for
4 abuse of process and not for delay based on, I
5 think, the notice of motion that was outstanding.

6 Justice Cosgrove makes a ruling.
7 On page 1792, you will see that he's going to
8 adjourn until 9 o'clock on Tuesday morning to begin
9 jury selection.

10 Matters go on, and Mr. Murphy on
11 page 1794 makes some submissions about the evidence
12 with respect to Berzins and Pelletier and he says
13 at line 16:

14 "My concern is this: the
15 extent of the coverup and the
16 nature of the meeting which
17 we didn't get into with
18 Detective Inspector
19 Bowmaster, it concerns me to
20 the extent that there will be
21 indeed further meetings and
22 discussions if we don't -- if
23 there's any delay. Having
24 notified, put the Crown on
25 notice that we wish Berzins

1 on the stand, and Pelletier,
2 I'm concerned that this cover
3 up is just going to continue,
4 and he'll come to court
5 without whatever element of
6 surprise cross-examination
7 brings with it. It will be
8 totally thwarted if we delay
9 until Tuesday, because I know
10 that nothing in the past has
11 prevented the Crowns from
12 consorting with each other to
13 discuss these issues and,
14 indeed, the meeting that we
15 wish to cross-examine him
16 about, is exactly such a
17 meeting where no notes are
18 taken by a detective
19 inspector of the OPP who is
20 present.
21 "I have a very serious
22 concern about losing the
23 element of spontaneity in the
24 evidence of Mr. Berzins and
25 Mr. Pelletier, and I know Mr.

1 Berzins was in the court this
2 morning, because I saw him
3 walking up the stairs with
4 Detective Inspector Bowmaster
5 --"

6 Down to line 18:

7 "And I'm very concerned that
8 if we adjourn, the cover up
9 just becomes further -- it
10 becomes impossible to bring
11 all of this to light.
12 "The Court: Mr. McGarry, any
13 comment?
14 "Mr. McGarry: Yes. I'm just
15 formulating my thoughts, Your
16 Honour, because, I must
17 confess, I am appalled that
18 my friend would suggest that
19 I would engage in any kind of
20 impropriety as a senior law
21 officer of the Crown. The
22 suggestion of that, without
23 evidence, that I, on my part
24 would do such a thing, is, in
25 my submission, singularly

1 inappropriate.

2 "The Court: I interpreted
3 his comments to apply to the
4 senior and regional Crown,
5 not to you.

6 "Mr. McGarry: Well, but
7 again, the same thing applies
8 to the senior regional Crown,
9 Mr. Pelletier, and to Mr.
10 Berzins, the Crown attorney
11 for Ottawa-Carleton. To
12 suggest, without any
13 evidence, that they would
14 engage in impropriety, in my
15 submission, is beyond the
16 bounds of professional
17 courtesy of our profession."

18 Mr. Murphy attempts to interject.

19 Mr. McGarry says:

20 "No, sir, you will not
21 interrupt me. Simply beyond
22 the bounds of professional
23 courtesy of our profession,
24 of the propriety that one
25 expects. I've seen more lack

1 of propriety from Mr. Murphy
2 this morning in regards to my
3 friend, who is sitting beside
4 me --"

5 I think he means Mr. Cavanagh:

6 " -- and now in regards to
7 myself. I am just shocked
8 and appalled that he would
9 say such a thing.
10 "The point is, if he wishes
11 to subpoena those people, he
12 is quite at liberty to do so.
13 But, to suggest that
14 somehow, if he doesn't do it
15 in the next ten minutes -- he
16 could have done it while we
17 were on the break -- if he
18 doesn't do it in the next ten
19 minutes, there is somehow
20 going to be, in the absence
21 of any evidence, some sort of
22 improper collusion. In my
23 submission, it's singularly
24 inappropriate and I ...
25 actually don't know how to

1 respond to it, because, in my
2 view, it is simply appalling
3 that counsel would do that.
4 And I must ask Your Honour,
5 as an officer of this court,
6 with respect, that you
7 instruct Mr. Murphy not to
8 make imputations against my
9 character without foundation
10 because, in my submission,
11 it's just not appropriate,
12 and I am asking the
13 protection of the court on
14 that."

15 The court calls on Mr. Murphy.
16 Mr. Murphy says, "This is where I come in", and he
17 goes back to the Brockville trial when Mr. Flanagan
18 came in with great aplomb, and that's Mr. Murphy's
19 colourful language:

20 " -- he asked Your Honour to
21 reprimand and put on notice
22 and admonish defence counsel,
23 myself, for making
24 representations or making
25 submissions that the Crown

1 was misleading the court. I
2 haven't heard that tone of
3 righteous indignation since
4 that time.
5 "The problem with that, Your
6 Honour, as you know, Mr.
7 Flanagan is now off the case,
8 as is his cohort, Mr.
9 Findlay. So it rings hollow,
10 in my submission, for Mr.
11 McGarry, as mired as he is in
12 this case, to at this point
13 be suggesting with the degree
14 of aplomb that he is, that
15 there's something untoward
16 about the concerns that I
17 expressed, and I was very
18 careful in the way I worded
19 them.
20 "Mr. Flanagan was the last
21 person to pull the righteous
22 indignation speech out and to
23 ask Your Honour to admonish
24 counsel and, Your Honour may
25 recall, that was done when

1 the jury was in. Your Honour
2 did admonish counsel, in at
3 least a preliminary way
4 -- and I'm not going to go
5 back and get the transcript
6 to read you what I said to
7 you, sir -- I said --"

8 And he is referring, and I
9 referred the panel to this incident earlier:

10 " -- I said: 'I don't resile
11 from any of my comments.'
12 And at the end of the day, I
13 said, sir, my final comments
14 were: 'At the end of the day,
15 Mr. Cadieux and I, as defence
16 counsel, will be able to say
17 that we've done our duty
18 under the law of our country,
19 and the Crown and the police
20 won't be able to make that
21 claim.'"

22 Mr. Murphy goes on after his
23 quotation:

24
25

"And I repeat that

1 allegation, I repeat that
2 observation today. And it's
3 rather -- if it wasn't so
4 farcical -- if it wasn't so
5 tragic, it would be farcical
6 to have Mr. McGarry now
7 waxing indignant about the
8 same thing. It just carries
9 no weight, and it should
10 carry no weight with this
11 court.
12 "The Crown asking you to
13 reprimand us in the face of
14 criminal conduct and what, in
15 my submission, the only
16 reasonable inference that can
17 be reached by any objective
18 observer, including Your
19 Honour, is that this is a
20 continuing criminal
21 conspiracy. And the victim
22 is not the Crown's
23 reputation, which, in my
24 respectful submission, is not
25 at issue."

1 He refers to what the Crown's duty
2 is and brings up the name of Leo McGuigan, who my
3 recollection is was the prosecutor in the Morin
4 case, and says at the top of page 1799:

5 " -- I'm sure you could find
6 Crown attorneys who, in the
7 midst of those proceedings,
8 stood up and waxed indignant
9 about defence counsel making
10 accusations --"

11 At line 9:

12 "I resist anything that this
13 Crown or any other Crown
14 involved with this case has
15 to say about the lack of any
16 basis for our suggesting that
17 a cover up is continuing.
18 The evidence is there. The
19 proof is in the pudding. And
20 as I will repeat again, Your
21 Honour, at the end of the
22 day, it won't be the defence
23 in this case who will have to
24 account for their credibility
25 or their conduct or

1 fulfilling their professional
2 obligations to the fullest,
3 it will be the Crown, who is
4 now sitting laughing in
5 conversation with counsel for
6 Mr. MacCharles. So for him
7 to make such severe
8 allegations is, in my
9 submission, transparent,
10 because it's simply deja vu.

11 I'm sorry, this is where I
12 came in."

13 Justice Cosgrove's response to all
14 of that was:

15 "The Court: The record will
16 show that I invited both
17 counsel to review the code of
18 conduct of counsel. Whatever
19 the opinion is of each
20 counsel, or whatever the
21 opinion of each counsel is of
22 the position of counsel
23 opposite, there is a manner
24 and a way which is
25 traditional in the profession

1 of conducting oneself,
2 notwithstanding the
3 seriousness of the issues
4 before the court, and I would
5 invite each counsel, as they
6 seem to be able to call and
7 recall transcripts, to go
8 back and take a look at my
9 exhortation.

10 "The manner of presentation
11 of the complaints of each
12 counsel to the court is not
13 one of the best examples of
14 the civility which is
15 mandated in the code of
16 conduct of the profession,
17 and I would ask each counsel
18 to take a look at that code
19 once again."

20 So that concluded that matter.

21 The next particular deals with the
22 issue of Crown Sotirakos:

23 " -- as Regional Director of
24 Central East --"

25 This is particular 3(f):

1 " -- appeared to advise of
2 the intention of the Crown to
3 bring an application to quash
4 subpoenas issued for Crown
5 counsel, defence counsel
6 suggested --"

7 So the particular goes:

8 " -- Mr. Sotirakos was 'one
9 in a series of pawns.' When
10 Mr. Sotirakos objected,
11 Justice Cosgrove interrupted
12 and gave credibility to the
13 statement by indicating that
14 Mr. Sotirakos '(did not) know
15 enough about the case.'"

16 Justice Cosgrove made a finding
17 about Sotirakos in his September 7th, 1997 ruling,
18 and I will just give you the reference. I read it
19 to you before. It is under the Segal references at
20 paragraph 69.

21 The Court of Appeal commented on
22 the Sotirakos issue at paragraphs 126 to 128 of the
23 Court of Appeal reasons. I will review some of
24 this. At page 3507 on Friday, October 9th, 1998,
25 Mr. Cavanagh introduces Mr. John Sotirakos, the

1 regional director for the Central East Region, "who
2 was notified last night", says Mr. Cavanagh:

3 " -- and was asked to come
4 down to be in front of Your
5 Honour today, not as counsel
6 for Mr. McGarry and I,
7 essentially, but to speak to
8 the issue of the Crown motion
9 to quash the subpoena or, in
10 the alternative, to hold that
11 myself and Mr. McGarry need
12 not testify. That is his
13 purpose in attending before
14 Your Honour today"

15 Mr. Sotirakos at the bottom of the
16 page says the first he knew about the case was at
17 6:00 p.m. the night before, and he knew that
18 Justice counsel requested that counsel be capable
19 of arguing the motion before him.

20 I have already read to you, I
21 think under the Segal matter, pages 3508 to 3516,
22 so I will just go over those pages fairly quickly.

23 Page 3509, Mr. Sotirakos sets out what the Crown
24 position will be.

25 Mr. Sotirakos made it clear he was

1 not there to argue the case. He was there because
2 he wanted the matter to be put over, but he sets
3 out on page 3509 what the Crown's position will be.

4 At 3510, Mr. Sotirakos indicates
5 that he or anybody would need some time to bring
6 himself up to date. At 3511, he is asking the
7 matter be adjourned until Tuesday morning. October
8 9th is a Friday. The Tuesday morning is the
9 Tuesday after the long weekend.

10 The court at page 3513 at line 7
11 queries why he only has one of a number of regional
12 Crown officers responding. At that 3515 the court
13 asks Mr. Sotirakos at line 17, "Who contacted you?"

14 And he says:

15 "I was contacted last night
16 by the Deputy Attorney
17 General, Mr. Murray Segal."

18 At 3516, Mr. Sotirakos, at the
19 middle of the page, says that Mr. Thompson can be
20 available next week to argue the matter, and,
21 indeed, Mr. Thompson was available next week and
22 did argue the matter.

23 Now I go to page 3517, and the
24 panel has not been read this material. Mr.
25 Sotirakos at line 24 again gives his rationale for

1 a delay over the long weekend not being
2 unreasonable and concludes, in the middle of the
3 page 3518 at about line 13, that:

4 " -- the Crown in the public
5 interest, would want to give
6 a priority to having counsel
7 available as soon as possible
8 --"

9 Mr. Murphy says on page 3520, in
10 response to Mr. Sotirakos's submissions, that he
11 has a strong sense of deja vu, and he refers, at
12 the top of page 3521, to the incidents in
13 Brockville in February, that they had the same
14 thing happen then. You remember that I read you
15 those incidents. At about line 7:

16 " -- the concern I have now
17 is that one would -- one
18 would reasonably expect, Your
19 Honour, that the deputy
20 Attorney General, Mr. Segal,
21 would have the sense of
22 responsibility to show up
23 himself, instead of
24 recreating perhaps some of
25 the worst pages of the annals

1 of military history
2 -- sending lesser officers
3 -- with no disrespect to my
4 friend from the central east
5 region, or central region,
6 whatever region it happens to
7 be -- being sent in the stead
8 of the commanding officer,
9 the general, as it were. Mr.
10 Segal should be here, in my
11 submission, and I am very
12 troubled by the fact that
13 this is just another
14 shuffling of Crown
15 attorneys."

16 Mr. Murphy goes on in that vein,
17 and over to page 3522 at line 2:

18 "Now we can see exactly how
19 pervasive it is on the part
20 of Mr. Segal, on the part of
21 his ministry, on the part of
22 his -- presumably,
23 ministerially responsible
24 would be Mr. Harnick --"

25 Who was the Attorney General of

1 Ontario at that time:
2 " -- and the complete
3 abandonment of any
4 acknowledgment that there is
5 a duty -- well, there has
6 been an acknowledgment -- of
7 any substantial recognition,
8 any purposeful or effective
9 action on the part of Crown
10 officers from the highest
11 level, of the minister down,
12 to do what is their duty,
13 which is to safeguard the
14 public interest and the
15 interest of the accused and
16 the administration of
17 justice. And there has been
18 here a complete abdication of
19 that responsibility.
20 "Sending my friend...with the
21 greatest of deference to him,
22 he doesn't know how he
23 figures in this, Your Honour.
24 He is one in a series of
25 pawns who has been placed on

1 the board by the Ministry,
2 and it is shocking that Mr.
3 Segal, knowing now the extent
4 to which he's been involved
5 as recently as apparently
6 yesterday or the day before,
7 would still think it was not
8 untoward to simply shuffle
9 the deck and try to find
10 somebody, and then to have
11 that person come here and
12 indicate that they're not
13 even certain that the
14 replacement that they're
15 going to find for themselves
16 will be available."

17 Mr. Murphy goes on in that vein.
18 Mr. Murphy continues on for the next several pages,
19 and at page 3524 at line 3 says:

20 "This a complete and thorough
21 abdication of the minister's
22 -- of the Attorney General's
23 duty to the public and to the
24 accused, and certainly there
25 is no issue with an

1 adjournment until Tuesday --"

2 And at line 13:

3 " -- what is an issue, Your
4 Honour, is that Murray Segal
5 and the Attorney General's
6 ministry are apparently
7 -- they're apparently trying
8 to keep this from spilling
9 over the gates of the kingdom
10 -- or of the city-state of
11 Toronto. They're apparently
12 reluctant to do what their
13 duty is, which is to step in,
14 provide counsel who is
15 available for the duration,
16 both of the motion and, if
17 necessary, beyond that, and
18 why we have to have this
19 comedy repeated again and
20 again and again is
21 unfathomable. This case, if
22 it hasn't been appreciated by
23 the Ministry already, by the
24 Attorney General of Ontario,
25 or his designates, may

1 outpace and surpass the Morin
2 case, in the aftermath of
3 which millions of dollars
4 have been spent on a
5 commission of inquiry. And
6 we've even heard, ironically,
7 how the so-called Kaufman
8 committee, on which Mr.
9 Berzins and Mr. Pelletier
10 sit, have had dealings in the
11 Cumberland matter which now
12 intertwines with this matter.

13 So it boggles the mind that
14 the Attorney General's
15 department in this province
16 seems to think that they can
17 fob this off and keep it
18 contained within watertight
19 compartments and make sure
20 that it doesn't cross the
21 border into the greater
22 Toronto area.

23 "It is a shocking repetition
24 of what happened before.

25 And Mr. Murphy launches into what

1 happened with Mr. Ramsay that I have already
2 brought to your attention. At the bottom of the
3 page, Mr. Murphy says:

4 " -- my friend doesn't appear
5 to be doing anything other
6 than floating the same
7 arguments from the portfolio
8 that's been presented
9 initially by Mr. Stewart --"

10 And Mr. Ramsay. Mr. Murphy goes
11 on and on, on the next few pages, and repeats at
12 the bottom of page 2526 that:

13 "If the Crown is abdicating
14 it's responsibility, that
15 raises an issue whether this
16 matter should be dismissed
17 for want of prosecution --"

18 Then he talks in the middle of
19 page 3527 about how the Crown should consent to
20 reasonable conditions on bail.

21 Mr. Sotirakos on page 3528, in
22 response to what Mr. Murphy has said for the
23 previous several pages, asked to reply, and Mr.
24 Sotirakos says about line 10, page 3528:

25 "Your Honour, as an officer

1 of the court, I truly respect
2 counsel's duty to
3 passionately argue on behalf
4 of their client in any
5 matter, whether it be a
6 murder case or something of
7 less seriousness, whatever
8 that might be, but I will
9 just try to highlight a
10 couple of points.

11 "Counsel has indicated that
12 the request for the
13 adjournment to Tuesday is not
14 an unreasonable one."

15 The court says "It's granted."

16 I can just pause there to say
17 that's all Mr. Sotirakos was there to request. Mr.
18 Sotirakos goes on:

19 "The second point -- and I
20 won't focus in on these,
21 because I consider them
22 petty, but I will only
23 mention them for the record.
24 "To have an officer of the
25 court refer to another

1 officer as a pawn, or as a
2 lesser officer, is, in my
3 humble submission to this
4 court, quite inappropriate.
5 Again, respecting that
6 counsel has to make strong
7 and passionate arguments on
8 behalf of their client.
9 "Counsel indicates that there
10 has been a complete and
11 thorough abdication of this
12 matter. On the contrary,
13 Your Honour. I know that I
14 have not been involved with
15 this matter to know enough
16 about the history of this
17 matter -- Your Honour
18 certainly is in the best
19 position to do so -- but to
20 suggest that there has been a
21 thorough and complete
22 abdication of this matter is
23 absurd.
24 "The Court: No. No,
25 counsel. That's the problem,

1 you see, you don't know
2 enough about the case. When
3 you go back to your office
4 and communicate the position
5 that was argued by counsel
6 for the accused today, in
7 addition to that, would you
8 tell Mr. Segal, on my behalf,
9 that on the last occasion,
10 when counsel sought an
11 adjournment, a six week
12 adjournment was sought while
13 counsel continued vacations
14 overseas. A trial, six
15 months in the making, was
16 sought to be adjourned while
17 Crown counsel vacationed
18 overseas for six weeks. That
19 is the nature and the extent
20 in the court's appreciation
21 of the priority that has been
22 given this case thus far, and
23 it is further complicated to
24 date.
25 "Mr. Sotirakos: I respect

1 Your Honour's comments there,
2 and I can certainly
3 understand how that might
4 have raised concerns with
5 respect to the delay in this
6 matter, but I'm simply
7 speaking on behalf of the
8 Ministry that to suggest, on
9 a murder case, Your Honour,
10 that there has been a
11 complete and thorough
12 abdication of this matter,
13 quite frankly, just does not
14 strike at the truth.
15 "We, as Crown attorneys,
16 prosecute a number of matters
17 across the province, as Your
18 Honour knows. I have
19 indicated to this court
20 -- counsel described it, I
21 think, as lip-service, and
22 then, on the other hand, did
23 not take issue with 'I'm
24 doing my best' when I said
25 that."

1 Then he goes on to say he is going
2 to have Mr. Thompson here on Tuesday and that he
3 will try to ensure that there is other counsel
4 available to continue.

5 Mr. Sotirakos goes on to say in
6 the middle of the page:

7 "Yes. And I say that with
8 all respect, because we
9 certainly cannot prejudge the
10 issue. It may be that Mr.
11 Cavanagh and Mr. McGarry are
12 able to continue carriage of
13 this matter."

14 At line 22:

15 "With respect to this
16 pervasive connection with the
17 police: With all due respect,
18 the Ministry of the Attorney
19 General is separate and
20 independent and apart from
21 the Ministry of the Solicitor
22 General. I am not going to
23 comment on what has happened
24 or allegedly has happened
25 with respect to the police

1 forces; I don't know enough
2 about that ... But to suggest
3 that somehow there's this
4 pervasive connection, I find
5 disturbing. That will be
6 something for Your Honour to
7 obviously address if it
8 raises itself as an issue."

9 Then there is a discussion about
10 who might be able to take carriage of the matter in
11 the event that present counsel cannot. Mr.
12 Sotirakos says at line 20:

13 "With respect to the region,
14 the central east region, the
15 reason that Mr. Segal turned
16 to this region is primarily
17 because, geographically, it
18 is the neighbouring region of
19 this region --"

20 This region being the east region
21 which Ottawa is:

22 " -- and, hence, should one
23 of the Crowns from my region
24 be required to have carriage
25 of a matter that may take six

1 months or longer, one would
2 hope that you would find
3 someone close to the region
4 so that their own life, you
5 know, can be conducted
6 personally.
7 "The Court: That doesn't
8 make sense at all, with
9 respect, Mr. Sotirakos, in
10 view of the fact that we've
11 had Mr. Ramsay from the other
12 side of the world, Toronto,
13 previously attend on a
14 motion. It doesn't -- and in
15 the context of what is before
16 this court, the travelling
17 plans or the convenience of
18 counsel for the Crown does
19 not amount for very much in
20 this judge's opinion."

21 So that was how Justice Cosgrove
22 dealt with Mr. Sotirakos in those submissions of
23 counsel.

24 I am about to go into another
25 matter, which would take me past 11:00 a.m. Does

1 the panel wish to have a break now?

2 THE CHAIR: Yes, all right.

3 --- Recess at 10:50 a.m.

4 --- Upon resuming at 11:07 a.m.

5 THE CHAIR: We don't seem to have
6 a full complement.

7 MR. CHERNIAK: We have gone to get
8 them. We are not sure where they are. However, I
9 won't start without them.

10 MR. PALIARE: I apologize. I go
11 from turning my back to Justice Wachowich, to
12 coming in late.

13 HON. WACHOWICH: I justified your
14 lateness saying there was a line-up at Second Cup.

15 MR. PALIARE: To be honest, not
16 this time. I was working. We were in the side
17 room, sorry.

18 MR. CHERNIAK: Now we are in the
19 particular 3(g), the particular which reads:

20 "Justice Cosgrove failed to
21 admonish defence counsel for
22 his comparison of the
23 Ministry of the Attorney
24 General's office to 'the last
25 days of the Third Reich where

1 Generals and members of the
2 SS were scrambling, literally
3 like rats deserting a sinking
4 ship, to make arrangement for
5 themselves...'"

6 You will see from what I'm going
7 to read is that in the background leading up to
8 this, that this is all in relation as to when the
9 Crown knew that the RCMP would be doing an
10 investigation and when it did advise the defence
11 counsel.

12 It starts at page 3679, and the
13 pages that deal with the particular itself don't
14 come until 3693, so I will try to take you through
15 the lead-up reasonably quickly.

16 Page 3679, we are on October 15th,
17 1998 not long after Mr. Sotirakos was there. You
18 remember he was there October 9th. Mr. Murphy
19 says, at about line 18, that there is a letter from
20 Mr. Sotirakos, and the issue is the potential delay
21 due to the fact that new Crowns might have to be
22 appointed.

23 The discussion about that and the
24 effect on the delay goes on for some pages, and the
25 letter is quoted at length. I am not going to take

1 the panel through it.

2 I would ask you to turn to page
3 3684. Mr. Murphy makes the submission at the
4 middle of the page, line 14:

5 "Mr. Segal knew, by the
6 evidence we've heard, by the
7 submissions we've heard from
8 Crown counsel -- successive
9 Crown counsel -- and from the
10 evidence we've heard from
11 witnesses, including
12 Mr. Pelletier, and from the
13 submissions from my friend
14 this morning -- Mr. Segal
15 knows and knew that this case
16 was in serious difficulty
17 from a prosecutorial point of
18 view. He knows that. He is
19 implicated, in my submission,
20 in that situation."

21 Mr. Murphy goes on in that vein on
22 page 3685 at the top, and makes the submission that
23 Mr. Segal should be in the witness stand today and
24 notes at about line 20 that, "Mr. Segal is right in
25 the thick of this". Mr. Murphy repeats his

1 allegation at line 30 that:

2 "This is a complete and
3 thorough abdication of
4 prosecutorial duties --"

5 Page 3686, line 7, he says:

6 " --to be nothing but fatuous
7 lip-service. It is hollow.
8 It is dishonest. It is a
9 continuation of the attempts
10 by the Attorney General's
11 ministry to mislead this
12 court as to its hidden agenda
13 with respect to this case.
14 It is 'win at all costs'..."

15 And:

16 " -- in Mr. McGarry's words,
17 'ensure a successful
18 prosecution', to withhold
19 information about decisions
20 that are made, withhold the
21 fact that Mr. Segal is
22 involved in those decisions.

23 He is implicated up to his
24 prosecutorial neck, and he
25 should be in this court as a

1 witness --"

2 THE CHAIR: Mr. Cherniak, can I
3 interrupt, sorry? Is there a motion or an
4 application of some sort that is being addressed at
5 this point? What are we talking about?

6 MR. CHERNIAK: My recollection is
7 that the issue is will the trial continue, and at
8 this point I think at least McGarry, and maybe not
9 Cavanagh, had been compelled to appear as
10 witnesses. The question is there is a jury out
11 there, and the question is: When and how will this
12 trial continue?

13 Everything is to do with the voir
14 dire on the further stay based on the abuse of
15 process, so that's all of this, because the trial
16 never did resume. I can't remember when the jury
17 was discharged, but I'm not sure the jury was ever
18 picked.

19 HON. MACDONALD: February of 1998
20 or so, wasn't it?

21 MR. CHERNIAK: That goes back to
22 February, but in September there was another jury
23 panel, and you remember the discussion about a new
24 jury and whether it should be picked or not. I
25 just can't recall. I'm not sure it ever was

1 buck, to mislead the court
2 about their failure to do
3 their duty?"

4 There is an interchange between
5 Justice Cosgrove and Mr. Murphy about the letter.
6 Mr. Murphy continues on page 3688, line 23:

7 "Now, I am not prepared, on
8 behalf of Miss Elliott who's
9 been receiving these
10 completely misleading,
11 hollow, if not deliberately
12 dishonest responses from the
13 prosecutors on her case, to
14 say nothing of the police, to
15 say nothing of the corruption
16 and criminality of the
17 investigators that is
18 continuing, the complete
19 flagrant breach by the police
20 investigators of court orders
21 not to communicate, the
22 behind-the-scenes scurrying
23 about, the rat-like collusion
24 of these officers attempting
25 to salvage their stinking,

1 rotting prosecution -- that's
2 what we're watching here,
3 Your Honour; I can't think of
4 stronger words to use.
5 "It is completely despicable
6 to the administration of
7 justice that this is being
8 allowed to continue, that we
9 are now being told at face
10 value, by Mr. Cavanagh -- who
11 may become a witness himself
12 as to the very issue --"

13 At line 23, Mr. Murphy says:

14 "Mr. Segal, to use the
15 vernacular, is in the loop;
16 he controls the loop."

17 Mr. Murphy at page 3690 repeats a
18 submission he made earlier, and at line 12 he makes
19 the comment about the victim's family:

20 "By coincidence again, at
21 this moment of dire crisis in
22 the Crown's case, the
23 immediate family members --
24 relatives of the victim,
25 appear in court. That's

1 happened on every other
2 critical juncture in this
3 trial, I can advise the
4 court, if the court wasn't
5 aware of that already.
6 "One can infer the cynical
7 manipulation that is going on
8 with respect to this
9 abdication of responsibility.
10 What the Crown fails to
11 do -- the courage that the
12 Crown fails to manifest, to
13 show up in person to answer
14 to its abdication of
15 responsibility, it seeks to
16 accomplish through the back
17 door by having the deceased
18 victim's family and relatives
19 come and sit in court at
20 these critical points and, in
21 my submission, I have no
22 desire to even attempt to
23 fathom what they must be
24 thinking about this
25 prosecution. I only note

1 that what we are watching is
2 not only an abdication of the
3 prosecutorial duty by the
4 Deputy Attorney General,
5 we're also watching a
6 continuation of what we've
7 been seeing for more than a
8 year by police and Crown."

9 Mr. Murphy says at the top of page
10 3691:

11 "I don't accept my friend's
12 representations about the
13 so-called ministry."

14 He refers to Mr. Lindsay's
15 submissions. Mr. Lindsay came and argued certain
16 matters about whether Crowns could or could not be
17 called, and accuses Lindsay of being misled by the
18 Deputy Attorney General.

19 Then at the bottom, he refers to
20 the facade. That's about line 25:

21 " -- of this facade of
22 seeking to quash subpoenas
23 ... at the initiative of the
24 ministry."

25 At top of page 3692, he refers to

1 the adjournment for three days:

2 " -- so Mr. Thompson could
3 come down and make perhaps
4 the most cogent and
5 near-persuasive
6 representations --"

7 He refers to the inconsistent,
8 transparent strategy of the Crown, and then at the
9 bottom of page 3692, I am going to quote what he
10 says from hereon in full:

11 "I also ask Your Honour to
12 consider what my friend is
13 also gingerly stepping
14 around. He said it, but it's
15 sort of left there as a kind
16 of an ominous implication,
17 perhaps in the hope that it
18 won't be explored or
19 elaborated upon further or
20 responded to. Well, I have
21 to respond to it and that's
22 this: Mr. Cavanagh says:
23 'Even if we do get somebody
24 by next week, they're going
25 to need more time to

1 prepare.' So we're looking
2 already at the possibility,
3 at least, of a further
4 lengthy period of
5 unconscionable and
6 unreasonable delay in this
7 case, again, because of the
8 conduct of the Attorney
9 General, the Ministry of the
10 Attorney General, from the
11 Deputy Attorney General level
12 right down to this region.
13 "It is not surprising to find
14 a paucity of prosecutors who
15 are willing to become mired
16 in this sinking ship, if
17 that's not a mixed metaphor.
18 It recalls the last days of
19 the Third Reich when generals
20 and members of the S.S. were
21 scrambling, literally like
22 rats deserting a sinking
23 ship, to make arrangements
24 for themselves to escape the
25 collapsing Nazi regime. What

1 they fear, in my submission,
2 Your Honour, and what
3 Mr. Segal should face up to,
4 is further evidence on this
5 voir dire, regardless of
6 which Crown appears to take
7 the bow, further evidence of
8 illegality, of criminality,
9 of lying to the court,
10 denying the existence of
11 information, of denial of the
12 involvement of the highest
13 levels of the OPP and of the
14 Ministry of the Attorney
15 General in these subterfuges
16 and deceptions.
17 "The Court: What is your
18 motion, Mr. Murphy?
19 "Mr. Murphy: My motion at
20 this point, Your Honour, is
21 that -- it's like when Your
22 Honour's asked us if we -- in
23 the face of everything we
24 were hearing, do we want to
25 have the jury come back on

1 Monday?"

2 I this answers the Chief Justice's
3 question:

4 "Well, maybe I should start
5 with that. Do we want to
6 have the jury come back? And
7 what are we supposed to do
8 about the jury? Am I
9 supposed to have a motion
10 about that?"

11 At line 10:

12 "I don't know what motion to
13 bring at this point, Your
14 Honour. I'm not -- I hope
15 Your Honour is not invoking
16 closure on me; I'm simply
17 responding that one would
18 have to have at least a break
19 in order to consider our
20 options, but I'd like to
21 continue with my comments, at
22 the risk of filibustering,
23 Your Honour. I find this ...
24 "The Court: No, I don't -- I
25 don't want to be filibustered

1 and I don't want you to
2 repeat what you've said. If
3 you have something new that
4 is relevant, that might
5 assist the court --"

6 Mr. Murphy goes on about
7 scheduling, and there is a discussion that follows
8 on scheduling which I won't take you through.

9 Page 3697, Mr. Murphy asks Mr. and
10 Mrs. Pender to be excused from the courtroom, and
11 that's at about line 8.

12 Mr. Cavanagh makes a comment about
13 that at the bottom of the page, and he suggests
14 that she should be allowed remain.

15 Page 3700 Justice Cosgrove, in the
16 middle of the page, rules that Mrs. Pender should
17 not be there. He renews his earlier order that Mr.
18 and Mrs. Pender be excluded from the proceedings
19 for the discussion, not only while witnesses are
20 testifying on the discussion of the issue as to
21 whether they should testify.

22 Mr. Murphy then goes on at page
23 3701, in the middle, about the witnesses that he
24 will need for his voir dire and how long they will
25 be, and he lists -- and I will just list them. I

1 won't take you through this: Detective Constable
2 Ball, Chief McCurley, McGarry, Detective Scobie,
3 Inspector Sweeney, Commissioner Boniface, Detective
4 Superintendent Edgar, Mr. Segal, Constable Mahoney.

5 He is totalling those days and he
6 thinks it will -- he says on 3704 he will need
7 about ten days to call all of those witnesses.

8 He makes reference to a variety of
9 other Charter violations at the bottom of 3704,
10 and, over 3705, some 75 further Charter violations.

11 At the bottom of the page, Justice
12 Cosgrove tells Mr. Cavanagh about a ruling that he
13 has made about Cavanagh's participation that
14 Cavanagh doesn't think he has heard, and he says at
15 page 3706, at line 9, that Mr. Cavanagh at that
16 point can continue, because he hasn't ruled on
17 whether he will have to give evidence at this
18 point.

19 3708, at the bottom, Justice
20 Cosgrove says about line 25:

21 " --as I say, I have no
22 reservation that you could
23 and, in my view, should
24 continue as Crown, but
25 bearing in mind that your

1 role was as assisting
2 Crown, ..."

3 "Mr. Cavanagh: Yes.

4 "The Court: --there might
5 be a valid reason, from the
6 Crown point of view, as to
7 whether the Crown wishes to
8 continue --"

9 Mr. Cavanagh says at line 15 on
10 page 3709:

11 "Thank you. Much of my
12 friend's filibuster, if I can
13 put it that way, was directed
14 to what he describes at the
15 Crown abdication of its
16 responsibility in this case.

17 I just state for the record
18 that that misstates how
19 things have developed here in
20 the court before Your Honour.

21 The defence brought a motion
22 to have both...

23 "Mr. Murphy: Your Honour, I
24 have to object on the basis
25 of the Deslauriers ratio. My

1 friend is now defending the
2 Crown's conduct. If that
3 doesn't -- if that doesn't
4 scream out to the heavens for
5 independent counsel --
6 perhaps he should retire and
7 find some counsel other than,
8 presumably Mr. Pelletier or
9 Mr. Berzins, to seek advice
10 from.

11 "What he has just accused
12 defence of is misstating
13 evidence and he is clearly
14 defending the conduct of his
15 fellow Crowns...

16 "The Court: I will give you
17 an opportunity of sur-reply,
18 Mr. Murphy. Go ahead,
19 Mr. Cavanagh."

20 Mr. Cavanagh goes on and makes his
21 submissions about the effect of what has occurred
22 in the motion, and there is discussion about Mr.
23 Sotirakos at the bottom of the page:

24 "And I would like to confirm
25 that. The court was very

1 impressed with the ability
2 and the depth with which Mr.
3 Thompson obviously had been
4 able to assume --"

5 Mr. Cavanagh makes a reference in
6 his submissions. On page 3711, he says this about
7 the family after making the submission that the
8 Crown wouldn't want to put anybody inexperienced in
9 to do the trial, and Mr. Cavanagh says:

10 "And even a person
11 unacquainted with the case
12 can understand that the court
13 would want before it prepared
14 and capable counsel, given
15 the length, history and
16 complexities of this case.
17 It's simply obvious, on its
18 face, most of my friend's
19 rant simply were a
20 nonsensical venting,
21 ad hominem insulting comments
22 that, I suppose, gave him
23 some form of release."

24 He then goes on to the issue of
25 whether Mr. Segal has said he wanted an adjournment

1 in this case, which he hadn't, or whether there
2 should be an adjournment of the Cumberland case,
3 which Mr. Segal did think should be adjourned.

4 The court then calls on Mr. Murphy
5 on page 3713 to respond to Mr. Ramsay, who says at
6 line 15:

7 "I don't want to appear to be
8 emulating the style of
9 Mr. McGarry, who has risen on
10 a number of occasions in
11 these proceedings to wax his
12 righteous indignation before
13 the court about what he
14 considers my unprofessional
15 submissions, and I know
16 that's a position that's
17 shared by, at least according
18 to the notes that I've seen
19 from Detective Inspector
20 Sweeney ... and Detective
21 Bowmaster, as well -- there
22 is clearly a consensus on the
23 part of the Crown and the
24 police that defence counsel
25 is highly unprofessional."

1 He thinks that is a form of
2 cognitive dissonance. At the bottom of the page:
3 "So if it comforts
4 Mr. Cavanagh, being in the
5 conflict that he is obviously
6 embroiled in, to accuse me of
7 'ranting', to use his word,
8 before the court, to say that
9 I'm insulting him -- well,
10 bravo to the Crown! This is
11 just a reprise of
12 Mr. McGarry's and Mr.
13 Flanagan's righteous
14 indignation. And I recall
15 the literary reference -- I
16 think it's Shakespeare --
17 'Methinks the lady doth
18 protest too much' -- not to
19 imply that the Crown is a
20 lady, but I gather that she
21 is at this point in history.
22 "The difficulty I have with
23 the tone of Mr. Cavanagh's
24 comments aside, the
25 difficulty I have is in light

1 of his comments, is that I
2 have to ask Your Honour, for
3 the reasons I'm about to
4 give, to reconsider, if not
5 your suggestion that was
6 declined by Mr. Cavanagh to
7 seek further legal advice on
8 the propriety of his
9 continuing, but to
10 reconsider."

11 Mr. Murphy goes on at some length
12 on that submission, and at the bottom of page 3715
13 says:

14 "So if Mr. McGarry is
15 compellable on that basis and
16 if he is in a conflict and
17 can't continue, in my
18 submission, perhaps
19 Mr. Cavanagh should go back,
20 follow Your Honour's
21 suggestion, a fair
22 suggestion, a prudent
23 suggestion, go back and speak
24 to supervisory Crown ... or
25 Murray Segal --"

1 Then he says at about line 12:

2 "Now, we've also heard what
3 is the tired refrain that we
4 heard from Mr. Stewart, who
5 bounced into court in
6 Brockville at the beginning
7 of February, introduced
8 himself in front of the
9 accused in the courtroom, to
10 the victim's family members
11 and advised them, assured
12 them in a jaunty manner that
13 he would be here for four
14 weeks and not to worry about
15 anything --"

16 Down to line 24:

17 "And Mr. Stewart sat at the
18 counsel table singing, before
19 Your Honour came in, in a
20 very upbeat tone, and then he
21 stood up, Your Honour, and he
22 made exactly the same
23 submissions to this court,
24 and that is this: 'Well, the
25 accused doesn't get to choose

1 their own Crown just by
2 accusing the Crowns of doing
3 something wrong ...', and
4 that's what my friend is now
5 reiterating."

6 Mr. Murphy continues on on this
7 submission about why Mr. Cavanagh should not
8 continue and, at the bottom of page 3717, says at
9 line 25:

10 "The fact that, in those six
11 rulings that Your Honour
12 made, including one in which
13 Mr. Cavanagh himself
14 purported to speak on behalf
15 of the Ministry ... the fact
16 that Your Honour would find
17 them compellable and now he
18 says that Your Honour is in
19 effect a party to a sham, to
20 a tactical artifice which is
21 defence counsel seeking to
22 grind the prosecution's case
23 to a halt by simply calling
24 them as witnesses, and that
25 Your Honour is presumably a

1 passive and willing
2 participant in that exercise.
3 That's contempt of court, in
4 my submission, and
5 Mr. Cavanagh should consider
6 withdrawing voluntarily on
7 that basis alone.
8 "His accusation is ill-
9 conceived, it's ill-thought
10 out, it's a misconception
11 and, more importantly, it's
12 completely at variance with
13 the evidence under oath we've
14 heard before this court --"

15 And he refers to Pelletier and
16 Berzins and, in effect, everybody else, and at line
17 22:

18 "And, on that basis alone, he
19 should withdraw from the
20 case.
21 "He has lost his perspective,
22 he has lost his sense of
23 professional duty. He is
24 making personal accusations,
25 in the same breath that he is

1 accusing defence counsel of
2 insulting him. The record
3 speaks loud and clear. There
4 is an ominous, disturbing,
5 continuing silence for five
6 weeks from Mr. Cavanagh;
7 that's why he's being
8 compelled as a witness,
9 amongst other issues that the
10 court has indicated it wishes
11 to hear ... from --"

12 At 3719, Mr. Murphy continues in
13 his sur-sur reply, which is what this is. Line 6:

14 "It is also an unprofessional
15 allegation against the
16 defence counsel and I say
17 this, Your Honour, without
18 wishing to seem that I'm
19 defending myself. It's not
20 the fault of the defence
21 counsel in this case that the
22 Crowns have failed to do
23 their duty --"

24 And he goes on again about the
25 various defence counsel, the Attorney General,

1 Deputy Attorney General Segal, and the like.

2 At the top of page 3720, Mr.
3 Murphy continues referring to the Deslauriers case,
4 he said at the top of 3720 that:

5 " -- the reason we need
6 independent counsel in
7 situations like this is so
8 that Crowns won't stand up
9 and do exactly what
10 Mr. Cavanagh did, which is to
11 engage in completely
12 transparent, gratuitous,
13 insulting comments about
14 defence counsel, by way of
15 defending the actions and
16 conduct -- impugned actions
17 and conduct of his fellow
18 Crowns."

19 He refers again to Mr. Ramsay's
20 involvement, which was at a much earlier stage.

21 Mr. Murphy goes on at page 3721, line 10:

22 "The fact of the matter is,
23 there isn't one level of this
24 investigation that isn't in
25 some way corrupted, and there

1 isn't one level of,
2 unfortunately and tragically,
3 of the Attorney General's
4 Ministry that hasn't in some
5 way been touched, either
6 through failing to do its
7 duty or knowingly looking the
8 other way and being wilfully
9 blind to what their duties
10 are as prosecutors. I think
11 Mr. Cavanagh is in a
12 completely untenable position
13 and he should withdraw
14 immediately, and he should
15 retract and apologize, both
16 to the court and to counsel,
17 for his insulting comments
18 that this is somehow a ploy.
19 Those comments are a
20 contempt. It implies that
21 Your Honour is simply ...
22 "The Court: That is a
23 repetition, Mr. Murphy."
24 Over to page 3722, Mr. Murphy
25 continues:

1 "I'm simply saying now at
2 this juncture, Your Honour,
3 the Crown is faulting defence
4 for bringing to light
5 improprieties on the part of
6 the Ministry of the Attorney
7 General and it is accusing us
8 of doing something in breach
9 of our duty. In fact, as I
10 said in February, when
11 Mr. Flanagan asked for you to
12 censure and rebuke me for
13 making comments that he was
14 misleading the court, I said
15 at that time and I repeat it,
16 I've repeated it since, I
17 don't resile from my duty, I
18 don't resile from any
19 allegations I've made against
20 the Crowns on this case,
21 against the Ministry and, as
22 far as I'm concerned, we are
23 doing our duty and the Crown
24 is not, and Mr. Cavanagh,
25 given that he has apparently

1 lost his perspective in this
2 matter, should withdraw
3 forthwith.
4 "The Court: Mr. Cavanagh,
5 before I give you... a sur-
6 sur-reply, I want to indicate
7 to counsel that a lot of time
8 has been taken this morning
9 on what is classically
10 described as ad hominem
11 argument and comment.
12 "I have been a lawyer for
13 35 years, and I can tell you
14 that about a half an hour of
15 the presentations this
16 morning went right over my
17 head, because they just came
18 at me as ad hominem. So you
19 are wasting your breath,
20 counsel. If I can't persuade
21 you to be civil and to follow
22 the rules of professional
23 conduct, which is to
24 demonstrate some civility to
25 one another, at least I can

1 alert you to the fact that if
2 it is exercise you are
3 engaged in, well that's one
4 point, but it is not
5 persuasive to the court.
6 Ad hominem arguments are not
7 persuasive to the court.
8 "On the issue of
9 Mr. Cavanagh's position, I
10 will not repeat, except this
11 one last time. This is the
12 third time I have ruled that
13 Mr. Cavanagh, in the court's
14 opinion, is entitled to, and
15 properly represents the Crown
16 at this point. My decision
17 with respect to Mr. Cavanagh
18 on the motion to give
19 evidence and the challenge to
20 the subpoena has not been
21 made. Well, I will stop
22 there."

23 There is a recess. After the
24 recess, at page 3727, Mr. Murphy makes a statement
25 at line 19:

1 "Your Honour, before I call
2 Detective Inspector Grasman,
3 I'd like to make a comment to
4 the court.
5 "I've had occasion, over the
6 break, to consider some
7 comments I made by way of an
8 analogy drawn between the
9 conduct of the Crown and the
10 OPP and the Third Reich and I
11 think, on reconsideration of
12 my comments, I think
13 although the analogy may be
14 apt in my some respects, I
15 want it clear that I am not
16 in any way suggesting that
17 there is a -- any kind of a
18 quantitative proximity in
19 terms of the evils that one
20 notoriously associates with
21 the Third Reich to the
22 misconduct, and even criminal
23 misconduct that is the
24 subject of the motion before
25 the court.

1 "I'm sensitive to the fact
2 that such comments, as made
3 by me, may be seen by some as
4 trivializing that horrific
5 period of history, and I just
6 want it to be clear on the
7 record of this court, I don't
8 wish to leave that
9 impression. I know better
10 than to suggest that the
11 extent and degree of the evil
12 and the misdeeds that are
13 associated in the minds of
14 the world with respect to the
15 Nazi Regime are in no way
16 comparable -- or I should say
17 the other way around -- the
18 actions of the officers and
19 the Crown in this case are in
20 no way comparable in terms of
21 the severity. I just want to
22 make that clear, because I
23 think it may count otherwise
24 as hyperbole, and I also say
25 that in response to Your

1 Honour's admonitions
2 concerning ad hominem
3 submissions by the
4 court -- to the court by
5 counsel.

6 "The Court: Thank you very
7 much."

8 That ends that passage.

9 If I can go particular 3(h), this
10 says:

11 "In the face of a Crown
12 objection, Justice Cosgrove
13 required an answer from the
14 superintendent of the jail at
15 which the accused was housed,
16 to the following
17 question/statement of defence
18 counsel regarding a recent
19 search of her cell: 'This is
20 like some cliched (sic)
21 southern prison movie and you
22 and your guards, sir, and
23 your senior officials at the
24 institution, I suggest you,
25 are bullying or allowing Miss

1 Elliott to be bullied and
2 intimidated to the point
3 where you are abusing her
4 verbally...and you've allowed
5 these goons to go into her
6 cell and trash it and destroy
7 her personal property. And,
8 sir, you come off like a
9 cliché stereotype southern
10 bigot...who is allowing that
11 injustice to happen and it
12 shouldn't be lost on anybody,
13 sir, I suggest to you, that
14 she's a black woman.'"

15 The comments in question are at
16 page 2128 and 9, and Justice Cosgrove's response to
17 the objection are there. But to understand the
18 background and the evidence, I think it is
19 important that the panel hear the evidence that
20 came before Mr. Murphy put that question to John
21 Hutton.

22 This will come up in later
23 material under a couple of headings, but there was
24 a -- there's this link the evidence that was
25 referred to again by the Court of Appeal as to the

1 prison in which Ms. Elliott was housed. Mr. Hutton
2 was the superintendent of that prison in Ottawa,
3 and there were a couple of issues that were
4 explored at very great length, as you will see
5 later.

6 One issue was the question of
7 something called Ferguson House, which was a
8 halfway house, and the issue was whether that would
9 or would not be a suitable place for Ms. Elliott to
10 go where bail could be allowed, where she could
11 supervised while bail was being allowed, and
12 whether the allegation that was being put forward.

13 And a witness was called, who ran Ferguson House,
14 as to the funding.

15 The issue was Ferguson House
16 didn't have the funding to do that, even if they
17 wanted to. The question was whether Mr. Hutton had
18 in some way interfered with their ability to get
19 funding so that Ms. Elliott would not be able to go
20 there, were she granted bail.

21 That was one major issue, and that
22 was explored at some considerable length with Mr.
23 Hutton and with others.

24 The issue that Mr. Hutton was
25 being examined this day had to do with a complaint

1 that Ms. Elliott had made with respect to the
2 searching of her cell.

3 Mr. Hutton was called, as we will
4 see, and questioned on the inspections that
5 occurred. This is Wednesday, September 16th, 1998.

6 Mr. Murphy opens that day by referring to some:

7 " -- extraordinary
8 circumstances have unfolded
9 since we subpoenaed Mr.
10 Hutton, the superintendent at
11 the regional detention
12 centre."

13 Mr. Murphy refers to a complaint
14 by Ms. Elliott that her cell had been trashed, as
15 she put it, by two female guards when she was out
16 at court. He goes on on page 2025 with what he
17 says the details of the trashing are, and that is
18 that some drawings she had on her wall were taken
19 down, and they turned the place over and she is
20 scared to death.

21 Mr. Murphy goes on at some length
22 on that complaint. The suggestion that Mr. Murphy
23 is making is that that was done in response to the
24 treatment that he thinks Mr. Hutton thought he got
25 when he was at court on the previous day.

1 That is the suggestion that he is
2 making in this long submission, which I won't read
3 to you in detail. Mr. Murphy says at the bottom of
4 2027 at line 30:

5 "My concern is our client is
6 not able, because of being
7 terrorized by these
8 occurrences at the jail, is
9 not able to sit and pick a
10 jury. She's not able to give
11 us instructions."

12 And the like. And he refers to
13 the harassment at the top of page 2028, and, at the
14 bottom of page 2029, a precursor of what is to
15 come. At line 24, Mr. Murphy says to the court:

16 "I've never seen her like
17 this, and she is imploring us
18 not to endanger her, but in
19 -- my position, Your honour,
20 is that this is like
21 something one would expect in
22 the third world or, you know,
23 in the caricatured southern
24 prison movie, you know, Cool
25 Hand Luke.

1 "This kind of emotional
2 torture --"

3 He goes on. He says at the top of
4 the page:

5 "Mr. Hutton's arrogance is
6 completely unprecedented, in
7 my experience."

8 Mr. Murphy says, and this is what
9 I indicated to you earlier comes from page 2030,
10 line 8:

11 "Well, I think the inference
12 is so obvious, I can't see
13 why two female guards, after
14 a three year history of
15 incarceration, why two female
16 guards would suddenly, of
17 their own initiative, enter
18 this accused's cell and then
19 disrupt it and destroy her
20 personal effects.

21 "The intent is clear. It is
22 not just rattling her cage,
23 it is going inside her cage
24 and destroying it.

25 "Mr. McGarry: I think,

1 though, Mr. Cavanagh's
2 concern there is that we not
3 get into speculation of what
4 the evidence is on this. We
5 don't have any evidence at
6 this point."

7 The discussion goes on on the
8 proposition Ms. Elliott fears for her life. At
9 2031, the issue is whether she can pick a jury that
10 morning. Mr. McGarry says at the top of page 2033:
11 "Well, as I was saying, Your
12 Honour, the question is: Is
13 Mr. Murphy asking you to take
14 action of some sort, because,
15 if he is asking you to take
16 action, then I think we have
17 to have evidence. There has
18 to be -- I don't think you can
19 act without evidence, and so
20 I think there has to be
21 evidence of some sort and a
22 request for relief. That
23 being the case, I don't think
24 we can do that in chambers
25 either."

1 This discussion has been in
2 chambers. And Mr. McGarry goes on and concludes at
3 the bottom of page 2033 and over the next page:

4 " -- again, if what Mr.
5 Murphy is seeking from you is
6 relief, then I think we have
7 to proceed on evidence and we
8 would have to do that in open
9 court with a hearing, in my
10 submission."

11 There is a discussion then
12 involving the judge, and the court makes some
13 observations about his previous experience. Again,
14 this is in chambers, page 2035, Justice Cosgrove
15 makes an observation about some previous experience
16 he has had. He says at line 22:

17 "But I'm wondering whether the
18 service is a little pissed
19 off with the court. The
20 court has already intervened
21 --"

22 Mr. Murphy says, "Mr. Runciman",
23 who was a solicitor general of Ontario at the time,
24 "has been complained of --"

25 There is a reference to a previous

1 incident with Ms. Elliott when police officers came
2 to investigate her about a completely different
3 matter that they were investigating. The
4 discussion goes on about what should happen.

5 On page 2040, line 20, Justice
6 Cosgrove says:

7 "Well, I share Mr. McGarry's
8 observation that we have to
9 have something on the record,
10 and we can clear the court
11 with the exception of who we
12 have here now ... to hear
13 evidence --"

14 Mr. Murphy asks at page 2041 that
15 a bench warrant -- a bench summons be issued to
16 have Mr. Hutton brought here without delay, and
17 some others, as well.

18 Mr. Murphy says at line 25 that he
19 is concerned with the safety of her and her fellow
20 inmates. He makes the suggestion again, at page
21 2042, what the inference is at line 8:

22 " -- the inference is obvious
23 that if Mr. Hutton leaves
24 court here in a huff and
25 within 12 hours his minions

1 are trashing her cell
2 apparently not -- not
3 spontaneously on their own
4 initiative, then he's the type
5 of individual who may raise
6 the stakes and figures that
7 he eliminates his problem
8 completely by arranging for
9 her to be murdered. And I
10 know that sounds somewhat
11 -- with respect to my
12 friends...
13 "Mr. Cadieux: Stranger
14 things have happened.
15 "The Court: I'm familiar
16 with that. I sit in Kingston
17 and I've heard and have been
18 convinced of that type of
19 activity on the part of the
20 service officers and, as a
21 matter of fact, there's an
22 inquiry going on now where a
23 transfer was made and the
24 prisoner complained and said
25 that she would be murdered

1 and she was murdered, and
2 that was within the last 18
3 months.

4 "Mr. McGarry: On the issue
5 of evidence, it's not for me
6 to say how Mr. Murphy
7 conducts these things, but it
8 seems to me that a more
9 appropriate thing would be
10 for him to establish the
11 basis of what happened,
12 whether through the other
13 inmate or through his client
14 or through the guards or
15 whatever. It's simply not
16 -- we're not going to get
17 anywhere other than confusion
18 by simply calling in prison
19 authorities --"

20 Mr. Murphy says on the next page
21 that he would prefer to start with Mr. Hutton.

22 This is about line 22:

23 " -- because the inference,
24 in my submission, is stronger
25 as to why he leaves to court,

1 having spent six hours in
2 court the day before, then,
3 the following day, this event
4 occurs."

5 Mr. Justice Cosgrove then makes a
6 statement that Mr. Hutton should bring in his
7 records, and at line 9 says:

8 " -- but at least then I have
9 a factual basis from which I
10 can be invited to draw
11 inferences. I think you want
12 to get that established
13 before you get into motive
14 and the other thing."

15 The discussion in chambers goes
16 on, and Justice Cosgrove observes at page 2047 that
17 the discussion has been about the prison
18 authorities, and Justice Cosgrove says.

19 "They won't pay any attention
20 to court orders. I made
21 court orders on Friday
22 afternoon at 4 o'clock and
23 directed -- signed and
24 directed that they be taken
25 to the penitentiary. They've

1 received them and said:
2 'We're too busy to deal with
3 this.' And on Monday morning
4 I said: 'If it's not dealt
5 with by Monday morning, would
6 you have the superintendent
7 in the court at 10 o'clock.'

8 Well, Sunday night
9 -- Monday morning they hadn't
10 dealt with it."

11 Then Mr. Justice Cosgrove gives
12 another example of prison authorities ignoring his
13 order. He says at page 2048:

14 "I think there should be a
15 subpoena to Mr. Hutton that
16 he appear forthwith, that the
17 issue is the security
18 arrangements with respect to
19 Miss Elliott that have
20 occurred over the last 48
21 hours, and I would like him
22 to be prepared to bring his
23 records and any staff that
24 have had any responsibility
25 for her security, whatever,

1 living areas are to be
2 searched once a -- once a
3 week; it's part of our
4 routine search of that
5 particular area.

6 "Question: Do you have
7 records that document the
8 frequency of those searches?

9 Mr. Hutton said that he did indeed
10 bring such records.

11 Over to page 2084, after giving a
12 description of the part of the woman's dormitory --
13 I am sorry, the annex that Ms. Elliott is housed
14 in, and it is called The Annex, and he indicates
15 that the people who are in the annex is because
16 there is some problem. He says at line 12:

17 "We keep them separate and
18 apart from the other
19 individuals for their own
20 safety.

21 Question: And is that
22 description the criteria?
23 Are you saying that Julia
24 Elliott is one of those
25 individuals?

1 "Answer: That's correct.

2 "Question: She is a
3 problematic prisoner?

4 "Answer: We've had numerous
5 situations where there has
6 been assaults at the
7 institution and her name has
8 been involved."

9 Over to page 2086, line 7:

10 "You've set the scene, as it
11 were, sir, can you tell us
12 why those two officers
13 -- you're talking about
14 searches and you say you have
15 a record. When is the last
16 time a search of that nature
17 was done?

18 "Answer: I believe a search
19 was done yesterday, sir.

20 "Question: Before yesterday.

21 "Answer: I cannot confirm
22 when the search was done, it
23 was done some time last week.

24 "Question: And the reason
25 for the search, sir?

1 Answer: Policies and
2 regulations as it pertains to
3 searches of inmate living
4 areas."

5 He goes on to refer to those
6 policies and procedures in prisons. Over to page
7 2087, he is asked what the procedure is at line 9:

8 "Answer: Sir, there's various
9 types of searches.

10 "Question: What manner of
11 search is it supposed to be?

12 "Answer: I believe
13 yesterday, when the search
14 was conducted, Miss Elliott
15 wasn't in the cell at the
16 particular time.

17 "Question: Where would she
18 have been, sir?

19 "Answer: I believe she was
20 at court.

21 "Question: And do you know
22 what day it was yesterday, of
23 significance to her
24 proceedings?

25 "Answer: No, I do not, sir.

1 "Question: You weren't aware
2 that the jury selection
3 process had begun yesterday?

4 "Answer: No, I did not,
5 sir."

6 He is asked about the nature of
7 the searches at page 2088 at line 12. Just above
8 that, he says, in the searches:

9 " -- there is some
10 disorderment with regards to.
11 The beds would have to be
12 remade again by the -- by the
13 inmates.

14 "Question: And what manner
15 of search? Is it supposed to
16 be reasonable or are the
17 officers authorized -- the
18 searching officers authorized
19 to tear the place apart, as
20 it were?

21 "Answer: All searches, sir,
22 once staff members go
23 through, there is disruption
24 in the appearance of an area
25 when they go through, because

1 they're searching for, as I
2 indicated, weapons and
3 contraband.

4 "Question: What about
5 destroying personal effects
6 and property?

7 "Answer: If personal effects
8 and property are adhered to
9 the wall, which quite often
10 happens, pictures, etcetera,
11 they sometimes get destroyed,
12 because inmates are not
13 permitted pictures on the
14 wall."

15 He goes on to explain on page 2089
16 that when matters are on the wall:

17 " -- there's a good
18 possibility they're going to
19 be torn, because they're
20 adhered to the wall. They
21 cannot have secured pictures
22 to the wall and we try to
23 prevent it."

24 He's asked about drawings affixed
25 to the wall at line 19, and he says that they're

1 going get damaged. He agrees they should not be
2 torn up. That's at the bottom of the page about
3 confiscating personal effects. He says at 2090:

4 "If the individual did not
5 purchase that particular item
6 from the institution, or the
7 institutional canteen, it
8 would be considered
9 contraband."

10 There is a discussion of the
11 nature of the cell that she was in. Page 2092,
12 about line 5 and following, he again indicates that
13 after the search, the officers do not make the beds
14 again. The individuals have to do that themselves.

15 He reiterates at page 2093 at the top that:

16 " -- we have found numerous
17 weapons within searches of
18 the institution. Searches are
19 conducted in order to ensure
20 the health and safety of my
21 staff and the other inmates
22 that are living within the
23 institution.

24 "Question: In that female
25 cell are you're describing?

1 "Answer: In all areas of the
2 institution."

3 The discussion goes on about what
4 he knows and what he did, and then at page 2096 at
5 line 7:

6 "And would you include in
7 that allowing or authorizing
8 correctional guards go into
9 Miss Elliott's cell, while
10 she's away at her first day of
11 court picking a jury or
12 trying to, would you include
13 that to be authorization that
14 they go in and trash her cell
15 while she's at her first day
16 in court?

17 "Answer: Sir, I indicated I
18 was not aware that there was
19 a jury motion. I've indicated
20 to you all areas of the
21 institution, every individual
22 cell in my institution gets
23 searched on a weekly basis."

24 The discussion goes on, and Mr.
25 Hutton repeats it, for instance, at 2101 at about

1 line 15, that:

2 "Sir, if items are secured to
3 the wall, they are not to be
4 on the wall."

5 There are references to the
6 records that he has page 2103, at line 7:

7 "Is the weekly search every
8 seven days or is it random?

9 "Answer: It's random, sir.

10 Question: So it isn't always
11 every week?

12 "Answer: No, it has to occur
13 once during the week, but it
14 can be random during the
15 course of that week."

16 Then he is asked to look at the
17 records. There is a discussion about certain hair
18 products, and that's at page 2105, line 10:

19 "Are your guards completely
20 unaware of the fact that a
21 person in Miss Elliott's
22 position is allowed to have
23 those hair products?

24 "Answer: Sir, I don't know
25 the item that you're

1 referring to, whether it is
2 contraband or not contraband.
3 "Question: And you don't
4 particularly concern yourself
5 whether the guards go in and
6 basically take things that
7 the inmates are allowed to
8 have?

9 "Answer: I'm very concerned,
10 sir, because I believe with
11 Miss Elliott, I went out of
12 my way to make sure that she
13 could secure a special hair
14 product to be added to the
15 canteen list to deal with
16 some issues."

17 The product had to do with
18 assisting in detangling of her hair.

19 He goes on to say that Ms. Elliott
20 is the only black person in the institution. Then
21 he is asked about whether he knows, on page 2106,
22 George Ball, and he says no; MacCharles, he says
23 no. And the question at line 19 is:

24 "Question: Sir, it sounds
25 from your evidence you don't

1 really remember anything very
2 clearly.

3 "Answer: I remember numerous
4 things, sir, but you have to
5 remember I do have 400
6 individuals coming through
7 here. I'm dealing with
8 parents, I'm dealing with
9 lawyers, I'm dealing with all
10 sorts of different agencies
11 and groups, and there is
12 nothing to have a 150 to 200
13 individuals coming through my
14 institution on a daily
15 basis."

16 Then there is a discussion about
17 whether police officers can or cannot come in. The
18 cross-examination goes on for some pages, and there
19 is a discussion at the bottom of 2114, and
20 continuing, as to whether Mr. Hutton does or does
21 not know that Mr. Murphy was Julie Elliott's
22 lawyer. He says he didn't know that until he saw
23 Mr. Murphy's letter.

24 The question at line 12 is:

25 "So, sir, are you suffering

1 from a malady that affects
2 your memory?

3 "Answer: No, sir. I guess
4 I'm just suffering from the
5 volume of individuals and
6 paperwork that crosses my
7 desk."

8 He goes on to say at the bottom of
9 the page that he doesn't care about trials. He
10 just looks. His responsibility is the people in
11 the institution when he is there.

12 He is again asked about some
13 correspondence that occurred with respect to Julia
14 Elliott. He says that at page 2117 he can't
15 confirm or deny whether he saw it:

16 "Question: You can't confirm
17 or deny anything, can you?"

18 Mr. Cavanagh objects. The court
19 agrees it is argumentative. The cross-examination
20 goes on for some pages. At page 2120, he is asked
21 whether he knows that Ms. Elliott has had
22 treatment, and this is about line 20, 21, 20:

23 " -- because of stress as a
24 result of pretrial
25 incarceration?"

1 with a representative of a
2 religious group?

3 "Answer: My understanding,
4 that particular request was
5 referred on to my other
6 deputy, Miss Tomkinson. At
7 the time I was not at -- not
8 at the institution at that
9 particular time.

10 "Question: Did you receive a
11 letter from Miss Elliott, a
12 complaint from her about the
13 conduct of that guard using
14 abusive language towards her
15 in the presence of a
16 representative of a religious
17 organization?

18 "Answer: I have discussed
19 with Miss Elliott a letter
20 which she -- what you call a
21 request form, in which she
22 wanted to see myself. I have
23 seen that particular -- I saw
24 Miss Elliott on that
25 particular situation and the

1 information...

2 "Question: When was the date
3 of that letter, sir?"

4 He was not sure. In the middle of
5 the page:

6 "I was on vacation. I was
7 out of the institution a good
8 portion of last week, I
9 believe it was probably last
10 Friday.

11 "Question: You read the
12 letter?"

13 "Answer: No, I did not, sir.
14 I just saw the request form
15 saying that she wanted to see
16 myself.

17 "Question: And you saw her?"

18 "Answer: And I saw her.

19 "Question: What was the
20 nature of the complaint?"

21 "Answer: She had indicated
22 to me that she had a
23 complaint concerning some
24 vocalizations in the visiting
25 area and that she had given

1 it to my other deputy.
2 "Question: Were those
3 vocalizations, as you call
4 it, not a little bit
5 assaultier (sic) than
6 vocalizations? Was she not
7 in fact verbally sworn at by
8 the guard; was that not what
9 she was complaining about?
10 "Answer: She was alleging
11 that there had been
12 inappropriate language used
13 to her.
14 "Question: Sir, I have the
15 woman who was present when
16 that happened sitting
17 outside, are you telling me
18 that it's an allegation that
19 has no merit?
20 "Answer: Sir, you're asking
21 myself. I have not followed
22 up on an investigation of
23 that particular issue at this
24 present time period.
25 "Question: Why not?

1 "Answer: Because I haven't
2 been at the institution, sir.

3 "Question: Sir, what you
4 have done, apparently, is
5 allowed a complete trashing
6 of her cell, resulting in the
7 destruction of her piece of
8 mind, as well as her personal
9 property. You've allowed
10 that to occur, but you
11 haven't followed up on a
12 complaint involving abusive
13 treatment by a member of your
14 staff, and you're suggesting,
15 sir, that there's no
16 coincidence between any of
17 that and what happened to her
18 cell yesterday in her
19 absence?

20 "Answer: No, sir, there's no
21 coincidence whatsoever.

22 "Question: I'm going to
23 suggest this to you, sir.
24 This reads like a scenario
25 out of a bad southern prison

1 movie and you, sir, and your
2 guards, appear to be bullies
3 who are intimidating a
4 defence...
5 "Mr. Cavanagh: Objection.
6 This is simply...
7 "Mr. Murphy: I'd like to
8 finish my question before the
9 objection is read, sir.
10 "Mr. Cavanagh: The insults
11 are already made and that's
12 why I rise at this time.
13 "The Court: Please sit down,
14 Mr. Cavanagh.
15 "Mr. Cavanagh: Thank you.
16 "The Court: Mr. Murphy.
17 "Mr. Murphy: Thank you.
18 "Question: This is like some
19 cliched southern prison movie
20 and you and your guards, sir,
21 and your senior officers at
22 the institution, I suggest to
23 you, are bullying or allowing
24 Miss Elliott to be bullied
25 and intimidated to the point

1 where you are abusing her
2 verbally in front of bona
3 fide visitors, members of a
4 religious organization, one
5 of whom is outside who I've
6 spoken to and I will call to
7 the witness stand if
8 necessary. You've turned a
9 blind eye to her written
10 complaints to you and you've
11 allowed your officers, merely
12 by coincidence, you're asking
13 us to understand, to go into
14 her cell the very day that
15 she's in court to pick a
16 jury, knowing that it must --
17 would have unsettled any
18 inmate, and you've allowed
19 these goons to go into her
20 cell and trash it and destroy
21 her personal property. And,
22 sir, you come off like the
23 cliché stereotype southern
24 bigot --"

25 The witness tries to inject:

1 " --who is allowing that injustice
2 to happen and it shouldn't be lost
3 on anybody, sir, I suggest to you,
4 that she's a black woman."

5 The witness tries to interject,
6 and Mr. Cavanagh says:

7 "Objection. I wonder if I
8 can address that last
9 question.

10 "The Court: No, please sit
11 down, Mr. Cavanagh.

12 "Mr. Cavanagh: Thank you.

13 "The Court: Your answer,
14 sir.

15 "The Witness: Okay. Sir, as
16 I indicated to you, the
17 searching of those particular
18 areas of the institution
19 occurs on a weekly basis. As
20 far as Miss Elliott goes,
21 Miss Elliott and myself, I
22 know we've had numerous
23 conversations in regards to
24 different activities and
25 levels within the

1 institution, and I have
2 always found Miss Elliott to
3 be very respectful towards
4 myself, just as I've been
5 respectful towards herself
6 with regards to --"

7 And Mr. Murphy cuts him off:

8 "You've called her
9 problematic, sir, and that's
10 why she's in that cell with
11 an iron door. Which is it?

12 "Answer: No, sir. No, sir.

13 I didn't call her
14 problematic.

15 ""Question: You said she was
16 problematic.

17 "Answer: I said -- I said
18 that there is definitely
19 problems when she is in the
20 area, because I have
21 situations where I have other
22 inmates claiming that she has
23 assaulted them in those
24 particular areas --"

25 And the discussion goes on. Mr.

1 Hutton explains at the top of page 2131 as to what
2 the nature of the area that Ms. Elliott is
3 presently lodged in.

4 At page 2133, Mr. Murphy goes on
5 at line 22, Mr. Murphy asks this question:

6 "I'm suggesting, sir, it
7 appears, that whereas the OPP
8 can waltz in under any
9 premise they wish and see any
10 inmate they wish, with or
11 without notice to counsel,
12 that defence counsel are held
13 up at the door and when
14 complaints are raised, they
15 are not acted upon, and
16 furthermore, sir, there's a
17 payback and the payback lands
18 on the inmate. That's what
19 I'm suggesting to you, sir,
20 and the culmination of that
21 payback is what happened
22 yesterday. And the
23 culmination of the payback is
24 what happened when you were
25 subpoenaed down here and you

1 were annoyed and pissed off,
2 to use the colloquial term,
3 so you gave licence to your
4 guards to go in under the
5 pretext of a routine search
6 and destroy her cell area;
7 that's what I'm suggesting to
8 you, sir."

9 The answer at 2134:

10 "Sir, that is a very nice
11 story.

12 "Question: It's a true
13 story, I suggest to you, sir.

14 "Answer: It's not a true
15 story.

16 "Question: Well, can you, in
17 this murky area of non-
18 recollection that you've
19 invited us to follow you
20 through this afternoon in
21 your evidence, can you give
22 us any other explanation,
23 apart from you don't recall
24 this and you don't know that,
25 and you're not certain about

1 this...
2 "The Court: No. That's the
3 end of the cross-examination,
4 Mr. Murphy. Please sit down.
5 "If Crown wishes to examine,
6 we will take ten minutes --"

7 That is the evidence on that
8 particular. Perhaps we can conclude this morning
9 dealing with the last part of this general
10 particular, because I don't think we can do both
11 that and 4.

12 If I could ask you to turn to
13 particular 3(i). This takes place on March the
14 9th, 1999. You remember that is about the time
15 that the RCMP investigation is under discussion.
16 The particular is:

17 "When Mr. Humphrey (acting as
18 Crown) objected to the
19 description of the actions of
20 the Crown and police as
21 'corrupt' on the basis that
22 it was 'absurd', Justice
23 Cosgrove told him not to use
24 the word 'absurd'. Justice
25 Cosgrove did not admonish

1 defence counsel."

2 To get the background of this, you
3 will see Mr. Murphy is making submissions, and the
4 issue is what is going to happen or what has
5 happened to Inspector MacCharles.

6 Mr. Murphy makes a reference to
7 MacCharles on March 12, 1998 concerning why:

8 " -- Ron Laderoute not
9 written down the licence
10 plate, he knew he was being
11 called by Crown Ramsay to
12 give evidence on that issue
13 in reply."

14 He refers to MacCharles' evidence.

15 I won't take you through that.

16 If we go over to page 8095 at line
17 6, after referring again to the Laderoute issue,
18 Mr. Murphy says:

19 "The Crown, in my submission,
20 is accountable for putting
21 him on the stand, in the face
22 of defence allegations of
23 criminal conspiracy,
24 including perjury in
25 furtherance of that criminal

1 conspiracy. It's not, in my
2 submission, an appropriate
3 response by the Crown of this
4 country to simply stand up
5 and say, 'Well, I never...'
6 which is, in effect, what Mr.
7 Ramsay's response was.
8 Righteous indignation, in my
9 submission, is not a
10 substitute for taking the
11 necessary steps to
12 investigate the basis of the
13 allegations which were based
14 on evidence that was called
15 from the preliminary inquiry
16 transcript, it was there on
17 the record. In other words,
18 Your Honour, in my
19 submission, the Crown is
20 implicated, if not
21 indirectly, in this
22 allegation of criminal
23 conspiracy."

24 Mr. Murphy goes on in that vein,
25 and at page 8096 you will see Mr. Murphy is making

1 reference at line 19.

2 " -- to the terms of
3 reference of that so-called
4 independent investigation,
5 the OPP and the Crown were in
6 turn exercising control and
7 direction over the likely
8 targets or the focus of that
9 purportedly independent
10 investigation."

11 Page 8097 in the middle, he's
12 complaining that he doesn't know much about what is
13 going on in the RCMP investigation, and after
14 making that complaint, at the middle of the page
15 Mr. Murphy says:

16 "Now, I agree Your Honour may
17 have difficulty in making the
18 leap, as it were, to finding
19 culpable direct involvement
20 by Mr. Ramsay in putting a
21 perjurer on the witness
22 stand, but, in my submission,
23 there's at the very least
24 willful blindness, and as
25 this saga continues to

1 unfold, there's a continuing
2 failure of the Crown to do
3 anything but appear to be
4 doing the right thing."

5 He goes on in that vein again. He
6 speaks on the next page about the issue of
7 potential charges against MacCharles, and, at the
8 bottom of 8100, there is a question about why no
9 criminal charges have been laid against MacCharles.

10 Mr. Murphy goes on at some length,
11 and eventually Justice Cosgrove at page 8103, line
12 25, wants to know what the prejudice is. The issue
13 was the delay of professional services branch of
14 the OPP in laying those charges.

15 Mr. Murphy gives an answer to
16 that, and the court asks Mr. Murphy how that
17 affects his client's right to a fair trial, that
18 maybe Inspector MacCharles was charged too late:

19 " -- how does that prejudice
20 your client's right to a fair
21 trial?"

22 And Mr. Murphy goes on at some
23 length to pursue that issue as to why it would
24 affect his client's right to a fair trial. Then in
25 response to the court's question, the court asks

1 again the question on this issue at the bottom of
2 8106. Mr. Murphy gives an answer in the middle of
3 8107, and he says at line 13:

4 "The Crown has basically
5 turned away and is pretending
6 to ignore that any of this
7 ever happened.
8 "And they didn't tell us,
9 after MacCharles gave his
10 quote/unquote confession,
11 they apparently have washed
12 their hands of the whole
13 situation and they are still
14 prepared to proceed as if
15 there isn't some elementary
16 unfairness to the fact that
17 he is allowed to retire with
18 impunity, literally with
19 impunity. And that, in my
20 submission, is relevant to
21 the issue of a stay because
22 it is a matter of
23 establishing circumstances
24 and behaviour on the part of
25 the prosecution and the

1 police that is offensive,
2 oppressive, vexatious and
3 offensive to the community's
4 sense of fair play.
5 "If the community is
6 presented with a misleading
7 and distorted and falsified
8 picture of Lyle MacCharles as
9 somebody who retired
10 unscathed as a result of all
11 this -- it may be open to the
12 Crown to argue that the
13 defence hasn't proved
14 anything about MacCharles
15 -- and what I'm simply saying
16 is they had a duty to nail
17 him, to charge him. They had
18 the basis to do it --"

19 Down at line to 16:

20 "And what I'm saying, Your
21 Honour, is, why should a jury
22 trial be considered fair when
23 the police investigator in
24 charge of it engages in gross
25 serious criminal activity and

1 nothing happens to him, and
2 the Crown proceeds to present
3 the case in front of the
4 jury, leaving the jury with
5 the false impression and the
6 community with the false
7 impression that there wasn't
8 anything done to him because
9 he didn't do anything wrong.
10 "The Court: So I suppose, in
11 sense it's prejudicial in
12 that it gives the Crown a leg
13 up?"

14 And Mr. Murphy, in effect, repeats
15 his earlier submission.

16 The court at the middle of page
17 8109 says:

18 "Well, leaving aside the fact
19 that we're talking about Mr.
20 MacCharles, who was a
21 policeman, it would be
22 advantageous to the Crown, in
23 any case, to present a
24 witness who is a witness
25 without charges, as opposed

1 to presenting a witness who
2 does have charges, which is
3 pretty simple."

4 Mr. Murphy goes on about the Ron
5 Laderoute issue again. Then after discussing the
6 Laderoute evidence and McCurley's evidence at line
7 26 on page 8110, Mr. Murphy says:

8 "I guess the point is, Your
9 Honour, that the community is
10 being conned about the extent
11 of the seriousness of the
12 wrongdoing in this
13 investigation, and that is
14 prejudice of the most severe
15 kind, because the Crown is
16 putting a phony case in front
17 of the jury and turning
18 around, as I know Mr.
19 Humphrey is going to do and
20 say, just as the Crowns did
21 in the Just-Desserts case:
22 'These are a bunch of wacky
23 defence lawyers who are
24 making all kinds of
25 irrelevant accusations about

1 the police, none of which
2 amount to a hill of beans.'"

3 At line 10:

4 "Well, the fact is, Your
5 Honour, in this case, unlike
6 in Just-Desserts, we've got
7 the lead investigator who is
8 a rotten apple."

9 He goes on in that vein to
10 contrast this case with Just Desserts. Mr. Murphy
11 goes on at the bottom of the page:

12 "I think we've covered -- one
13 scenario would be, the Crown
14 will say, 'Well, ladies and
15 gentlemen of the jury, my
16 friend has made a great deal
17 about Mr. MacCharles and I
18 can advise you that, you
19 heard the evidence, he hasn't
20 been charged, there's no
21 charges against him, he has
22 an exemplary record. All we
23 have is his own admissions as
24 to wrongdoings that really
25 don't amount to very much,

1 because obviously they don't,
2 because the Crown -- the
3 police decided not to lay
4 charges against him.'
5 "It's so self-serving, it's
6 corrupt.
7 "Mr. Humphrey: Your Honour,
8 you can appreciate I've been
9 extremely, extremely
10 restrained during the course
11 of this argument and ... I
12 don't want Your Honour to
13 take that as any acceptance
14 of any of what Mr. Murphy is
15 saying. There's been a
16 history of interruptions of
17 argument in these proceedings
18 and that's why I deliberately
19 chose, and I hope it found
20 some favour with Your Honour,
21 I deliberately chose to sit
22 on my hands, if you will, for
23 as long as possible, but...
24 "The Court: I appreciate
25 that, otherwise we may end in

1 some of the chapters of the
2 Just-Desserts case. But my
3 response to you, though, has
4 to mirror my response to Mr.
5 Strosberg initially, when he
6 was before the court, to say
7 that - and you rose when the
8 word, I noticed, 'corrupt'
9 was used. Corrupt, in the
10 court's view, is a parallel
11 word for saying that there
12 has been a criminal
13 conspiracy involving Crown
14 officers, in the
15 administration, down to
16 regional Crowns, down to
17 Crowns -- a number of Crowns
18 who appeared in this court.
19 That, might otherwise be
20 described as corruption and
21 that was alleged in writing,
22 as you read this morning, in
23 November, October of 1997.
24 So...
25 "Mr. Humphrey: If I might

1 just interrupt. That's not
2 why I rose, Your Honour."

3 Mr. Humphrey continues:

4 "The allegation of corruption
5 has been made in the past.
6 I've been sitting here and not
7 interrupting Mr. Murphy in
8 making that allegation. It's,
9 when we truly get reduced to
10 the point of absurdity,
11 that's why I rose, and with
12 respect, Your Honour, you
13 appreciate that it's absurd
14 to suggest that the Crown at
15 this trial would stand in
16 front of a jury and assert,
17 as my friend just said it
18 would, that he has an
19 exemplary record, that he's
20 never been charged with
21 anything.

22 "Your Honour, if this gets in
23 front of a jury, we all know
24 -- I submit, one, the Crown
25 would never attempt to do

1 that; but two, we all know
2 that Your Honour would never
3 let that happen. And, in my
4 respectful submission, it
5 doesn't assist this process.
6 It simply delays it if the
7 argument gets bogged down to
8 arguing the absurd. And in
9 my respectful submission,
10 that's why I rose. If I'm
11 out of turn, then I won't rise
12 again with similar objections
13 but, in my respectful
14 submission, that's just
15 getting into the completely
16 absurd.

17 "The Court: Well, perhaps
18 the admonition of the court
19 to try to keep the process on
20 an even keel is to invite
21 both counsel to, in the
22 future, to refrain from the
23 word 'absurd', please."

24 Mr. Murphy says:
25 "That may be a wise

1 admonition, your honour."

2 Mr. Murphy says:

3 "And I agree with my friend,
4 my position is that he is out
5 of turn; that's all I'm going
6 to say about that.

7 "The Court: No, I appreciate
8 that there is a potential
9 for, because it's a serious
10 matter, it's potentially a
11 matter where counsel
12 seriously will contest each
13 other's point of view, but
14 again, I ask you to do it
15 within the bounds of
16 professional presentation,
17 that's all. Please go
18 ahead."

19 That's the end of the evidence on
20 that particular. It is just about 12:30. Would
21 this be a convenient time to adjourn?

22 THE CHAIR: Yes, thank you.

23 --- Luncheon recess at 12:28 p.m.

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

25 THE CHAIR: Mr. Cherniak, are you

1 ready?

2 MR. CHERNIAK: Yes, thank you.

3 We are on particular No. 4, in book No. 3.

4 This originates from January 5,
5 1999, when there was a publication ban with respect
6 to the evidence in the trial.

7 Mr. Murphy starts at the bottom of
8 page 7130, and indicates there is a Supplementary
9 Notice of Application for a Stay by reason of the
10 Crown's breach of trust and contempt of court.

11 He notes that:

12 "It is, simply put, Your
13 Honour, a supplementary
14 notice to the court that we
15 are seeking an order for a
16 stay which would obviously be
17 in addition to the previous
18 application and renewed
19 applications for a stay of
20 proceedings pursuant to
21 section 24(1). The basis,
22 or the grounds for this
23 application are set out at
24 page 2 and they are, to
25 summarize, the appearance in

1 the Canadian Press and The
2 Ottawa Sun, and in The
3 Brockville Recorder and
4 Times, news stories. One
5 news story, but appears in, I
6 believe, at least three
7 different versions written by
8 Jim Monaghan, who is present
9 in court, under subpoena,
10 today by defence.
11 The article in question, Your
12 Honour, first came to my
13 attention when I opened the -
14 I suppose I don't regularly
15 buy The Sun on a routine
16 basis, but I have been, from
17 time to time, with respect to
18 this case. Thursday,
19 December 24th, 1998, The
20 Ottawa Sun, page 8. I'm
21 reading from a copy of the
22 newspaper edition, on the
23 bottom of the page in a box
24 is an article, two columns
25 entitled: "Province

1 parachutes prosecutors mid-
2 trial." I can read it, it's
3 rather brief, Your Honour:
4 "Ontario's Attorney General's
5 Ministry has parachuted
6 private lawyers onto the
7 prosecution team in the
8 middle of a murder trial.
9 Prominent Toronto defence
10 lawyer David Humphreys and
11 Harvey Strosberg, treasurer
12 of the Law Society of Upper
13 Canada, have been retained to
14 assist Crown attorney
15 Mitchell Hoffman prosecute
16 Julia Yvonne Elliott.
17 They will be assisted by
18 Sidney Robins, a retired
19 appeal court judge, and a
20 battery of other lawyers."
21 And then it says in the fourth

22 paragraph:

23 "Regional Crown attorney
24 Robert Pelletier said private
25 lawyers are often retained on

1 a per diem basis by
2 overloaded Crown offices to
3 prosecute minor cases.
4 But he acknowledged this case
5 is unusual. "Something like
6 this is not usual, where
7 private Crowns get involved
8 in a murder case." Elliott,
9 39, is accused of killing 64-
10 year- old Larry Foster of
11 Kemptville and dismembering
12 his body before tossing some
13 of the parts into the Rideau
14 River.
15 Arrested in August 1995, the
16 masseuse and fashion
17 consultant has spent nearly 3
18 1/2 years in jail awaiting a
19 verdict.
20 Last spring Justice Paul
21 Cosgrove dismissed the first
22 jury and moved the trial from
23 Brockville to Ottawa three
24 weeks after the start of a
25 voir dire into issues raised

1 by Elliott's lawyer Kevin
2 Murphy.

3 A new jury was selected in
4 October but has yet to hear
5 any evidence."

6 Mr. Murphy then goes on to list
7 other places where the story was published.

8 There was a broadcast of the story
9 as well, which Mr. Murphy goes into, and he refers
10 to an internet version of the broadcast and reads
11 from that version.

12 I won't read, except for one
13 portion at page 7135:

14 "None of it can be reported
15 until after the trial because
16 of a publication ban.

17 Strosberg told Cosgrove he
18 and Humphreys will confine
19 their role in court to one
20 specific issue raised by the
21 defence.

22 Arguments over that issue are
23 scheduled to begin February
24 9.

25 But Strosberg also said they

1 will conduct "an independent
2 review" of the case to
3 determine if there is a
4 reasonable prospect of
5 conviction.
6 Foster's twin brother Leonard
7 and son Steven declined to
8 comment on the latest
9 development, but they
10 appeared unsure what
11 implications it has for their
12 desire for closure.
13 Regional Crown attorney
14 Robert Pelletier said
15 in an interview private
16 practice lawyers are often
17 retained on a per-diem basis
18 by overloaded Crown offices
19 to prosecute minor cases.
20 But he acknowledged the
21 circumstances surrounding the
22 participation of Strosberg
23 and Humphreys in the Elliott
24 matter are extraordinary.
25 "Something like this is not

1 usual, where private Crowns
2 get involved in a murder
3 case."

4 Mr. Murphy then refers to what
5 Justice Cosgrove said about media reports in his
6 March 16 ruling, and he goes on about the evidence
7 of Crowns Berzins and McGarry and Cavanagh, and at
8 the bottom of page 7137 he refers to:

9 " -- the denial on the part
10 of the Crown and the Ministry
11 of the Attorney General for
12 them to be blaming defence
13 counsel for their own
14 ineptitude and misconduct and
15 the corruption of their
16 police officers."

17 Mr. Murphy goes on at some length
18 about that, and on the next page states:

19 "In my submission, it is
20 quite reasonable for a
21 reasonable and objective
22 person, including a juror who
23 has been picked to be on this
24 jury, to get the clear
25 impression from this article

1 two things: One, is the
2 defence is playing games.
3 Elliott's lawyer Kevin Murphy
4 has been engaging in a non-
5 stop delay tactic since the
6 trial started. And,
7 secondly, that the crown is
8 out-paced and out-manned;
9 that they are overloaded, and
10 that they have had to resort
11 to calling in a high-powered
12 team, or to use the other
13 headline news in The Sun, a
14 parachuted team of
15 prosecutors.
16 The clear impression is left
17 by the article, Your Honour,
18 that there is a disadvantage
19 operating against the crown.
20 And, quite apart from how
21 one reads it, whether one
22 reads it in that way or
23 perhaps more neutrally, in my
24 submission it is completely
25 inappropriate for Mr.

1 Pelletier, being a witness on
2 the abuse of process voir
3 dire, being implicated in the
4 very act complained of by the
5 defence, that he should be
6 granting an interview to a
7 representative of The
8 Canadian Press and commenting
9 to any extent, not least to
10 the extent that he's
11 confirming that these are
12 extraordinary circumstance."

13 He continues in that vein, and at
14 the top of page 7140:

15 "I should say it is arguable
16 that he's committed a
17 criminal offence, that's Mr.
18 Pelletier. I haven't
19 subpoenaed him because I
20 first wanted to obtain from
21 the source, the writer that
22 is, not the source of his
23 quote --"

24 On page 7141, Mr. Murphy wants Mr.
25 Monaghan to answer to the court:

1 "Mr. Monaghan, in my
2 submission, has to answer to
3 this court for now apparently
4 raising the spectre of
5 further prejudice."

6 Mr. Murphy goes on at length about
7 that. At the bottom of page 7142, he says at Line
8 25:

9 "I think it would be open to
10 the court to cite The
11 Brockville Recorder and The
12 Canadian Press for violation
13 of the sub-judicial order, or
14 the sub-judicial rule, I
15 should say, for contempt of
16 court and contempt of the
17 publication ban, reckless
18 contempt on the part of The
19 Canadian Press."

20 Mr. Murphy continues at some
21 length, and at page 7104 he states at Line 10:

22 "I am raising this concern on
23 the record. I think Mr.
24 Pelletier should answer to
25 this court for his conduct.

1 It astounds me that
2 apparently escaping Mr.
3 Pelletier's considerable
4 experience as a prosecutor
5 and a public official, are
6 his capacity to say two words
7 "No comment". "The matter is
8 before the court, no
9 comment." "I am a witness in
10 the proceedings, I cannot
11 comment." Those are two
12 alternatives he could have
13 referred to.
14 The problem is, Your Honour,
15 that we are now left with a
16 situation where the damage is
17 done, the toothpaste is
18 already out of the tube, and
19 it is unfair. Everything
20 that we in this court are
21 aware of with respect to the
22 litany of misconduct and
23 illegal activity on the
24 crown's side, on the part of
25 the OPP investigators, the

1 lying, the cheating, the
2 falsifications, everything,
3 is a litany, is a huge record
4 of corruption. We're not
5 allowed to say anything about
6 that because we're bound by
7 the court's order, we're
8 bound by the sub-judicial
9 rule of common law. But,
10 apparently the crown, in its
11 perhaps desperation, is
12 flagrantly disregarding that.
13 They are fighting this case
14 subliminally and not so
15 subliminally in the press and
16 we're left with our hands
17 tied behind our back."

18 Mr. Murphy talks about what he
19 would like to do, and says at page 7145, Line 12:

20 "Mr. Pelletier is just as
21 subject to that witness
22 exclusion order as anybody
23 else --"

24 And on page 7146, Mr. Murphy asks:

25 "Will Mr. Strosberg and Mr.

1 Humphrey have to retain
2 independent counsel in order
3 to decide whether any
4 sanctions should be brought
5 against the press in this
6 case?"

7 Justice Cosgrove says, on page
8 7147, that he has the article before him because he
9 lives in Brockville, and on page 7150 Justice
10 Cosgrove makes a ruling.

11 On Line 25:

12 "I was immediately alerted to
13 the potential of legal
14 implications deriving from
15 the article. The evidence
16 which the court has received
17 this morning of publication
18 in The Ottawa Sun and the
19 publication by television
20 based upon, obviously, these
21 reports has further enlarged
22 the potential impact and
23 legal repercussions of the
24 original story which at this
25 point I am assuming was the

1 report in The Recorder and
2 Times by staff writer Mr.
3 Monaghan, who I see is in the
4 court today.
5 Defence has argued that
6 amongst the concerns raised
7 by this publication is the
8 impact upon the fair trial
9 issue, which has been the
10 basis of a number of stay
11 applications or continuations
12 of stay applications before
13 the court. I agree with
14 that. There are
15 implications.
16 Secondly, the counsel for the
17 defence, for the accused,
18 argues there may be some
19 criminal implications as a
20 result of the publication or
21 of the participation of the
22 crown in that. I'm not going
23 to make any comment upon that
24 issue."
25 And he notes the amended

1 application for stay -- I won't read what he says
2 on page 7152 about the previous findings.

3 But at the bottom of that page:

4 "However, the court has to
5 deal with the continuing
6 issues of the fact that we
7 are in mid-trial, in mid-
8 motion, and are confronted
9 with allegations that the
10 process is undermined by
11 press. This is
12 unacceptable. It's
13 surprising, that is the
14 publication, in view of the
15 fact that there is a
16 publication order
17 outstanding."

18 He goes on to order that:

19 "Nothing should be printed
20 about the application. And,
21 the court repeats its order.

22 Now one will have to
23 underline its order that
24 there should be no broadcast
25 of the proceedings in this

1 court, in the middle of a
2 voir dire dealing with the
3 alleged abuse by police and
4 crown of the accused's
5 rights, giving rise to the
6 remedy of a stay. There
7 should be no publication of
8 what has transpired in the
9 court this morning, or
10 anything else that I have to
11 say this morning."

12 Further down, Justice Cosgrove
13 indicates that:

14 "-- counsel should be advised
15 that they will be contacted
16 by the court office for a
17 return of the issue, which is
18 the potential finding of the
19 contempt of the court as a
20 result of the publications
21 being generated by the
22 original story by Mr.
23 Monaghan and then the re-
24 publication by The Ottawa
25 Sun."

1 connected with that is the
2 concern of the potential
3 contempt of court orders
4 prohibiting publication
5 during the voir dire of
6 proceedings. Of course that
7 publication and these
8 proceedings were ordered not
9 to be published, because they
10 may or may not become
11 evidence before the jury."

12 And on page 7586, the Court refers
13 to some of the history --

14 MR. PALIARE: Excuse me, but the
15 judge point out that the jury has been chosen.

16 MR. CHERNIAK: Yes, the jury had
17 been chosen and, at this point, had not been
18 discharged.

19 I informed that shortly after
20 this, on January 18, the jury was discharged. But
21 they had not yet been discharged at this point.

22 Justice Cosgrove refers to remarks
23 about Sidney Robins, and a battery of other lawyers
24 all paid for out of the public purse, and he goes
25 on:

1 "I ask myself, what is the
2 purpose of the comment "paid
3 for by the public purse"?
4 You would assume that the
5 criminal justice system in
6 the province of Ontario,
7 through its Crown offices, is
8 paid for by the public purse.

9 Why that comment? More
10 serious a difficulty for the
11 court is in the paragraph
12 that begins: "The decision
13 came three weeks after the
14 start of a voir dire into
15 issues raised by Elliott's
16 lawyer, Kevin Murphy."

17 Then Justice Cosgrove gets into
18 the history of the voir dire, and at the bottom of
19 page 7587, he says:

20 "The fact of the matter is,
21 that the trial was
22 rescheduled to begin in April
23 of last year, and the trial
24 was yet again delayed when,
25 in April, significant new,

1 fresh evidence was produced
2 by the Crown, which resulted
3 in defence asking that the
4 stay application be
5 continued.
6 That continued application
7 was concluded by yet another
8 decision of this court, in
9 which the court detailed, as
10 a result of this new material
11 being provided by the court,
12 eleven additional breaches of
13 the accused's Charter rights.
14 Those were in addition to
15 the seventeen breaches which
16 the court found as a result
17 of the first stay
18 application, and that
19 application was adjourned
20 until the Crown put its case
21 before the jury, in order for
22 the court to assess the
23 significance of these
24 multiple breaches of the
25 accused's rights in the

1 context of a fair trial
2 argument. And the trial was
3 set for hearing before the
4 jury yet again in mid-August.
5 In mid-August, there were
6 dramatic disclosures by the
7 Crown. The chief
8 investigating officer was
9 removed from the case,
10 charged under the Police Act,
11 and two officers under his
12 supervision complained that
13 they were instructed to
14 destroy evidence and to lie
15 about it. They were
16 threatened that their jobs
17 were in jeopardy. As a
18 result of that information,
19 the stay application was yet
20 again moved, and the
21 evidence, I thought, had been
22 concluded, but I have been
23 advised by counsel, as a
24 result of yet further
25 disclosures, that defence

1 will be seeking to call
2 further evidence on that
3 application.
4 There are some 80 pages of
5 additional alleged breaches
6 of the accused's Charter
7 rights as a result of the
8 proceedings. And to have
9 that reported in the paper,
10 that "the legal arguments
11 that began in Brockville have
12 continued on an off until
13 today", in my view, has the
14 potential of grossly
15 distorting and potentially
16 interfering with the
17 objectivity of a jury hearing
18 this trial, and I am somewhat
19 baffled by the decision to
20 publish, in view of the next
21 paragraph: None of it can be
22 reported until after the
23 trial, because of a
24 publication ban."
25 The Court goes on to refer to the

1 content of the article referring to the treasurer
2 of the Law Society and a retired Appeal Court
3 judge, counsel from Toronto and, at the bottom of
4 the page at Line 28:

5 "Now, is a juror, a
6 prospective juror, one of the
7 jurors going to come in on
8 Monday next, reading that,
9 going to ask himself the
10 question: Well, I wonder why
11 the experts said this trial
12 should continue? I think
13 that is not appropriate.
14 It's not proper. It's very
15 difficult for the court."

16 And over on the next page:

17 "The aspect of the
18 implication of the
19 publication for the fair
20 trial prospect of the accused
21 has yet to be argued.
22 Presumably, that will be
23 argued by Messrs. Strosberg
24 and Humphrey. My concern is
25 that this type of reporting

1 not continue. I don't know
2 the extent of the problems
3 that have been created thus
4 far, but I don't want it
5 continued.
6 I can look at the - I think,
7 at the publication, and the
8 difficulties for the court,
9 in the context of contempt of
10 the court's orders or, as an
11 alternative, I thought that
12 potentially the matter can be
13 approached from the viewpoint
14 of a description of the
15 publication as unbalanced
16 reporting, that a subsequent
17 report by the media who have
18 reported and who are
19 represented today might, for
20 example, by offering a more
21 balanced report undo,
22 potentially undo some of the
23 potential damage that has
24 been occasioned. For
25 example, the jury is being

1 called on Monday to get an
2 update to see whether they
3 are individually available to
4 continue with the trial
5 which, as best I can
6 determine, if the trial
7 proceeds, might take four to
8 six months. A report saying
9 that the jury had been vetted
10 and was able to continue
11 might be enlarged with the
12 comments by the papers that
13 the trial has been delayed as
14 a result of the fresh
15 production by the Crown of
16 evidence to the defence, both
17 in April and August of this
18 year, which caused the delay
19 in the proceedings. That is
20 an alternative way of
21 attempting to overcome the
22 problem.
23 Potentially, what the court
24 is faced with is the prospect
25 of argument that the trial

1 will have to be transferred
2 to yet another court or
3 another city for hearing;
4 that is potentially one of
5 the problems that the court
6 faces. So that is my
7 concern, and I wanted to
8 express those concerns to
9 counsel without jumping into
10 the formalities of conflict
11 of your clients with the
12 process of the court, to
13 alert counsel as to the
14 gravity of the problem, of
15 the challenges to the
16 court --"

17 He then invites Mr. Scott to make
18 submissions, and Mr. Scott opens by referring to
19 the transcript of what His Honour said on January 5
20 with respect to the potential for a finding of
21 contempt of court.

22 At page 7593, Mr. Scott says:
23 "I think the court should
24 note, because there's a
25 process question here that

1 will have to be dealt with,
2 that the Attorney General
3 takes no position on this
4 matter. The Attorney
5 General does not, as I
6 interpret the utterances on
7 the last occasion through the
8 Crown attorney, and does not,
9 through anything that has
10 occurred since, and indeed
11 has been confirmed by Crown
12 counsel this morning, takes
13 no position on this matter
14 and, therefore, this is not a
15 case where, at the moment, at
16 least, the Attorney General
17 has launched any proceedings
18 or expressed an intention to
19 launch any proceeding for
20 contempt against the Ottawa
21 Sun.

22 THE COURT: I agree with
23 that. It is a court
24 initiated concern. I should
25 indicate to you, that there

1 is comment by an attorney,
2 for the Attorney General,
3 reported in the article of
4 the Recorder and Times, which
5 continues a complaint of
6 counsel for the accused that
7 the office of the Attorney
8 General in this trial is
9 frozen, it's hopelessly
10 compromised and has been
11 negligent in the exercise of
12 its traditional role in these
13 proceedings because it's
14 implicated in the proceedings
15 in terms of direct
16 interference with the fair
17 trial rights of the accused."

18 Mr. Scott says that he doesn't
19 know anything about that, and goes on:
20 "The Attorney General of the
21 province is, except for cases
22 of contempt in the face of
23 the court, is the
24 institution that
25 traditionally has

1 administered the fair trial
2 process by the launching of
3 contempt proceedings."

4 Justice Cosgrove says:

5 "Well, I can assist you with
6 that. I have, in these
7 proceedings, initiated two
8 hearings for contempt in the
9 face of the court. I view
10 the potential - the problems
11 with the publication as
12 potentially - they are
13 potentially problems, but I
14 categorize them as being in
15 the face of the court.

16 MR. SCOTT: Well, on behalf
17 of the Ottawa Sun, let me
18 say that we would, with the
19 utmost respect, disagree with
20 that categorization, and the
21 categorization of it will
22 become an issue once we've
23 outlined our position."

24 Mr. Scott says on page 7595:

25

1 "Let me say, at the outset,
2 that it is our view that,
3 after a careful
4 consideration, that the
5 Ottawa Sun article is not
6 contemptuous. As you know,
7 Your Honour, there are very
8 severe limitations on the
9 institution of the court's
10 right to control freedom of
11 the press and freedom of
12 speech under the Charter, as
13 indicated in the Dagenais
14 case, which you are no doubt
15 well familiar with. There
16 is a balancing process and,
17 therefore, the entitlement to
18 control what the press
19 responsibly utters is narrow.
20 So, without getting into the
21 details of it at the moment,
22 our position is, first of
23 all, that we do not believe
24 and we will argue at the
25 appropriate time that nothing

1 printed by the Ottawa Sun
2 could realistically impact on
3 the accused's right to a fair
4 trial, and that the proper
5 interpretation of the
6 entitlement of the press to
7 speak, would make it
8 inappropriate to attempt to
9 control the comments, the
10 reporting comments that have
11 been made by the Ottawa Sun.

12 The second point is that
13 Your Honour's order of
14 November - I'm sorry, of
15 March 5th, is, as we
16 interpret it, a voir dire
17 non-publication order. In
18 other words, you were
19 directing that there be no
20 publication of information in
21 the court. Whether it's
22 treated as a common law
23 order, or an order akin to
24 the prohibition under s. 648
25 of the Criminal Code, is that

1 order, as we understand it,
2 that it is being alleged may
3 give rise to contempt
4 questions. And our
5 position substantively would
6 be, if you were hearing this
7 matter on a contempt basis,
8 is that there is no published
9 information regarding any
10 portion of the trial in the
11 article published by the
12 Ottawa Sun, and thus it
13 cannot be said, particularly
14 in the light of the freedom
15 of the press, it cannot be
16 said to impinge on any order
17 that you have made or any
18 application of s. 648
19 properly interpreted.
20 Now, that is what we would
21 say if it came to an issue of
22 contempt. Our position
23 basically is, with the
24 greatest of respect to the
25 court, that Your Honour ought

1 not to hear any questions of
2 contempt in this matter."

3 He then refers to some
4 authorities, and the guidelines for the use of
5 contempt powers, which he quotes at length on the
6 next few pages.

7 At page 7599, Justice Cosgrove
8 says at Line 16:

9 "The content of the decision,
10 to which you have made
11 reference, was considered by
12 the court on two occasions in
13 this trial, and I am quite
14 aware of the challenge to the
15 court in the context of the
16 caution that is offered in
17 the decision."

18 Justice Cosgrove then refers, on
19 page 7600, to another situation which you will hear
20 about later on, and which involves Constable Ball.

21 At the bottom of page 7600, to his
22 citation of the chief investigating officer, which
23 is Bowmaster, for contempt.

24 Mr. Scott goes on, on page 7601,
25 to say:

1 " -- but my position, at the
2 end of the day, is that this
3 newspaper article, which was
4 reported by the Ottawa Sun on
5 the 24th of December, coming
6 on to a month ago, could not
7 amount to contempt in the
8 face of the court and, even
9 if it did, there is no
10 practical reason why another
11 judge shouldn't deal with
12 what is in effect a contempt
13 question."

14 Justice Cosgrove responds to that,
15 and says he has concerns of repetition, and Mr.
16 Scott says:

17 "Well, you see, Your Honour,
18 the difficulty from my client
19 is, with the greatest of
20 respect seriously meant to
21 the court, it does not agree,
22 and I do not agree with the
23 concerns about the article
24 that it printed."

25 Mr. Scott continues on page 7602,

1 at Line 15:

2 "The second point is that
3 Your Honour has really, in
4 your own heart of hearts,
5 made up your mind about this.
6 This contempt question is,
7 in effect, an issue of mixed
8 fact and law, which the
9 Ottawa Sun, my client, is
10 entitled to a trial on. And
11 not only based on what you
12 said - and I don't quarrel
13 with your saying it, you were
14 perfectly entitled to say
15 what you said on the last
16 day, and perfectly entitled
17 to say what you said on this
18 day - but if you combine what
19 you said on the last day and
20 what you said on this day, it
21 is quite clear that you have
22 made up your mind that these
23 articles were inappropriate
24 and improper, and impinge or
25 are likely to impinge on the

1 fair trial, and I say, having
2 been before the courts for
3 some years, it would be
4 impractical to invite me to
5 persuaded you otherwise. And
6 since there is a genuinely
7 held belief that these
8 articles are not
9 appropriately the subject of
10 judicial criticism, that is
11 the article published by the
12 Ottawa Sun, is all I'm
13 talking about here, then the
14 policy of the law is that you
15 should not deal with these
16 matters. It is judicially
17 inappropriate, with the
18 greatest of respect, for you
19 to be the trial judge in this
20 case and conducting, in
21 effect, a contempt trial
22 involving the media, when
23 that issue could very easily
24 dealt with in precisely the
25 same time frame by one of

1 your brother or sister
2 judges."

3 And just a bit further down:

4 "You would not find yourself
5 in the position of the
6 accuser and the decision-
7 maker and, interestingly,
8 also the questioner of
9 witnesses as well."

10 He then refers to the fact that
11 Crown counsel is not taking any position, and at
12 page 7604, Mr. Scott goes on:

13 "Now, let me conclude by
14 saying this: This morning
15 you suggested another course,
16 and the other course would
17 involve the media in this
18 case, in my case the Ottawa
19 Sun, perhaps undertaking to
20 print something which would
21 have a balancing effect, as I
22 understood your comments.
23 And I'm sure Your Honour has
24 considered that this would be
25 - again, with respect - an

1 extraordinary invitation.
2 It's an invitation on the
3 part of the court to have the
4 media, the print media, print
5 something at the request of
6 the court."

7 He continues further down:

8 " -- even if it were
9 appropriate for it to accept
10 the directions of the court
11 as to what it should say, it
12 would be impossible for the
13 media to say much, to provide
14 what Your Honour considers as
15 a need for balancing without,
16 in the course of doing it,
17 falling into the same area of
18 criticism that the media is
19 facing at the moment. But I
20 don't rest my submission in
21 that respect on that point.
22 I say, if one pauses and
23 reflects, it is
24 inappropriate, in terms of
25 the institutions of society

1 which are engaged here, in my
2 respectful submission, for
3 the media to be invited to
4 print something at the
5 request, in effect, of the
6 court, to communicate
7 information to the public at
8 request of the court. In my
9 submission, while no doubt
10 the idea was intended to lay
11 this matter to rest, and to
12 provide the insurances that
13 Your Honour needs, I submit
14 it is inconceivable, with
15 respect, that media could be
16 directed by the court to do
17 something, as a basis upon
18 which something - some
19 process might not take place
20 involving them."

21 Mr. Wilson, on behalf of the
22 Brockville Recorder & Times in effect takes the
23 same position on the next few pages.

24 I won't read them to you, except
25 for a passage on page 7609, where Mr. Wilson says:

1 "I agree with Mr. Scott that
2 it would not be appropriate
3 for this court to direct any
4 member of the media, nor do I
5 believe you have the
6 authority to direct any
7 member of the media to print
8 anything in particular.
9 However, in some of the
10 concerns you have raised, and
11 the mere fact that you have
12 raised those concerns in this
13 way, by calling these people
14 here, that is something that
15 can be taken by my clients
16 and reflected upon or
17 discussed."

18 The Court calls on Mr. Murphy, at
19 page 7610, and Mr. Scott, at Line 12, says:

20 "Mr. Murphy has standing on
21 this matter, where we've been
22 invited before you as parties
23 otherwise unconnected with
24 the proceedings."

25 Mr. Murphy does go ahead, and on

1 page 7611, Line 15, says:

2 " -- why is the Ministry of
3 the Attorney General simply
4 sitting back and saying:
5 "Sorry, we're not taking a
6 position. We're not getting
7 involved."

8 Mr. Scott and the Court have a
9 discussion on the next page, and Mr. Scott says at
10 Line 9:

11 "Could I just respond to
12 that, since Your Honour
13 permitted Mr. Murphy to make
14 those submissions. I don't
15 think that conclusion is
16 warranted at all. I don't
17 know anything about the
18 history of these proceedings,
19 but it's an incredible
20 assertion to say that the
21 Attorney --"

22 I will just stop there to note
23 that while Mr. Scott didn't know anything about
24 these proceedings then, he was counsel on the
25 appeal. So he ultimately did learn a lot about

1 these proceedings.

2 "THE COURT: Well, absent
3 your participation over the
4 last year and a half in these
5 proceedings, you might, in
6 retrospect, if you were aware
7 of these proceedings, might
8 not attempt to make the
9 submissions which you are
10 going to launch into.

11 MR. SCOTT: If you look at
12 this publication which my
13 client is required to account
14 for, I do not accept, and I
15 say this with the greatest of
16 respect, I do not accept, as
17 counsel for the Ottawa Sun,
18 or as an officer of the
19 court, that it is a given
20 that article is contemptuous.

21 And the conclusion that the
22 Attorney General isn't doing
23 anything because he is so
24 conflicted out, assumes that
25 this article is contemptuous

1 and he should be doing
2 something --"

3 He goes on to say that nothing
4 should be read into that.

5 Justice Cosgrove, after hearing
6 that argument and a short adjournment, says at page
7 7614:

8 "The complaints by defence
9 counsel and my expressed
10 concerns as to risk of
11 contamination of the jury
12 resulting from the
13 publications which are the
14 subject of the court's
15 concern and the discussions
16 this morning are matters
17 which remain to be dealt with
18 in the context of the pending
19 stay application before the
20 court.

21 That issue, which is the
22 trigger to the court's
23 concern and the request of
24 counsel and the clients of
25 the media to be here to a

1 today, is the genesis of the
2 request that the two
3 newspaper counsel attendant,
4 as I have indicated, as a
5 result of the publications
6 and as a result of an
7 amendment by defence counsel
8 to the grounds of the stay
9 application irrespective of
10 the issue which the court
11 flagged and which was
12 discussed with counsel this
13 morning, those are issues
14 which will be vetted at a
15 future date.

16 It is not my intention now to
17 pursue a show cause contempt
18 hearing and, in answer to Mr.
19 Wilson, the court's complaint
20 and process was one of
21 potential contempt for the
22 court's order of non-
23 publication. I don't
24 intended to proceed with a
25 show cause hearing, either by

1 myself or by reference to
2 another judge to conduct such
3 proceedings."

4 And so ended that episode. I
5 would like to move now to particular 5(B), which
6 relates to Gilles Gauthier, a Bell Canada employee.

7 A subpoena had been left at Mr.
8 Gauthier's office the previous day, after he had
9 already left the office, and when he arrived in
10 court the next day, Justice Cosgrove reiterated
11 that he would have had him arrested had he not
12 attended in response to the subpoena.

13 This evidence all relates to the
14 question of Bell Canada records.

15 We start with May 11, 1998, and
16 the evidence of Francine Leduc, who was also a Bell
17 Canada employee.

18 Mr. Murphy says on page 543:

19 "Well, Your Honour, this was
20 a Crown reply witness and my
21 preference or request would
22 be to reopen the voir dire
23 for one purpose; to hear from
24 Francine Leduc on this issue,
25 on this number, and to hear

1 from Gilles Gauthier."

2 He then talks about the run-around
3 he's been getting, and then on page 545 Mr. Murphy
4 says:

5 "I have serious concerns, and
6 I suppose I should just put
7 it as succinctly as I can,
8 Your Honour. I think that
9 Bell Canada and/or the Crown,
10 and/or the police
11 investigators are involved in
12 a coverup of the telephone
13 number. I believe it is far
14 from conclusive that this
15 number did not exist. The
16 fact that it now belongs to a
17 corporation that is in
18 partnership with Bell Canada
19 and, indeed, Mr. Cadieux had
20 a conversation that resulted
21 in a person from the ISG
22 (sic) group telling him to
23 contact - or the IMS (sic)
24 group - ISM, telling him to
25 contact Bell Canada security,

1 whereupon we were ironically
2 told that Bell Canada
3 couldn't give us a number for
4 its own security department."

5 Mr. Murphy goes on about the
6 cover-up at some length, and he in effect wants to
7 call some more evidence on the voir dire.

8 On page 549, the Court calls for a
9 response from Mr. Cavanagh:

10 "I understand the bottom line
11 of my friend's submissions is
12 that he wishes to be
13 permitted to call at least
14 Francine Leduc and perhaps
15 Mr. Gauthier, Gilles Gauthier
16 he referred to.

17 I'm not privy to the prior
18 dealings that my friend had
19 with Bell Canada; he's
20 outlined some of them for
21 Your Honour just now. It's
22 not evidence, but I suppose
23 it gives him a basis for the
24 request, and I don't wish to
25 dispute it at this time."

1 Justice Cosgrove then says at page
2 550:
3 "I agree with the request of
4 Mr. Murphy that more - a
5 number of issues have been
6 raised by the evidence of the
7 last witness. She was called
8 to assist the court in
9 relation to the phone number
10 or phone numbers, but it
11 appears that her role with
12 Bell Canada is, at least in
13 her present occupation, is
14 one that is limited ... In
15 addition to that, the last
16 witness has indicated that
17 Francine Leduc has some type
18 of a record or a file, quite
19 apart from the microfiche
20 issue which the witness made
21 reference to, and I agree
22 that the court should hear
23 Francine Leduc. She should
24 be required to bring anything
25 and everything with her --"

1 And at page 552, Justice Cosgrove

2 states:

3 "Then I am going to ask for
4 the assistance of the Crown's
5 good offices in communicating
6 with Francine Leduc in
7 advising that the court
8 orders that she - which I
9 guess is as good as a
10 subpoena - that she attend
11 court to give evidence and
12 that she bring with her any
13 and all records with respect
14 to this issue. And you can
15 comfort her that they will
16 not require - she will not be
17 required to produce them at
18 least until such time as the
19 court hears and determines
20 whether there is some privacy
21 rule as to why she should or
22 should not produce them.
23 After we've heard her
24 evidence, the court will
25 decide whether it is

1 this morning?

2 A. He spoke to Linda. He
3 wanted to speak to me, and I
4 told him I was coming here.

5 Q. What did he want to speak
6 to you about?

7 A. I don't know. I said I
8 was coming here, and I was...

9 Q. Did he mention to you
10 that he was subpoenaed
11 yesterday afternoon, to
12 appear yesterday afternoon?

13 A. No, he didn't, but we -
14 when I got back to the
15 office, one of the managers
16 said that he was."

17 On page 559, Line 6:

18 "MR. MURPHY: You can't
19 explain why Mr. Gauthier
20 would disobey a subpoena to
21 come to court, can you?

22 A. When I got back to the
23 office yesterday, Joanne told
24 me, like I said, that he was
25 subpoenaed, and he wasn't in

1 the office at the time."

2 On page 560, there are some
3 questions about Mr. Gauthier, and the question is
4 asked:

5 "So he's not ignorant, as far
6 as your personal knowledge,
7 and direct knowledge of him,
8 he's not ignorant of what a
9 subpoena means when he gets
10 one?

11 A. No. And I spoke to our
12 lawyer, and she asked me to -
13 to tell the judge that - why
14 Mr. Gauthier wasn't able to
15 be here yesterday."

16 What happened was that the
17 subpoena arrived at the office at 15:35, and Mr.
18 Gauthier left sometime before that and never got
19 the subpoena.

20 There is then a question about the
21 involvement of the Bell Canada lawyer, Genevieve
22 Bich.

23 On page 561, at Line 19:

24 "Q. Can you explain why Mr.
25 Gauthier is not here today,

1 on a murder case?

2 A. Did he - like, he didn't
3 receive a subpoena for this
4 morning.

5 Q. He received a subpoena
6 for yesterday afternoon, Ms.
7 Leduc, and he's aware of it,
8 according to what you're
9 telling us. You can't give
10 us any explanation for why
11 he's not here?

12 A. No."

13 The Court intervenes, and the
14 witness says at page 562:

15 "THE COURT: Do I correctly
16 understand you, that a lawyer
17 in Montreal, who is employed
18 by Bell Canada...

19 THE WITNESS: Right.

20 THE COURT: ...or works for
21 a law firm - which one?

22 THE WITNESS: She works for
23 Bell.

24 THE COURT: She works for
25 Bell. ...advised you to

1 advise a judge this morning -
2 what?

3 THE WITNESS: To tell you
4 that he - Gilles Gauthier
5 couldn't be here yesterday,
6 when he was subpoenaed at
7 15:35 to appear in court at
8 15:45, because he wasn't in
9 the office. He was working
10 on a case in the east end,
11 and he couldn't appear at
12 15:45 yesterday.

13 THE COURT: And did she ask
14 you to tell me why he wasn't
15 here this morning?

16 THE WITNESS: No, because the
17 subpoena was for yesterday."

18 The discussion goes on about the
19 subpoena, and at page 566:

20 "Q. Now, is Mr. Gauthier the
21 manager of corporate
22 security?

23 A. No, he's not. He's a
24 manager in corporate
25 security.

1 Q. Who's the head person in
2 your department?

3 A. It's Pat Roche.

4 Q. Patrick Roche?

5 A. Yes.

6 Q. Does Mr. Roche know about
7 this, about these matters in
8 court?

9 A. Yes, he does."

10 The witness goes on to explain why
11 he knows about that, and at the bottom of page 529:

12 "Q. And why isn't he here
13 today; do you have any idea?

14 A. Mr. Roche?

15 Q. Yeah.

16 A. Because I'm the one
17 that's subpoenaed, or ordered
18 by the judge to be here."

19 There is further discussion about
20 the internal workings at Bell, and who their
21 lawyers are and what their lawyer said.

22 Justice Cosgrove, on page 572,
23 says he has some questions for the witness. He
24 wants to know what the message was from Michelle
25 Mahoney, the constable in charge of getting

1 witnesses, and Justice Cosgrove wants to know
2 exactly what that message was, and the witness
3 responds:

4 "That I was to appear in
5 court at 9:30 to see the
6 Judge Cosgrove, and that they
7 didn't think that I had to
8 testify or take the - the
9 stand. And I went this
10 morning to the - the third
11 floor, and I spoke to one of
12 the Crowns, and I was told to
13 go to the sixth floor."

14 There is then a discussion in the
15 absence of the witness, and Justice Cosgrove
16 indicates his confusion.

17 There is a recess, and Mr. Murphy
18 says at the bottom of page 575:

19 "Sorry, Your Honour. That's
20 the original copy, the
21 backing copy of the subpoena
22 that was delivered yesterday
23 to a person in the security
24 office, room 2100, who
25 indicated to us that Mr.

1 Gauthier had left a few
2 minutes prior to our
3 arrival."

4 Mr. Murphy goes on to explain what
5 occurred, and the Court says at Line 25:

6 "One of the reasons why I
7 asked for the subpoena is
8 that I have a recollection in
9 some documents - some
10 subpoenas, that it is
11 something - that it reads
12 something to the effect that:
13 'You are to appear on such
14 and such a day, and
15 thereafter, for as long as is
16 required in order that this
17 matter --" - but that
18 doesn't appear, that type of
19 wording does not appear on
20 this subpoena."

21 The witness comes back into court,
22 and on page 577, Justice Cosgrove asks how long she
23 has known Mr. Gauthier.

24 She says their office is on the
25 same floor, and the last time she saw him was at

1 lunch time, about two o'clock.

2 On page 548:

3 "THE COURT: But what time
4 did you speak to Mr. Gauthier
5 yesterday afternoon?

6 THE WITNESS: I guess it was
7 around 4 o'clock.

8 THE COURT: And he called
9 you, rather than you calling
10 him?

11 THE WITNESS: He paged me,
12 and I called him back --"

13 And the witness explains that he
14 said he was in the east end of the city, and she
15 left a voicemail.

16 At page 637, Ms Leduc is still in
17 the witness box, and she says that she did have a
18 chance to speak to Mr. Gauthier this afternoon and
19 he was going to Kingston. There is further
20 discussion about Mr. Gauthier being in Kingston
21 working.

22 On page 639, she is asked if she
23 spoke to anyone else, and she says that she spoke
24 to Linda Everard and Mr. Roche, and explains what
25 her discussion with Mr. Roche was about.

1 Mr. Murphy asks her about these
2 conversations and she answers:

3 "Mr. Gauthier asked me if I
4 told the judge about him not
5 being here yesterday, and I
6 said yes. He wanted to know
7 that, and this morning."

8 And she indicates she told him
9 what occurred.

10 On page 642, she is asked if she
11 knows what a subpoena is, and what it means not to
12 comply, and she is asked more about her
13 conversation with Mr. Gauthier, and whether he can
14 be there today.

15 The questioning continues, and she
16 asked about dealings with the lawyers and the like,
17 and the Bell security department.

18 At the bottom of page 647, Line
19 29, Mr. Murphy says:

20 "I'm asking about subpoenas
21 and court process now. We're
22 now into a separate area. I
23 agree with you, if these were
24 simple matters of what you
25 had to bring, that would be

1 one thing. I'm asking you
2 why aren't they here, knowing
3 now what you've told us
4 they're aware of about this
5 proceeding, this murder
6 trial, why isn't anybody
7 here? Can you answer that
8 question?"

9 Mr. Cavanagh makes an objection,
10 and he says:

11 "Thank you, Your Honour. I
12 believe that there's a
13 serious issue before the
14 court in terms of Gilles
15 Gauthier and the subpoena
16 that was served on him
17 yesterday. However, my
18 friend's last question
19 embraced most of the upper
20 management of Bell Canada, as
21 I understand it, including
22 specifically Mr. Roche and a
23 lawyer in Toronto, none of
24 whom received - that I'm
25 aware, on the evidence we've

1 hear to this point - none of
2 whom received any - either a
3 subpoena or, as Miss Leduc
4 did and Officer Windle did, a
5 direction, through the court
6 - or from the court through
7 Crown counsel, to attend here
8 and be present for
9 examination."

10 He goes on about the fact that
11 there was no request of anyone other than Mr.
12 Gauthier and, at the top of page 649:

13 "In my respectful submission,
14 there not having been any
15 requests to anyone but Gilles
16 Gauthier, she can't answer -
17 there's no foundation for a
18 question, in my respectful
19 submission, as to why Mr.
20 Roche or Miss Bich aren't
21 here; they weren't asked to
22 be here and it's, in my
23 respectful submission, an
24 unfair question."

25 Mr. Murphy responds and says he

1 that is significant for the
2 court, in my view, is non-
3 responsive. I find that she
4 has done what she can but,
5 really, is not able to assist
6 the court. My intention is
7 to advise the witness that
8 the person in charge of her
9 operation in Ottawa, Mr.
10 Roche, should come to court
11 prepared to answer policy and
12 technical questions. What I
13 propose to do is to tell the
14 witness that she should tell
15 Mr. Roche that he should be
16 here at 2 o'clock tomorrow
17 afternoon, prepared to answer
18 the questions.

19 I am going to tell her
20 further that I believe that
21 the information which is
22 sought is, in fact,
23 available, that it exists,
24 but I suspect that there are
25 policy reasons why, for

1 example, they advise people
2 who inquire that, for
3 example, trace information is
4 not available after a six-
5 month period. So I am going
6 to ask Mr. Roche to get that
7 information by 2 o'clock
8 tomorrow afternoon or, in the
9 alternative, to be prepared
10 to answer both policy and
11 technical questions as to why
12 it is not available.
13 Similarly, I intend to ask -
14 tell her to convey to Mr.
15 Roche that the court would
16 like to know why the answer
17 with respect to the telephone
18 number 247?6009, is an answer
19 "not available". Again, I
20 suspect that that information
21 is available. I suspect
22 there is a history with
23 respect to telephone number
24 247?6009, and I'd like to
25 have that history tomorrow,

1 when Mr. Roche comes, or in
2 the alternative, expect him
3 to be able to answer from a
4 technical or a policy point
5 of view why the - why this
6 witness is unable to help the
7 court in those areas.
8 I intend, also, to advise the
9 witness that she should
10 advise both Mr. Roche and Mr.
11 Gauthier that Mr. Gauthier is
12 to be in the court at 10
13 o'clock tomorrow morning to
14 answer questions, or a
15 warrant will be issued for
16 his arrest."

17 Ms Leduc is back in the witness
18 box on May 12, and on page 680 Justice Cosgrove
19 questions the witness:

20 "So Mr. Patrick Roche is the
21 person who has top
22 responsibility in Ottawa?

23 THE WITNESS: That's right.

24 THE COURT: What I want you
25 to do is to indicate to him

1 that the judge, after hearing
2 your evidence today and the
3 evidence yesterday of Miss
4 Everard, finds that the
5 evidence is not complete.
6 There are two areas that I
7 remain concerned about, and I
8 want you to bring to Mr.
9 Roche's attention."

10 Justice Cosgrove goes on to
11 discuss what that is, that it is with respect to
12 the number 247-6009, and at Line 22 Justice
13 Cosgrove says this:

14 "The second is with respect
15 to the trace call. I'm going
16 to give this so you can take
17 it with you, and you can
18 bring it to his attention.
19 You've indicated that the
20 policy of the corporation is
21 that a call trace, which has
22 been identified and
23 confirmed, but then not
24 sought by police within six
25 months, is no longer, is

1 destroyed or whatever. I
2 believe that that is not the
3 case. I believe that that's
4 public policy, that that's
5 what you tell the public,
6 that these numbers, or that
7 the information is no longer
8 available after six months.
9 I believe it is available.
10 This is a murder trial and
11 the court wants that
12 information, and I would like
13 Mr. Roche to bring that
14 information; that is, what
15 was the telephone number
16 identified by this call trace
17 back in 1995. And I want him
18 to bring that information to
19 the court with him tomorrow
20 afternoon at 2 o'clock.
21 If he - his evidence is that
22 it is not available, then I
23 want him to be prepared to
24 explain the technical
25 implications of its non-

1 person to respond to it, then
2 he will have to retain
3 counsel, because a warrant
4 will go for his arrest."

5 On May 13, Mr. Gauthier shows up
6 and explains, on page 732, what happened on the day
7 the subpoena was served, that he was not in his
8 office after two o'clock.

9 He explains that by the time he
10 was told about the subpoena it was 15:41, and the
11 subpoena was for 15:45.

12 At page 736, Mr. Cavanagh
13 complains about Mr. Murphy's laughing at the
14 witness, and objects to that.

15 On page 737, Mr. Murphy apologizes
16 and goes on to question Mr. Gauthier about how many
17 times he had been in court, and he thinks it was
18 about fifteen times.

19 He is questioned about the meaning
20 of a subpoena, and he says he knows he is supposed
21 to show up. On page 744, Mr. Murphy asks Mr.
22 Gauthier if he knows this is a murder case, and the
23 witness responds that he did not.

24 The questions go on as to why he
25 didn't respond at 15:41, and Mr. Gauthier describes

1 where he was in terms of where the Ottawa
2 courthouse is, and explains on page 745 and 746
3 about the legal advice he got, and that someone was
4 going to go to court the next morning.

5 On page 748, at Line 7, he says:

6 "The legal advice that I was
7 given indicated that she was
8 going to make the calls and
9 that ...

10 Q. But you just said before,
11 sir, that she told you that
12 you had to appear as soon as
13 possible, and yet you don't
14 even show up yesterday. You
15 didn't even come down to
16 court yesterday morning.

17 A. No, because she advised,
18 at that time, that someone
19 would be sent to the court to
20 explain that I couldn't be
21 here. I believe Francine
22 tried to - or I believe she -
23 she - she said something to
24 that effect yesterday
25 morning.

1 Q. Who said something to
2 that effect?

3 A. Francine Leduc."

4 He is questioned about going to
5 Kingston the next day to do with work. On page
6 800, Justice Cosgrove questions the witness:

7 "Can you tell me what is the
8 meaning, or the information
9 that is intended to be
10 conveyed by your designation
11 on this card as "Staff
12 manager"?

13 THE WITNESS: That means I
14 have no staff reporting to
15 me. Staff managers in Bell
16 Canada do not - they don't
17 supervise employees."

18 Further down, Justice Cosgrove
19 says:

20 "I indicated yesterday that I
21 was puzzled with why someone
22 who is so closely associated
23 with the police, would find
24 it difficult, that they would
25 have to phone a lawyer

1 employed by Bell Canada to
2 know whether or not to
3 respond to a subpoena - a
4 court subpoena. And I've
5 heard your evidence today,
6 and I am still not satisfied
7 with your explanation.
8 This is a trial that is now
9 in its eighth month, and it
10 is a murder trial. The
11 office in which you are
12 associated has had some
13 involvement with this matter
14 since 1995, it has been
15 subject to previous
16 subpoenas, and the office -
17 and the physical location of
18 your building is immediately
19 adjacent or opposite the
20 courthouse on Elgin Street,
21 in the City of Ottawa. I
22 continue to be perplexed at
23 the lack of cooperation
24 extended to the court, when I
25 am told that your office is

1 in daily contact and
2 cooperation with police
3 officials, but yet, you
4 found it necessary to call a
5 lawyer to find out whether
6 you should be required to
7 come to court. It is very
8 difficult for the court.
9 I appreciate that the advice
10 that you got from a lawyer,
11 having done that, was to the
12 effect that the lawyer would
13 attempt to smooth it over,
14 and that, in the lawyer's
15 opinion, the requirement of
16 you to come to court was
17 unreasonable. I want to let
18 you know, as a judge of this
19 court, it is the judge who
20 decides, in the final
21 analysis, what is reasonable
22 and unreasonable under the
23 circumstances.
24 In my view, the efforts to
25 have persons attend from your

1 office to this court was
2 reasonable, in view of the
3 chronology that I have
4 outlined and the proximity of
5 your office to the court. In
6 my view, the opinion of the
7 lawyer who advised you, was
8 misguided. Further, I should
9 confirm that had you not
10 attended at this court this
11 morning, I would have issued
12 a warrant for your arrest.
13 I am ordering you not to
14 discuss any of the evidence
15 that you have offered, or any
16 of the questions that have
17 been asked of you with any
18 other person, until such time
19 as the trial in which this
20 court is now engaged - the
21 Queen v. Julia Yvonne Elliott
22 - is completed. There are
23 two exceptions to that - or,
24 the exceptions to that are
25 that you may discuss the

1 evidence and the questions
2 with the Crown counsel, who
3 are engaged in this case, or
4 with defence counsel. Apart
5 from that, I am ordering you
6 not to discuss what has been
7 discussed in this court
8 today. Thank you very much.
9 You are free to go."

10 That is the end of that matter,
11 and perhaps this would be a good place to take our
12 break before I move on to the next matter?

13 THE CHAIR: Yes, that is fine.

14 --- Recess at 2:41 p.m.

15 --- Upon resuming at 3:01 p.m.

16 THE CHAIR: Mr. Cherniak?

17 MR. CHERNIAK: Yes, thank you,
18 Chief Justice.

19 We are now at the last particular
20 in Book 3, particular 5(B), which deals with the
21 question of Dr. Li, Mr. MacCharles' physician.

22 The issue was Mr. MacCharles'
23 ability to testify in court.

24 Dr. Li practices in Pembroke, at
25 least an hour away from the Ottawa courthouse.

1 Mr. LaRoche comes to court the
2 morning of September 10, 1998, and tells the court
3 that he was retained by Mr. MacCharles and he has a
4 letter from Dr. Lee, Mr. MacCharles' treating
5 internist.

6 Mr. Murphy objects to the letter
7 as being hearsay:

8 "Your Honour, I'm going to
9 object. Just for the sake of
10 completeness, and subject to
11 Your Honour's comments. This
12 is hearsay, and I assume that
13 Dr. Li isn't in the
14 courtroom, just as he wasn't
15 when a letter originating
16 purportedly from him on
17 October 17th last year... So
18 I object to the hearsay
19 evidence that this counsel,
20 who is seated at the counsel
21 table on the Crown's side, is
22 now purporting to give the
23 court."

24 In the middle of page 1733, Mr.
25 LaRoche says:

1 "The letter is tendered in
2 what I would call urgent and
3 exigent circumstances,
4 because it deals with a
5 matter of personal safety and
6 health that arises from the
7 subpoena, and I would...
8 MR. MURPHY: Your Honour, I
9 have to object again. My
10 friend is giving evidence.
11 He has now said it's a matter
12 of urgent circumstances
13 pertaining to health. He's
14 not a doctor, he can't give
15 that evidence, and it's
16 hearsay, and I object to it."
17 MR. MURPHY: Your Honour, I
18 have to object again. My
19 friend is giving evidence.
20 He has now said it's a matter
21 of urgent circumstances
22 pertaining to health. He's
23 not a doctor, he can't give
24 that evidence, and it's
25 hearsay, and I object to it.

1 MR. LaROCHE: So my first
2 position, if I can put it
3 that way, Your Honour, is
4 that you have under s. 700 of
5 the Criminal Code - and I
6 can provide you with the
7 excerpts - authority and
8 jurisdiction to excuse
9 witnesses within your
10 discretion.

11 I do not suggest at this time
12 that Mr. MacCharles be
13 excused from giving any
14 evidence in this proceeding.

15 What I suggest at this time
16 is that he be excused for
17 this day and that I be
18 required to report to the
19 court with any further
20 communication, perhaps
21 weekly, from his physician,
22 which would indicate that he
23 is mentally and physically
24 able to testify; that is, he
25 is out of this danger area

1 and into an area where cross-
2 examination could take place
3 without the likelihood, as is
4 indicated here, of physical
5 harm."

6 Mr. LaRoche continues further
7 along:

8 "Those are simply practical
9 suggestions for dealing with
10 this problem. If my friend
11 wishes to take the position,
12 as he is probably entitled to
13 do, that this is complete
14 hearsay and "I want to
15 examine Dr. Li", then I will
16 make arrangements with Dr. Li
17 to have him down to give
18 evidence before Your Honour
19 with respect to Mr.
20 MacCharles' condition. That,
21 of course, would be subject
22 to the exigencies of his own
23 practice in Pembroke, but I
24 am sure that that could be
25 arranged, if my friend wants

1 to take that position, and we
2 could explore this further.
3 All of that, as I say, Your
4 Honour, is subject to a
5 second concern which I have,
6 and that is the materiality
7 of this evidence.

8 Mr. Murphy objects again:

9 "My friend is clearly
10 misinformed, non-informed or,
11 if he isn't - I can give him
12 the benefit of the doubt. In
13 my respectful submission, if
14 he's not - and I'm giving him
15 that doubt - if he hasn't
16 been advised frankly by his
17 client as to what the true
18 state of his subpoena is, or
19 the reasons for it, then my
20 friend is about to embark on
21 the possibility of
22 attempting, unwittingly
23 perhaps, to mislead the
24 court."

25 On page 1738, Mr. LaRoche

1 concludes:

2 "I am here today with respect
3 to physical health and the
4 prospect that today's
5 proceedings will likely, as
6 the letter says, cause
7 physical harm to this
8 gentleman.

9 MR. MURPHY: I resist
10 everything that this person
11 purporting to be a barrister
12 in the province of Ontario is
13 bringing before this court.
14 For one thing, Your Honour,
15 this is a transparent attempt
16 to give evidence and, for
17 this gentleman - a barrister
18 in this province to arrive
19 and to have the gall - that's
20 the only polite word to
21 describe it - to stand here
22 and to raise as one issue
23 that he's going to address,
24 leaving aside, in my
25 submission, his complete lack

1 of propriety in arriving, as
2 Your Honour has noted, in the
3 twelfth month of a homicide
4 trial and suggesting that we
5 all hold on to our horses
6 while he engages in the
7 niceties of civil litigation
8 procedures that he's used to
9 doing."

10 Mr. Murphy goes on in that vein,
11 and refers to the Dr. Li's letter at some length,
12 as well as another letter from 1997 from Dr. Li,
13 when there was also a problem with a myocardial
14 infarction.

15 Mr. MacCharles was actually in the
16 courtroom at the time, and Mr. Murphy, at the
17 bottom of page 1741, asks him to leave. Mr.
18 LaRoche has no objection to that.

19 Mr. Murphy objects to Mr. LaRoche
20 saying anything, and that they shouldn't be at the
21 counsel table, and Mr. McGarry says:

22 " -- every counsel in this
23 province, in my submission,
24 is entitled to sit at counsel
25 table, and I take great

1 exception, as I did earlier
2 when Mr. Murphy stood up and
3 said that this gentleman,
4 whom I've never met, Mr.
5 LaRoche, I believe it is,
6 until this morning, is a
7 purported barrister. I
8 thought that was insulting
9 and inappropriate, and I
10 think Mr. Murphy's behaviour
11 is the one that calls into
12 question the conduct of
13 barristers in this province,
14 when he behaves like that in
15 this court.

16 MR. MURPHY: I don't resile
17 from anything I've said, Your
18 Honour. Perhaps he is
19 entitled by common law
20 convention to sit at the
21 counsel table, but perhaps he
22 shouldn't be interjecting the
23 way he has on the last
24 point."

25 The Court asks Mr. Murphy to

1 continue, and Mr. Murphy does, and then on page
2 1748, he says at Line 10:

3 "I went on to ask him about
4 the September 10th meeting -
5 and ironically, this will be
6 the third anniversary of that
7 meeting - at Kurt Flanagan's
8 residence that Mr. MacCharles
9 attended."

10 And Mr. Murphy continues to talk
11 about what has gone on with respect to Mr.
12 MacCharles for several pages.

13 On page 1751, at Line 24:

14 "So this is the gentleman, I
15 suggest to you, who, making
16 representations through a
17 third party - a barrister who
18 has obviously not a full
19 appreciation of the case -
20 one must presume that or else
21 he - I would assume that he
22 can't have been informed of
23 this, because it's completely
24 incongruent with his
25 submissions this morning that

1 we take, somehow at face
2 value, these further evasions
3 of the process that his
4 client is engaging and
5 attempting to use him for."
6 And on page 1752, Mr. Murphy says:
7 "Detective Inspector
8 MacCharles is a coward; that
9 is a reasonable inference.
10 It's one I make reluctantly,
11 but he is a person who will
12 stop at nothing to avoid
13 coming to court and being
14 forced to answer for what
15 he's done. He goes through
16 all the trouble, presumably -
17 the stress, indeed - of
18 hiring himself a lawyer from
19 Ottawa, retaining one, and
20 has the lawyer come with him
21 to court. After having Mr.
22 Edelson run interference for
23 him yesterday, he has this
24 gentleman arrive in court
25 today and try to tell Your

1 Honour, with a straight face,
2 that he's too ill to testify
3 and, what's more, he's under
4 an hypnotic. That might be
5 an accurate description of
6 his perceptions of reality,
7 if he thinks he can evade
8 telling the truth. And
9 that's, in my submission,
10 what he's trying to do."

11 Mr. Murphy again goes on at some
12 length, and on page 1754, Line 12:

13 "We heard from Mr. Edelson
14 that he spoke to him in
15 Kingston, and now we hear
16 yesterday that he had to be
17 served just outside of
18 Pembroke in the Province of
19 Quebec. Before that, where
20 was he? He was here. He was
21 there. He was everywhere!
22 He was the Scarlet Pimpernel!
23 And now he comes to court and
24 sits in the back because, in
25 my submission, he's too

1 cowardly to get up on the
2 stand and submit himself to
3 the deserved cross-
4 examination that he should
5 face concerning the
6 instructions that he gave,
7 not only on Project Toy but,
8 in my submission, the obvious
9 inference that he's been
10 doing the same thing during
11 the same time period, and he
12 should be here to face the
13 truth, because he's got Julia
14 Elliott sitting in jail for
15 three years, waiting for a
16 fair trial, and he's the
17 engineer of the train that's
18 going to convict her
19 unfairly. And he's going to
20 try to lurk in the background
21 and hide out --"

22 He continues on page 1755:

23 "This man is a coward. He's
24 a coward to tell officers to
25 break the law and then to lie

1 about it. He's an even
2 greater coward to tell them
3 that if they come forward
4 he'll have them kicked off
5 the police force. And he's
6 the biggest coward of them
7 all when he refuses to come
8 to court and hires himself a
9 lawyer to come here and sit
10 at the counsel table and
11 argue that he's too sick or
12 too incapacitated by stress."

13 Mr. Murphy continues on, and on
14 page 1757, Mr. LaRoche asks to reply:

15 "I've let my friend continue
16 at some length. There are
17 matters that he has raised
18 which will be matters between
19 he and I and the Law Society,
20 but I've let him continue
21 because it makes the point
22 that there is a tremendous
23 degree of vitriolic rhetoric,
24 there is a tremendous degree
25 of aggression, and a cross-

1 examination which he
2 conducts, I suspect, would be
3 extremely aggressive. The
4 stress that would result from
5 that, the information before
6 Your Honour is, would cause
7 Detective MacCharles
8 physical...

9 THE COURT: That's all
10 supposition on your part,
11 counsel, and it's evidence
12 and I would prefer you would
13 get on to something else more
14 germane.

15 MR. LaROCHE: Okay. What I
16 have to say that is germane
17 is this: if my friend is not
18 prepared to accept the letter
19 at face value, and if Your
20 Honour is not content with
21 the information that is
22 contained...

23 THE COURT: Well, I can put
24 you at ease. The court does
25 not accept this letter at

1 face value in light of the
2 points that have been made by
3 defence counsel. I am not
4 prepared to accept this
5 letter for the truth or
6 validity of anything therein
7 contained.

8 MR. LaROCHE: Understandably,
9 Your Honour. Understood.
10 But I would like to use the
11 letter then as the basis - as
12 a request for an adjournment,
13 so that I could produce Dr.
14 Li."

15 Mr. LaRoche then suggests that he
16 contact Dr. Li's office and make arrangements for
17 him to attend.

18 Mr. McGarry states:
19 "The Crown obviously takes
20 the position that it wants
21 Mr. MacCharles to testify,
22 because it wants to get on
23 with these proceedings --"

24 And then says on page 1760:

25 "I don't think we could

1 proceed with this part of the
2 proceedings, the motion,
3 until you have heard
4 evidence, at the very least,
5 from Dr. Li. When he can be
6 here? I'm in the court's
7 hands on what to do with
8 that. You know, as a matter
9 of practicality, we're
10 talking about a doctor coming
11 from Pembroke who's in the
12 middle of a practice, and I
13 suppose whenever it can be
14 arranged --"

15 There is then a discussion about
16 how long a drive it is from Pembroke, and Mr.
17 McGarry says that he understands that Mr.
18 MacCharles had been driven to court that morning.

19 On page 1762, Line 15:

20 "THE COURT: Are you
21 indicating that you are going
22 to subpoena the doctor?

23 MR. MURPHY: I was just
24 going to say, Your Honour,
25 either that, or Your Honour

1 can issue a bench summons. I
2 think the matter is a matter
3 that I framed in terms of
4 being contempt of court, and
5 if Your Honour doesn't see it
6 that way, then perhaps it is
7 open to defence to subpoena
8 him. We can have a subpoena
9 sent by process server today.

10 THE COURT: Well, the
11 practical matter is to ensure
12 the attendance of the doctor
13 as quickly as possible.

14 MR. MURPHY: I'm just
15 querying why my friend
16 somehow sees himself --

17 THE COURT: Well, in
18 fairness to Mr. LaRoche, he
19 has indicated that he has
20 only had a brief introduction
21 and a brief - he's only been
22 briefed briefly in this
23 matter, and he's indicated
24 that he needs time to talk to
25 you to benefit from...

1 MR. MURPHY: I don't want
2 him going anywhere near Dr.
3 Li. The obvious - the
4 independence of witnesses
5 becomes of paramount concern
6 here. I'm not saying that
7 because of any concern, other
8 than I don't want MacCharles,
9 through officers of the OPP
10 or through his counsel, to
11 have contact with Dr. Li, not
12 least when we are asking Dr.
13 Li to be cross-examined about
14 when, for example, MacCharles
15 made the request for the
16 appointment. Was it five
17 minutes after Bowmaster
18 called him or someone else
19 called him --"

20 That goes on, and on page 1763:

21 "THE COURT: No, I should
22 have said, and I guess it was
23 implicit in what I said, but
24 I'm prepared - or at least I
25 accept that, as I have

1 already indicated in earlier
2 comments, that heart
3 conditions are unpredictable
4 and you just don't know from
5 day to day whether they
6 improve or they deteriorate
7 and, on that basis, and out
8 of abundant caution, I would
9 want Dr. Li to attend to be
10 cross-examined on his opinion
11 as to the health of his
12 client, Detective Sergeant
13 MacCharles, before I require
14 him to give evidence or to be
15 cross-examined. The question
16 is: How are we going to get
17 the doctor here?

18 MR. LaROCHE: I don't mean
19 to trump my friend in any
20 way. I mean, I seem to have
21 stepped in a rat's nest that
22 I didn't intend to. I simply
23 mean to assist the court in
24 making that arrangement."

25 The discussion goes on about how

1 to get Dr. Li there, and Mr. McGarry says on page
2 1765:

3 "Your Honour, I, as you know,
4 normally do whatever I can to
5 assist the court, especially
6 on matters of procedure and
7 making arrangements with
8 regard to witnesses. I've
9 already indicated on a
10 previous occasion, I am
11 uncomfortable, in this
12 situation, having any contact
13 with Dr. Li, for reasons
14 which I think were apparent
15 from the submissions this
16 morning. If I go out of this
17 courtroom or somebody acting
18 on my direction goes out of
19 this courtroom this morning
20 and communicates with Dr. Li
21 and comes back with
22 information that Mr. Murphy
23 finds unacceptable, then I
24 will be subject to the same
25 imputations and I don't

1 intend to put myself in that
2 position. I think if Mr.
3 Murphy wishes to contact the
4 doctor, it's his witness, let
5 him do it."

6 At the bottom of page 1766, Mr.
7 LaRoche suggests that Mr. Murphy contact Dr. Li,
8 since he is already on his witness list, and then
9 Justice Cosgrove says at Line 12:

10 "Yes, I am going to take an
11 adjournment to ask the court
12 registrar on behalf of the
13 court, myself, telephone Dr.
14 Li and attempt to speak to
15 the doctor to explain that
16 the court has his letter of
17 September 9th and the court
18 requires that he attend to be
19 examined on that letter, and
20 that he bring with him all
21 files, medical files dealing
22 with his patient, Lyle
23 MacCharles. And I would ask
24 the court registrar to obtain
25 from the doctor the first

1 available date that he is
2 available --"

3 The discussion goes on to the
4 question of excluding witnesses, and Mr. LaRoche
5 speaks to that matter, and Justice Cosgrove says:

6 "The purpose of that
7 exclusion was I didn't want
8 to expose him to the stress
9 that might arise as a result
10 of the submissions.

11 THE COURT: Well, the
12 purpose, the legal purpose
13 for the exclusion of
14 witnesses, and the one which
15 motivated the court to grant
16 such an order, was that the
17 witness would not have the
18 benefit of the information or
19 discussion that transpired
20 thereafter in his absence.

21 MR. LaROCHE: If that is
22 what motivated Your Honour,
23 that is the basis on which
24 that ruling was made, that's
25 fine by me, and I've

1 consented to it and I will
2 live with that. So I will
3 not communicate with Mr.
4 MacCharles the form or
5 substance or detail of
6 anything that my friend has
7 said since Mr. MacCharles
8 left the room."

9 Mr. LaRoche continues further
10 down:

11 "Dr. Li is a physician who is
12 going to give evidence with
13 respect to the physical
14 condition of a witness. I
15 would have thought, in the
16 ordinary course, and again
17 part of the process in which
18 you've been involved here,
19 that he would be open to
20 interview by any party who he
21 agreed to speak with. That,
22 if I wanted to speak with Dr.
23 Li and Dr. Li agreed to speak
24 with me, that would be fine.
25 And the same would be true

1 of my friend, and the same
2 would be true of the Crown.
3 THE COURT: No, because
4 your interest is your
5 client's interests. Your
6 client has been excluded from
7 the court, and he's excluded
8 because of things that have
9 been said by Mr. Murphy, and
10 my concern is now that you
11 would simply be a conduit
12 through to Dr. Li of what has
13 been discussed here today.
14 MR. LaROCHE: Oh!
15 THE COURT: There should be
16 no communication with Dr. Li.
17 MR. LaROCHE: Sure. No.
18 Understandably. Yes. I
19 would not want that
20 imputation to arise. But I
21 would like to be able to
22 discuss with Dr. Li my
23 client's medical condition;
24 that is, the particulars of
25 his heart attack history.

1 THE COURT: You will be
2 able to do that in your
3 examination of him in the
4 witness box, counsel, and not
5 before. That is the court's
6 order."

7 There is a recess, and the
8 registrar reports that Dr. Li is out of town for
9 two days, and Mr. Murphy, on page 1771, asks for a
10 summons or a subpoena from the bench be delivered
11 to Dr. Li's office.

12 There are some other discussions
13 on other matters, and on page 1776, Justice
14 Cosgrove asks what Mr. Murphy proposes in terms of
15 court time, and Mr. Murphy says:

16 "Well, Your Honour, we've
17 just been advised by the
18 registrar that he's not
19 available today or tomorrow.

20 I suppose that means we
21 could have a process issued
22 or a subpoena issued for him
23 to appear on Monday morning."

24 Mr. Murphy goes on at page 1777:

25 "Well, we're talking about

1 specific involvement that
2 he's had going back to last
3 October presumably. I would
4 say we're looking at, at the
5 very least, a day. And I
6 should be including the
7 Crown's cross-examination, if
8 indeed there is one, but I
9 would think in order to
10 canvass the particulars of
11 Mr. MacCharles' purported
12 stress sensitivity or his
13 heart condition, it would be
14 necessary for us to take a
15 considerable amount of time,
16 at least a half a day, and
17 that doesn't speak to the
18 issue of timing of motions,
19 or argument I should say."

20 On September 14, four days later,
21 a question arises at page 1979:

22 "MR. CAVANAGH: I understand
23 there's another witness
24 tomorrow morning, is that
25 correct?"

1 Is Dr. Li returning at the
2 court's request?

3 THE COURT: I think there's
4 a subpoena to have the doctor
5 available tomorrow, if he
6 exists.

7 MR. MURPHY: Your Honour, I
8 should advise you, Dr. Li,
9 according to the process
10 server - and I'm giving
11 evidence here, but I hope
12 nobody will take issue - he
13 was served personally - well,
14 actually, I have the
15 affidavit of service - he was
16 served personally on Friday
17 the 11th of September,
18 personal service at the
19 address given. We were told
20 he was away for two days, but
21 the difficulty is that I -
22 the complication, I should
23 say, is that I asked him to
24 come for ten o'clock.

25 THE COURT: Tomorrow?

1 MR. MURPHY: Yes.

2 THE COURT: Well, the court
3 had initially sought to find
4 from the doctor when he would
5 be available for a minimum of
6 a half day.

7 MR. MURPHY: Yes.

8 THE COURT: And maybe we
9 could do that - we can
10 shoehorn that some time in
11 five or ten minutes tomorrow
12 somehow, early."

13 And Mr. Cavanagh says at the
14 bottom of the page:

15 "Are we going to bring him
16 here for five to ten minutes
17 to find out his schedule?
18 Maybe that could be
19 accomplished over the phone,
20 is what I'm thinking. I'm in
21 Your Honour's hands on that.

22 THE COURT: The problem,
23 counsel, is that when we
24 attempted to contact him by
25 phone his answering service

1 said he wasn't available.
2 So I want the doctor here and
3 answer to the subpoena or he
4 will be arrested.

5 MR. CAVANAGH: That's fair
6 enough.

7 THE COURT: And the point
8 is we will have to hear from
9 the doctor when he can be
10 available."

11 On September 15, the next day, on

12 page 2031:

13 "Now, there is - changing the
14 subject, there is a subpoena
15 returnable this morning at 10
16 o'clock and the purpose of
17 that was to inquire of the
18 doctor when he would be
19 available to attend the court
20 for a half day in these
21 proceedings; Dr. Li or Dr.
22 Lee?

23 MR. MURPHY: Yes, I believe
24 he's present in court, if I'm
25 not mistaken."

1 The court addresses Dr. Li about
2 the subpoena, and addresses him at some length with
3 respect to the issue of his letter with respect to
4 Mr. MacCharles.

5 On page 2003, Justice Cosgrove
6 says at Line 25:

7 "The court registrar advised
8 that she attempted to speak
9 to you through your office at
10 the hospital in Pembroke and
11 was told by an answering
12 service, I believe that was
13 Thursday of last week, that
14 you were out of - we could
15 not contact you for a couple
16 of days. For that reason, a
17 subpoena was issued to have
18 you attend the court this
19 morning so we could talk to
20 you in person and to find a
21 time that would be convenient
22 for you in the near future
23 when you could be available
24 to the court, and it's
25 estimated that the time

1 required could be
2 approximately a half day.
3 Can you tell me, doctor, when
4 you might conveniently be
5 able to give evidence in this
6 trial in the near future?
7 DR. LI: Monday, Wednesday -
8 first day of any week would
9 be all right with me."

10 The exchange goes on, and Dr. Li
11 asks the court:

12 "If I can kindly ask the
13 court to let me know maybe a
14 week or so ahead of time so
15 that I can arrange my
16 schedules."

17 There is a discussion about that,
18 and Mr. Murphy says:

19 "Yes, if the doctor can - if
20 the doctor, we could simply
21 have him appear on Wednesday,
22 which will be the 23rd, I
23 believe.

24 THE COURT: The 23rd,
25 doctor, at 10 o'clock in the

1 morning, and I would ask that
2 you bring with you all your
3 records dealing with you
4 patient, Lyle MacCharles.

5 DR. LI: Your Honour, what
6 time should I be here on...

7 THE COURT: Ten o'clock."

8 Mr. Murphy then asks:

9 "I would just like to ask
10 that Dr. Li be admonished
11 that he shouldn't be in
12 communication with Mr.

13 MacCharles or his counsel
14 while he's on the stand,
15 until he's off the stand.

16 MR. LaROCHE: That was the
17 issue I wanted to address,
18 Your Honour. I never spoke
19 with Mr. Li and I don't know
20 anything about the
21 availability of cardiac care
22 in Pembroke, but perhaps Dr.
23 Li might be able to address
24 an emergency situation that
25 arises with my client. It's

1 a question of health care,
2 were he to have another
3 attack. Dr. Li might be
4 able to fill you in on that.
5 DR. LI: Can I address the
6 question, Your Honour?
7 THE COURT: No. Dr. Li is
8 being called as witness and
9 when he's called he will be,
10 I'm sure, asked those
11 questions. Mr. McGarry, any
12 comment?
13 MR. MCGARRY: No, I have no
14 comment.
15 THE COURT: Ten o'clock
16 then Wednesday morning next,
17 Dr. Li, and, in the meantime,
18 you are not to have any
19 communication, except for
20 health purposes with your
21 client, and you should have
22 no communication with your
23 client's lawyer."
24 We then have the evidence of
25 Constable Mahoney on November 5, 1998. There is an

1 issue with respect to her, as she is currently
2 absent on sick leave.

3 Mr. Murphy is making submissions
4 at this point, and he refers to having received a
5 memorandum from Michael Temple who is the Chief
6 Legal Counsel for the Ontario Provincial Police
7 Association.

8 On page 5275 , there is a letter
9 referred to from Dr. Oliver addressed to Mr.
10 Cavanagh; at Line 25 Mr. Murphy reads from the
11 letter:

12 "Please be advised that
13 Michelle Lynne Mahoney is
14 currently under my care and
15 that at the present time I do
16 not believe that it is in her
17 best interests to participate
18 in any work-related stressful
19 situation such as court
20 appearances. If you have any
21 questions with respect to the
22 above feel free to contact
23 me."

24 On page 5276, Mr. Murphy
25 complains:

1 "It appears now, Your Honour,
2 we're getting our disclosure
3 as to the availability of
4 witnesses and their notes
5 through the Police
6 Association counsel. This
7 letter is addressed to Mr.
8 Cavanagh, dated the 3rd
9 November. It wasn't
10 disclosed to us other than
11 through this memo faxed
12 yesterday afternoon from Mr.
13 Temple.

14 I just want to advise you, I
15 wrote back this morning to
16 Mr. Temple and advised him of
17 two things: Firstly, I don't
18 think it is appropriate for
19 him to represent Constable
20 Mahoney given that his name
21 and his conduct and the
22 conduct of the OPPA, and his
23 fellow counsel or his
24 colleague Ms. Hutchinson have
25 arisen in the evidence before

1 forward without counsel."

2 And then on page 5279, he says:

3 "I wanted to bring it to the
4 court's attention because it
5 introduces a further
6 roadblock to determining
7 exactly why Constable Mahoney
8 has not provided further
9 notes. If indeed she was
10 absent since July 9th, we
11 still don't have her notes
12 for the period from June to
13 July, and we still don't
14 understand clearly, in my
15 submission, what the
16 circumstances of her
17 departure was --"

18 And further down, he adds:

19 "My suspicions wouldn't be
20 aroused, Your Honour, if Mr.
21 Temple himself wasn't making
22 the leap of faith as, in my
23 submission, Mr. LaRoche did
24 to some extent with the
25 letter from Dr. Lee for Mr.

1 MacCharles to say that
2 there's an issue of health
3 being endangered."

4 On November 6, the next day, Mr.
5 William Carroll appears for Constable Mahoney:

6 "I appear this morning as a
7 result of a request from
8 Michael Temple. He is chief
9 legal counsel to the Ontario
10 Provincial Police
11 Association, and in that
12 capacity he represents one
13 OPP Constable Michelle
14 Mahoney, a person who I am
15 led to believe is under a
16 subpoena to testify in these
17 proceedings."

18 He refers to the letter from Dr.
19 Oliver, and the Court says at page 5467 that the
20 procedure is to call the doctor to explain the
21 basis for his letter.

22 The court says at the bottom of
23 page 5469:

24 "I can tell you, you can
25 communicate to the doctor

1 a depression that arose as a
2 result of the death of her
3 sister last New Year's Eve, I
4 believe. She has weekly
5 appointments with her
6 doctor...

7 THE COURT: Is that the
8 doctor with whom you
9 attempted to communicate?

10 MR. CARROLL: It is, sir.
11 ...but was unable to attend
12 her appointment last week due
13 to illness, and that was of a
14 physical nature, she had the
15 flu or something.

16 Her next appointment is
17 tomorrow afternoon at 2:30."

18 Further down, he says with respect
19 to the doctor:

20 "She indicated to me, and I
21 quote: "that she's not in any
22 way able to testify, I know
23 that 100 percent".

24 Mr. Carroll reviews the
25 information he had from Mr. Temple, and on page

1 6513:

2 "I have further information
3 with respect to the nature of
4 the illness from which she
5 suffers. That, of course,
6 comes from her and not from
7 her doctor, as I indicated I
8 haven't been able to speak to
9 the doctor. And I can give
10 you that, if it's of
11 assistance to you,"

12 and goes on to describe the nature
13 of the depression she is suffering, and she is out
14 on sick leave, and he gives the details of that.

15 Mr. Carroll goes on to say at page

16 6515:

17 "I will renew my attempts to
18 speak to the doctor today,
19 and I instructed the client
20 that, pursuant to her
21 attendance tomorrow before
22 her physician, that the court
23 will require, at the very
24 least, a further and much
25 more thorough written

1 explanation from her
2 physician as to why she's not
3 able to attend, if in fact
4 that continues to be the view
5 of the doctor."

6 Mr. Murphy then makes some
7 interjections, and there is then the question of
8 when she will give evidence.

9 At page 6517, Justice Cosgrove
10 says:

11 "I'm thinking from a legal
12 point of view, and I'm
13 thinking about the reputation
14 of the court and the court
15 has already gone through a
16 circus of having to try to
17 contact the doctor, then send
18 process servers and then to
19 threaten to have the doctor
20 brought under arrest of the
21 court.

22 MR. CARROLL: Is this the
23 same doctor?

24 THE COURT: I am not going
25 to pursue that circus on this

1 occasion. The doctor will be
2 brought to the court by her
3 own volition on the date that
4 the court sets or I will have
5 her arrested; that's the way
6 the court is approaching this
7 matter. I'm in the
8 fourteenth week of a homicide
9 case and the niceties now
10 have to be weighed in the
11 context of what is happening
12 in this case."

13 On December 1, Mr. Carroll is
14 back, and the court says at the bottom of page
15 6544:

16 "Mr. Carroll, I've had the
17 opportunity of reviewing the
18 letter of Dr. Oliver provided
19 this morning on behalf of
20 your client and, in my view,
21 it does not provide a reason
22 why your client ought not to
23 testify in these proceedings.
24 I would have no objection if
25 Dr. Oliver accompanied your

1 client tomorrow and was
2 present while your client
3 testified, in the event that
4 it appears that your client
5 is not able to testify or has
6 troubles in the witness box
7 then she may - she might
8 enjoy the confidence of
9 having the doctor here with
10 her.

11 In terms of having the doctor
12 called, I think the
13 communications to the doctor
14 were clear that she should
15 explain to the court the
16 reasons why her client
17 couldn't testify. I've read
18 them and they're not
19 acceptable to the court. So,
20 I am not going through the
21 process of requiring the
22 doctor to testify - will it
23 be necessary to issue a
24 warrant to have your client
25 here tomorrow morning at 10

1 o'clock?

2 MR. CARROLL: I would
3 certainly hope not.

4 THE COURT: Then I would
5 ask that your client be here
6 at 10 o'clock tomorrow
7 morning. If she is not here
8 I will issue a warrant and
9 have her arrested."

10 At page 6560, Mr. Carroll says at

11 Line 16:

12 "I first, Your Honour,
13 contacted Constable Mahoney
14 and I do not wish to be put
15 in the position by counsel
16 where I am a witness in these
17 proceedings, but I can advise
18 you that the reaction of
19 Constable Mahoney upon being
20 advised that she was required
21 to be here and if not she -
22 her attendance would be
23 compelled, resulted in an
24 emotional, significant
25 emotional reaction on the

1 phone, such that it concerned
2 me and I terminated the call
3 as quickly as possible and
4 then had a call put in to her
5 doctor. And I'm doing this
6 in the barrister's room, on a
7 three-way from my office,
8 only to find out that the
9 doctor who, now having
10 provided me with this letter
11 today, is absent from her
12 office and unavailable until
13 next Monday. I had told the
14 Constable upon speaking with
15 her that I would get back to
16 her after speaking with the
17 doctor. I haven't called
18 Constable Mahoney back
19 because I noted the hour was
20 beyond that which I had
21 agreed to appear back before
22 you, and that's all of the
23 information that I have at
24 this point."

25 Mr. Carroll goes on:

1 "I assume there may be a
2 doctor covering for Dr.
3 Oliver, but I don't know.

4 THE COURT: You would think
5 so. I don't know either, you
6 would think so. The court's
7 position has not changed.
8 She is required to be here
9 tomorrow morning or process
10 will issue.

11 So we will adjourn until
12 tomorrow morning at 10
13 o'clock and I expect that the
14 officer will be here.

15 Mr. Hoffman then interjects:

16 "Your Honour, I'm wondering
17 if I might speak on this.
18 I never met Constable
19 Mahoney, I just have a
20 concern - I understand Your
21 Honour has this letter in
22 front of you that's been
23 marked as exhibit - is it 4-
24 L?

25 THE COURT: Yes.

1 MR. HOFFMAN: But my only
2 concern is that there's a -
3 there's the words at the end
4 of paragraph three, 'felt
5 suicidal' --"

6 And Mr. Hoffman says further down:
7 "My concern is, and I
8 understand the need for this
9 matter to go ahead, but in
10 the absence of her doctor,
11 the one who has been treating
12 her, and with the concerns
13 about suicidal feelings, I
14 just have concerns that the
15 course of action that we're
16 taking may precipitate some
17 serious emotional, or more
18 immediate concern, physical
19 consequences for the officer.
20 Again, never having met her,
21 not having seen her in court,
22 but just based on a letter -
23 and I understand the court's
24 comments --"

25 Mr. Carroll than says at Line 13:

1 "I've asked my friend, for
2 the record, if he would
3 consider, in view of the
4 situation that's outlined in
5 the doctor's evidence, if he
6 would withdraw his subpoena
7 for tomorrow's purposes on
8 the understanding that
9 further information would be
10 provided and the officer
11 would become available
12 ultimately to testify on this
13 case, and he's indicated no,
14 that he's not prepared to do
15 that, and as I said, I was
16 about to - and I - I should
17 say this, because I'm not in
18 the habit of arguing with the
19 presiding judge once a ruling
20 has been made, and I don't
21 want to be taken to be seen
22 to be doing that, Your
23 Honour, but and again, I
24 haven't met Constable Mahoney
25 other than by telephone, so I

1 can't - and I haven't met Dr.
2 Oliver, nor can I vouch for
3 that doctor, but it seems to
4 me that if there are any
5 other matters that the court
6 can deal with until this
7 woman is in better shape to
8 testify --"

9 And the court, at page 6564, Line
10 8 says:

11 "Well, neither counsel have
12 had the advantage that the
13 court has of observing the
14 officer testify in these
15 proceedings very recently
16 and, in my view, the
17 constable was alert, was
18 responsive, demonstrated none
19 of the concerns or the traits
20 that are identified in the
21 letter by Dr. Oliver today.
22 In addition to that, prior to
23 her testifying, counsel, who
24 I believe was Mr. Cavanagh,
25 when I asked whether the

1 officer was in the court,
2 looked around and said the
3 officer is not here. In
4 fact, the officer was sitting
5 in the row of seats
6 immediately behind you, Mr.
7 Carroll, and she stood and
8 identified herself to the
9 officer and there was a
10 little bit of humour
11 involved, so that my
12 appreciation is that the
13 officer is in a condition to
14 testify, and in part that is
15 based upon my observance of
16 the officer's interaction
17 with people in the courtroom
18 and in answering questions of
19 me that I put to her when she
20 did testify.

21 With regards to the doctor's
22 letter, I agree with Crown
23 that a complaint or an
24 identification was made when
25 she initially contacted the

1 doctor that apparently
2 complaint was made that she
3 felt suicidal, but that was
4 in July. Since that time she
5 has been under medication and
6 she has also been receiving
7 therapy consultations on a
8 weekly basis. The doctor
9 says that it takes
10 approximately six weeks after
11 the levels are stable for the
12 effect of the medication to
13 occur. Well, July - we're
14 looking at July, August,
15 September, October, November,
16 that's five months ago -
17 ample time for the medication
18 to have assisted the officer,
19 and I'm confident on her
20 presentation in this court
21 that in fact she is capable
22 of testifying."

23 Mr. Carroll talks about his
24 concern that, in the doctor's view, testifying
25 would precipitate a setback, and the Court said:

1 "Well, quite frankly, I give
2 little credence to the last
3 paragraph and to the
4 assumptions. I give so
5 little credence to the whole
6 - to this letter being
7 offered as a professional
8 opinion as to whether this
9 person can testify, that that
10 is what has motivated me to
11 call the doctor. To offer to
12 the court that a witness
13 can't testify because she's
14 gradually getting better, I
15 mean, is the doctor
16 addressing a kindergarten
17 group? Do I accept that as a
18 reason why, in the middle of
19 a murder trial, a witness
20 can't come forward to
21 testify? It's ludicrous that
22 that would be a basis for me
23 accepting that a person
24 couldn't come to the court to
25 testify. On that basis, no

1 one in this province would
2 come to the court to testify
3 because they weren't quite
4 better.

5 MR. CARROLL: In fairness to
6 the doctor, it doesn't say
7 Constable Mahoney is
8 "gradually getting", but is
9 "nowhere near the point of
10 being able to go back to work
11 or be exposed to any
12 stressful situation." So I
13 understand Your Honour is
14 saying that, I suppose, if
15 you had to be given a total
16 clean bill of health and be
17 in perfect shape to testify,
18 none of us would ever get
19 there, but this seems to
20 indicate that although
21 there's progress being made,
22 it is not, at least in the
23 doctor's view --"

24 The court goes on at page 6567, at

25 Line 7:

1 "If, when the officer appears
2 and she has problems with
3 evidence - you, for example,
4 I don't think have been here
5 when former Detective
6 Inspector MacCharles
7 testified. It was apparent he
8 was having some problems, and
9 I suspect they had to do with
10 medication... If it's
11 apparent that the witness has
12 problems, the court won't
13 proceed, but I insist that
14 she be here and that we begin
15 the process.

16 MR. CARROLL: I will
17 communicate that to her.

18 THE COURT: And it's a
19 process, quite frankly, that
20 has been - that was generated
21 by my concern as the
22 presiding judge that there
23 were officers in contempt of
24 this court who had not
25 produced notes and who, I

1 feel, were contemptuous if
2 not in contempt of the court
3 by the answers that they
4 offered for non-production of
5 their notes. That continues
6 as a problem with Officer
7 Mahoney."

8 On the next day, December 2, Mr.
9 Carroll is back:

10 "Yes, pursuant to your
11 direction and the subpoena,
12 Your Honour, Constable
13 Mahoney is present and she's
14 going to testify, and I've
15 told her that in the event
16 that she feels any stress or
17 distress, that she's just to
18 advise you and she would be
19 accorded the same courtesies
20 as any witness, but she seems
21 anxious to deal with the
22 matter this morning, Your
23 Honour.

24 THE COURT: Yes, we've had
25 occasion in this trial of

1 witnesses who had some
2 medical problems and the
3 court has indicated to the
4 witnesses that if they do
5 feel some emergent
6 discomfort, all they have to
7 do is signal that to the
8 court.

9 MR. CARROLL: Very good.

10 THE COURT: And that's all
11 your client need do.

12 MR. CARROLL: Yes, as far as
13 her doctor is concerned, we
14 were not able to make
15 arrangements to have the
16 doctor here because, in fact,
17 the doctor is away from the
18 city of Kingston for the next
19 six or seven days but...

20 THE COURT: Well, I was
21 thinking about that
22 overnight, Mr. Carroll. I
23 thought that I had asked you
24 to communicate to the doctor
25 that she was to hold herself

1 to be available for today.

2 MR. CARROLL: I did.

3 THE COURT: I see. But
4 obviously she had some other
5 pressing engagement.

6 MR. CARROLL: That's my
7 understanding, Your Honour.
8 There was no...

9 THE COURT: Which, you
10 know, is - you've only been
11 at one part of a trial now
12 that is in its second year,
13 but that's been a history of
14 the difficulty to the court.

15 I attempt to persuade people
16 and to work with people to
17 cooperate with the court, it
18 doesn't seem to work, and
19 then the court has to issue
20 subpoenas and summonses and
21 whatnot.

22 MR. CARROLL: Yes, I hope
23 that that will be - the
24 necessity of that will be
25 obviated by the presence of

1 Constable Mahoney."

2 That finishes that particular.

3 THE CHAIR: Mr. Cherniak, in your
4 cast of characters, Detective Mahoney was described
5 as a witness liaison officer.

6 Can you tell us, in a nutshell,
7 what she was being required to testify about?

8 MR. CHERNIAK: It was about her
9 notes.

10 I am reminded that the issue of
11 Constable Mahoney's notes is a particular in the
12 next book, so we will be getting into that.

13 It is almost four o'clock, so I
14 wonder if we should end here for the day, rather
15 than me going forward for the next particular.

16 THE CHAIR: Yes, that is fine, we
17 will continue with that tomorrow.

18 --- Whereupon the hearing was adjourned
19 at 3:43, to be resumed on Wednesday,
20 September 10, 2008.

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

and

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

Nancy Greggs, CCR