

COMMISSION OF INQUIRY INTO  
CERTAIN ASPECTS OF THE TRIAL  
AND CONVICTION OF JAMES DRISKELL

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The Honourable Patrick LeSage, Q.C. Commissioner

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Transcript of Proceedings  
before the Commission sitting  
at the Winnipeg Convention Centre  
Winnipeg, Manitoba

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Wednesday, August 16, 2006

Volume 19

INQUIRY PROCEEDINGS

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INDEX OF PROCEEDINGS

DESCRIPTION:	PAGE
JEREMY GEORGE DANGERFIELD, continued	
- BY MR. ABRA	4384
- BY MR. PROBER	4393
- BY MR. CODE (Re-exam)	4455
STUART JAMES WHITLEY	
- BY MR. CODE	4474
- BY MR. KENNEDY	4627

INDEX OF EXHIBITS

33 Excerpt of examination of Zanidean, 4416  
page 122

34 Document dated March 19, 1993 to 4468  
Dangerfield from Miller

1 Wednesday, August 16, 2006

2 Upon commencing at 9:30 a.m.

3

4 THE CLERK: This Commission of Inquiry is now in  
5 session.

6 THE COMMISSIONER: Good morning, Mr. Abra.

7 BY MR. ABRA:

8 Q Thank you, Mr. Commissioner. Mr. Dangerfield,  
9 just a few questions. Firstly, could you go  
10 please to -- I would like to have you look at  
11 three tabs. Tab 28 is the first letter that  
12 Mr. Brodsky sent to you dated February 7th of  
13 1991, making the request for numerous  
14 particulars, if I can use that expression. I  
15 understand that you didn't provide or show a  
16 copy of this letter to Bruce Miller. Am I  
17 correct?

18 A This letter?

19 Q Yes?

20 A No.

21 Q Okay. Similarly, tab 33, George, is the next  
22 request from Mr. Brodsky dated April 25th of  
23 '91?

24 A Yes.

25 Q And you didn't show this letter to Bruce Miller

1 or discuss it with him at all?

2 A I don't think so. I don't know why I would.

3 Q Okay. And finally tab 43, now, you said  
4 yesterday you weren't sure that you even  
5 received a copy of these questions that  
6 Mr. Brodsky had prepared. Assuming that you  
7 did, you didn't discuss them with Bruce Miller  
8 at all, you have no recollection of having done  
9 so?

10 A Well, I must have received them, there is some  
11 handwriting on it.

12 Q Is it your handwriting?

13 A It could be, I don't know. Anyway, no, I didn't  
14 discuss these.

15 Q Okay. Thank you. Now, you said yesterday that  
16 Anderson and Paul were the two members of the  
17 homicide division that you were working closest  
18 with throughout this matter?

19 A I believe so. I really, Mr. Abra, have no clear  
20 recollection of any of this day-to-day stuff.  
21 If they were the lead detectives, they would be  
22 the ones that I would deal most with.

23 Q Okay. But I gather that in any meetings that  
24 you had with them, they did not give you any  
25 information about Mr. Zanidean's participation

1 in the Swift Current arson, or the dealings that  
2 they had, or that Anderson had with the RCMP out  
3 there about it?

4 A I don't recall that, no.

5 Q You don't recall that they ever did?

6 A No.

7 Q Okay. And yesterday I asked you about the  
8 evidence that they had given related to  
9 Mr. Miller, and the advice that they allege that  
10 he gave to them about telling Zanidean after he  
11 testified. Did either Anderson or Paul ever  
12 tell you that the RCMP were not going to be  
13 charging Zanidean and that they were going to  
14 tell him that after he testified?

15 A No.

16 Q And they never told you that they did tell him  
17 that after he testified?

18 A They never told me anything about it as far as I  
19 remember.

20 Q Okay. Now, Vandergraaf has also testified that  
21 he actually was the -- just to back track a bit.  
22 I believe you said in your statement, I  
23 certainly know from experience having worked  
24 with you, that you usually had one police  
25 officer that you used as one of your assistants

1 to sort of marshal witnesses and to get anything  
2 that you needed during the course of a trial and  
3 so on?

4 A That's right.

5 Q And Vandergraaf testified that in this  
6 particular case he actually fulfilled that job.  
7 Do you recall that?

8 A No, I don't.

9 Q So when Zanidean testified and gave the answers  
10 to Mr. Brodsky in cross-examination, that you  
11 have already been asked about, you have no  
12 recollection whether Vandergraaf ever drew to  
13 your attention that what Zanidean was saying may  
14 not be true?

15 A About what, I am sorry?

16 Q Related to the Swift Current arson and related  
17 to the request for immunity and a request for  
18 payments of money and so on?

19 A No, I don't recall him ever saying that to me.

20 Q You don't remember Vandergraaf or anybody else  
21 ever drawing it to your attention during the  
22 course of the trial?

23 A No, I don't.

24 Q Okay. Now, I would like you to go to tab 56,  
25 please?



1 A Mine starts at 58, which book are we --

2 Q It is hidden in volume 2. There is more tabs

3 after --

4 A I see, I'm sorry. Yes.

5 Q Now, this is the supplementary that was prepared

6 some two years later by Paul, related to the

7 incident at the hotel where he and Anderson were

8 babysitting Zanidean, so to speak. And you were

9 shown this during your -- they were staying at

10 the Niakawa Hotel -- this supplementary was

11 drawn to your attention and you were questioned

12 by Mr. Code at some length about the

13 confrontation that Paul had with Zanidean, and

14 that he contacted Inspector Johnson, and Johnson

15 told them to withdraw their protection of

16 Zanidean on June 20th?

17 A Yes, I recall that, yes.

18 Q And when they searched the records of the hotel,

19 they found that in fact a call, a telephone call

20 had been placed by Zanidean to Mr. Brodsky's

21 telephone number?

22 A So I understand from the material, yes.

23 Q Now, you were never given any of this

24 information by Anderson and Paul?

25 A No.

1 Q Okay. They never mentioned it to you, never  
2 contacted you, told you what had happened or  
3 anything of that nature?

4 A No.

5 Q As lead counsel and trial counsel in this case,  
6 would you agree that you should have been told  
7 by them, or somebody should have told you?

8 A About his intention to renege on his evidence?

9 Q Well, the threat to recant, the fact that he  
10 appeared to have phoned Brodsky and so on?

11 A Yes, I should have known that.

12 Q Pardon me?

13 A I should have known that.

14 Q Now, and with the passage of time it is  
15 certainly understandable, it has been over 15  
16 years since the trial and so on. There are many  
17 things that you've testified to that you simply  
18 don't remember?

19 A That's right.

20 Q And in particular, one of the significant issues  
21 is what is demonstrated at tab 56, is the -- no,  
22 I am sorry -- Mr. Brodsky's memorandum of the  
23 pre-trial conference where apparently the Swift  
24 Current arson was discussed, but you have no  
25 recollection of it having been discussed?

1 A No recollection, no.

2 Q Okay. There is various other things related to  
3 this particular matter that you simply don't  
4 remember? And I'm not being critical, you  
5 simply don't remember?

6 A That's right.

7 Q Now, is it fair to say that in view of the fact  
8 that Bruce Miller's office was next door to  
9 yours, the two of you did see each other on a  
10 regular basis, although you may not have  
11 socialized together, but you did see each other  
12 on a regular basis, that there were various  
13 issues related to his negotiations with Kovnats  
14 or other matters that he was dealing with that  
15 he may have mentioned to you and you simply have  
16 forgotten? For example, do you remember him  
17 telling you about his negotiations with Kovnats  
18 and how difficult Kovnats was to deal with?

19 A I don't recall that, no.

20 Q Did you have any recollection of discussions  
21 about immunity at all?

22 A I don't remember them, no.

23 Q Are you saying they didn't occur, or you simply  
24 don't remember?

25 A I don't remember. And although we were near

1 each other, I think there was an office or two  
2 between us, these things weren't going on, on a  
3 daily basis.

4 Q I understand.

5 A So there was times when I was out of the office  
6 for long periods of time on other trials and  
7 other matters, and I simply don't recall  
8 anything being said about difficulties of any  
9 kind.

10 Q Okay. Now, you do recall, you were aware of the  
11 fact, though, that Bruce was dealing with  
12 witness protection for both Gumieny and  
13 Zanidean?

14 A That's what I was -- I understood him to be the  
15 go between, the liaison man.

16 Q Okay.

17 A I don't know who was doing the actual  
18 negotiating, I thought that he was simply taking  
19 one position to the other party, and if money  
20 was to be transferred, that's what he would do.

21 Q Okay. But you were aware of the fact that it  
22 did involve money?

23 A Oh, yeah.

24 Q And that if Zanidean had gone into witness  
25 protection through the RCMP, there would have

1           been a cost inherent in that witness protection?

2    A       He wouldn't necessarily have got the money

3           himself. In fact, I don't think he did. But

4           bills were submitted and paid in due course,

5           first paid by the RCMP and then repaid by the

6           government. And that's where I thought

7           Mr. Miller's main duties lay. He was presenting

8           the bills, getting them verified, getting them

9           approved, and seeing that the money was paid

10          across.

11   Q       Okay.

12   A       Very little money, as far as I could make out,

13          actually got in the hands of either man.

14   Q       All right. Now, with respect to Zanidean,

15          though, you ultimately did learn that there had

16          been a payment of \$20,000?

17   A       That was a long time later, yeah.

18   Q       But you were aware of the fact that even if

19          Zanidean had gone into witness protection, there

20          would have been payment at least paid for his

21          benefit, if not directly to him, costs would

22          have been covered and so on?

23   A       From later information, and I cannot tell you

24          where I received it, I gathered that the payment

25          negotiated was approximately what it would have

1 cost to put him in the program.

2 Q Okay. That was the point I was going to ask  
3 you. That's certainly the information that's  
4 been put before the Commission, was that the  
5 estimated cost of witness protection would have  
6 been approximately \$20,000, and in lieu of that,  
7 he was paid the \$20,000, with the specific  
8 purpose of him using it to relocate himself?

9 A That's what I now understand, yes.

10 Q Okay. That's fine, sir. Thank you very much.  
11 Thank you, Mr. Commissioner, I have no further  
12 questions.

13 THE COMMISSIONER: Thank you, Mr. Abra.

14 MR. ABRA: Did I do it in five minutes?

15 THE COMMISSIONER: Pretty close.

16 MR. PROBER: Good morning, Mr. Commissioner.

17 THE COMMISSIONER: Good morning, Mr. Prober.

18 MR. PROBER: Good morning, Mr. Dangerfield.

19 THE WITNESS: Mr. Prober.

20 MR. PROBER: I have a number of questions. I  
21 can tell you, Mr. Commissioner, I don't expect  
22 and I hope to be not longer than about an hour.

23 BY MR. PROBER:

24 Q Mr. Dangerfield, how old are you?

25 A I'm 73.

- 1 Q And how many children do you have?
- 2 A I have two, a daughter Susan and a son Michael.
- 3 Q Michael is the police officer that you referred  
4 to the other day?
- 5 A Yes, he is.
- 6 Q And how many grandchildren do you have?
- 7 A I have eight, seven granddaughters and a  
8 grandson. The daughters, my son's children are  
9 all daughters.
- 10 Q Five of them I understand?
- 11 A Yes. And my daughter has two girls and a boy.
- 12 Q Now, you prosecuted thousands of cases, would  
13 that be fair?
- 14 A I suppose if you count every appearance I ever  
15 made, it might come to, I don't know if  
16 thousands, but quite a lot.
- 17 Q How many murders, alleged murders, can you  
18 estimate how many you prosecuted or not?
- 19 A No.
- 20 Q How do you view your role, or did you view your  
21 role as a prosecutor in terms of objectivity,  
22 independence, that sort of thing, just generally  
23 speaking?
- 24 A Well, I began at the department in 1965, and in  
25 those days the prosecutor carried the case, he

1           made the decisions, and that was his duty. And  
2           I carried that view right through to the end of  
3           my career, that I was the one in control in the  
4           court.

5           As to the duty itself, well, we were all  
6           described as officers of the court. I  
7           maintained as much objectivity as I could,  
8           because if you lose it, you lose your direction  
9           and you lose your point of view and everything  
10          else. There were some cases that it was  
11          difficult to maintain objectivity in. I  
12          remember a case called Turk where a couple had  
13          beaten their three-year old son to death. That  
14          was hard to maintain. And I was very disturbed  
15          by the case of Betty Osborne, because she was a  
16          pretty young thing and didn't deserve to die  
17          that way. But beyond that sort of emotional  
18          impact of the various cases, I did try to  
19          maintain my objectivity.

20        Q        Okay. And in terms of your independence, your  
21                fairness, your openness, what do you have to say  
22                about that?

23        A        I tried to be as open with counsel as openness  
24                was regarded in the eras that I prosecuted in.  
25                To begin with, there was absolute prohibition



1           against giving statements to anyone. And if you  
2           even thought of doing a thing like that, a  
3           fellow named A.A. Sarchuck would come down on  
4           you like a ton of bricks. But later on as I got  
5           older and more sure of myself, I would do as I  
6           thought was right.

7    Q       Which is what?

8    A       Give as much to the other side as I could.

9    Q       And now that you are retired, have you embarked  
10           on any sort of new career?

11   A       Yeah, I missed the courtroom, the sort of the --  
12           what is it -- the thrill sounds inappropriate,  
13           but you know what I'm talking about.

14   Q       The challenge, the excitement?

15   A       Right. So I took up acting.

16   Q       Okay?

17   A       And some years of training, and I appeared in  
18           the film Capote, as the jury foreman with  
19           speaking lines, and my name, if you look in the  
20           credits, is Jeremy Dangerfield. I use my first  
21           name.

22   Q       Okay. Now, that's a little bit of personal  
23           background, Mr. Commissioner.

24           If we can focus on some of the evidence,  
25           Mr. Dangerfield, I would direct your attention

1 first of all to an area that I want to ask you  
2 about, and it is found in tab 52 of volume 2?

3 A Yes.

4 Q It is the cross-examination, or part of it, by  
5 Mr. Brodsky of Zanidean.

6 A That's right.

7 Q All right. And I direct your attention to pages  
8 42 and 43, please? In cross-examining you  
9 Mr. Code directed your attention to this  
10 passage, the top of page 43 in particular.

11 "Q You talked to your lawyer?

12 A Right.

13 Q About making a deal to avoid being  
14 charged in Swift Current?

15 A No, that's not what I said."

16 Do you recall being asked about that by  
17 Mr. Code?

18 A I can't honestly say I can.

19 Q All right. Well, you can take it from me that  
20 you were.

21 A I don't doubt it, I just can't --

22 Q And when Mr. Code was cross-examining you, he  
23 asked you, confirmed with you that you knew that  
24 Zanidean was making demands; correct?

25 A Yes.

1 Q What knowledge did you have of the demands being  
2 made of Zanidean?

3 A Nothing of the demands themselves, no.

4 Q Okay. And when Mr. Code was cross-examining  
5 you, he said, he confirmed with you that you  
6 knew there were negotiations going on between  
7 Miller and Kovnats, at least as a result of the  
8 confrontation at the Public Safety Building?

9 A Yes, I thought it was all part of this Witness  
10 Protection Program.

11 Q Of course. And what specific knowledge did you  
12 have of those negotiations?

13 A None.

14 Q You knew, according to what you told Mr. Code,  
15 that Zanidean, through Kovnats, at the Public  
16 Safety Building on May 26, 1991, said he wasn't  
17 going to testify if his demands were not met.  
18 Do you recall that?

19 A Yes, that's what triggered that response of mine  
20 that I would prosecute him.

21 Q Right. And what knowledge, again, what specific  
22 knowledge did you learn that evening about the  
23 demands that were being made?

24 A None. I was just addressing the situation of  
25 this decision not to testify.

1 Q So when Zanidean testified at the trial that he  
2 had not talked to a lawyer about making a deal  
3 to avoid being charged, you had no knowledge of  
4 the demands he was making, how would you know  
5 about whether he was telling the truth or not?

6 A I wouldn't.

7 Q Well, let me ask you a second question. Without  
8 the benefit of hindsight, which we have, and  
9 without hearing Kovnats' evidence, which we have  
10 heard about the demands, and without the nice  
11 analysis of the documents that we have gone  
12 through, the detailed analysis of the  
13 December 14th, 1990 letter from Kovnats to  
14 Miller, a shopping list of demands, without all  
15 of that which we have done, without the benefit  
16 of hindsight, what jumped out at you at the  
17 trial, when you were sitting there in the heat  
18 of battle, that Zanidean may not have been  
19 truthful --

20 A Nothing.

21 Q -- about this issue?

22 A Nothing that I recall. I was busy making notes  
23 on what he was saying.

24 Q And what -- second question -- what jumped out  
25 at you at the trial, when you are sitting there

1 in the heat of battle, that would have prompted  
2 you to consult with Miller?

3 A Nothing.

4 Q Okay. Zanidean testified that there was no  
5 deal. What was your understanding in relation  
6 to any deal that may or may not have been made  
7 with Zanidean?

8 A I didn't know of any deal.

9 Q Well, let's look at it from a different  
10 perspective. If you look at -- I don't know if  
11 the witness has this, Madam clerk, but it is  
12 volume 2 of the Brodsky book of exhibits, 20B,  
13 if you would turn to--

14 A I start at 26 here.

15 Q Yes, I was giving the exhibit number. I give  
16 you the exhibit number, 20B, and I would ask you  
17 to look at tab 33?

18 A 33, yes.

19 Q Remember now we are talking about Brodsky's  
20 cross-examination of Zanidean about any deal  
21 that was made or whether he consulted a lawyer  
22 about a deal. You didn't know about a deal, you  
23 have told us that. But look at what Mr. Brodsky  
24 has in his memo. Now, the memos are all dated  
25 June 10, 1991 in this particular tab, but at the

1 bottom is a page number, 404, have you got that?

2 It is about three pages in on that tab.

3 A Yes, yes.

4 Q And we know this was a meeting that Mr. Brodsky  
5 had with Kovnats?

6 A Um-hum.

7 Q "I have just come from Dave Kovnats'  
8 house at 89 Eastgate. His client has still  
9 not signed the witness protection  
10 agreement. He promises for it to be  
11 delivered by way of signed paper."

12 We don't know whether it is going to be  
13 delivered to Brodsky or not, but we see there  
14 that Brodsky knew about the fact that there was  
15 a witness protection agreement negotiated?

16 A Yes.

17 Q And further on in that memo, a sentence starts  
18 on the right-hand side,

19 "He told me that he passed on my  
20 request...,

21 he meaning Kovnats,

22 "...that I be allowed to meet with his  
23 client in the presence of Bruce Miller who  
24 said that his client would call him at  
25 2:00 o'clock tomorrow, June 3rd, 1991."

1 So even though the memo is dated June 10th, we  
2 know this refers to a meeting, I think it was  
3 Sunday night, between Brodsky and Kovnats; do  
4 you see that?

5 A Yes, yes.

6 Q So it appears that Brodsky knew about the  
7 witness protection agreement --

8 A Yes.

9 Q -- which he put to, and we will get to that in a  
10 moment, to Zanidean. It would appear that he  
11 also knows of Miller's involvement?

12 A Yes.

13 Q Do you know whether Mr. Brodsky ever went  
14 directly to Mr. Miller or not?

15 A No, I don't.

16 THE COMMISSIONER: Just bear with me for a  
17 moment. I was making note here and I got a bit  
18 behind, the Miller reference?

19 MR. PROBER: Oh, right. Mr. Commissioner, you  
20 will see that halfway down this memo, there is a  
21 sentence on the right that starts,

22 "He told me that he passed on my request  
23 that I be allowed to meet with his client  
24 in the presence of Bruce Miller."

25 THE COMMISSIONER: I see it, thank you.

1 MR. PROBER: And so on. Thank you.

2 BY MR. PROBER:

3 Q Again, this is the second area that Mr. Code  
4 took to you in his cross-examination, he  
5 isolates another passage of Brodsky's  
6 cross-examination. If you look at page 45, and  
7 that's -- sorry, that's back to tab 52?

8 A Yes.

9 Q If you look at page 45, I have noted line 17 to  
10 21, where Zanidean testifies.

11 "My mortgage payments are in arrears right  
12 now..."

13 A Yes.

14 Q I'm going to wait for Mr. Commissioner to get  
15 there, it is at page 45, Mr. Commissioner, of  
16 tab 52.

17 THE COMMISSIONER: Yes.

18 BY MR. PROBER:

19 Q At line 17 to 18 is what Mr. Code put to you.

20 "My mortgage payments are in arrears right  
21 now since then, and I'm on the verge of  
22 losing my house; and you can check that  
23 out.

24 What arrangements have you made for that?

25 I have made no arrangements for that."



1           That's where Mr. Code stopped, as I recall.

2           But if you read on, the question is,

3           "Have you signed an agreement?

4           A     No. With who?

5           Q     With anyone for the, to be compensated  
6           for this testimony?

7           A     No, I haven't."

8           We saw from the previous memo of June 2nd,  
9           Brodsky is aware of the witness protection  
10          agreement. And he continues on from the house  
11          arrangements to the agreement, and it appears  
12          that he goes on to confirm that, again, that  
13          Zanidean engaged a lawyer to take care of the  
14          witness protection program. And again at page  
15          46, lines 11 to 15, continuing on,

16          "Q     Didn't you engage the lawyer also to  
17          work out an agreement so that you could be  
18          compensated for your testimony?

19          A     I engaged a lawyer to take care of the  
20          witness protection program."

21          Wasn't that your understanding, Mr. Dangerfield?

22          A     Yes.

23          Q     "Q     Wasn't that payment of money?

24          A     No. What it is is relocation and new  
25          identity, if needed.

1 Q And start-up costs?

2 A They never mentioned start-up costs."  
3 Whose words are those "start-up costs"?

4 A I don't know.

5 Q Well, here they appear to be Brodsky's words in  
6 the question?

7 A Yes, they are Brodsky's words.

8 Q Did you know what that meant?

9 A Did I know what it meant?

10 Q Yes, at the time?

11 A Well, I think I understood it to mean that they  
12 would be supporting him for a period of time  
13 until he got himself on his feet working. I  
14 guess that's what it meant.

15 Q But you will notice in the passage that I read  
16 you, or perhaps you won't, that he asks about  
17 any arrangements made with the house,  
18 immediately follows about have you signed the  
19 agreement?

20 A Yes.

21 Q It would be my understanding that that puts the  
22 arrangements for the house into the context of  
23 an agreement. Would you agree or disagree with  
24 that, based on this?

25 A Sounds like it, yes.

1 Q And there is another passage that's isolated at  
2 page 44, and you were taken back and forth by  
3 Mr. Code to these various passages, but at page  
4 44, line 13?

5 A Yes.

6 Q "Q And you had to move out of your  
7 house?

8 A Right.

9 Q You're being paid for that?

10 A Paid for moving out of my house? No.

11 Q What are you being paid for?

12 A I'm not being paid for nothing."

13 First of all, do you understand, as it appears  
14 Mr. Code does, that being paid for moving out of  
15 your house means moving expenses, or is it  
16 something different, or do you know?

17 A I think that was all covered in that special by  
18 Tom Anderson.

19 Q We will get to that in a moment, that's at tab  
20 9.

21 A I thought those were -- I understood the moving  
22 costs would be paid on his behalf.

23 Q Right. My question is, is being paid for moving  
24 out of your house the same as having your moving  
25 expenses paid, or do you know? And if you don't

1 know, that's fine. I don't know.

2 A I see what you are getting at. I don't know  
3 that I would have made that distinction myself  
4 sitting and listening to it.

5 Q Okay. Go ahead.

6 A I said he doesn't seem to think it is a  
7 compensation, because he objects and says I was  
8 only paid for my accommodations and my--

9 Q Well, did you know anything otherwise at the  
10 time?

11 A No.

12 Q So now, again, without the benefit of hindsight,  
13 without the benefit of the nice detailed  
14 analysis of the documents that you were taken  
15 through, without the benefit of this nice  
16 detailed analysis of the documents and comparing  
17 it to Zanidean's evidence, what, if anything,  
18 jumped out at you at the trial when you were  
19 sitting there, that this was probably not true,  
20 that is was probably false, at the time of the  
21 trial?

22 A Nothing.

23 Q Well, what jumped out at you at the trial then  
24 that would have prompted you to run across the  
25 street to see Miller about it?

1 A Nothing. I mean much of this, if you go back to  
2 this analysis of the documents, you see that  
3 Lawlor actually signs off on the cheques that  
4 cover part of these expenses.

5 Q And the cheques are made payable to the police  
6 officers?

7 A That's right, not to Zanidean.

8 Q Well, so when you agreed with Mr. Code's  
9 suggestion that Zanidean's, with his suggestion  
10 that Mr. Zanidean's evidence was probably false,  
11 was that something you realized or adverted to  
12 at the time of the trial?

13 A No.

14 Q Or is it something that you came to realize now,  
15 after reviewing all of this material and looking  
16 back at it now?

17 A It would be the second, that I realized it much  
18 later when we were dealing with it here, not at  
19 trial, anyway not at trial.

20 Q Now, one of the documents that Mr. Code put to  
21 you was at tab 9?

22 A Tab 9, yes.

23 Q Volume 1 of your book of documents?

24 A Yes.

25 Q It is a supplemental report; right?

1 A Yes.

2 Q Prepared by Anderson and Paul?

3 A Yes.

4 Q Dated it appears the 11th of April, 1990?

5 A Yes.

6 Q This was put to you and it was confirmed that.

7 "Zanidean is currently....",

8 in the first paragraph,

9 "...living in a house with his common-law

10 wife, they own the house and have lived

11 there since December of 1989. They have

12 been visited there by the accused and other

13 associates who could potentially act on

14 behalf of the accused."

15 And we see at the head of the supp report is

16 witness protection for Zanidean?

17 A Yes.

18 Q Right. And they deal with short-term measures

19 and then they deal with long-term measures, and

20 under long-term,

21 "Mr. Zanidean and his wife want to move to

22 Calgary, Alberta as soon as they're able to

23 dispose of their house. They have

24 contacted a real estate agent and hope to

25 have their house listed on the market

1                   soon."

2           Is there anything in that supp that relates to  
3           any financial benefits that are going to be paid  
4           to Zanidean?

5    A    No.

6    Q    Were you aware of any financial benefits that  
7           were going to be paid to Zanidean?

8    A    No, this is just a comment on what Zanidean is  
9           planning to do, as far as I can see.

10   Q    Right. And it relates to what?

11   A    Moving away, moving to another city.

12   Q    There is some dispute, Mr. Commissioner, excuse  
13           me, as to the date of that. I had suggested  
14           April, now it appears that somebody is  
15           suggesting November 4th. I can never understand  
16           whether it is April or November. I would have  
17           thought that was early on in terms of the  
18           witness protection and it related to April, but  
19           that may be --

20   MS. CARSELL: Mr. Commissioner, if I can just  
21           say, if you read the police reports, the  
22           standard practice is year, month, day, in dates.

23   THE COMMISSIONER: And I think it is more  
24           logical.

25   MR. PROBER: It may be November.

1 THE COMMISSIONER: It seems more logical that it  
2 is November. However, I think somebody has to  
3 conduct an inquiry as to why in Canada, maybe  
4 the rest of the world, we can't have a uniform  
5 system?

6 MR. PROBER: I appreciate the correction, it  
7 makes no sense it is in April -- I am thinking  
8 April '91, but it is April '90, it wouldn't make  
9 any sense, it doesn't go to the police until  
10 October '90, so it is November.

11 BY MR. PROBER:

12 Q But in any event, is there anything in there  
13 about the financial benefits?

14 A No.

15 Q No. It relates to what, witness protection, or  
16 is it obvious?

17 A It talks about his nerves, his fear and his  
18 move, which I suppose is relating to the witness  
19 protection.

20 Q Who else would have had that supplementary  
21 report?

22 A Mr. Brodsky, I expect.

23 Q Right. So if Zanidean were lying about that,  
24 his questioner, Mr. Brodsky, presumably would  
25 know?



1 A Yes.

2 Q Incidentally, at the time of the trial what  
3 knowledge --

4 THE COMMISSIONER: I'm just -- I'm not so sure  
5 that I would interpret that Brodsky would have a  
6 copy of this, because this is -- I have  
7 forgotten what his evidence was, but I would  
8 have thought there was material in here that  
9 gives the location and would not have been  
10 disclosed to Brodsky.

11 MR. PROBER: It may not have been. But I know,  
12 Mr. Commissioner, in the same tab, if you turn  
13 to page 5, well, the fifth page in I should say,  
14 the bottom is 419, we heard from Anderson -- do  
15 you see that -- to Inspector Bell, M.R. Bell, I  
16 think it is Randy Bell, when it wasn't to go in  
17 a supp, and if I recall correctly it is in tab  
18 12, because I put it to Anderson on his  
19 examination by me, this would not go to Brodsky.  
20 That's why it was done in that form. Yet the  
21 other would go to Brodsky, the supp. But you  
22 are right, it would be a little dicey  
23 considering it refers to a location. But I know  
24 if the intention was that it wasn't to go to  
25 defence counsel, they would do that sort of memo

1 form rather than a supp. That's my  
2 understanding of Anderson's evidence, and it is  
3 probably subject to argument.

4 THE COMMISSIONER: I don't think at the end of  
5 the day much would turn on it.

6 BY MR. PROBER:

7 Q Incidentally, Mr. Dangerfield, at the trial,  
8 what knowledge did you have about the \$7,700 we  
9 heard about that was paid to Zanidean for the  
10 equity in his house?

11 A None. That house sale was not resolved until  
12 months after the trial, I didn't think. I don't  
13 know.

14 Q That's your understanding of it, right?

15 A Yes. Looking at the materials I have looked at,  
16 it seems that it occurred much, much later. And  
17 the payment was made to Mr. Kovnats, to his  
18 file.

19 Q Right. And again, this is the final area that  
20 Mr. Code directed you to in his  
21 cross-examination, where he isolates a  
22 particular part of Zanidean's cross-examination.  
23 It is at page 45, the third area actually, the  
24 first again being what we went through in terms  
25 of the deal; the second being this business with

1 arrangements for the house; now Mr. Code took  
2 you to the business of payments for room and  
3 board. And the impression that was left by  
4 Zanidean, according to what Mr. Code suggested,  
5 was this was sort of a temporary benefit. But  
6 if you look at page 45, lines 9 to 12?

7 A Yes.

8 Q Tab 52, again the cross-examination of Zanidean  
9 by Brodsky.

10 A I have it, yes.

11 Q Page 45, lines 9 to 12.

12 "Q For how long will they continue to  
13 pay you room and board? That's a pretty  
14 good deal, isn't it?

15 A Until the end of today, unless I'm  
16 needed tomorrow."

17 Then continuing on, Mr. Code -- we have already  
18 been there -- at page 46, put to you the concept  
19 of start-up costs that was testified to?

20 A Yes.

21 Q And Zanidean didn't ask for clarification, but  
22 he said they never mentioned start-up costs,  
23 whoever they were. And suggested that this left  
24 an impression by Zanidean that he was only  
25 receiving some sort of temporary benefit, but in

1 your statement you would acknowledge that you  
2 assumed that he was going into the Witness  
3 Protection Program. Again, we know that he  
4 wasn't in the program. We know that he wasn't  
5 going into the program. We know that he never  
6 got into the program. He didn't believe he was  
7 in the program. So, again, what at the trial  
8 jumped out at you to indicate that he wasn't  
9 telling the truth here?

10 A Nothing. I expected he would be paid day-to-day  
11 expenses while he was in court, and that the  
12 program they had planned for him wouldn't begin  
13 until after he had finished his testimony.

14 Q How would you know at the trial that he may have  
15 been leaving a false impression?

16 A I wouldn't.

17 Q Now, the man admitted, we saw, to Brodsky in the  
18 cross-examination that he retained a lawyer to  
19 get into the Witness Protection Program, and no  
20 agreement was signed yet. That's what he said.  
21 How would you know at trial that that wasn't  
22 accurate?

23 A I wouldn't.

24 Q And what, if anything, on this point jumped out  
25 at you at the trial that would prompt you to run

1 across the street in the middle of the trial and  
2 talk to Miller about this issue?

3 A Nothing that I recall.

4 Q And finally, and I alluded to this when  
5 Mr. Lockyer began his cross-examination, and we  
6 have distributed copies, Mr. Commissioner, to  
7 the clerk and to the other counsel at the  
8 inquiry, page 122 of Zanidean's  
9 cross-examination starting at line 10.

10 THE COMMISSIONER: This should be given a  
11 number, should it?

12 MR. PROBER: Please?

13 THE CLERK: 33.

14 (EXHIBIT 33: Excerpt of examination of  
15 Zanidean, page 122)

16 MR. PROBER: And it is the only handout that I  
17 have, but I didn't want to feel left out and  
18 have no handouts at all. But exhibit 33, thank  
19 you.

20 BY MR. PROBER:

21 Q Starting at line 10, Mr. Commissioner,  
22 Mr. Dangerfield,

23 "Q Is everything you are saying in court  
24 today bullshit too?

25 A No, sir.

1 Q Some of it?

2 A None.

3 Q I see.

4 A Except for the stuff I admitted to  
5 lying about like the house and Swift  
6 Current and things like that. It is true  
7 that I'm telling you about it."

8 I mean, he admits, apparently, according to  
9 this, lying in front of the jury, does he not?

10 A Yes.

11 Q Do you recall, it doesn't appear to be the case  
12 in the transcript whether Mr. Brodsky ever  
13 followed up on that to clarify what Zanidean was  
14 talking about?

15 A No.

16 Q All right. That's my first area of questions  
17 relating to what Mr. Code took you through. I  
18 have a few more areas that I would like to talk  
19 to you about.

20 First of all, you confirmed that you would  
21 want to know the circumstances or developments  
22 relating to any witnesses, not just Zanidean,  
23 any witness's credibility or motive and you  
24 wouldn't have wanted to be blind-sided?

25 MR. PROBER: When you two have finished, I would

1 be happy to continue.

2 BY MR. PROBER:

3 Q And you were asked, why didn't you go back to  
4 Mr. Miller? You could have gone to Mr. Miller.  
5 What would you have expected Mr. Miller to do if  
6 there were any significant developments relevant  
7 to a witness' credibility?

8 A Occurring while the trial was going on?

9 Q Either just before the trial, prior to the  
10 trial, or during the trial, what would you  
11 expect him to do?

12 A I would have thought that he would have alerted  
13 me to them.

14 Q Right. You trusted him?

15 A Oh, yeah.

16 Q You relied on him?

17 A Yes, we were good friends.

18 Q And you still today trust him?

19 A Oh, yes.

20 Q I mean, in the sense your trust is still there  
21 as it was before --

22 A Oh, yes.

23 Q -- at that time period?

24 A Yes. He was not by nature a devious man, I had  
25 no reason to think he was doing anything.

1 Q Right. And now it is easy to suggest what we  
2 know now, with the review of all of these  
3 documents, some of which you have seen, some of  
4 which you haven't, the evidence of Brodsky, you  
5 weren't here for that, the evidence of Kovnats,  
6 you weren't here for that?

7 A No.

8 Q The evidence of the police, you weren't here for  
9 that?

10 A No.

11 Q And it is easy for us, putting it all together,  
12 that you should have gone to Mr. Miller. But  
13 was there anything at the time that would have  
14 prompted you to go to Mr. Miller?

15 A Not that I recall, no.

16 Q When Mr. Code was questioning you, I may be  
17 wrong, but it was my sense that he was talking  
18 about Zanidean making demands, and the  
19 negotiating that was going on, and the decision  
20 making as one sort of process. But making  
21 demands, negotiating, and making decisions are  
22 three different things, are they not?

23 A Yes.

24 Q And once decisions were made, if they were made  
25 about immunity, about compensation, between



1 Kovnats and Miller, what would you have expected  
2 Mr. Miller to do?

3 A I think he would have told me that they were  
4 done, yes.

5 Q Right. And if there was a deal for immunity, if  
6 there was a deal for compensation when Zanidean  
7 went into the box, and you knew about that, how  
8 would you have dealt with it?

9 A I would have said to the jury that the witness,  
10 Zanidean, is a man you would have to be careful  
11 with, he has a criminal record, that he is going  
12 into the Witness Protection Program because of  
13 his fear, and that he is being compensated to  
14 some degree. As a result, he is prepared to  
15 give evidence, you will judge him on those  
16 terms, or something to that effect.

17 Q You have done that before in other cases?

18 A Yes.

19 Q Right. Let me ask you about the undertakings  
20 that you gave in court before Chief Justice  
21 Hewak in terms of the disclosure that you  
22 promised to give Brodsky, and the confirmation  
23 that you made about his having everything at  
24 that particular time. What efforts, first of  
25 all, what efforts did you and Lawlor make to

1 live up to those undertakings?

2 A We referred matters to the police which we did  
3 not have, we went through the files of things we  
4 had and provided the information as best we  
5 could.

6 Q Right. And what is your position today as to  
7 whether those undertakings were fulfilled?

8 A I believe they were fulfilled as best we could,  
9 yes.

10 Q You have told us that in terms of the disclosure  
11 requests that you went to the police. What  
12 reason, if any, did you have to doubt or  
13 question what the police were giving you in  
14 terms of information?

15 A None. I mean, this is where I got my  
16 information from when I was prosecuting and I  
17 relied on the police --

18 Q Okay.

19 A -- to tell me what was in fact the case.

20 Q What reason, if you can recall, if any, did you  
21 have to second guess the police and go to their  
22 notebooks and see whether they were telling you  
23 the straight goods?

24 A None. And I think it was suggested to me I  
25 should have gone to the police and gone to their

1 other files, whatever they were.

2 Q Right.

3 A I had no reason to do that. They gave me this  
4 information. I believed it.

5 Q Did you ever go down to the police station, to  
6 the police building, and go through their files  
7 because you doubted what they were saying? I  
8 mean on this case or any other case?

9 A No. I had obviously gone down to the Public  
10 Safety Building to talk to them about cases, but  
11 not because I doubted what they had been giving  
12 me.

13 Q Okay. If you would look, I just want to take  
14 you, and you have been to some of this before,  
15 to some of the disclosure letters. First of  
16 all, at tab 29, and I believe that's in volume  
17 2. It is your letter of February 8th to  
18 Mr. Brodsky.

19 A Yes.

20 Q I think maybe the day of the pre-trial, or not  
21 the pre-trial, the hearing before Chief Justice  
22 Hewak. In any event, direct your attention,  
23 please, to paragraph 6? You have seen this  
24 before?

25 A That's page 3826.

1 Q Yes. Page 3 of your letter.

2 "In answer to your paragraph 6, we can not  
3 provide the details of the protection  
4 offered witnesses for fear of giving them  
5 away, but can assure you that protection  
6 amounts to provision of monies to help  
7 support them while they are protected and a  
8 constant surveillance over them."

9 My question to you is, what did you know over  
10 and above that, if anything?

11 A Nothing. We were limited in our knowledge to  
12 believing that the monies to be expended were  
13 solely to protect, to support these men for a  
14 term necessary to get them on their feet. I  
15 don't think I knew the length of the term, but I  
16 surmised it wasn't going to be very long.

17 Q While we are on the issue of witness protection,  
18 something occurred to me this morning, and so I  
19 don't want to forget it. Tab 59 of volume 3 --

20 A Yes.

21 Q -- talking about witness protection, we have  
22 heard your evidence that it was a matter for  
23 Miller and Whitley only?

24 A Yes.

25 Q I don't know that you were referred to this.

1           You mentioned it I think in answer to a  
2           question, it is three pages in,  
3           Mr. Commissioner, tab 59, volume 3 of  
4           Dangerfield, Lawlor and Whitley's book of  
5           documents.

6           THE COMMISSIONER:   Yes.

7           BY MR. PROBER:

8    Q       And you have apparently what we have been  
9           advised is the cover of the file relating to  
10          Zanidean, Gumieny, concerning R. v. Driskell,  
11          witness protection file.  What does it say under  
12          that?

13   A       B. Miller and S. Whitley only.

14   Q       Only.  Your name is not on there --

15   A       No.

16   Q       -- as one of the people that should be involved  
17          in that?

18   A       I never saw this file.  I think this hearing or  
19          this year --

20   Q       Probably when you met with me some time ago when  
21          I had first been advised about it?

22   A       Yes.

23   Q       And I think we were advised during the hearing  
24          by Mr. Olson that he had discovered that  
25          actually.

1           In any event, paragraph 16 of your letter,  
2           again we are back at tab 29, volume 2, paragraph  
3           16.

4    A    Yes.

5    Q    You indicate that he has,  
6           "...all of the statements taken from  
7           Zanidean. Beyond them there was no further  
8           record of contacts with the police except  
9           with respect to caring..."

10   A    I think they put the "for" on the wrong side.

11   Q    "...caring for him pending trial."

12   A    Yes.

13   Q    "To be absolutely certain however we will  
14           supply you with any supplemental reports of  
15           conversation, informal or otherwise, with  
16           police officers."

17           That was done?

18   A    Yes.

19   Q    And did you have any knowledge apart from what  
20           the police told you?

21   A    No. I see their note beside that "discuss with  
22           George."

23   Q    You wouldn't be putting that to yourself, that's  
24           obviously something Lawlor is writing?

25   A    No, I think this is a letter sent to

1 Mr. Brodsky --

2 Q No, no. Who is writing it, "discuss with  
3 George," paragraph 16?

4 THE COMMISSIONER: Yes, it is your letter but  
5 the writing there would appear to be Lawlor's.

6 BY MR. PROBER:

7 Q Do you see that?

8 A Yes.

9 Q Whose writing it that? Do you know?

10 A No. I would think Lawlor maybe.

11 Q It wouldn't be yours?

12 A No, it wouldn't be mine.

13 Q Again, I think Ms. Carswell may have touched on  
14 this, but same letter, paragraphs 22 and 23?

15 A Yes.

16 Q "In answer to your paragraph 22, police  
17 files do not reveal anyone with a motive  
18 for implicating Jim Driskell in the  
19 killing."

20 A Yes.

21 Q Paragraph 23.

22 "With respect to paragraph 23, these  
23 files...",  
24 what files are those, police files?

25 A I would expect so.

1 Q "...do not reveal that those assisting  
2 the police have independent motives for  
3 assisting the police or in giving evidence  
4 against Driskell."

5 Where would you have received that information?

6 A From the police.

7 Q And you relied on them?

8 A Yes.

9 Q Did you have any reason to question what they  
10 were telling you was accurate and truthful?

11 A No.

12 Q Let's look at tab 33 in that same volume,  
13 please? This is described by Mr. Code as the  
14 second major disclosure letter sent by  
15 Mr. Brodsky?

16 A Yes.

17 Q Well, in paragraph 5, for example, you say that  
18 criminal records and so on -- it has been read  
19 many times here. Where would you have gotten  
20 that information?

21 A From the police. They had access, I think I  
22 tried to say earlier, to records they kept  
23 themselves, and what are known as the FPS  
24 records, where if you have acquired a Federal  
25 penitentiary number, crimes you commit



1 afterwards are listed there, or crimes that you  
2 are charged with, I should say, are listed  
3 there.

4 Q You will note if we go to paragraph 9, and I  
5 think Mr. Abra actually referred to this in his  
6 cross-examination, there are three fires  
7 referred to?

8 A Yes.

9 Q But about the Swift Current fire, what was your  
10 best understanding about the information Brodsky  
11 would have had about that?

12 A At that time?

13 Q Yes?

14 A Well, I assume his client would have told him  
15 the whole story.

16 Q Right. His client later on gave a statement to  
17 the RCMP in Swift Current. We know that.

18 A Absolutely, yes.

19 Q And what about the body packs, would Mr. Brodsky  
20 have had those?

21 A Yes.

22 Q Yes. Was the Swift Current fire discussed in  
23 those?

24 A It is alluded to. There is a passage there  
25 where I think it is Zanidean brings it up.

1           There is an acknowledgment by Driskell, and then  
2           there is that passage below it where I think it  
3           is Zanidean talking about monies owed. It  
4           doesn't directly relate to the fire, but it must  
5           have been about it.

6    Q       So Brodsky would have had the information from  
7           his client, as you understood?

8    A       Yes.

9    Q       And he would have had the information from the  
10          body packs. Were you aware, and I don't know  
11          whether you are aware or not, that he had an  
12          investigator by the name of Savage in the field  
13          gathering information about that?

14   A       No, I didn't know. I knew Savage, he was a  
15          former police officer in the RCMP and I knew he  
16          had been used by others, but I didn't know that  
17          Brodsky was using him then, no.

18   Q       If you go to tab 34, again, just confirmation  
19          that -- when I say you, I mean the Crown -- in  
20          this case it is Mr. Lawlor goes to the police  
21          for information?

22   A       Yes.

23   Q       And in this case, I think it is directed to  
24          Vandergraaf, right? Tab 34?

25   A       Yes, it is.

1 Q Tab 34?

2 A Yes, it is a fax to him, yes.

3 Q Then again tab 35?

4 A Yes.

5 Q And again it is a letter by Mr. Lawlor to

6 Mr. Brodsky?

7 A Yes.

8 Q With your continued efforts to get the answers

9 to Brodsky's disclosure requests; right?

10 A That's right.

11 Q And on the first page with respect to paragraph

12 16, we heard about this,

13 "...I am advised that you have all of the

14 statements..."

15 I mean, I can ask Mr. Lawlor this, but what

16 would your understanding be, advised by whom?

17 A Someone in the police department.

18 Q Yes. And again, did you or did you not believe

19 what the police told you?

20 A Yes.

21 Q Did you or did you not have any reason to not

22 take the police at face value?

23 A No, no.

24 Q Would you have expected to be misled by the

25 police?

1 A No.

2 Q Again, tab 36, again a letter by Lawlor saying  
3 on the second page,

4 "The remainder of your queries have been  
5 passed on to the Winnipeg Police  
6 department."

7 Tab 36, do you see that?

8 A Yes.

9 Q Tab 37, I'm taking you through these quickly  
10 because --

11 "Winnipeg Police have nothing on these  
12 incidents."

13 Do you see that, tab 37, paragraph 3 rather?

14 A Yes.

15 Q And I say I'm taking you through these quickly  
16 because we have gone through them all before,  
17 not you and I, but the Commission. Again you  
18 relied on the police?

19 A Yes, I don't even know what that refers to  
20 actually.

21 Q All right. Well, you can go back, we can see it  
22 is paragraph 9 in his April 25th letter relating  
23 to the fires.

24 A Okay.

25 Q The three fires actually.

1 A All right.

2 Q And was there anything in all of this that  
3 alerted you that you should go to Miller?

4 A No.

5 Q Did disclosure come from the police or did it  
6 come from Miller?

7 A From the police.

8 Q Tab 41.

9 A Okay.

10 Q It is a supplemental report in answer to some of  
11 the questions raised by Mr. Brodsky, disclosure  
12 questions?

13 A Yes.

14 Q And it is a supplemental report prepared by  
15 Anderson and Paul?

16 A Yes.

17 Q Trying to get Brodsky the information that he  
18 wanted?

19 A Yes.

20 Q And you have been referred, and other witnesses  
21 have countless times, to question 6 at the  
22 bottom?

23 A Yes.

24 Q And I'm not going to have you read it or read it  
25 again, but what reason did you have to doubt or

1 question the accuracy of what the police were  
2 telling you and Mr. Lawlor?  
3 A None.  
4 Q Tab 43, pardon me, I have a note, paragraph 16,  
5 a letter from Brodsky asks you for access to the  
6 police files?  
7 A Where are we now?  
8 Q Tab 43.  
9 A Yes, page number?  
10 Q Sorry, I jumped in a little fast, page 4,  
11 paragraph 16?  
12 THE COMMISSIONER: Page 4, 291 at the bottom.  
13 THE WITNESS: Thank you. That's easier for me  
14 to see the 291. Yes, all right.  
15 BY MR. PROBER:  
16 Q Paragraph 16, letter from Brodsky dated  
17 April 25, paragraph 21.  
18 "...we are still awaiting a reply in terms  
19 of this request."  
20 And on the side it says "won't provide." That  
21 relates to access, I can tell you, to the police  
22 files.  
23 A Yes.  
24 Q Right?  
25 A Yes.

1 Q Police files are different than the files you  
2 have in your office with respect to open box  
3 disclosure issues? I mean, it is not the same  
4 thing, is it?

5 A I don't think so. I had a file, like the pinks,  
6 most of which Mr. Brodsky had seen I think.

7 Q Right. Okay. At tab 44, you have seen this as  
8 well, the bottom number, page number is 332?

9 A Yes, yes.

10 MR. PROBER: Mr. Commissioner, I'm going to ask  
11 for a break so Mr. Code and Mr. Dawe can consult  
12 without distracting me from examination of my  
13 client.

14 MR. CODE: We are not saying anything, we are  
15 just reading from the screen.

16 MR. PROBER: Well, then you are reading out  
17 loud.

18 THE COMMISSIONER: The point is that it is  
19 distracting for Mr. Prober.

20 MR. CODE: I'm finished.

21 MR. PROBER: Okay. That's fine. I'm prepared  
22 to continue.

23 BY MR. PROBER:

24 Q Anyway, we are at tab 44?

25 A Yes.

1 Q And it is Brodsky's memo of a pre-trial, and it  
2 appears that Mr. Lawlor in your presence is  
3 giving him information that Zanidean probably  
4 set the fire, the RCMP chose to do nothing about  
5 it, any favour extended to Zanidean -- these are  
6 Brodsky's questions to himself presumably. But  
7 whatever you gave Brodsky, did you hold back  
8 anything?

9 A Not that I remember, no.

10 Q I may have misunderstood this, but at tab 20,  
11 which would be in volume 1 --

12 A Yes.

13 Q -- when Mr. Code was questioning you, it seemed  
14 to me, and I could be wrong, that he was putting  
15 it in the context of something being  
16 discloseable at trial. But it is dated, as you  
17 can see, October --

18 A '91.

19 Q -- '91, well, after the trial, right?

20 A Yes.

21 Q And did you ever have this or do you know if you  
22 ever got it?

23 A No.

24 Q No. I mean, we know that you have seen it  
25 now --



1 A Yes.

2 Q -- because of the inquiry and so on, but do you  
3 recall ever seeing that or receiving it?

4 A Well, as you say --

5 Q It is not to you.

6 A As you say, it is after the trial, it doesn't  
7 appear to be the usual form of a special, I  
8 don't think. I don't recall seeing this, no.  
9 This seems to be an internal office memorandum.

10 Q Right. It has been described to us, I am just  
11 clearing up the date so that it wouldn't be  
12 something that you would have been able to  
13 disclose at trial even if you had it, number  
14 one, right? Because it was dated after the  
15 trial?

16 A I think Mr. Code, in fairness to him, was  
17 referring to the fourth paragraph where it says,  
18 "On the second day of our involvement with  
19 Zanidean, he revealed to us that his  
20 credibility was damaged."

21 And I don't recall being told that at the time.

22 Q Fair enough.

23 A But as regards this report to his superior, I  
24 didn't see it.

25 Q Mr. Code may well have been referring to that.

1 A I think that must be it.

2 Q I thought I was careful in saying that I wasn't  
3 sure, I could have been mistaken about that.

4 A I think you were, but I am pretty sure that  
5 Mr. Code was treating that as a discloseable  
6 fact at the time.

7 Q Fair enough. Still on disclosure, this is the  
8 end of that issue that I want to question you  
9 on, but did you rely on oral briefings by police  
10 officers, whether it would have been Vandergraaf  
11 or Anderson, with respect to evidence being used  
12 in court?

13 A Well, I believe I said no, in that context. But  
14 if you recall in the trial itself, Mr. Paul, or  
15 Sergeant Paul gave evidence right at the end of  
16 a distance between somebody's house and a grave  
17 site. I would have instructed him orally to do  
18 that based on information that he had given me  
19 or somebody had given me orally or -- and  
20 received his answer, made a note of it, and  
21 asked the question in court.

22 Q All right.

23 A But I took you to, I took the question to mean  
24 would I conduct a whole trial based on oral  
25 representations? No, of course not, I wouldn't

1 remember them all.

2 Q That would have been -- in relation to Paul it  
3 would have been at the last minute?

4 A Or a witness like that, I mean, somebody coming  
5 forward and saying, by the way, I think we know  
6 this and that. And I would say, well, go get  
7 the information for me, and they would come back  
8 and I would use it. But not on the basis of  
9 building of a case.

10 Q Prior to trial --

11 A I would have the police reports and work from  
12 there, yes.

13 Q And if they gave you an oral briefing on a  
14 particularly significant issue or important  
15 point, what would you do?

16 A They would reduce it to writing, I'm sure.

17 Q Was that something that you would ask for?

18 A I think they would reduce it for writing anyway,  
19 I mean, they would bring a supplementary in.

20 Q Now, was Vandergraaf's role, I think he  
21 described it as a coordinator or manager, is  
22 that what you recall his role was in the  
23 Driskell prosecution?

24 A I have very little recollection of him being in  
25 the prosecution as such. His role, he was then

1 a Staff Sergeant, he had a managerial role in  
2 the section known I think then as the homicide  
3 section, or the robbery/homicide.

4 Q Right.

5 A He would be overseeing the work of people like  
6 Tom Anderson and Al Paul, and Ed Paulyshyn or  
7 anybody else that was connected to that  
8 division.

9 Q If Vandergraaf -- and so it is a likelihood that  
10 you would meet with him much if he was a  
11 coordinator or manager or not?

12 A I wouldn't think so. I have no recollection of  
13 it. He may have come down because he was  
14 interested, he may have done some fetching and  
15 carrying, but I don't recall basically. In any  
16 event, I may have called him to get witnesses,  
17 but he wouldn't do it himself, he would send  
18 others out to get them, I would think anyway.

19 Q If Vandergraaf came to your office and told you  
20 that Zanidean had immunity, what would you ask  
21 Vandergraaf to do about that?

22 A Well, I would want to know the details.

23 Q Right. And in what form?

24 A Well, written down so we could keep an order  
25 straight on them. I guess I would go and have

1 to talk to Miller or somebody about this.

2 Q In a supplemental report?

3 A I would expect so.

4 Q Would that be a special? You referred to

5 specials?

6 A They were known as both, specials and supps.

7 Q Are you okay to continue, Mr. Dangerfield, or do

8 you need a break?

9 A I'm fine.

10 Q Dealing with some post trial matters, if you

11 would look at tab 63, please, which would be in

12 volume 3? Are you there?

13 A Yes.

14 Q I'm not going to have you read the memo. We

15 know the memo comes some months after the

16 original letter from Quinney?

17 A Yes.

18 Q Right?

19 A Yes.

20 Q Just for the record, there is no material

21 attached to the copy we have.

22 A That's true.

23 Q There was no material, I understand it, on the

24 Department of Justice file attached to the copy

25 of this memo?

1 A Not when I was given the file to look at, no.

2 Q Okay. And when you say you were given the file  
3 to look at, you are talking about --

4 A At a period when I could answer Mr. Enns'  
5 questions.

6 Q That's during Judge Enns' inquiry?

7 A Yes. And it is also not signed by Miller, I  
8 notice here, it is signed by a secretary.

9 Q Okay. Do you know whether the materials were  
10 ever attached or not?

11 A I couldn't tell you. I don't recall ever seeing  
12 them, no.

13 Q Now, let's go to tab 64?

14 A Yes.

15 Q And in particular the last page, it is a --

16 A Yes.

17 Q -- March 11, '93 memo?

18 A Yes.

19 Q Raising the same issue, it is about a year after  
20 this July -- well, less than a year after the  
21 July '92 memo. But again there is no materials,  
22 which are referred to in the memo, attached to  
23 this copy?

24 A No.

25 Q And again, when you went to review the file, the

1 Department of Justice file, was there any  
2 material attached to the memo?  
3 A You mean to answer Mr. Enns' questions?  
4 Q Yes?  
5 A I don't even think I saw this memo.  
6 Q Okay. You have a note at the bottom?  
7 A That file, by the way, Mr. Prober, wasn't very  
8 complete.  
9 Q No. Okay. Now, you say, in fact, Bruce -- read  
10 that for us, please, because I can't read the  
11 first part?  
12 A Well,  
13 "I don't recall if the material..."  
14 and then I stop.  
15 Q So there may be a word missing there?  
16 A Yes.  
17 "Perhaps you could refresh my memory by  
18 showing it to me. I hesitate to agree to  
19 send it to counsel without first looking at  
20 it."  
21 Q Do you recall ever receiving the material?  
22 A No.  
23 Q Okay. Now go to tab 67, please?  
24 A Yes.  
25 Q It is a month later, it is a memo to Whitley

1 from Miller?

2 A Yes.

3 Q Look at the third paragraph.

4 "As you can see from the materials

5 attached, Mr. Dangerfield clearly agrees

6 that the material should be sent to

7 Mr. Brodsky with an accompanying

8 explanation."

9 A Yes.

10 Q What attached materials? We don't have them

11 here?

12 A I presume he is referring to the Quinney

13 letters.

14 Q Well, did you ever see them in relation to this

15 memo? Were they attached to this memo when you

16 looked at it in the Department of Justice file,

17 when you went up to review the Department of

18 Justice file?

19 A No, they weren't.

20 Q No. We don't have them?

21 A No.

22 Q You don't know what happened to them?

23 A No.

24 Q No.

25 A But I presume I must have seen them at this



1 point.

2 Q At some point, but you don't know when?

3 A No.

4 Q Then going up to the next paragraph, last  
5 sentence,

6 "From what I gather it was due to an  
7 oversight that Mr. Dangerfield did not  
8 address this issue when it was first  
9 brought to his attention."

10 Mr. Code appeared to imply that it was your  
11 oversight. My suggestion is it could have been  
12 the oversight in not attaching the material to  
13 the original memo, or do you know?

14 A I don't know. It is not very clear. You could  
15 read it the way Mr. Code did, or you could read  
16 it to some oversight, I didn't do it.

17 Q You don't know whether it was because you didn't  
18 receive the material or because you just didn't  
19 advert to it at the time?

20 A I didn't -- I prepared -- the directions were to  
21 prepare a letter, which I did and --

22 Q And in the end your position was that it should  
23 be disclosed to Mr. Brodsky, you are clear about  
24 that?

25 A Yes.

1 Q Now and then, right?

2 A Yes. I also appear to have written, or somebody  
3 has written a draft letter to Ms. Janie Duncan.

4 Q Right. Did you ever see that again?

5 A No.

6 Q Well --

7 A I have never seen the draft copy in the files  
8 that I prepared.

9 Q Let's look at the Quinney letter, much has been  
10 made of that. That's the letter tab 61,  
11 Mr. Commissioner. Mr. Dangerfield, if you would  
12 go to that, please?

13 A Yes.

14 Q Second page?

15 A Yes.

16 Q Where Mr. Quinney is suggesting that information  
17 about the Swift Current arson should be  
18 disclosed and so on. What was your  
19 understanding, at this point, and you look at  
20 the top of the letter, of Mr. Brodsky's  
21 knowledge of that information that he already  
22 had?

23 A Well, if you see that top paragraph --

24 Q Yes?

25 A "This was given with the concurrence

1 of Driskell's defence counsel, Greg  
2 Brodsky."

3 Q That is referring to Mr. Driskell's statement  
4 about the arson?

5 A Yes, and it was given under a protective order  
6 of immunity, a proper one I gather. So I  
7 believe that Mr. Brodsky was fully aware of all  
8 of these details as to Driskell's participation  
9 in the fire.

10 Q Now, the next comment in the letter that your  
11 attention was directed to, and others, is the  
12 last paragraph on page 2.

13 "With respect to the arson in this  
14 province, it seems clear that Mr. Zanidean  
15 is of the view he was granted immunity from  
16 prosecution no matter exactly how this came  
17 about."

18 Would you, Mr. Dangerfield, have any knowledge  
19 whether Zanidean, if he had that view, got it  
20 from Kovnats, or the police, Winnipeg Police or  
21 the RCMP, or from Miller, because he dealt  
22 directly with Miller we heard, or from Orr? I  
23 mean, would you know?

24 A No, I don't know.

25 Q No. I won't deal with you -- I have a note to

1 ask you about the Hall and Ewatski review and  
2 their notes, the fact there is no reference in  
3 it to their raising these post-trial new matters  
4 they discovered, but -- as Mr. Olson covered  
5 that with you -- but there is one correction,  
6 because it is in the book of exhibits, that I  
7 would ask you to look at, or perhaps make.

8 That's at tab 81?

9 A Yes.

10 Q That's the letter that was sent, that's at tab  
11 81, volume 3?

12 A Yes.

13 Q That's the letter that was sent by me to  
14 Mr. Enns, or Judge Enns, and I would direct your  
15 attention to page 2?

16 A Yes.

17 Q Number 3(a),

18 "At the time of Driskell's trial George  
19 Dangerfield knew nothing about the Swift  
20 Current arson."

21 But that was not accurate at that time?

22 A No.

23 Q And you know that now, having seen all of these  
24 other documents, which you didn't see when you  
25 went to review the file apparently; is that

1 correct?

2 A Yes.

3 Q All right. I just wanted to tidy that up.

4 Mr. Lockyer's cross-examination, I have a  
5 few questions arising from that, a very few. My  
6 recollection is that Mr. Lockyer asked if you  
7 directed Brodsky to Miller; do you recall that?

8 A Directed him to Miller?

9 Q Yes, to talk to Miller?

10 A No.

11 Q But we saw from Brodsky's memo that he already  
12 knew about Miller's involvement because he met  
13 with Kovnats on June 2nd; right?

14 A Yes.

15 Q And then I believe Mr. Lockyer suggested to you  
16 that you didn't tell Brodsky that Zanidean was  
17 making demands. But, again, I showed you that  
18 he met with, Mr. Brodsky met with Kovnats?

19 A Yes.

20 Q About that issue, about the witness protection  
21 agreement; right?

22 A Yes.

23 Q I believe there was also a suggestion by  
24 Mr. Lockyer that you held off to the last moment  
25 to have Mr. Zanidean testify, to when he was

1 ready to testify, to -- for whatever, there was  
2 a suggestion of some ulterior motive. Perhaps  
3 you could deal with that?

4 A I think the implication was that I was waiting  
5 for a deal to be completed.

6 Q Right.

7 A If you look at the transcript, there is a remark  
8 to the judge that I had several witnesses that I  
9 could deal with on a particular day, the day  
10 before I call Zanidean. And that I had one  
11 lengthy witness I would prefer to start the next  
12 day, that was Zanidean. Reference to whether he  
13 was ready, I simply meant that the police had  
14 shown him his statements if they needed to, he  
15 was prepared to come to court, he could be  
16 brought to court from where ever it was he was  
17 staying.

18 Q Right.

19 A That's all.

20 Q And who was likely to advise you that he was  
21 ready to testify?

22 A Well, the police officers. I believe that's --

23 Q And I am just about done, Mr. Commissioner.  
24 Mr. Lockyer referred you to the cases of Starr,  
25 Unger and Sanderson, and the issue of hair

1 analysis?

2 A Yes.

3 Q And these were experts that testified about  
4 that?

5 A Yes, they are RCMP hair and fiber analysts.

6 Q Christian, Cadieux, I think the names were --  
7 Christianson, rather, and Cadieux.

8 A Christianson and Cadieux, yes.

9 Q You relied on these experts?

10 A Yes.

11 Q Yes. They were qualified by the court as  
12 experts?

13 A Yes.

14 Q Yes.

15 A I mean, I don't think Mr. Brodsky objected to  
16 any of them?

17 Q Right.

18 A Yes.

19 Q And was there anything that gave rise to your  
20 doubting the accuracy or honesty of their  
21 testimony, that you can recall?

22 A I think they gave their testimony the way they  
23 believed. Sometimes, and I don't recall it  
24 happening in this case, but sometimes if they  
25 made statements, I would say to them, but the

1 best you can say is that the hairs are similar?  
2 I think in this area here they are beginning to  
3 step up the proof a bit to include the  
4 likelihood of transfer of another person's hair  
5 to wherever these hairs were found.

6 Q But the point is, was there anything that gave  
7 rise, in your mind, to doubting their honesty or  
8 accuracy?

9 A No, I relied on them. I had relied on them in  
10 the past.

11 Q And to your best recollection, Mr. Brodsky  
12 didn't object?

13 A I don't think he did, no. He didn't ask for any  
14 proof of -- he knew them as well as I did.

15 Q Right. And likely agreed to their expertise?

16 A Yes, I believe he did. It wasn't challenged, in  
17 any event, as far as I remember.

18 Q What did the defence counsel receive from you in  
19 terms of disclosure?

20 A I believe I gave him everything I had that  
21 related to this trial.

22 Q Right.

23 A I can't recall specifics, but I believe I did  
24 that.

25 Q Right. Well, we see the specifics, but that's



1           what you intended to do, give him everything you  
2           had?

3       A     That's what I intended to do. Any lapses were  
4           unintentional.

5       Q     Okay. Now, Mr. Commissioner, I'm going to ask  
6           Mr. Dangerfield a few questions about exhibit  
7           31D. And then I'm going to ask for your  
8           direction on something, because I just got off  
9           the phone this morning with Mr. Weinstein, and  
10          you will see how it is relevant when you look at  
11          31D again, which is an addendum to further  
12          disclosures received from James Lockyer and  
13          Allan Libman.

14      A     Which book would that be in?

15      Q     He may not have it. You may have it under the  
16          blue book? That's it. And I see you have got  
17          something tabbed there, is it the handwritten  
18          note?

19           THE COMMISSIONER: They are the tabs that  
20          Mr. Lockyer put in.

21           THE WITNESS: I think he mis-tabbed one, I'm not  
22          sure.

23           MR. PROBER: But you have got the handwritten  
24          notes?

25           THE COMMISSIONER: Yes, second tab, I think it

1 is the second tab.

2 THE WITNESS: Okay. All right.

3 MR. CODE: Second last document in the book.

4 THE WITNESS: Yes, I have it, thank you.

5 BY MR. PROBER:

6 Q Do you know whose note this is?

7 A No.

8 Q There is a reference to not "a Provincial  
9 Crown," but towards the bottom of the page,  
10 subject to confirmation "with Provincial Crown."

11 A Yes.

12 Q Do you know who that is referring to?

13 A No.

14 Q What knowledge, if any, did you have about these  
15 negotiations with Lovelace's counsel?

16 A None at all.

17 MR. PROBER: That concludes my examination,  
18 Mr. Commissioner of Mr. Dangerfield. The issue  
19 that I'm concerned about is this. I spoke to  
20 Mr. Weinstein this morning -- I think probably  
21 the best thing is to discuss it with Mr. Code,  
22 but he gave me some information that may be  
23 relevant to this whole issue, but I don't know  
24 how significant it is in terms of your  
25 deliberations. That's my concern. If it is

1 significant, then Mr. Weinstein either should be  
2 here to testify about it, because I'm not going  
3 to be giving evidence as to what he said.

4 THE COMMISSIONER: Well, I would suggest that  
5 you discuss it with Mr. Code. It strikes me  
6 that it may not be that relevant --

7 MR. PROBER: It doesn't relate to Driskell,  
8 that's for sure.

9 THE COMMISSIONER: -- having regard to the  
10 narrow scope that I permitted in the examination  
11 of that case.

12 MR. PROBER: Right. I'm going to ask for a very  
13 short recess, it is earlier than our regular  
14 time, to give Mr. Dangerfield and me a chance to  
15 use the facilities, because I think I drank as  
16 much water as I asked questions. So thank you.

17 MR. CODE: Should I do my re-examination and  
18 then we can get Mr. Tapper --

19 THE COMMISSIONER: I think not.

20 THE CLERK: All rise. This Commission of  
21 Inquiry is in recess.

22 (Proceedings recessed at 11:00 o'clock and  
23 reconvened at 11:15 a.m.)

24 THE CLERK: All rise. This Commission of  
25 Inquiry is reopened.

1 MR. PROBER: Mr. Commissioner, I'm ready.

2 Somebody took you at your word yesterday.

3 MR. CODE: I will have to fill Mr. Prober in  
4 that there is a notorious case in Ontario called  
5 Felderhoff, where that's exactly what counsel

6 did, is he simply stood up and said usual

7 objection over and over again. It is the

8 subject of comment in the Court of Appeal.

9 BY MR. CODE:

10 Q I have got three matters to deal with in  
11 re-examination, Mr. Dangerfield. So we won't be  
12 long here.

13 First of all, in relation to these  
14 Ostrowski materials that Mr. Lockyer put to you,  
15 and that your own counsel, Mr. Prober, then  
16 questioned you about, and there is two exhibits,  
17 exhibit 31C and 31D, and I just have a couple of  
18 questions coming out of those, because you will  
19 recall these materials were subject to an  
20 undertaking.

21 First of all, in 31C which at tab 3 has got  
22 the transcript?

23 A Yes.

24 Q We were at page 1180, which is the conclusion of  
25 your examination-in-chief of Lovelace, and the

1 commencement of Mr. Brodsky's cross-examination.  
2 And Mr. Lockyer wanted to read you the  
3 cross-examination starting at line 20, and you  
4 wanted to take him back to your interjection at  
5 line 12. Do you recall that?

6 A Yes.

7 Q So I am at page 1180, the cross-examination  
8 starts in earnest at line 20, but you were  
9 pointing out to Mr. Lockyer the earlier  
10 interjection you had made at line 12, where you  
11 said,

12 "I'm sorry, Mr. Brodsky, there is one or  
13 two questions I had forgotten to put if you  
14 don't mind."

15 Do you remember that?

16 A I remember referring to it, yes.

17 Q And what I just wanted to clarify with you is  
18 that, as I understood you, this didn't come out  
19 fully because Mr. Lockyer kept wanting to move  
20 you on to the cross-examination. But as I  
21 understand it, what you were trying to get at is  
22 that you had wanted to interject and put on the  
23 record what you knew in relation to any kind of  
24 an arrangement with Lovelace. Was that the  
25 theory --

- 1 A That's what I thought, that's what -- Mr. Code,  
2 this is the first time I have seen this  
3 transcript in 20 years. Counsel from -- my  
4 counsel questioned me about the memorandum, the  
5 written one, and I now realize that I didn't  
6 know anything about this. I don't know what I  
7 was doing here.
- 8 Q So that was just a possible theory as to what  
9 you might have been trying to do?
- 10 A Although the cross-examination doesn't disclose  
11 it, I mean, the transcript doesn't disclose it,  
12 you see that the reply to that is,  
13 "Fine. I don't need them. Thank you very  
14 much. I'm sorry."
- 15 Q It looks like you and Brodsky had a bit of an  
16 aside --
- 17 A Yes.
- 18 Q -- and you decided not to deal with it?
- 19 A That's right.
- 20 Q And the second question I had, and this one is  
21 in exhibit 31D, the handwritten note that your  
22 counsel, Mr. Prober, just took you to at the  
23 back of 31D?
- 24 A Yes.
- 25 Q Again, when Mr. Lockyer questioned you on this,

1           you identified two names there, J. Hassbeek and  
2           Tony Cherniak?

3    A       Yes.

4    Q       As being Winnipeg Police Service officers?

5    A       Working out of vice. I think Tony Cherniak was  
6           either the inspector of vice or the senior  
7           sergeant.

8    Q       So those are both Winnipeg officers?

9    A       Yes, they are, yes.

10   Q       And my question to you is, did those officers  
11           have any involvement in your homicide against  
12           Ostrowski?

13   A       Haasbeek took the statement from Correia, he was  
14           part of that team, it was Haasbeek and I forget  
15           the other man's name, John something or other.  
16           And he also was the lead investigator into the  
17           raid on Ostrowski's house which uncovered the  
18           hidden safe, the load of drugs and the money. I  
19           don't know if he continued in the investigation  
20           all the way through, but he was certainly  
21           featured in those instances. And since he took  
22           the statement from Correia, I imagine he did  
23           take part in the rest of the investigation to  
24           some extent, but I can't remember exactly.

25   Q       So your recollection is that Haasbeek at least

1 appeared to have some involvement in the  
2 homicide?

3 A Yes. And he would be dealing with the drug  
4 aspects too, because these are drug people that  
5 he is talking to.

6 Q The drug aspects are what lead to the homicide,  
7 they are the motive for the homicide presumably?

8 A Yes.

9 Q So the note appears to indicate that Haasbeek  
10 and Cherniak have some knowledge about the  
11 matter under discussion. And my question to you  
12 is very simply, did those Winnipeg Police  
13 Service officers brief you in relation to what  
14 they had been discussing concerning "if Lovelace  
15 comes through will stay"?

16 A No, not that I recall. It is a long time ago.

17 Q All right. That was --

18 MR. LOCKYER: Can I just put in one piece of  
19 information that Mr. Dangerfield may or may not  
20 remember. I understand Mr. Haasbeek also,  
21 Mr. Dangerfield may remember this, had taken a  
22 statement from the deceased before he died of  
23 his injuries.

24 THE WITNESS: That's right. They sat with him  
25 and took --



1 MR. LOCKYER: In the hospital.

2 THE WITNESS: Yes, a very rambling sort of  
3 statement.

4 MR. LOCKYER: Thank you, sir.

5 BY MR. CODE:

6 Q Now, the second matter that I wanted to ask you  
7 about in re-examination, Mr. Dangerfield, and  
8 this comes out of Mr. Prober's  
9 cross-examination, is this piece of transcript,  
10 page 122. I don't know if we ever marked it,  
11 Mr. Prober?

12 MR. PROBER: Yes, we did.

13 THE COMMISSIONER: Yes, it is 33 I think.

14 MR. CODE: Thank you.

15 THE COMMISSIONER: Unfortunately, I actually put  
16 it in behind 52, but it is 33, behind tab 52.

17 BY MR. CODE:

18 Q Now, if I could ask the parties and the  
19 Commissioner to also have exhibit 20C handy,  
20 which is a book of -- supplementary book of  
21 documents that we used during Mr. Brodsky's  
22 examination. It is a small, slim, it is volume  
23 3 of the Brodsky documents, and it is exhibit  
24 20C. And it contains some additional  
25 transcripts, both body pack transcripts and

1 transcripts of the cross-examination.

2 If I could ask you a few additional  
3 questions about the exhibit that your counsel  
4 put in, Mr. Dangerfield, this excerpt from the  
5 cross-examination. You see at the top of page  
6 122, the transcript at exhibit 33 --

7 A Yes.

8 Q -- that the court asks,

9 "Mr. Brodsky, where are you?"

10 And he says,

11 "The last sentence on page 67."

12 A Yes.

13 Q Is that right?

14 A Yes.

15 Q And I take it what he is doing at this point is  
16 he is cross-examining Zanidean on the transcript  
17 of the body pack intercepts.

18 A I would imagine.

19 Q And in that context, Mr. Brodsky says in the  
20 excerpted line that we have at the very top of  
21 the page that,

22 "...almost everything you said is  
23 bullshit?"

24 A Yes.

25 Q And what Zanidean is saying is that, yes, a lot

1 of what he said on the wiretap intercept when he  
2 is conversing with Driskell was not true; is  
3 that correct?

4 A His answer is,

5 "Once it did that, yes."

6 I don't know quite what he means.

7 Q It is a little bit difficult because we don't  
8 have page 121 to understand the context, but you  
9 recall Brodsky cross-examined extensively on the  
10 body pack transcripts?

11 A I recall him doing it, yes. I don't recall the  
12 specifics.

13 Q And you will recall that a great deal of what  
14 Zanidean was putting to Driskell on the wiretap  
15 was deliberately false. He was setting up  
16 stories with Driskell in order to try to elicit  
17 responses out of Driskell?

18 A I don't remember that particularly. I haven't  
19 seen that material.

20 Q I will take you directly to the transcript then,  
21 Mr. Dangerfield. Do you have exhibit 20C in  
22 front of you?

23 A 56?

24 Q 57, please?

25 A 57, yes.

1 Q If you look at page 87, you see in the middle of  
2 page 87 it says "audio tape played." And then  
3 Mr. Brodsky asks the officer to stop and he asks  
4 some questions about what he has been playing to  
5 him. And the questions are as follows:

6 "Q When you were pulled over the first  
7 time, were you pulled over and questioned  
8 about the Swift Current fire?

9 A That was all a lie, I wasn't pulled  
10 over.

11 Q You just told that to Jim to make him  
12 believe that you were?

13 A I didn't want him to start getting  
14 suspicious of me.

15 Q So you made up a story?

16 A Right.

17 Q A total lie.

18 A Right.

19 Q A fabrication?

20 A Yes.

21 Q Same as you are doing now?

22 A Wrong."

23 Have I read that cross-examination accurately?

24 A Yes.

25 Q Does that help you remember the approach that

1 Brodsky was taking?

2 A Not really. I mean, I don't have the whole  
3 details of that event in my mind. I understand  
4 that he is pressuring him on some statement that  
5 he made to the police.

6 Q It is apparent on the face of the  
7 cross-examination that what he is doing is he  
8 said you lied on the body pack with Driskell, so  
9 therefore you are lying now, or something to  
10 that effect?

11 A Or something to that effect, yes.

12 Q And Zanidean concedes, yes, I lied on the body  
13 pack but I'm not lying now; is the substance of  
14 his evidence?

15 A Yes.

16 Q And Brodsky repeats this a number of times, he  
17 keeps playing portions of the tape and stopping  
18 it and pausing and asking questions, does he  
19 not, in the course of his cross-examination?

20 A Yes.

21 Q So, at Page 122 when we get this excerpt that's  
22 exhibit 33, and Brodsky again asks him at line  
23 10,

24 "Is everything you are saying in court  
25 today bullshit too?"

1 Do you see that?

2 A Yes.

3 Q He says,

4 "No, sir."

5 It is essentially the same question he asks back

6 on page 88, is it not, contrasting the body pack

7 with his sworn evidence in court?

8 A Where are you looking, at the answer?

9 Q I'm comparing the question?

10 A Yes, yes, the questions, yes.

11 Q He is putting essentially the same proposition

12 to him at page 122 as he put back at page 88?

13 A Yes.

14 Q Juxtaposing the out of court lies with the

15 suggestion that there are in court lies.

16 A Yes.

17 Q And Brodsky then says,

18 "Some of it."

19 And his answer is,

20 "None."

21 And Brodsky says,

22 "I see."

23 And then the answer is,

24 "Except for the stuff that I admitted to

25 lying about like the house and Swift

1                   Current and things like that."

2                   What was it that Zanidean had already admitted  
3                   to lying about?

4     A            I'm not sure.

5     Q            Well, if you look back at pages 87 to 88?

6     A            He admitted to lying about being pulled over by  
7                   the police.

8     Q            And questioned about the Swift Current fire?

9     A            And being questioned about Swift Current, yes.  
10                  That's what he said anyway.

11    Q            So do you read that answer there, at page 122,  
12                  line 16, as likely referring back to the lies on  
13                  the body pack as opposed to lies in court?

14    A            And other things I guess, because he says "and  
15                  things like that." I don't know what he is  
16                  referring to there.

17    Q            Did he ever admit that his cross-examination at  
18                  pages 42 to 46, that I took you to in your  
19                  evidence the other day, was all lies?

20    A            Which was that again? Remind me?

21    Q            Well, the cross-examination that I read to  
22                  you --

23    A            I cannot, I am sorry, Mr. Code, recall that. If  
24                  you could give me a reference, I will look at  
25                  it.

1 Q It is in your book.

2 A My book?

3 Q It is in your book, volume 2, tab 52?

4 A Okay.

5 Q Early in Brodsky's cross-examination, pages 42  
6 to 46, he cross-examines him about the benefits  
7 he is receiving through witness protection, and  
8 about the motivation for hiring a lawyer --

9 A Yes.

10 Q -- and matters that your counsel reviewed with  
11 you just this morning, about an hour ago. Did  
12 he ever admit that those answer were lies?

13 A I don't remember.

14 Q All right. I think the transcript will speak  
15 for itself.

16 A I am sorry, I think you asked me, I think the  
17 purport of your question before was, was there  
18 anything that I should have gone to Miller about  
19 because of these admissions or suggestions. And  
20 I think I replied, I thought that he had  
21 admitted to lying under oath at the trial. Is  
22 that what happened? I can't remember.

23 Q No, I'm just trying to deal with your counsel's  
24 suggestion about this exhibit 33, and I think we  
25 have covered it sufficiently.



1           The last area that I want to cover with  
2           you, Mr. Dangerfield, is a new document that we  
3           have just discovered, I should say Mr. Lockyer  
4           kindly brought to our attention. And if I could  
5           ask that Madam registrar provide it to you and  
6           to the Commissioner. I believe they have been  
7           distributed on the recess and everybody now has  
8           this document.

9           And I apologize, Mr. Dangerfield, for our  
10          overlooking this document. I think it is a  
11          document that's helpful to you. And I discussed  
12          it with Mr. Prober, and he is content that I  
13          deal with it in re-examination. And as I say,  
14          I'm grateful to Mr. Lockyer for drawing it to  
15          our attention, because we should have included  
16          it in our materials and I should have reviewed  
17          it with you on Monday when we started.

18          THE COMMISSIONER: Should this document be  
19          exhibit 34?

20          MR. CODE: Thank you.

21                   (EXHIBIT 34: Document dated March 19, 1993  
22                   to Dangerfield from Miller)

23          BY MR. CODE:

24          Q        Have you had a chance to read it,  
25          Mr. Dangerfield?

1 A Yes.

2 Q And you might want to have tab 67 open in your  
3 volume 3 of your book of -- I am sorry, tab 64  
4 open in your book of documents, which is the  
5 closest memo to this one, the one that it  
6 appears to follow. And at tab 64 there is a  
7 number of documents. We start with the Sid  
8 Lerner handwritten memo and some handwritten  
9 notes. And then at the back of tab 64 is a  
10 March 11 memo from Miller to you. And then this  
11 is eight days later, another memo from Miller to  
12 you dated March 19th. So I think that's the  
13 context in which the document should be  
14 situated.

15 A Let me go through that again, first the  
16 handwritten note?

17 Q Have you got tab 64?

18 A Yes.

19 Q There is the Lerner memo at the front, and then  
20 some handwritten notes. And at the back of tab  
21 64 there is a Miller to Dangerfield memo?

22 A Which I said I had couldn't recall the material,  
23 that memorandum.

24 Q Exactly, your handwritten note is responding by  
25 asking him to send you the material?

1 A Yes.

2 Q Now, this new document, exhibit 33, dated  
3 March 19th, could you first of all identify the  
4 handwriting on the bottom? There is two  
5 separate notes on the bottom in handwriting.

6 A The one I signed is mine. So --

7 Q So that's the one on the right hand with the two  
8 points and then it looks like George?

9 A Yes.

10 Q That's your handwriting?

11 A Yes.

12 Q And what about the note on the left, the  
13 March 24th note saying,  
14 "Bruce, can we discuss this tomorrow."

15 A I don't know. I don't think that's my  
16 handwriting.

17 Q It doesn't look like yours, is that fair?

18 A Yes.

19 Q All right. So your note is the one on the  
20 right-hand side?

21 A That's right.

22 Q The second point I wanted to ask you is if we  
23 look at the tab 64 memo that precedes this, the  
24 context is Miller has sent his memo to you  
25 asking you, inquiring of you whether the

1 Saskatchewan material was disclosed to Brodsky.  
2 And you have responded by saying that you don't  
3 recall the material, could he please provide it  
4 to you?

5 A Yes.

6 Q And we don't know the date on which your  
7 response was made, but we do know there is eight  
8 days before the second memo comes to you. And  
9 it is dealing with a slightly separate matter, a  
10 letter from Chief Klippenstein, or a  
11 conversation with Chief Klippenstein asking  
12 about a letter from Janie Duncan and how to  
13 respond to it; is that correct?

14 A Yes.

15 Q What it appears, as I read your note, number 1,  
16 is that you use this further memo on Miller as a  
17 somewhat related topic as an opportunity to  
18 respond to the material to be sent to Brodsky.  
19 Is that correct?

20 A Yes. I say in turn,

21 "We send the material to Brodsky with  
22 explanation."

23 Q And that note of yours, that we should send the  
24 material to Brodsky with an explanation, if we  
25 then flip forward to tab 67, fits in nicely with

1 Mr. Miller's further memo to Whitley, in which  
2 he says that you and he, that's Dangerfield and  
3 Miller, are both in agreement that the material  
4 should be disclosed. Is that correct?

5 A Yes, it does. But this is some time later, yes.

6 Q Well, you get -- the exhibit 33 memo comes to  
7 you on March 19th, and somewhere, we don't have  
8 the exact date, you respond to Miller saying  
9 that you should send the material to Brodsky.  
10 And then there is a March 24th note from  
11 somebody asking Miller if we can meet to discuss  
12 the matter --

13 A Yes.

14 Q -- tomorrow, that would be March 25th. And a  
15 couple of weeks later by April 13th, Miller has  
16 got the draft letters from you, it appears?

17 A Yes. Yes.

18 Q So the whole story appears to fit at that point;  
19 is that fair?

20 A Yes.

21 MR. CODE: Thank you very much. Those are my  
22 questions in re-examination. I think that  
23 completes your evidence, Mr. Dangerfield.

24 THE COMMISSIONER: Actually, I have never been,  
25 I haven't been in an inquiry before, but in my

1 former experience I could ask a question at the  
2 end and so I'm going to. And counsel can follow  
3 up on it.

4 I'm not going to ask you to follow through  
5 on these tabs, but tab 43 -- and I say this just  
6 for counsel, don't bother looking at it -- in  
7 that tab 43, written beside the request from  
8 Brodsky and it says "won't provide." And that  
9 refers back to this question from Brodsky in his  
10 April 25th letter at tab 33. And don't bother  
11 looking at it. But the question is,

12 "Do you have any objection to my reviewing  
13 the Winnipeg Police Department file either  
14 by myself, by the investigator I have  
15 assisting me, or jointly?"

16 And what, if anything, would you normally  
17 respond to a request like that, at that time or  
18 even today if you were still working?

19 THE WITNESS: I probably wouldn't -- I probably  
20 wouldn't immediately grant him access. I would  
21 seek the police opinion on it.

22 THE COMMISSIONER: Okay.

23 THE WITNESS: Today would be different, now with  
24 Stinchcombe it would all be in his hands anyway.

25 THE COMMISSIONER: I don't think anything turns

1 on it, I was just curious.

2 Do you have anything, Mr. Prober?

3 MR. PROBER: No.

4 MR. CODE: For the record, I was erroneously  
5 referring to this memo as exhibit 33, it is  
6 exhibit 34, I think.

7 THE COMMISSIONER: Yes, 34, that is right.

8 Thank you Mr. Dangerfield.

9 STUART JAMES WHITLEY, having first been  
10 duly sworn, testified as follows:

11 THE COMMISSIONER: Good morning.

12 BY MR. CODE:

13 Q Mr. Whitley, do you have the three volumes of  
14 documents that have been marked as exhibit 30  
15 now in these proceedings?

16 A Yes, I do.

17 Q At tab 3 of those documents, we find your  
18 statement or summary of interview to the  
19 inquiry; is that correct?

20 A Yes.

21 Q And after the interview was completed on  
22 July 7th, we circulated a draft to you; is that  
23 correct?

24 A That's correct.

25 Q And you reviewed it and made a few minor

1 corrections and revisions and returned it to us?

2 A Yes, I did.

3 Q And you were content with its accuracy?

4 A I am.

5 Q And at tab 4, we then find a further statement  
6 that you submitted to us through your counsel,  
7 dated July 29th; is that correct?

8 A Yes.

9 Q So we now have both of your statements?

10 A Yes.

11 Q Now, I will not review everything with you that  
12 is in your statement, I can leave much of it in  
13 writing, I hope. But I will try and highlight  
14 the important parts.

15 First of all, your background is covered at  
16 pages 1 to 2 of the memo; is that correct?

17 A I believe that's right, yes.

18 Q If I could just briefly summarize the most  
19 relevant parts of it, you began your career in  
20 1974 as Crown counsel here in Manitoba?

21 A Yes.

22 Q And you prosecuted criminal cases for almost 10  
23 years?

24 A Yes.

25 Q And in 1984, you were promoted to become the



1 director of the New Constitutional Law section  
2 of the Ministry?

3 A That's correct.

4 Q And that was as a result of the advent of the  
5 Charter that this new department was set up,  
6 essentially?

7 A Yes.

8 Q In 1987, you went back to the criminal division,  
9 promoted to the position of Director of  
10 Prosecutions?

11 A Yes.

12 Q And at that time there was only one director, so  
13 you were director for the entire province?

14 A Yes.

15 Q In that period when you were director, from 1987  
16 to 1989, in addition to your management  
17 responsibilities, you also prosecuted some major  
18 cases?

19 A I know we talked about this in our interview,  
20 and I believe that's correct. I can only  
21 remember one, though, in searching my memory.

22 Q And the one case was --

23 A It involved a hate crime against a Ku Klux Klan,  
24 or alleged members of the Ku Klux Klan.

25 Q You stated in your statement to us that the last

1 murder case you prosecuted was in the late  
2 1980s. Do you see that at the top of page 2?  
3 Is that correct?

4 A I believe the last murder case that I prosecuted  
5 was the Sophonow case. I'm quite sure that that  
6 is the case.

7 Q That was in the late 1980s?

8 A No, that would be in the early '80s, that would  
9 be actually before I became director of  
10 Constitutional Law. I can't recall doing any  
11 homicide cases after I moved into senior  
12 management.

13 Q So that's erroneous then at the top of page 2?

14 A It may be.

15 Q You believe your last murder prosecution was  
16 Sophonow?

17 A I think so, yes.

18 Q In 1989 you were appointed Assistant Deputy  
19 Minister in the Criminal Law Division?

20 A Yes.

21 Q And in terms of the management structure of the  
22 division, the directorships under you were split  
23 into three so that you had three directors  
24 reporting to you?

25 A Yes.

1 Q And at the time of the Driskell trial in 1991,  
2 that is obviously our primary focus, you were  
3 the ADM and remained so for the following four  
4 years until the spring of 1995?

5 A That's right.

6 Q All right. I want to ask you a number of  
7 questions about the lead prosecutor in the case,  
8 Mr. Dangerfield. He held the position of  
9 general counsel in the Criminal Law Division at  
10 the time of the Driskell case?

11 A That's my belief, yes. But I have read  
12 somewhere in some of the documents that he was  
13 appointed senior general counsel and he may have  
14 been that at the time. I'm not entirely sure.

15 Q All right. The position of general counsel or  
16 senior general counsel was the most, the highest  
17 non-management rank that one could attain as a  
18 Crown prosecutor in the Criminal Law Division?

19 A That's right.

20 Q It was a small, elite group. The general  
21 counsel group was a group of four selected by a  
22 panel?

23 A Yes, that's right. I thought it was three at  
24 the time, but it might have been four.

25 Q We have been told Montgomery, Dangerfield,

1 Lawlor and Saull were the four at the time. Is  
2 that consistent with your recollection?

3 A No, my recollection is that Saull came later  
4 than that, but I can't be certain.

5 Q At some point he became a general counsel?

6 A Yes.

7 Q Dangerfield was generally acknowledged to be the  
8 leading counsel in the office and he conducted  
9 most of the serious prosecutions?

10 A That's right, without question.

11 Q Could you tell us something generally about his  
12 style, his habits, his practices as a  
13 prosecutor? What kind of a prosecutor was he,  
14 known to you and known to the department, to be?

15 A I considered George to be a first rate  
16 prosecutor. When I started with the department  
17 in 1973 as an articling student, we would often  
18 do tasks that were assigned to us by senior  
19 counsel. And I recall that one of my first  
20 cases with George was a case called Jobling, and  
21 I remember it vividly to this day. Because  
22 halfway through the trial for manslaughter of a  
23 man who was alleged to have killed his baby  
24 daughter, George withdrew the case because he  
25 felt that the evidence didn't come up, would not

1           come up to proof. He had serious doubts about  
2           the forensic evidence. There was quite a bit of  
3           consternation I remember at the time about that  
4           approach being taken, that this should go to the  
5           jury, let them decide. But he was adamant.

6           That impressed me as a very young Crown Attorney  
7           and --

8       Q     He had a reputation for fairness?

9       A     He had a very strong reputation for fairness.

10      Q     What about his manner of preparation, was he a  
11           thorough, meticulous Crown who prepared  
12           assiduously or was he a bit light on  
13           preparation?

14      A     My impression, and this was based on the cases  
15           that I worked with him on, he prepared very  
16           well, but he prepared in a way that was  
17           different than my style, for example. I tend to  
18           worry about everything that can go wrong, and  
19           George committed a huge amount of material to  
20           memory, and would make notes in very tight  
21           handwriting about the key things that he needed  
22           to work with. So I would say that he put a fair  
23           bit into preparation of his cases.

24      Q     What about appellate work, did he do appellate  
25           work?

1 A Yes, he did.

2 Q Was he knowledgeable in the law?

3 A Extremely, he and I actually shared a turn, we  
4 tended to rotate through the appellate courts,  
5 and I spent I think a year or two years doing  
6 solely appellate work. He was lead counsel in  
7 appellate work, and he was very knowledgeable in  
8 the law, a very effective appellate counsel.

9 Q What about his style in terms of independence,  
10 was he the kind of counsel who liked to take a  
11 very firm grip on his cases, or did he like to  
12 work in teams with a lot of collaboration and  
13 group decision making? What was his style in  
14 that area in terms of the way he liked to work?

15 A He was a very independent lawyer, very  
16 independent minded lawyer, but he liked to have  
17 junior counsel with him. He made it very clear,  
18 and this is certainly the situation when I  
19 worked with him, that we understood our roles,  
20 that he was lead counsel, he made the final  
21 decisions, junior counsel took very much a  
22 subordinate role, which doesn't mean by any  
23 stretch that their views weren't taken into  
24 account or they weren't allowed participation in  
25 decisions that had to be made, but at the end of

1 the day, George called the case.

2 Q Tell us about his personality?

3 A He had a very strong personality, a very  
4 determined way about him. He tended to be a  
5 little impatient. I got along very well with  
6 him. We were never social friends, but I  
7 consider him a friend, I consider him -- I  
8 considered him at one time in the department as  
9 a mentor to me to learn the business.

10 Q So, again, in terms of his personality, you  
11 would say he was on the strong and forceful side  
12 as opposed to the timid and retiring side?

13 A I think that's a fair thing to say about George,  
14 yes.

15 Q Were some people a little bit fearful of him?

16 A I think junior counsel were a little intimidated  
17 by him, yes. But as colleagues, George has a  
18 very good sense of humour, he is a very funny  
19 man, and he takes as good as he gives on that.  
20 So, at least at our level, the senior people in  
21 the department, he wasn't an intimidating man,  
22 but I can see how junior people in the  
23 department would consider him a figure to beware  
24 of.

25 Q Who did he report to?

- 1 A In the organization, he reported to me.
- 2 Q And did you have the time to manage a full-time  
3 prosecutor?
- 4 A No. No, I didn't. But with somebody of  
5 George's experience and stature, it wasn't a  
6 question of hands-on management. He knew what  
7 his business was, he knew what to do.
- 8 Q You weren't going to interfere in his cases. He  
9 wasn't that kind of a junior counsel who he  
10 needed you to be second guessing his decisions,  
11 I take it?
- 12 A I can't recall ever doing that, but I think that  
13 if I felt it was required to do it, I would do  
14 it.
- 15 Q What I'm getting at more than that kind of  
16 obtrusive managing is the subtler forms of  
17 managing. Would you meet with him and confer  
18 with him and discuss his cases and quietly have  
19 your input --
- 20 A No.
- 21 Q -- in a collaborative way?
- 22 A No.
- 23 Q You did not do that?
- 24 A That was not a routine thing. We would chat  
25 from time to time about things, but, no.



1 Q So is it fair to say that nobody was managing  
2 him in any way in relation to his conduct of his  
3 major cases?

4 A I think that's probably fair to say, yeah.

5 Q Did you ever give him express instructions that  
6 he was to report to Bruce Miller on this  
7 specific case, the Driskell case?

8 A I don't recall that, but from time to time --  
9 no, I don't recall that in relation to this  
10 case -- but I would often say to him, I want you  
11 to work with Bruce or Les or Mike, I'm talking  
12 about Les Kee and Mike Watson, the other  
13 directors, or Jack, because he and Jack  
14 Montgomery, the other senior counsel, had a good  
15 working relationship. So I would often say to  
16 him, or not often, but I would say to him, I  
17 want you to work with so and so and work through  
18 these issues. I wouldn't direct him to do that.  
19 That's not the kind of relationship that we had  
20 in the department at that level anyway.

21 Q Let's talk for a moment about his relationship  
22 with Bruce Miller. Was he senior or junior to  
23 Bruce Miller?

24 A He was senior by far in terms of experience.  
25 Yes.

1 Q And I'm speaking of seniority simply in terms at  
2 this stage of years of service?

3 A Yes.

4 Q He had many more years of service than Bruce  
5 Miller?

6 A Oh, yes. He had many more than me. Bruce and I  
7 were in the same class.

8 Q He was the most experienced senior prosecutor in  
9 the division?

10 A Absolutely.

11 Q And aside from mere tenure, years of service,  
12 was he more experienced than Miller in  
13 prosecuting major cases?

14 A By far. I don't think Bruce did many major  
15 cases.

16 Q And Miller by this time, 1991, was he a pure  
17 manager or was he still going to court?

18 A No, he was purely management function.

19 Q What was Dangerfield's relationship like with  
20 Bruce Miller?

21 A I thought it was a cordial relationship. We  
22 were all working in the same part of the floor,  
23 the fifth floor or the sixth floor, I'm not  
24 sure. But in relation to one another, our  
25 offices were adjacent, we would chat from time

1 to time at the end of the day. I don't think it  
2 was overly warm, I don't think we were social  
3 friends, but cordial.

4 Q In our interview with you at the top of page 3,  
5 tab 3, you said that they were not close. What  
6 did you mean by that?

7 A Well, what I just said, they didn't see each  
8 other after work, they didn't fraternize, but  
9 there was a good working relationship.

10 Q Did Dangerfield respect Miller in terms of  
11 decision making in criminal prosecutions?

12 A I think so. He never expressed any disdain for  
13 Bruce. I don't think George was particularly  
14 enamored of a consensus building kind of  
15 approach to problem solving, but he accepted it  
16 because that was what I wanted.

17 Q His own personal style was not a collaborative,  
18 team decision-making kind of approach. He was  
19 much too independent for that, I take it?

20 A That's probably overstating it. I would bring  
21 George into problem solving discussions in which  
22 he accepted the consensus that we arrived at.  
23 It wasn't as if he would take ornery, out of  
24 left field positions and go off on his own. He  
25 was perfectly willing to accept -- I can

1 remember a case involving a citation for  
2 contempt for one of our leading counsel here,  
3 who I don't think is present this morning. And  
4 he was being cited for contempt for double  
5 booking, and it was brought to my attention, and  
6 the consensus initially seemed to be it is  
7 between the court and counsel.

8 In my view, double booking, although it  
9 wasn't a very happy practice, it assisted us in  
10 managing a backlog problem that we had  
11 constantly in those days. So I said that we  
12 need to appear as amicus and speak to the policy  
13 side of it, that mitigates against the finding  
14 of contempt. This was something that benefited  
15 us. And George willingly took that forward and  
16 argued that position, after we had debated it  
17 among ourselves. That just jumps out at me as  
18 an example.

19 Q You said, and I'm not quoting you, but you said  
20 he was not overly enamored of the collaborative  
21 approach?

22 A No, he is an independent-minded man.

23 Q But you were trying to encourage a more  
24 collaborative approach, I take it --

25 A Right across the department.

1 Q -- in terms of your own personal style?

2 A Right across the whole department, that's the  
3 message I was trying to send in those years,  
4 yes.

5 Q Turning to a different topic, Mr. Whitley, and I  
6 know this is a topic you know very well, and we  
7 will try not to spend too much time on it,  
8 because I know that you will be fond of talking  
9 about policy issues. I want to talk a little  
10 bit about disclosure practices and what happened  
11 in the post-Marshall pre-Stinchcombe period  
12 there. There was a two-year period from -- the  
13 Marshall Inquiry report comes down in 1989; is  
14 that correct?

15 A Yes, that's my recollection.

16 Q Right when you were starting up as ADM?

17 A Yes.

18 Q It must have been one of your very first  
19 challenges on the job was to deal with the  
20 recommendations of the Marshall Commission that  
21 we legislate a codified Criminal Code disclosure  
22 regime across the country. Do you remember  
23 that?

24 A Yes.

25 Q And there was basically a two-year window until

1 the Supreme Court of Canada gave up on the  
2 legislative process and came down with  
3 Stinchcombe in late 1991; is that correct?

4 A Yes.

5 Q And the recommendations of the Marshall  
6 Commission were given great weight in Attorney  
7 General departments across the country because  
8 it was a Federally appointed inquiry headed up  
9 by three very senior judges; is that correct?

10 A Yes.

11 Q From three separate provinces?

12 A Yes.

13 Q And the conclusion of the report, that Marshall  
14 had been wrongly convicted as a result of the  
15 Crown and the police withholding relevant  
16 material, was a conclusion that sent, is it fair  
17 to say it sent shock waves through the  
18 prosecution bar?

19 A I think that's fair, yes.

20 Q It is something that we never thought could  
21 happen until that report came along?

22 A It is hard to go back and think about the  
23 mindset in those days, but the way you've  
24 described it is pretty accurate. It was a shot  
25 across the bows, we needed to get our act

1 together.

2 Q And the response, in which I'm sure you were  
3 actively involved, was that various committees  
4 were set up in Justice Ministries across the  
5 country and at the Federal/Provincial level to  
6 try to respond to Marshall; is that correct?

7 A Yes, that's correct.

8 Q And that would have been a leading role for you  
9 to be involved in those meetings and to try to  
10 develop a response to the Marshall report?

11 A That's was some of the work that I was doing at  
12 the national level, yes.

13 Q You would be meeting nationally with your  
14 colleagues across the country and you would also  
15 be meeting locally within your own department  
16 trying to develop a position?

17 A Yes.

18 Q In other words, it was a hot topic for that two  
19 years when the Marshall recommendations were  
20 still on the legislative agenda?

21 A Um-hum, yes.

22 Q Is that correct?

23 A Yes.

24 Q Tell me what was the general culture in your  
25 department -- and the Driskell prosecution of

1 course takes place smack in the middle of that  
2 period in June of 1991 -- what was the culture  
3 in your department at that time in relation to  
4 disclosure practices and policies?

5 A I can't tell you. I can't sit here and tell you  
6 that I had an easy time bringing in my initial  
7 disclosure policy of 1990. And it wasn't  
8 because of any bloody-mindedness on the part of  
9 prosecutors, as I recall, but it was -- although  
10 some might call it that -- it had to do with the  
11 belief, the mythology that somehow we were  
12 responsible for looking after witnesses, and  
13 protecting their interests, and protecting  
14 victims, and that sort of thing.

15 When I introduced the 1990 version, that  
16 was the pre-Stinchcombe version of our  
17 disclosure policy, which was pretty well  
18 mandating a full disclosure to defence, I recall  
19 having a meeting in the big boardroom in one of  
20 the upper floors of the Woodsworth Building that  
21 was fairly unpleasant for me. And one of the  
22 ringing commentaries that stayed with me all of  
23 these years is, "if it ain't broke don't fix  
24 it," in spite of what had happened in Marshall.  
25 And I, although I'm inclined to build consensus



1           where I can, and perhaps it was my inexperience  
2           at the time, I'm not sure, but I cut off debate  
3           by saying this is not open for discussion any  
4           longer, this is what is going to happen.

5       Q     Within that culture that you've just described,  
6           of some initial resistance, but then your firmly  
7           instituting the policy that we are going to come  
8           to in a moment, what was Dangerfield's general  
9           approach to disclosure, what was his reputation?  
10          I'm sure you will recall that in the  
11          pre-Stinchcombe period there was tremendous  
12          variation across the board within a Crown's  
13          office as to what the approach of individual  
14          Crowns was to disclosure.  What was  
15          Dangerfield's?

16       A     I didn't get any resistance from George at all  
17           on this issue.  My impression was that he had a  
18           good working relationship with most of the  
19           senior counsel in the city.  This is a small  
20           bar, we all know each other fairly well, we know  
21           each other's weaknesses and strengths, and all  
22           of the gossip that goes on around and about  
23           reputations.  My impression was that he had a  
24           good relationship, and if people needed  
25           something they could call him and ask him.  I

1 certainly didn't get any resistance from him.

2 Q All right. I want to take you then to the  
3 policies and practices that were developed in  
4 the immediate pre-trial period leading up to  
5 Driskell, and the policy that you developed  
6 which is set out nicely in your statement at  
7 pages 3 to 4. So I will simply highlight this,  
8 because it is fairly well covered in writing  
9 there. And I want to deal first of all with  
10 what you got from the police and then what you  
11 gave to the defence, and again pre-Stinchcombe.

12 What was the routine practice in terms of  
13 what the police gave to the Crown, what was  
14 available to you as prosecutor?

15 A For most of those years we would get what were  
16 called the pinks, which would be the pink,  
17 obviously, pink copy of the police report. I  
18 think there were four different colours of  
19 copies that were prepared. We got the pinks.

20 In those days the police made it very, very  
21 clear -- we all sort of came up through the  
22 Crown office at the Public Safety Building, so  
23 we were right in the police station -- and the  
24 police made it very clear, this is our property  
25 and you have it for the purposes of prosecution,

1 but once the prosecution is over, it is back to  
2 us.

3 Q The Crown would never keep the file after the  
4 prosecution, it would be returned to the  
5 Winnipeg Police Service, for example?

6 A Yes, but for practical purposes, copies were  
7 made quite often, so we ended up with a Crown  
8 file that, in fact, did have some or all of the  
9 police report.

10 Q What about notebooks? What was the practice  
11 with notebooks in that period?

12 A For the longest time, until judicial prodding  
13 took over, police notebooks were considered not  
14 only the property of the police but the property  
15 of the officer giving the testimony. So  
16 routinely we weren't given access to that.

17 Q All right.

18 A There had to be an application in court, as I  
19 remember, and there had to be a certain basis  
20 upon which -- it was a self-defeating kind of  
21 application, because how could defence counsel  
22 know what was in them to make the application in  
23 the first place? So it was not very long before  
24 the courts started pushing us here in Manitoba  
25 along the lines of, let's see what is in there.

1 Q Assuming you routinely got the police reports  
2 and routinely didn't get the notebooks without  
3 some request or order of the kind you have  
4 described, what was the practice as to what was  
5 to go into police reports? What was your  
6 experience in Manitoba as to what you got in the  
7 police reports?

8 A I'm not entirely sure I follow that, but if you  
9 are asking what I think you are asking, we would  
10 expect to get all of the details of the  
11 investigation that were relevant to the charges  
12 that we were pursuing; otherwise, how could we  
13 do our jobs?

14 Q That's exactly what I'm asking. It was a very  
15 simple question, that's probably why it wasn't  
16 clear.

17 A Sorry, I was looking for something much more  
18 sophisticated.

19 Q I wasn't asking for anything difficult. It is  
20 common sense it seems.

21 Turning then to the defence side, what was  
22 it that you gave to the defence, again in this  
23 pre-Stinchcombe period, and in particular, if  
24 you could assist us with the policy that you  
25 developed in October of 1990 that's summarized

1 in the middle of page 4 of your statement?

2 A You are referring to the formal written policy  
3 in October of 1990?

4 Q Yes. And I'm talking generally in all cases,  
5 not direct indictment cases. If we could  
6 separate out direct indictment cases, I will  
7 deal with them in a minute. I'm just trying to  
8 establish the general culture and practice as to  
9 what was routinely provided in routine cases  
10 under your October 1990 policy that was in place  
11 at the time of the Driskell trial?

12 A We would ensure that the police summary of the  
13 case, which always accompanied the police  
14 report, was in the hands of counsel.

15 Q A synopsis, as we call it?

16 A Yes. The statements of the accused, statements  
17 and can-says of other witnesses -- that was the  
18 point, I should say, of greatest resistance, the  
19 statements of witnesses, because it was felt  
20 that witnesses would be exposed in advance to  
21 counsel seeking them out and all that sort of  
22 thing. Criminal records, criminal records of  
23 witnesses, if the records related to crimes of  
24 dishonesty, as I recall.

25 Q What about the police reports and the police

1 notebooks, what did your policy say on that?

2 A Actually, I haven't looked at it for some time,  
3 so I just don't recall, but I read that I  
4 commented here that it didn't provide for the  
5 disclosure of police reports or notebooks.

6 Q And that again was consistent with this idea  
7 that you only had them by the grace of God for a  
8 limited period of time and --

9 A We were bailees of the police report.

10 Q All right. Turning then to direct indictment  
11 cases; what was the practice? Was it the same  
12 or was it different, again in this  
13 pre-Stinchcombe 1991 time period?

14 A They were relatively rare. And it has always  
15 been my feeling that if we are going to take  
16 away a preliminary inquiry, then counsel have to  
17 have much more than we would ordinarily supply.  
18 And George was involved in probably most of  
19 those direct indictment cases, if not all of  
20 them. Jack may have done one, Jack Montgomery  
21 may have done one or two of them. But I'm quite  
22 sure that he was of the same mind, that there  
23 ought to be more disclosure rather than less.

24 Q And in fact, what we see in this case, and I  
25 won't take you to it, but the transcript of the

1 motion to expedite before Chief Justice Hewak at  
2 tab 27, Chief Justice Hewak appears to take the  
3 bill that there is a right or an entitlement to  
4 very full disclosure. Was that consistent with  
5 your understanding?

6 A Yes.

7 Q All right. I want to turn to the topic of  
8 witness protection next. Who was responsible  
9 within the overall justice system, as between  
10 the police force and the Crowns, for financing  
11 witness protection arrangements? In other  
12 words, who held the budget?

13 A Ultimately, it would be the Justice Department.

14 Q And within the Justice Department, if you could  
15 explain the process of how witness protection  
16 issues would come up? Who is responsible for  
17 initially raising witness protection issues and  
18 then who was responsible for authorizing the  
19 expenditures?

20 A In the course of preparing for a prosecution,  
21 the practice would be that the police would  
22 approach the prosecutor and indicate that, for  
23 evidentiary reasons, we will need to rely on  
24 Mr. X. However, Mr. X is very fearful of the  
25 accused, and we have a reasonable or rational

1 basis to believe that, therefore, we need to  
2 protect this witness from any harm that may come  
3 to him.

4 The witness protection program at large was  
5 managed by the RCMP because of their federal  
6 nature and because of their ability to put  
7 people into different identities and move them  
8 around the country with considerable ease. But  
9 initially it would be raised with the  
10 prosecuting attorney, the person who had conduct  
11 of the case. That person was obliged to raise  
12 that issue with his or her Director of  
13 Prosecutions. Ultimately, it would come to the  
14 ADM, which would have been me. I would have  
15 been responsible for managing the budget, and I  
16 would want to be satisfied that there was a  
17 sound basis for the expenditure of monies for  
18 the protection of witnesses.

19 Q And the Deputy might also ultimately become  
20 involved, depending on the amount of money  
21 involved?

22 A The Deputy would be involved no matter what. I  
23 mean, the Deputy would be involved, principally  
24 because he had to sign off on the -- he had the  
25 signing authority for that kind of money.



- 1 Q In terms of the statutory framework and the  
2 Deputy's responsibilities, if you look at volume  
3 3 of your materials there is a helpful little  
4 memo at tab 58, the very first tab in volume 3,  
5 exhibit 30C, tab 58. You see at that tab  
6 initially there is two pages of handwritten  
7 notes of Mr. Miller's, and this is all about  
8 requisitioning the ultimate \$20,000 cheque?
- 9 A I am sorry, I have tab 58, but I have some  
10 handwritten notes here.
- 11 Q That's exactly what I just said, it starts with  
12 two pages of handwritten notes.
- 13 A Oh, I see. Okay.
- 14 Q And behind those handwritten notes there is an  
15 October 21st memo from Arnason?
- 16 A Yes.
- 17 Q And you see he sets out the procedure for  
18 requisitioning this \$20,000 cheque, and at  
19 points number 2 and 6 on his list he says that  
20 section 15 of the Attorney General's Act  
21 requires that deputies sign off their approval  
22 for the expenditure of funds?
- 23 A Yes.
- 24 Q That is consistent with what you just told us?
- 25 A Yes, it is.

1 Q And similarly, Mr. Lawlor's memo on the  
2 preferred indictment at tab 7, where he raises  
3 the witness protection issues -- do you have tab  
4 7 in volume 1?

5 A I do.

6 Q And the witness protection issue is coming up in  
7 the manner you just told us about through the  
8 line prosecutor to you. And at the end of the  
9 memo, his last line is,

10 "...the witness protection must be  
11 discussed with the Deputy Minister...",  
12 do you see that?

13 A Yes.

14 Q So, again I take it the process that we see in  
15 that memo is consistent with what you have just  
16 described?

17 A Yes, it is.

18 Q And finally if you look at tab 14 -- I am sorry,  
19 the two more tabs I want to take you to -- tab  
20 14 when Mr. Miller is sending you his very first  
21 memo on this, he suggests a discussion with the  
22 Deputy at some point about the witness  
23 protection issues, again consistent with what  
24 you have just told us?

25 A Yes.

1 Q And the last reference there, Mr. Whitley, is in  
2 volume, the end of volume 2, tab 57, the very  
3 last tab in volume 2, when the \$20,000 payment  
4 first appears to have been agreed to in this  
5 June 21st letter from Miller, he stamps on it  
6 that it is subject to approval by the Deputy  
7 Minister. Do you see that?

8 A Yes.

9 Q And then the draft attached, we see the notes  
10 going back and forth between you and the Deputy  
11 and between Mr. Miller and you, obtaining the  
12 Deputy's approval?

13 A Yes.

14 Q Which again is consistent with the practice that  
15 you have just told us about?

16 A Yes, it is.

17 Q You also advised us in the interview, and I'm  
18 back at tab 3, page 5, Mr. Whitley, that  
19 completely aside from the expenditures of money,  
20 that the placing of a witness in a major case  
21 into the formal RCM program was an exceptional  
22 event, is the way you described it at page 5?

23 A Yes, it is, or was.

24 Q And Mr. Dangerfield, when he came and testified,  
25 said that the Driskell case in fact was the

1 first time he had ever done it, put a witness  
2 into the RCMP program. So this wasn't a normal  
3 event in the Ministry, I take it?

4 A No.

5 Q And that a cash payment, and this is again at  
6 page 5 of your statement to us at tab 3, you  
7 describe a straight cash payment to a witness in  
8 lieu of formal RCMP witness protection was even  
9 more unusual?

10 A Yes.

11 Q And for those reasons, completely aside from the  
12 expenditure of monies, these were matters that  
13 you would expect to be brought to your  
14 attention?

15 A Yes.

16 Q And finally on this general subject of witness  
17 protection, just a couple of questions about  
18 disclosure, Mr. Whitley. The expenditures of  
19 monies on witnesses to protect them, to relocate  
20 them, to get them started in a new jurisdiction,  
21 as I understand your view of the matter, were  
22 all discloseable facts?

23 A Yes.

24 Q And that is whether you are inside the RCMP  
25 program or outside of it, the payment of monies

1 was a discloseable fact?

2 A Absolutely. There may have been issues which  
3 were not discloseable, obviously, but the fact  
4 of the payments, absolutely.

5 Q I think it is common practice, and indeed common  
6 sense, that what is not discloseable is the  
7 location. Where the witness is, right now and  
8 in the future, would be a privileged fact that  
9 would never be disclosed; is that fair?

10 A Yes.

11 Q And the identity of the witness, if there is  
12 going to be a change of identity as there often  
13 is, would also not be a discloseable fact, that  
14 you would claim privilege over that?

15 A That's right.

16 Q Was there any policy or system put in place to  
17 ensure that witness protection arrangements were  
18 disclosed to the defence, consistent with the  
19 logic or reasoning that you have just set out  
20 for us?

21 A I don't think there was a formal policy in  
22 place. This was not a usual kind of situation,  
23 or routine kind of situation to occur. But as  
24 long as I can remember, as a Crown Attorney, if  
25 you made some kind of an arrangement with a

1 witness, and I have done this myself, where you  
2 have dropped a charge, or you have agreed to a  
3 transfer from one prison to another, or given  
4 money to allow somebody to get out of town, that  
5 sort of thing, it is the very first thing you  
6 lead from the witness, the absolute very first  
7 thing.

8 Q So there was a tradition, if you will, or a  
9 practice within the department that you brought  
10 this out yourself in chief, whether you  
11 disclosed it or not through disclosure  
12 processes?

13 A Absolutely. Otherwise, the evidence that's  
14 called subsequently is in complete danger of  
15 being undermined.

16 Q Another aspect of it that I want to get your  
17 views on is the phenomenon that we see in this  
18 case, ultimately, is that although the initial  
19 witness protection request comes up through the  
20 line prosecutors, and we see Mr. Lawlor having  
21 some involvement for the first two or three  
22 months during November, December, January say,  
23 and perhaps a little bit into February, that  
24 ultimately Mr. Miller appears to take over the  
25 primary role in negotiating the witness

1 protection package, if I can call it that. But  
2 we have different prosecutors, Dangerfield and  
3 Lawlor doing the line prosecuting and making  
4 disclosure decisions.

5 What was the practice and policy in terms  
6 of this situation where we have got two  
7 different aspects of the Crown involved in the  
8 case in this way?

9 A Well, as I said, it wasn't exactly a daily  
10 occurrence that this sort of situation arose.  
11 But, in reflecting on it, as I have for some  
12 time, it seemed like, seemed like it was a  
13 sensible thing to do, so that Dangerfield  
14 wouldn't be in the position of haggling with a  
15 witness because, as I read the documents now, it  
16 looked like that very much could fairly describe  
17 what was going on. But my expectation would  
18 have been that Bruce would have kept George  
19 advised as to what was happening with his  
20 witness. It would make sense for that to be  
21 handled by somebody else.

22 Q And don't mistake my question, I think there are  
23 many sensible policy reasons for having somebody  
24 separate do the negotiating, as you have  
25 suggested. But assuming that's a wise policy,

1 to have somebody separate doing the negotiating,  
2 you have set up a problem that you have got a  
3 discloseable fact and the prosecutor who is  
4 doing the disclosing isn't the one who is doing  
5 the haggling. So was there any system in place  
6 to overcome the separation of roles that we  
7 have -- that we have set up with this kind of a  
8 system?

9 A There was no policy in place, if that's sort of  
10 your direct question. There was no policy in  
11 place. You would expect that two senior  
12 prosecutors managing the file would talk to one  
13 another, particularly when their offices were in  
14 ear shot of one another.

15 Q So it is simply an expectation, based on the  
16 common sense logic that you have put to us, that  
17 this was a discloseable fact and the one person  
18 negotiating would keep the other person  
19 prosecuting informed?

20 A Right. We all understood that any kind of  
21 arrangement made with a witness is an upfront  
22 discloseable fact that is first out of the  
23 mouths of the witness.

24 Q Turning to the subject of immunity agreements,  
25 Mr. Whitley, which you had adverted to briefly



1 in one of your answers, but I want to separate  
2 the subject of witness protection from the  
3 subject of immunity. And perhaps I should ask  
4 you that at the start. Are these two  
5 conceptually distinct issues, protecting a  
6 witness who is in fear and providing immunity to  
7 a witness who requests assistance in relation to  
8 matters in which they are in jeopardy?

9 A Well, yes, they are separate issues in a way,  
10 but there is a connection in another way, in  
11 that you are treating a witness differently than  
12 in the ordinary course. Providing protection to  
13 a witness is a bit of a volatile issue, as you  
14 well probably understand, because a jury can't  
15 hear that, or shouldn't hear, at least from the  
16 Crown, that a witness is fearful for his or her  
17 life from the accused. That's an incendiary  
18 kind of thing to lead in evidence. So we have  
19 to be very careful about how we manage that kind  
20 of information. That's -- you can't lead that  
21 kind of information as you would with  
22 arrangements for immunity, for example.

23 Q So you are saying an immunity agreement with a  
24 witness is an easier matter to bring up than a  
25 protection agreement with a witness?

1 A Yes. That doesn't change the quality of the  
2 information in terms of what defence counsel  
3 chooses to do with it, of course.

4 Q Bringing out a protection agreement in chief  
5 might prejudice the accused. Bringing out an  
6 immunity agreement in chief is likely to help  
7 the accused?

8 A Yes.

9 Q So I take it that you are agreeing with me that  
10 they are conceptually distinct?

11 A I am.

12 Q Requests for immunity by witnesses, I take it,  
13 is not something that is unheard of in the  
14 criminal justice system in this country or this  
15 province?

16 A No. Sometimes it is just not possible to solve  
17 a crime without cooperation of unsavory people.

18 Q And unsavory people often seek these kind of  
19 benefits as a quid pro quo for their  
20 cooperation?

21 A Yes, unfortunately, that's true.

22 Q And when that happened, again, could you tell us  
23 who would have -- I want you to discuss process  
24 with us again -- who would have the initiating  
25 or primary responsibility of evaluating such a

1 request and raising such a request for decision?  
2 A It would come up in much the same way as I  
3 described earlier. Police would approach the  
4 prosecuting attorney, who would be advised that  
5 Mr. so and so will testify, but he has charges  
6 against him, and he feels that if he is a rat  
7 and goes to prison, they will take it out on  
8 him. And the police will say, well, look, here  
9 we are dealing with a murderer on the one hand  
10 but we are only dealing with shoplifting on the  
11 other. On balance, we should forget about the  
12 small stuff. That kind of conversation would go  
13 on with the prosecuting attorney. The  
14 prosecuting attorney would make some kind of an  
15 assessment about the need for reliance on this  
16 kind of evidence.

17 And I think it is fair to say back then,  
18 and I'm going on my own experience as well, we  
19 would often look at that kind of evidence and  
20 say, yeah, if we can corroborate this, if we can  
21 use this in some way that will be materially  
22 shored up by other evidence, then we should use  
23 it. I think we have all learned and moved on  
24 since that position. But the expectation was  
25 that no Crown Attorney was empowered to make an

1 immunity agreement unless it was brought to the  
2 Director of Prosecutions.

3 Q All right. I will come in a minute to moving it  
4 up the chain of command for approval, but just  
5 pausing on this initial stage where you say you  
6 need an initial evaluation or assessment from  
7 the line prosecutor, is it fair to say the first  
8 step in any immunity agreement is you need what  
9 really is a cost benefit analysis?

10 A Yes, absolutely.

11 Q You have to know how important is this witness  
12 to our case, and how much is it going to cost us  
13 in terms of the witness' credibility by making a  
14 deal with him?

15 A There is another element to it as well and  
16 that's, you know, is the damage that's done by  
17 dropping charges, or creating some kind of side  
18 deal with an unsavory character, greater than  
19 the benefit that we get from employing such  
20 people? So there is kind of a large policy  
21 issue that needed to be weighed as well, which  
22 is why we wanted a director to be involved in  
23 that assessment.

24 Q You are talking about larger issue of damage to  
25 the confidence in the justice system?

1 A Yes.

2 Q I was talking about the narrower issue of damage  
3 to the credibility of the witness because the  
4 testimony appears to have been purchased?

5 A Yes.

6 Q Which is another cost involved?

7 A Absolutely.

8 Q And who is situated to do that kind of cost  
9 benefit analysis as to how important the witness  
10 is as opposed to the damage to the witness'  
11 credibility?

12 A The way I had set up the department with the  
13 assistance of consultants back in '87 or '88 was  
14 to create management committees throughout the  
15 department. All of the prosecutions that came  
16 out of the City of Winnipeg, and they were  
17 generally speaking by far the most complex, not  
18 always, but generally speaking, needed to be  
19 reviewed. The difficult issue laden  
20 prosecutions needed to be reviewed by the  
21 Winnipeg Prosecutions Management Committee,  
22 which was chaired by Bruce Miller. So that the  
23 prosecutor, as I recall the practice of the day,  
24 would appear at that committee, which met every  
25 week and sometimes on a special basis, and make

1 a presentation on the issues in the particular  
2 case. This was an issue that came before that  
3 committee. Ultimately, it was Bruce's call.

4 Q So the initial recommendation and the argument,  
5 pro and con, comes from the line prosecutor, and  
6 then the committee would make a decision or  
7 recommendation on whether the deal should be  
8 done; is that correct?

9 A Yes.

10 Q And the ultimate decision, was this a matter  
11 that would have been a significant issue that  
12 would have been brought to your attention, an  
13 immunity agreement?

14 A Not necessarily. Again, the way I had set up  
15 the department was that we had a senior  
16 management committee, which I have erroneously  
17 referred to as executive management committee,  
18 that was another life. We had a senior  
19 management committee that consisted of the three  
20 directors, that was chaired by me. And the  
21 expectation was that issue that potentially  
22 would require Ministerial intervention, or some  
23 sort of extraordinary publicity, or in some way  
24 needed more than the usual layer of management,  
25 they would be brought to our committee and we

1 would review it there, and then it would be a  
2 matter for me to address.

3 Q So some immunity deals, the shoplifting example  
4 that you gave would obviously not be a matter  
5 that would be brought to your attention, or the  
6 Deputy's attention, but a significant immunity  
7 agreement you would expect to come to your  
8 attention?

9 A That's right. From my own experience I can tell  
10 you that I accepted a plea to manslaughter from  
11 a person who set an apartment block on fire, at  
12 the behest of the apartment block owner. And in  
13 our view, we needed the testimony of the torch,  
14 as we called him. But that immunity agreement,  
15 it wasn't strictly speaking an immunity  
16 agreement, it was a special consideration, but  
17 that went to the Director of Prosecutions for  
18 approval.

19 Q And if you look at your statement at tab 3, page  
20 9, I want to be specific here. The kind of  
21 agreement that was under discussion in the  
22 Driskell case, immunity for Zanidean for blowing  
23 up -- this is the middle of page 9 of your  
24 statement -- immunity for Zanidean for blowing  
25 up a house in Swift Current, in other words, a

1 serious charge in another jurisdiction, where he  
2 was a key witness in a major homicide  
3 prosecution, was that the kind of decision that  
4 you would have expected to be brought to your  
5 attention and ultimately the Deputy's?

6 A Yes, I would have expected that that would be  
7 something that we would have at least talked  
8 about. I understood that he set fire to a  
9 house, but I'm not -- that's just from reading  
10 the documents -- I wasn't aware that he had  
11 blown it up. But it is an arson and it is a  
12 serious matter, and I think that in the ordinary  
13 course at least I would have been briefed on it.

14 Q All right. Turning to the question of  
15 disclosure, again, what was your view as to  
16 whether these kinds of arrangements were  
17 discloseable facts?

18 A The immunity arrangements you mean?

19 Q Yes?

20 A Those are absolutely discloseable facts.

21 Q And what was the procedure as to how it would be  
22 disclosed? What kind of process for disclosure  
23 would be used?

24 A The case was always in the hands of counsel.  
25 Counsel had policy direction, they had memos of



1 instruction keeping them up-to-date with the  
2 latest rulings. They had a statement of ethics.  
3 It was pretty clear that their responsibility  
4 was to disclose fully and fairly.

5 Q All right. If the negotiations were  
6 unsuccessful and an agreement ultimately  
7 couldn't be worked out, was the fact that a key  
8 witness was seeking immunity a discloseable  
9 fact?

10 A Yes.

11 Q All right.

12 A I would understand that defence counsel would  
13 know -- not defence counsel for the accused  
14 necessarily, but counsel would know that. I  
15 expect that.

16 MR. PROBER: I missed that last answer, please?

17 THE COMMISSIONER: I didn't quite follow it  
18 either. Could you just repeat that?

19 THE WITNESS: That counsel would expect to know  
20 if a witness had been trying to, in effect,  
21 haggle for some consideration in return for his  
22 or her testimony.

23 THE COMMISSIONER: But then you said something  
24 about defence counsel.

25 MR. CODE: I think that is defence counsel you

1 are talking about.

2 THE WITNESS: I wanted to clarify by saying that  
3 defence counsel would expect to know. I am  
4 sorry for --

5 BY MR. CODE:

6 Q From the Crown's perspective there was a clear  
7 duty to disclose this, and from the defence  
8 perspective they would expect it to be disclosed  
9 is what you are saying?

10 A Yes. It would indicate the frame of mind of the  
11 accused, that his or her evidence was worth  
12 something.

13 Q Yes. Now, at some point in this case we see  
14 that a manager, namely, Mr. Miller, as opposed  
15 to the line prosecutor, Mr. Dangerfield, becomes  
16 involved in dealing with Zanidean's demands for  
17 immunity on the Swift Current arson, especially  
18 through the negotiations by his lawyer,  
19 Mr. Kovnats.

20 Was that the normal arrangement in relation  
21 to immunity deals, that you again have got this  
22 problem of a division between the person  
23 negotiating the immunity and the line prosecutor  
24 who is making disclosure? Was that normal? And  
25 you told us it is normal in protection cases, is

1           it normal in immunity cases?

2    A       I would expect that the director would be  
3           involved in that, yes.

4    Q       Okay. And again, when that kind of arrangement,  
5           the separation of roles happened, what would be  
6           the expectation in terms of communication  
7           between those two parties?

8    A       The prosecuting attorney would have to have  
9           regular updates on what was going on.

10   Q       And again in terms of disclosure policies here,  
11          you told us about the sensitivities that certain  
12          aspects of witness protection can't be disclosed  
13          such as location and identity. Are there any  
14          similar sensitivities in relation to immunity  
15          agreements?

16   A       I can't off the top of my head think of any.

17   Q       Neither can I. Assuming that situation is what  
18          came to pass here, that it is Mr. Miller who is  
19          negotiating both protection and immunity in a  
20          sort of a related package, because certainly the  
21          position Kovnats and Zanidean were taking is  
22          that they were related, and Dangerfield and  
23          Lawlor are prosecuting, could you tell us  
24          something about Mr. Miller's personality and  
25          management style and how he would cope with that

1 kind of situation, to your knowledge?

2 A Bruce was a very decent, very easy going,  
3 amiable fellow. He had a very, very good  
4 personal relationship with his Crown attorneys,  
5 with police officers, and with defence counsel.  
6 He was very approachable, very likable, and had  
7 a huge tolerance for difficult people. I think  
8 I mentioned that in my interview. So he tended  
9 to allow debate to go on much longer than  
10 probably it should have. A very generous man, I  
11 would say.

12 Q What was his reputation in the bar for fairness?

13 A I think he was regarded as a fair and decent  
14 man.

15 Q If he was negotiating an immunity for a key  
16 Crown witness, as we know he was in this case,  
17 and it is a case being prosecuted by George  
18 Dangerfield, as we know this one was, knowing  
19 their two personalities, can you imagine  
20 Mr. Miller keeping Dangerfield in the dark?

21 A No.

22 Q Would there be any good reason to keep him in  
23 the dark?

24 A Well, I have seen some of the material. I can't  
25 imagine why he would be kept in the dark, no. I

1 don't have anything to offer on that.

2 Q Was Dangerfield the kind of prosecutor who would  
3 tolerate a manager keeping him in the dark on  
4 decisions about one of his key witnesses?

5 A George had a temper. He would, as we say, he  
6 would go ballistic. If he knew he was kept in  
7 the dark, he would be very angry about that.

8 Q Was Mr. Miller aware of that temper, to your  
9 knowledge?

10 A Yes. We all worked together. Bruce and I, as I  
11 said, were classmates. We worked for the  
12 department for 22 years. George worked there I  
13 think eight or ten years longer than that. We  
14 all worked together and we all knew each other  
15 very, very well.

16 MR. CODE: This is a perfect time for me to  
17 break and we are right at the recess,  
18 Mr. Commissioner.

19 THE CLERK: All rise. This Commission of  
20 Inquiry is now adjourned until 2:00 o'clock.

21 (Proceedings recessed at 12:45 p.m. and  
22 reconvened at 2:00 p.m.)

23 THE CLERK: All rise. This Commission of  
24 Inquiry is now re-opened. Please be seated.

25 MR. CODE: Mr. Commissioner, before I resume

1 with Mr. Whitley, I've been asked to clear up a  
2 matter on the record. Apparently, these  
3 Ostrowski materials that were used in  
4 cross-examination of Mr. Dangerfield, and then  
5 again in re-examination, Exhibit 31D, have  
6 apparently caused some confusion as to how we  
7 came to have them and introduce them in the  
8 record. You'll recall that Mr. Lockyer had  
9 them, but he had them under an undertaking of  
10 confidentiality from Mr. Scullion and the 696  
11 unit in Ottawa.

12 And what happened, the process was that on  
13 Monday night, after Mr. Dangerfield's  
14 examination was almost complete, and he had  
15 testified that he had never heard of this kind  
16 of a secret immunity deal before, and it was not  
17 his practice to ever engage in that kind of an  
18 immunity agreement, we had a discussion with  
19 Mr. Lockyer about the Ostrowski case. And we  
20 sent a fax to Mr. Scullion on Monday night, and  
21 this then re-sent it on Monday morning by way  
22 of -- Tuesday morning by way of e-mail asking  
23 for the materials and asking to relieve  
24 Mr. Lockyer of his undertaking so that they  
25 could be explored with Mr. Dangerfield.

1 Mr. Scullion then faxed them to us very early  
2 Tuesday morning. We photocopied them. We  
3 distributed them. In other words, they were  
4 produced to us by Mr. Scullion and not by  
5 Mr. Lockyer, and relieving Mr. Lockyer of his  
6 undertaking simply allowed Mr. Lockyer to refer  
7 to them. But they were produced at our request  
8 and distributed by us without there being any  
9 undertaking on our part, so I just wanted to  
10 clarify that.

11 THE COMMISSIONER: Thank you, Mr. Code.

12 MR. PROBER: I'm discussing with Mr. Lockyer,  
13 Mr. Commissioner, that very exhibit. There  
14 appears to be the first page of the letter  
15 missing in my copy. You see that --

16 MR. DAWE: Yes. I can indicate that's the --  
17 this is simply a copy of what we received from  
18 Mr. Scullion, so we don't have the first page of  
19 the letter either.

20 MR. LOCKYER: It will be in my office, if you  
21 want, the first page.

22 MR. PROBER: Perhaps we can get it at some  
23 point, please.

24 MR. DAWE: It is Mr. Lockyer's letter.

25 MR. PROBER: Thank you.

1 BY MR. CODE:

2 Q Mr. Whitley, I'd like to now walk you through  
3 all the documents that are relevant to you in  
4 the pre-trial period. And there's not a lot of  
5 them here, but I want to just reconstruct the  
6 chronology, as best we can, with -- and assist  
7 you with the documents going through the  
8 sequence of events. So if you could have volume  
9 1 available, where most of the early documents  
10 are found.

11 And the earliest one that comes to your  
12 attention, as best we can see, are the two memos  
13 at tabs 6 and 7 about the direct indictment,  
14 both dated November 19th; is that correct?

15 A Yes, that appears to be the case.

16 Q And Mr. Lawlor and Mr. Dangerfield -- Mr. Lawlor  
17 sends you the direct memo at tab 7, but he  
18 appends Mr. Dangerfield's memo at tab 6 to it,  
19 so it appears you got both of them. And both  
20 counsel forcefully raise the witness protection  
21 issues with you; is that correct?

22 A Yes.

23 Q And that becomes the main basis for the direct  
24 indictment; is that correct?

25 A Yes.



1 Q And you appear to act very quickly on the  
2 matter, because at tab 8 we see the minister  
3 signs the direct indictment that very same day,  
4 November 19th; is that correct?

5 A Yes.

6 Q And given that you had just received the memos  
7 that day, I take it that's a fairly speedy  
8 turn-around for a direct indictment?

9 A Yes, it would be.

10 Q And given that Driskell had just been charged on  
11 October 22nd, to have a direct indictment within  
12 less than a month of the charge, charging  
13 decision, would also be a fairly speedy  
14 turn-around?

15 A Yes.

16 Q And I take it that reflects the urgency that was  
17 attached to this matter because of the witness  
18 protection concerns?

19 A Yes.

20 Q You'll also note at tab 7 that Mr. Lawlor, on  
21 the last page of his memo, refers to the fact  
22 that:

23 "The key witness in this case has obtained  
24 a lawyer, who tells me his client is jumpy  
25 and nervous and very demanding."

1 Do you see that?

2 A Yes.

3 Q And would you be able to tell us whether the  
4 fact that a key witness had hired a lawyer in a  
5 major homicide and was advancing demands at an  
6 early stage was an unusual event? Was this  
7 common?

8 A I'm not sure I can really answer that. If a  
9 witness is fearful for his safety and has  
10 obtained a lawyer to ensure that his concerns  
11 are properly safeguarded and is jumpy about  
12 issues of personal safety, that wouldn't suggest  
13 something extraordinary or unusual to me. But I  
14 can't say that that would have engaged my  
15 attention.

16 Q I am not saying there is anything wrong with  
17 retaining a lawyer to help you with witness  
18 protection concerns. I am just asking you is  
19 this a commonplace event in Winnipeg homicide?

20 A No. I misunderstood your question. Witness  
21 protection concerns were not a common event,  
22 neither were direct indictments, for that  
23 matter.

24 Q And witnesses retaining lawyers and making  
25 demands was presumably also not very common?

1 A No, that wouldn't be.

2 Q And would that be a discloseable fact?

3 A I think the answer is yes, but how one -- let me  
4 see if I understand the question correctly. The  
5 fact that a witness is jumpy and nervous?

6 Q No. No. The fact that he has retained a  
7 lawyer, who is advancing demands with the  
8 ministry?

9 A Oh, yes. Yes.

10 Q Thank you. We see, once the direct indictment  
11 is signed, in this early period, for the first  
12 month or so, that witness protection issues  
13 continue to be brought to your attention. And,  
14 indeed, you appear to initiate some of the  
15 initial requests for monies for a safehouse.

16 If you could look at two memos at tabs 10  
17 and 12. You will see at tab 10 is a memo dated  
18 November 26th, on which you and Lawlor and  
19 Garson were all copied, that secures a cheque  
20 for \$1,300 to essentially move Zanidean to a  
21 safehouse. Do you see that?

22 A I do.

23 Q And a little less than a month later, at tab 12,  
24 on December 19th you send a memo. Both of these  
25 memos are going to Arnason, who presumably is

1 the fellow who would write the cheques; is that  
2 correct?

3 A Yes.

4 Q The one at tab 12 is authored by you and copied  
5 to Lawlor. And this one is for an \$853 cheque.  
6 Again, the purpose is to pay the costs of moving  
7 Zanidean to the safehouse?

8 A Yes.

9 Q Do you see that?

10 A I do.

11 Q And the fact that you're involved, at this early  
12 stage, in these initial expenditures on the  
13 safehouse, is there anything unusual about that?

14 A No. It is just -- it is an unusual expenditure  
15 of money, so I would normally be kept apprised  
16 of it, at the very least.

17 Q The first major development in the negotiations  
18 with Mr. Kovnats, who as we all know is the  
19 lawyer who is making the demands that Mr. Lawlor  
20 spoke of in the preferred indictment memo.

21 Mr. Kovnats sets out those demands in a  
22 December 14th letter, which we have here at tab  
23 11. If you could just turn to that for a  
24 moment?

25 A Yes.

1 Q And it appears to be framed in the form of a set  
2 of demands. You see the introduction to the  
3 list of 15 items is:

4 "What Ray requires is as follows..."

5 So does that appear to be consistent with what  
6 Mr. Lawlor observed?

7 A I'm sorry, Mr. Lawlor --

8 Q Mr. Lawlor had commented, at the end of the  
9 direct indictment letter, that there was a  
10 lawyer involved who was making demands on behalf  
11 of Zanidean. And this letter follows shortly  
12 after on December 14th?

13 A Yes. I'm sorry, I was looking for something  
14 more.

15 Q Does the letter appear to be consistent with  
16 what Mr. --

17 A Yes.

18 Q -- Lawlor had stated?

19 A Yes.

20 Q And the demands include, without going through  
21 them all, but there are a number of financial  
22 benefits, if you want to just look quickly.  
23 Number one is that he wants his house to be  
24 bought out. Number five, he wants his moving  
25 costs. Number ten, he wants his car to be

1 bought. And number fifteen, he wants some  
2 start-up costs, sufficient monies to live on,  
3 until he starts his new job with his new  
4 identity in B.C. So a number of financial  
5 matters that the -- are being put to the  
6 ministry. Do you see that?

7 A I do.

8 Q And also he asks, at number eight, for immunity  
9 on any other outstanding matters --

10 A Yes.

11 Q -- that he not be prosecuted for?

12 A Yes.

13 Q Is that kind of a letter, leaving aside the form  
14 in which disclosure would be made, but the  
15 contents, the facts, the information in the  
16 letter, a discloseable fact, in your opinion?

17 A Yes, it is, absolutely.

18 Q Miller responds to the letter two weeks later on  
19 the 28th. And he then passes his response and  
20 the original letter on to you. If you could  
21 look at tab 13 is his response. And you see he  
22 simply says to Mr. Kovnats that:

23 "We will be addressing this matter  
24 internally at the earliest opportunity."

25 Do you see that at tab 13?

- 1 A Yes, I do.
- 2 Q And then at tab 14 he passes the correspondence  
3 to you, the letter from Kovnats and the  
4 response. Do you see that?
- 5 A I do.
- 6 Q Now, the memo to you at tab 14 refers to the  
7 fact that he has already had earlier discussions  
8 with you, is that correct, before he drafted his  
9 response to Kovnats?
- 10 A That's what it says, yes.
- 11 Q And do you recall the general nature of those  
12 discussions? Obviously, I don't expect that you  
13 would recall any detail about them, but do you  
14 have a general recollection?
- 15 A No. No, I don't.
- 16 Q Was it -- leaving aside the fact that you don't  
17 recall them, would it be appropriate and normal  
18 for Miller to confer with you after receiving  
19 the kind of letter that Kovnats had sent?
- 20 A I would expect that, yes.
- 21 Q It seems to be common sense that he would want  
22 to review that with you before he responded?
- 23 A Yes.
- 24 Q And his response, that we saw at tab 13, doesn't  
25 reject any of Kovnats' demands out of hand; is

1           that correct?

2    A       That's what it appears.

3    Q       It appears that everything is on the table for  
4           discussion, at this stage, at least?

5    A       Yes.

6    Q       And sticking with the memo at tab 14, Miller  
7           also suggests a meeting that would include  
8           Dangerfield. Do you see that in the last  
9           paragraph?

10   A       Yes.

11   Q       And why would Miller be drawing Dangerfield in  
12           at this stage?

13   A       My assumption is that Mr. Dangerfield now has  
14           conduct of the case. So it would be logical  
15           that he would understand what the nature of the  
16           demands are so that he would have full awareness  
17           of what his witnesses were going to be like.

18   Q       Does this go back to what we were talking about  
19           just before the lunch recess about the cost  
20           benefit analysis that the prosecutor could help  
21           you?

22   A       Yes.

23   Q       And, finally, at the end Mr. Miller concludes by  
24           saying.

25                 "I await your further instructions."



1           And I take it that reflects what you've  
2           just told us, that he would have conferred with  
3           you in advance to make sure that he was  
4           proceeding in a manner that was at least doable  
5           within the ministry?

6    A    Yes.

7    Q    The next document, Mr. Whitley, is at tab 15,  
8           the next tab.  A couple of weeks later, after  
9           the new year, January 11, 1991, Mr. Miller  
10          re-sends the original matter to you because he  
11          has spoken to you and the material seems to have  
12          gone astray.  Do you see that?

13   A    Yes.

14   Q    And the memo is now marked "urgent".  Do you see  
15          that at the top?

16   A    Yes.

17   Q    And also in the body of the memo he refers to  
18          the urgency?

19   A    Yes.

20   Q    And the urgency is because disclosure is being  
21          made; is that correct?

22   A    Yes.

23   Q    So the defence is going to learn the identity of  
24          the witnesses.  And, again, does this  
25          coordination of the steps Miller's taking with

1 disclosure reflect the communication with the  
2 line prosecutors that you have told us would  
3 have to be going on?

4 A Yes.

5 Q Needless to say, Mr. Miller wouldn't be going  
6 and making disclosure, I take it?

7 A No.

8 Q If you could look at the handwritten notes at  
9 the bottom and help us briefly with them. These  
10 are all referred to in your statement, but if I  
11 could simply highlight them now for the public  
12 record. First of all, taking it  
13 chronologically, the right-hand note appears to  
14 be the earlier of the two because it refers to a  
15 January 22nd meeting. Do you see that?

16 A Yes, I do.

17 Q And if I understand what you told us in the  
18 interview, the way you decipher this note is  
19 that your assistant, Cece, was that her name?

20 A Cecelia.

21 Q Cecelia, but Cece for short?

22 A Yes.

23 Q It appears that Cece has sent a note to Miller  
24 asking: "What's happening?"

25 A Yes.

1 Q Her name Cece is down at the bottom. And in  
2 between, Miller has filled out a response  
3 advising Cece that he has set up a meeting with  
4 Kovnats for the two of you to attend --

5 A Yes.

6 Q -- on January 22nd?

7 A Yes.

8 Q And I suppose the question I need to ask you  
9 about this, do you recall the meeting with  
10 Kovnats?

11 A No, I don't.

12 Q And in your statement, what you said to us, is  
13 that although you don't recall that, you may  
14 well have attended. You are not denying that  
15 you attended the meeting?

16 A No. No.

17 Q And you recalled that you somehow had come to  
18 know that Kovnats was difficult and demanding,  
19 and you may well have been helping Miller out?

20 A Yes.

21 Q If I could take you briefly to Exhibit 15, Madam  
22 Registrar, which is Kovnats' book of documents.  
23 And this is in 15A Mr. Kovnats has a memo where  
24 he briefly -- a memo to file where he briefly  
25 refers to the meeting. If you could just look

1 at Tab 3. Tab 3 is the memo to file --

2 A Yes.

3 Q -- which he drafts or he dictates a few months  
4 later, so it's not contemporaneous. About  
5 two-thirds of the way down the page, do you see  
6 a paragraph saying,

7 "During the course of our dealings with the  
8 Crown, they promised us a meeting"?

9 A Yes.

10 Q "And then we finally had a meeting on

11

12 January 22nd."

13 Do you see that?

14 A Yes.

15 Q And he says the meeting is with you and Miller.  
16 So his memo appears consistent with the note at  
17 tab 13 concerning the date of the meeting; is  
18 that correct?

19 A Yes.

20 Q And what he says about the substance of the  
21 meeting, the only reference to it is in the next  
22 line.

23 "At the meeting they promised me most of  
24 the things contained in the January  
25 meeting."

1 A bit of a non-sequitor.

2 "Promised to get in touch with the RCMP to  
3 get the proper witness protection person.

4 And they promised to get me a retainer."

5 A I read that.

6 Q Would that be consistent with the kinds of  
7 matters that would be discussed at that early  
8 meeting, his list of demands setting up a  
9 meeting with the RCMP and getting him his  
10 retainer letter?

11 A Yes.

12 Q Turning back to the -- your memo at tab 15, or  
13 the memo to you from Miller, if we could then go  
14 to the second note at the bottom, the left-hand  
15 note referring to a January 28th meeting, some  
16 six days later. And whose writing is that in  
17 the bottom left?

18 A That appears to be mine.

19 Q And it appears you are communicating with Miller  
20 and telling him that you have set up a meeting  
21 for the two of you with Tom Orr on January 28th,  
22 the witness protection person?

23 A Yes. I can't tell you that I set it up or Cece  
24 set it up. I don't know how it came about, but  
25 it is clear that that's in the offing. And Tom

1 Orr would have been the witness protection  
2 coordinator for the RCMP.

3 Q And, again, you don't recall this meeting, I  
4 understand?

5 A I, in my review -- the short answer is no. In  
6 my review of the documents, it appears that this  
7 meeting didn't happen as it was planned.

8 Q Your review of the documents is that the meeting  
9 did not happen?

10 A Well, that's what I'm -- I don't believe this  
11 meeting happened, but I can't say for sure.

12 Q What is it that makes you think it didn't  
13 happen?

14 A There is a reference to a meeting with Bruce  
15 Miller and Tom Orr or, pardon me, Larry Callans,  
16 I believe, later on that month. I read this  
17 somewhere in the file that that seems to have  
18 superseded this meeting.

19 Q I am not familiar with that document. But, in  
20 any event, there had to be a meeting with the  
21 RCMP, I take it?

22 A Yes. Yes.

23 Q They were the ones who were going to arrange the  
24 long-term protection?

25 A That's right.

1 Q And the fact that your office has set up the  
2 meeting and you say "we've got a meeting", that  
3 looks like the plan is that both you and Miller  
4 would attend. I take it, again, there is  
5 nothing unusual with your helping out --

6 A No.

7 Q -- in an unusual matter like this?

8 A No.

9 Q I don't think anything turns on the meeting  
10 itself. I'm just trying to understand the  
11 process. So after these two meetings have been  
12 set up in January, late January, the next  
13 document, Mr. Whitley, that we have to help  
14 trace the chronology is at tab 18. A little  
15 over a month later, in early March, Mr. Miller  
16 sends you a memo. It's at tab 18, the March 4th  
17 memo from Miller to Whitley that, in essence, is  
18 an update keeping you informed, as I read it.  
19 Is that a fair characterization of it?

20 A Yes.

21 Q And, again, that kind of process with him having  
22 carried out the operational steps and then  
23 reporting to you and keeping you informed would  
24 be the ordinary way in which the process would  
25 work?

1 A Yes.

2 Q And there may well have been informal  
3 discussions between you, from time to time, that  
4 don't get documented in a memo, can I assume  
5 that?

6 A That's entirely possible, yes.

7 Q The memo begins by referring to the meeting that  
8 the two of you had with Kovnats; is that  
9 correct?

10 A Yes, it was.

11 Q And he then proceeds to bring four matters to  
12 your attention, and I want to just briefly  
13 review them with you. The first one, on the  
14 first page, is Zanidean's mortgage payments  
15 after his relocation. He has been moved into a  
16 safehouse in December. He owns his own home.  
17 So his own home has been left vacant, and so  
18 there is this issue about what's going to happen  
19 with the house and the mortgage payments? And  
20 the sentence at the very bottom of the first  
21 page says:

22 "To my  
23 knowledge, that is not..."

24 and the question is:

25 "Is the department going to be responsible



1 for the mortgage payments?"

2 And Miller says:

3 "To my knowledge, that is not the case and  
4 certainly was not undertaken by us at the  
5 time of our meeting with Mr. Kovnats."

6 Do you see that?

7 A I do.

8 Q And would it be fair to read that as, again,  
9 indicating that it's likely that at the  
10 January 22nd meeting with Kovnats you reviewed  
11 his list of demands and some of them were agreed  
12 to and some of them were not?

13 A That's fair, yes.

14 Q Is that what it appears to be saying?

15 A Yes.

16 Q The second item over the page is:

17 "The pending launch of the formal witness  
18 protection application."

19 Do you see that, item 2?

20 A Yes.

21 Q That Sergeant Anderson is going to get going and  
22 submit it to Corporal Orr. And the date of this  
23 memo, being early March, is consistent with what  
24 we know about the actual formal application that  
25 appears was submitted to Corporal Orr somewhere

1 around mid-March 1991, so the dates are  
2 generally consistent. And what I wanted to ask  
3 you about the actual formal application, when  
4 it's prepared in the next couple of weeks, and  
5 the document is at tab 9, it's a large  
6 formal-type document, would Miller have  
7 generally reviewed the content of it with you,  
8 especially the more sensitive issues like the  
9 Swift Current immunity issue?

10 A I don't have any recollection of Bruce reviewing  
11 it with me now, at this point in time. But I  
12 would have expected to be briefed, at least  
13 generally, on what was happening.

14 Q And I wasn't suggesting he would have asked you  
15 to review the document and deal -- get involved  
16 in drafting or anything. But if we look at the  
17 immunity issue as the one that would likely be  
18 the most sensitive, indeed is characterized as  
19 such, you see the numbering in the bottom  
20 right-hand corner in tab 19? There is some fake  
21 numbering. And if you flip, oh, about halfway  
22 through the document, you will find page 481. A  
23 little bit passed, halfway through the document,  
24 you will see a 481 in the bottom right-hand  
25 corner?

1 A Yes.

2 Q And the heading in the middle of the page there  
3 is:  
4 "Summarize information divulged by the  
5 witness with respect to other criminal  
6 activity."  
7 And under that heading, there is a good  
8 discussion of the Swift Current arson, that  
9 Zanidean has admitted to it to the police  
10 officers?  
11 A Sorry, I'm just --  
12 Q Do you have page 481 there, tab 19?  
13 A I thought I had.  
14 Q Tab 19, page 481. The heading is "Summarize  
15 information divulged"?  
16 A Paragraph 4?  
17 Q Paragraph 4.  
18 A Yes.  
19 Q In the middle of the page it is the criminal  
20 activity divulged by the witness?  
21 A Yes.  
22 Q It is a formal standard heading, we're told by  
23 Corporal Orr, in witness protection matters.  
24 And Zanidean has disclosed the Swift Current  
25 arson to the police. And the police have been

1 in touch with Constable Burton of the RCMP, who  
2 is investigating the matter. Do you see that?

3 A Yes, I do.

4 Q And right four lines down into the paragraph, it  
5 says.

6 "Constable Burton has agreed not to pursue  
7 Zanidean at this time, but will continue  
8 investigation once our trial is concluded.  
9 He had made it perfectly clear to the  
10 witness that we will not pursue immunity  
11 from this charge in exchange for his  
12 evidence. We have told him that we  
13 notified the RCMP and the outcome of the  
14 investigation rests with them. In the  
15 meantime, however, Zanidean's lawyer has  
16 requested of Mr. Miller complete immunity  
17 from prosecution and a written guarantee  
18 stating the same prior to the murder trial.  
19 This delicate matter has not yet been  
20 resolved."

21 Is that the kind of matter that you would expect  
22 Miller to have discussed with you, in a general  
23 way, as the matter proceeded?

24 A I would have expected to be briefed on this and  
25 a recommendation made.

- 1 Q It appears, at this point, the decision is not  
2 to give him immunity, and yet Kovnats is  
3 persisting with it. But at the same time, there  
4 is a sort of interim standstill agreement with  
5 the RCMP, if I can call it that. So assuming  
6 it's the kind of matter that you would be  
7 briefed on, what about the other way? Would you  
8 have expected Mr. Dangerfield to have been  
9 briefed by Mr. Miller on this kind of matter?
- 10 A Before a recommendation would come to me, I  
11 would expect that the director and the  
12 prosecuting attorney would have conferred and  
13 reached some sort of consensus, so that the  
14 recommendation would represent both their input.  
15 Obviously --
- 16 Q I take it --
- 17 A Sorry.
- 18 Q I take it you wouldn't make a decision on this  
19 without knowing Mr. Dangerfield's views on it?
- 20 A No.
- 21 Q All right. If you could put that aside,  
22 Mr. Whitley, and go back to the original memo  
23 from Mr. Miller where we were going through  
24 these points?
- 25 A Which tab is that, I'm sorry?

1 Q You'll find it back at tab 18. It's the  
2 immediately preceding tab.

3 A Yes.

4 Q So we have dealt with the first two matters.  
5 And then the third matter is:

6 "Interim accommodation expenses for  
7 Zanidean pending trial."

8 He appears to be simply keeping you informed that  
9 the department is on the hook for these  
10 expenditures on Zanidean's behalf pending the  
11 trial; is that correct?

12 A Yes.

13 Q And then the fourth and last matter is he  
14 asked -- he appears to ask you to take a direct  
15 hand in this, asking you to confer with Mr.  
16 Hague about the retainer letter for Mr. Kovnats;  
17 is that correct?

18 A Yes.

19 Q And Mr. Hague was the fellow on the civil side  
20 who looked after retainer letters when the  
21 ministry went out and retained outside counsel?

22 A Yes.

23 Q And was that appropriate for Miller to ask you  
24 to intervene with Hague on it?

25 A That wouldn't be unusual.

1 Q And we see, if you look at volume 2, that the  
2 retainer letter takes some three months before  
3 it finally gets to Kovnats. It's at tab 54 of  
4 volume 2. Tab 54, Exhibit 30B, June 12th letter  
5 from the Deputy, Graeme Garson, to Mr. Kovnats  
6 retaining him. Do you see that?

7 A I do.

8 Q And you're copied on it, as well as Mr. Hague?

9 A Yes.

10 Q And is there any explanation why it took three  
11 months to get that retainer letter to  
12 Mr. Kovnats that you can recall?

13 A No. I'm sorry, I can't help with you that.

14 Q You see, the retainer letter authorizes him to  
15 appear in court when Zanidean testifies. Do you  
16 see that in the fourth line:

17 "To attend at the trial proceedings when  
18 Zanidean is testifying"?

19 A Yes.

20 Q And, in fact, he testifies the day before on  
21 June 11th. The retainer letter arrives right  
22 after his testimony is completed. Are you able  
23 to assist us with that at all?

24 A I'm sorry, no.

25 Q All right. The next development in the

1 negotiations, moving on from Miller's March 4th  
2 memo to you, is Kovnats docket a second meeting  
3 with you and Miller. And, again, if you've got  
4 that Exhibit 15 handy still. Have you got the  
5 Kovnats documents there?

6 A Yes, do I.

7 Q 15A, tab 2 is Mr. Kovnats' docket. And if you  
8 go to the second page of the docket, so Exhibit  
9 15A, tab 2, page 2, you see on March 20th, 16  
10 days after Miller has just sent you this update  
11 memo, Kovnats, at the top of the page, docket a  
12 meeting with Stu Whitley and Bruce Miller, do  
13 you see that, 0.7 hours?

14 A Yes.

15 Q And can you help us with that? Do you recall  
16 that second meeting with Kovnats?

17 A I'm sorry, I don't.

18 Q And, again, do I take it you're not denying it  
19 happened?

20 A No.

21 MR. CODE: You just don't have a recollection.

22 THE COMMISSIONER: I'm sorry, what was the date  
23 of that, Mr. Code?

24 BY MR. CODE:

25 Q It's March 20th. And, again, would there be



1 anything inappropriate in your assisting Miller  
2 and -- given the kind of demands that Kovnats is  
3 making?

4 A No.

5 Q All right. If you stay with those dockets for a  
6 minute, you see Mr. Kovnats, five days later or  
7 six days later, dockets a meeting with Corporal  
8 Orr. Do you see that there? He has got it as  
9 March 26th. But it appears from Orr's records  
10 that it was actually the 25th and that the clerk  
11 who recorded the docket has got the digit wrong  
12 by one. But, in any event, shortly after the  
13 meeting with you, it appears from the evidence  
14 we have heard that Kovnats meets with Orr. And  
15 the -- to put -- not to put too fine a point on  
16 it, the meeting didn't go too well, by all  
17 accounts.

18 And you see what immediately follows in  
19 Kovnats' dockets, if you look at March 28th,  
20 there are three entries for March 28th:

21 "Meeting attempted Bruce, attempted Stu,  
22 call to... Ray..."

23 that should be. That's a typo, that's to his  
24 client. Then he has a second docket:

25 "telephone attempt Bruce, Whitley, Garson."

1           And then he has got a third docket. This one is  
2           a longer docket. 1.7, where he appears to get  
3           through, telephone calls. And, again, we have  
4           got a typo that should be Bruce, we're told. And  
5           "Bruce" and "minister" appears. According to his  
6           dockets, he gets through to the minister. And  
7           there are these attempts to engage high-level  
8           officials, ranging from Miller, to yourself, to  
9           Garson, to the minister. And, again, my usual  
10          question, can you assist us at all with what was  
11          going on here at this stage?

12        A     No.

13        Q     You've no recollection of this?

14        A     None whatsoever.

15        Q     Again, I take it if Kovnats was calling you, and  
16          calling the deputy, and calling the minister  
17          about matters that you were engaged on, you  
18          would have heard about it?

19        A     Yes.

20        Q     Now, turning to a somewhat more helpful  
21          document, again still in this Exhibit 15, if you  
22          could hold on to it for a minute. Mr. Miller is  
23          writing some file notes in and around this time  
24          period in March, April that I just wanted to  
25          review with you, and they are at tabs 12 and 13.

1           And at tab 12, the first note simply sets out a  
2           number of the items that were under discussion,  
3           not particularly significant items. But if you  
4           look at the second page, do you see a March 7th  
5           note?  
6        A     Yes.  
7        Q     1991.  
8        A     M'hm.  
9        Q     Three days after he sent you the memo, the  
10          March 4th memo, he has a note --  
11          THE COMMISSIONER: Mr. Code, I'm lost.  
12          MR. CODE: I'm sorry.  
13          MR. LOCKYER: So am I.  
14          MR. CODE: I'm sorry. Exhibit 15A, the same  
15          volume we have been in for the last little  
16          while, the same one with the dockets in it.  
17          THE COMMISSIONER: Okay. So we go back.  
18          MR. CODE: Tab 12.  
19          THE COMMISSIONER: Yes.  
20          MR. CODE: Is the file memos of Mr. Miller.  
21          THE COMMISSIONER: Okay. I'm sorry.  
22          MR. CODE: The handwritten notes.  
23          THE COMMISSIONER: I'm sorry. And I thought it  
24          was Anderson's note. I'm sorry.  
25          MR. CODE: I'm sorry.

1 THE COMMISSIONER: No. It's not your fault.

2 BY MR. CODE:

3 Q And it is the second note on March 7th that  
4 deals with matters of greater substance, namely  
5 reimbursing Zanidean for his equity position in  
6 the Chelsea Avenue home. Do you see that?

7 A I do.

8 Q And Miller makes a number of notes, general  
9 notes. He says:

10 "We will make up any shortfall based upon  
11 reasonable assessments."

12 He seems to be trying to come up with a market  
13 value price for the house. And the next one he  
14 says:

15 "Our undertaking is not to leave the  
16 witness in the lurch or in jeopardy,  
17 reasonable comparative lifestyle in area  
18 where he is relocated."

19 And is the general tenor of those kind of  
20 undertakings, that Miller appears to be making a  
21 note of, consistent with what you would expect  
22 the minister's policy would be on a matter like  
23 this?

24 A Yes.

25 Q Now, the next note at tab 13, again this one is

1 undated, but it's associated with an April 15th  
2 note on the third page. So there is some  
3 contextual evidence that it is in and around the  
4 same time period, and it's just the first page.  
5 So at tab 13, Mr. Commissioner, of the same  
6 book, he sets out two options, option one and  
7 option two. Do you see that?

8 A Yes, I do.

9 Q The first option is:

10 "Formal entry into the Witness Protection  
11 Program through the RCMP."

12 And the second option is:

13 "We pay him a lump sum and they undertake  
14 their own relocation. He does not enter  
15 the program at all."

16 Do you see that?

17 A I do.

18 Q And is that a matter of substance or importance,  
19 which of those two options the ministry was  
20 willing to go with, that again you would expect  
21 some substantive discussions on?

22 A Yes.

23 Q Both upwards with you and downwards with  
24 Dangerfield?

25 A Yes.

1 Q And I take it, again from your interview and the  
2 discussions that we've had, that option two  
3 would be unusual?

4 A It would be unusual.

5 Q Indeed, option one, you've told us, is an  
6 unusual event. But option two is particularly  
7 unusual?

8 A Yes.

9 Q We know, and I am not going to take you through  
10 all of the subsequent documents, Mr. Whitley,  
11 but throughout late April, May and early June,  
12 the tenor of the evidence in the documents is  
13 that all of the parties increasingly moved  
14 towards option two. And I don't want to repeat  
15 all of that evidence with you. It will take a  
16 lot of time. But we've been through it with Orr  
17 and Vandergraaf and Kovnats. And I simply want  
18 to ask you that, assuming the parties were  
19 increasingly moving towards the straight cash  
20 payment option, option number two, that would be  
21 a matter that would require careful approval at  
22 the highest levels?

23 A Yes. Only the deputy minister could sign this  
24 off, and he would have to be briefed  
25 appropriately on it.

1 Q The last document I want to take you to in this  
2 sequence of the chronology leading up to the  
3 trial is the document at tab 24 of the --  
4 A Of the Kovnats' material?  
5 Q Well, it is in the Kovnats -- it's not in the --  
6 it is in the Kovnats' material, but it is not at  
7 that tab. The tab 24 is in your own materials.  
8 So if we go back to Exhibit 30A, tab 24. So  
9 volume 1 of your materials, Exhibit 30A.  
10 A The continuation report?  
11 Q Tab 30A is the continuation report.  
12 A Yes.  
13 Q This is Corporal Orr's note of a discussion he  
14 has with Miller at the end of May?  
15 A Yes.  
16 Q And the point we've just dealt with, if you look  
17 at the middle of the page, you see he says:  
18 "Mr. Miller and I discussed a number of  
19 points, including the aspect of a single  
20 payout to Zanidean."  
21 And this is an example of the kind of documents I  
22 was referring to where they increasingly start  
23 discussing the single payout option, as he calls  
24 it. But what I wanted to refer you to in this  
25 document is more the apparent ultimatum

1 Mr. Miller received from Kovnats that day on  
2 May 29th. So if you go up to the top of the  
3 page?

4 A Yes.

5 Q So this is Miller telling Orr about his  
6 communications with Kovnats, who sets out three  
7 key demands. You see them numbered there?

8 A Yes, I do.

9 Q And it's number 3 that is the particularly  
10 sensitive one.

11 "Unless his client was given immunity to  
12 prosecution for the Swift Current affair,  
13 he would take steps to ensure his client's  
14 protection. Miller was given a day to  
15 respond."

16 So there appears to be a kind of a brinkmanship  
17 going on in relation to this immunity issue on  
18 the eve of trial. And, again, is this a matter  
19 that would likely have to have been discussed  
20 with you?

21 A One of the things I do recall from those days,  
22 and this whole matter, was Miller's frustration  
23 with Mr. Kovnats and how Mr. Kovnats was  
24 constantly pressing him for this, for that, for  
25 one set of arrangements and for another. I do



1 remember that Bruce expressed a good deal of  
2 frustration about these kinds of tactics.

3 Q And my question is that the fact that you've got  
4 a recollection of that is consistent with Miller  
5 having conferred with you when that kind of an  
6 ultimatum was coming through?

7 A Yes.

8 Q Perhaps on the point you just raised,  
9 Mr. Whitley, I could help you. If you look at  
10 tab 80, which is in volume 3 of your documents.  
11 Consistent with what you just said, but a little  
12 more detailed, this was your response to Judge  
13 Enns. So I'm in Exhibit 30C, volume 3 of the  
14 present book, tab 80. Are the materials in tab  
15 80 your response to Judge Enns in early 2004?

16 A They are.

17 Q And if you could look at page 2 at the bottom,  
18 there is a helpful note that says essentially  
19 what you've just said in a little more detail.  
20 You see three lines from the bottom of page 2.

21 "I do recall that Bruce Miller was having a  
22 difficult time with a person by the name of  
23 Zanidean, who was in the Witness Protection  
24 Program. The difficulty was around  
25 persistent and extravagant demands being

1                   made by Zanidean's lawyer on his behalf."

2                   Does that accurately reflect the recollection  
3                   that you had in 2004 when this matter was brought  
4                   to your attention?

5     A            Yes, it does.

6     Q            All right. That completes the chronology, as  
7                   best we can reconstruct it, in the pre-trial  
8                   period. The trial starts the following Monday,  
9                   June 3rd. And I want to step back and ask you a  
10                  few general questions about this overall  
11                  six-month course of negotiations with Kovnats  
12                  and Zanidean that we have just reviewed between  
13                  December and late May. Is it fair to say that  
14                  the materials we have just reviewed raise a  
15                  number of obvious disclosure issues?

16    A            Yes.

17    Q            In particular, the straight cash payment option  
18                  is obviously discloseable?

19    A            Obviously.

20    Q            And the demand for immunity on the Swift Current  
21                  arson, whether it was successful or not, is also  
22                  obviously discloseable?

23    A            Yes.

24    Q            While you and Miller were engaged in these  
25                  discussions, and I mean you in a supervisory

1           consultative capacity, although it appears you  
2           did attend some meetings, but Miller is doing  
3           most of the leg work here, while the two of you  
4           were conducting these negotiations, did you take  
5           any steps to ensure that these -- this process  
6           was drawn to Dangerfield's attention? Do you  
7           remember any discussions exactly on this point  
8           that, we have got obvious disclosure problems  
9           here, Bruce. Are you being sure to keep  
10          Dangerfield informed? Something along those  
11          lines?

12        A     I don't recall any discussions along those  
13          lines. I think I would have taken it for  
14          granted that these were obvious disclosure items  
15          and that Bruce would have discussed this with  
16          George in the ordinary course of events.

17        Q     Do you remember any discussions directly with  
18          Dangerfield between the two of you --

19        A     No.

20        Q     -- in which you drew these matters to his  
21          attention?

22        A     No.

23        Q     Perhaps I could just deal with this issue at  
24          this point. The reason that I raise this is  
25          because if you look at volume 3 of your

1 documents, tab 59, you'll see one of the files  
2 that the ministry kept on these witness  
3 protection issues in the Driskell case is a  
4 white folder and a blue folder. Do you have tab  
5 59 in volume 3?

6 A I do, yes.

7 Q If you look at the cover page on the inside, you  
8 see this is both Gumieny and Zanidean, the two  
9 protected witnesses?

10 A The little --

11 Q It says "strictly confidential" and then says  
12 "directors only, very confidential". Do you see  
13 that, at the bottom of the first inside page?

14 A I see "strictly confidential, witness in  
15 relocation, Gumieny, Zanidean, public  
16 prosecutions directors only", yes.

17 Q "Very confidential" at the bottom has been cut  
18 off a little bit?

19 A Yes.

20 Q So it has "strictly confidential" stamped on it  
21 twice and "very confidential" at the bottom.  
22 And when we look, the file obviously has to  
23 be -- it has got a sign-out regime. And we see  
24 Cecelia or Cece signing it out a couple of times  
25 in 1995, much later in the day, and Mr. Miller

1 signing it out in 1994. Do you see that?

2 A Yes.

3 Q And then over the page it has -- in the next  
4 cover page it says:

5 "Witness protection, B. Miller and S.  
6 Whitley only."

7 Do you see that?

8 A I do.

9 Q Can you assist us with the sort of high-level of  
10 security that the ministry had surrounding a  
11 file like this?

12 A Just very generally, the whole business of  
13 witness protection was something that we kept  
14 very confidential within the office, I think for  
15 obvious reasons. The arrangements around  
16 relocating people and what their new identities  
17 might be were things that we kept strictly on a  
18 need-to-know basis.

19 Q So given the close way in which this information  
20 was being held, as between you and Miller, for  
21 the reasons you've just given, was there not a  
22 need to make sure there was a process in place  
23 to keep Dangerfield briefed since he couldn't  
24 have access to the file?

25 A I think, yes. The short answer to that question

1 is yes. But to say that George wouldn't have  
2 access to this file isn't, I think, strictly  
3 accurate because he could get access to this  
4 file through Bruce or through me if he needed  
5 it. It is just that we had to control how the  
6 information around protected witnesses was  
7 released. Of course he had to know about it.

8 Q And presumably the file would be particularly  
9 sensitive because it might contain his  
10 relocation, the fact that he was asking to go to  
11 B.C. and the new identity might be in there. I  
12 understand the sensitivity for it, but the -- in  
13 terms of setting up some kind of a formal  
14 process with Dangerfield to keep him briefed,  
15 there was nothing that you were aware of?

16 A No.

17 Q You simply relied on the common sense of Bruce  
18 Miller, in the ordinary practice of the  
19 department, to keep Dangerfield in the loop?

20 A Yes.

21 Q Now, I have to put this to you, Mr. Whitley,  
22 because this is the flip side of the coin that  
23 you're telling us about. Mr. Dangerfield has  
24 told this inquiry, both in his statement and in  
25 his sworn evidence, that he received what he

1 describes as "very specific instructions" from  
2 yourself and Miller, or a combination of the two  
3 of you, that he was not to know and not to  
4 disclose any of the details of the witness  
5 protection arrangements. Do you recall ever  
6 giving him those kinds of specific instructions?

7 A If I had given those kind of instructions, I  
8 would have recalled them. It runs counter to --  
9 it runs counter to our practice at the time. It  
10 doesn't make any sense. I don't recall ever  
11 telling George to do something that I think he  
12 would have been quite resistant to following.

13 Q You say resistant because the instructions are  
14 illogical?

15 A They don't make any sense.

16 Q What's not discloseable is the new identity and  
17 the new location, not the monies or the immunity  
18 issue?

19 A The fact of the immunity arrangement is clearly  
20 discloseable, clearly, and that was our  
21 practice. To give instructions to do something  
22 that was not only unethical, probably illegal,  
23 doesn't make any sense.

24 Q You see, Mr. Brodsky makes a very direct request  
25 for the details of the witness protection

1 arrangements. And Mr. Dangerfield, he gives him  
2 a general response that we're protecting him.  
3 And there are costs involved in protection, but  
4 he refuses to give him the details. And he  
5 justifies that on the basis that he was simply  
6 acting according to instructions. Did he ever  
7 discuss that request that Brodsky made with you?

8 A No.

9 Q Did he ever ask to be relieved of his  
10 instructions?

11 A No.

12 Q On the basis of the common sense reasoning  
13 given?

14 A No, absolutely not. He would have had no  
15 hesitation of expressing his view of such  
16 instructions.

17 Q And when pressed, he does acknowledge that his  
18 refusal is overly broad. So you're saying he is  
19 not the kind of man who would have cow-towed to  
20 a stupid order from a superior?

21 A Absolutely not.

22 Q I want to take you to a series of events that  
23 happened in and around the trial, immediately  
24 before it and immediately after. And I'll ask  
25 you the same standard questions in relation to



1 each of these events as to whether you were  
2 aware of them. But regardless of whether you  
3 were aware of them, whether they are the kinds  
4 of things that normally would be brought to your  
5 attention. And there is five events, in  
6 particular, I want to review with you.

7 The first one happens on May 26th, that's  
8 about a week before the trial. We know, both  
9 from documentary and viva voce evidence at the  
10 inquiry, that Zanidean appears to have gone on  
11 the lam to Alberta. He is arrested there on a  
12 material witness warrant and brought back to  
13 Winnipeg by the police in custody. And what  
14 ensues is a -- what could be characterized as a  
15 fairly serious argument or dispute down at the  
16 Public Safety Building between Mr. Kovnats and  
17 Mr. Dangerfield, in which Kovnats is making  
18 threats, if I can call them that, to the effect  
19 that if Zanidean didn't get what he wanted, then  
20 Kovnats would instruct him to cease cooperating  
21 with the Crown. Dangerfield responds in kind  
22 with a threat of his own that he is going to  
23 have Kovnats charged with obstruct of justice.  
24 And Miller intervenes, Miller comes down at some  
25 point and settles the dispute in the interim.

1           If that kind of an event had happened on  
2           the eve of a major trial involving its most  
3           important witness, who had been in witness  
4           protection negotiations that you had some  
5           involvement in, would you expect that matter to  
6           have been brought to your attention?

7    A    I would hope that -- I don't have any  
8           recollection of this, but I would hope that that  
9           kind of thing would come to my attention.  It's  
10          unusual, in the extreme, to have Crown  
11          threatening other counsel.  That's not something  
12          that happens that often.

13   Q    And on the other side, Mr. Kovnats threatening  
14          that if he didn't get what he wanted --

15   A    Well --

16   Q    -- that you weren't going to have a witness.

17   A    Well, in the context of how I remember this, and  
18          you referred to it as brinkmanship, but I recall  
19          that Bruce was very frustrated with that kind  
20          of, well, I need this or I'm going to go here or  
21          I'm going to go to the Deputy and that sort of  
22          thing.  But having a Crown attorney make a  
23          threat like that, I would have expected to know  
24          about that because I'm responsible for that kind  
25          of behaviour, ultimately.

1 Q So this -- you don't recall the incident, I take  
2 it?

3 A No. What was the date of it? I'm sorry.

4 Q It's May 26th, about a week before the trial.  
5 So it may well be that you were briefed on it.  
6 You simply don't recall it now?

7 A That's entirely possible. This is 1991?

8 Q Yes, it is.

9 A The spring of '91 I was very much involved with  
10 setting up a huge inquiry into the Pollock  
11 affair. That was very much something that was  
12 preoccupying me in the spring of '91. It is  
13 possible that I was briefed on it, but it seems  
14 unlikely I would forget that. When I read about  
15 it somewhere, it struck me as extraordinary.

16 THE COMMISSIONER: It seems to have been a  
17 fairly hot piece of gossip around the Winnipeg  
18 bar.

19 THE WITNESS: That depends on the day, sir.  
20 What constitutes hot gossip in the Winnipeg bar  
21 is a matter of time of day.

22 MR. CODE: I am not going to go anywhere near  
23 that answer.

24 THE COMMISSIONER: We will leave that for the  
25 Winnipeg bar.

1 MR. CODE: I hope Mr. Prober explores it.

2 MR. PROBER: I don't know. But I'm going to do  
3 this:

4 (Prober holds up "usual objection" card)

5 THE WITNESS: Actually, it is funny you should  
6 ask.

7 MR. PROBER: It would take days, weeks.

8 BY MR. CODE:

9 Q The second event, Mr. Whitley, is into the  
10 trial. The trial starts June 3rd. And on the  
11 Monday of the second week of trial -- Crown has  
12 been calling its case for five, six days and  
13 getting very close to the end of its case. And  
14 on Monday, June 10th, we know that there are at  
15 least two meetings, at least from Mr. Kovnats'  
16 dockets. He docketed two meetings. One is an  
17 evening meeting on that Monday, June 10th.  
18 Lengthy meetings in which, according to his  
19 evidence, there is an attempt to reach a  
20 last-minute settlement. And Zanidean is about  
21 to go into the box the next morning. He  
22 testifies on June 11th, Tuesday, June 11th.

23 Dangerfield holds off on calling him until  
24 the last minute, until the end of his case. And  
25 then he's -- Dangerfield is finally told that

1 the disputes have been resolved. An agreement  
2 has been reached on the protection issues, and  
3 Zanidean has agreed to testify. Do you recall  
4 being informed of those final developments?

5 A No.

6 Q Again, would the final agreement reached with  
7 the key witness in a major prosecution like this  
8 be the kind of thing on which you would likely  
9 be briefed?

10 A I would have expected to have been briefed on  
11 that, absolutely. I was away for a week and a  
12 bit in June of '91 in Vancouver for issues  
13 dealing with family violence and so on. Bruce  
14 would have been acting in my stead, but I would  
15 have expected to be briefed on my return.

16 Q And you have no recollection of what the final  
17 agreement was before Zanidean got into the  
18 stand?

19 A No.

20 Q The third event, and we're dependent on the two  
21 homicide officers, Anderson and Paul, for this  
22 account, is according to their evidence, after  
23 he completes his testimony on June 11th, he is  
24 informed by Sergeant Anderson, as they are  
25 taking him back to the secure hotel room, or

1 back at the hotel room, Sergeant Anderson and  
2 Sergeant Paul tell him that there is an immunity  
3 arrangement in place that the Winnipeg Police  
4 had reached with the Swift Current RCMP a couple  
5 of months earlier in April, and that he is in  
6 the clear on the Swift Current arson, that they  
7 had made this agreement and they have kept it  
8 secret from him until after he completed his  
9 testimony. And then once he is informed of the  
10 agreement, it becomes a component part of the  
11 final settlement negotiated with Miller, between  
12 Miller and Kovnats.

13 A Just so I follow this, Mr. Zanidean, through  
14 Mr. Kovnats, has not told --

15 Q Is not told.

16 A -- that he has immunity from the charges in  
17 Saskatchewan?

18 Q Exactly.

19 A Until after he testifies?

20 Q Exactly. Police to police reach this agreement.  
21 The agreement is that he won't be told.  
22 According to the officers, they fully brief  
23 Miller on this. And Miller approves of it and  
24 agrees with the strategy of not telling the  
25 witness, so that the witness can testify in a

1           pristine state of knowing about the benefit  
2           that's been obtained. And, according to  
3           Vandergraaf, Dangerfield is briefed on it. And  
4           my question to you is if that kind of an  
5           arrangement had been made, would you expect to  
6           be briefed on it?

7    A       I would not only expect to be briefed on it, I  
8           would have overruled it. That is no different  
9           than a wink and a nudge.

10   Q       Were you ever briefed on any such arrangement?

11   A       No.

12   Q       Would you have remembered if there was such?

13   A       Absolutely.

14   Q       And when you say that you would have overruled  
15           it, because I think the old adage is a wink is  
16           as good as a nod to a blind donkey, or a blind  
17           horse, I'm sorry.

18   A       A blind bat.

19   Q       Can you elaborate on what the -- what the reason  
20           is why that's an improper arrangement, in your  
21           view?

22   A       It's an artifice. It is a way of a witness  
23           being, strictly speaking, literally honest when  
24           they testify, but in the background is this  
25           understood arrangement that no, things are going

1 to be just fine, that's implicit in this deal.  
2 It doesn't pass the smell test, never mind any  
3 question of ethical propriety. That's -- I  
4 mean, these are the kinds of things that our  
5 policy directions were trying to get at. You  
6 don't make these kinds of deals. You don't not  
7 share these kinds of arrangements with the  
8 defence counsel. How could they possibly  
9 address the issues around credibility of a  
10 witness without knowing that?

11 Q So leaving aside the propriety of the pre-trial  
12 agreement, if I can call it that, or the  
13 pre-trial arrangement, the post-trial  
14 arrangement after Zanidean is told, again,  
15 according to the officer's account, at that  
16 point in June and July when the negotiations  
17 continue, the immunity arrangement with Zanidean  
18 becomes a component part of the final settlement  
19 worked out between Miller and Kovnats, were you  
20 ever briefed about immunity on the Swift Current  
21 arson having become a component part of the  
22 final post-trial agreement?

23 A Not to my knowledge.

24 Q If there was such an agreement to give Zanidean  
25 immunity after his testimony was completed,



1 would that have required your approval?

2 A Yes, it would.

3 Q It would have required the deputy's approval?

4 At least the briefing of the deputy?

5 A At least briefing the deputy, yes.

6 Q The fourth event I want to bring to your  
7 attention, and ask you the same series of  
8 questions about, is a June 19, 1991 meeting. So  
9 this is -- the trial, I believe, is completed on  
10 the 14th with the jury's verdict of guilty. And  
11 about five days later, on June 19th, all of the  
12 parties meet. At least all of the parties who  
13 appear to be negotiating the deal, Miller,  
14 Kovnats and Zanidean, the four of them get  
15 together. And Miller, it appears at this point,  
16 puts the straight cash payment option on the  
17 table. And let me take you to the documents in  
18 that regard. They are in volume 2 of your  
19 materials, Exhibit 30B, tabs 55 and 57.

20 A Sorry?

21 Q Tab 55. If you start at tab 55, the back of  
22 Exhibit 30B. You have, again, Corporal Orr's  
23 continuation report in the RCMP file. And you  
24 see he has -- it's a June 16th note. He has  
25 some discussions with Miller in the days leading

1 up to the meeting that he notes initially. Do  
2 you see in the middle of the page a sentence:

3 "I believe Mr. Miller is going to recommend  
4 a relocation fee..."

5 A Yes.

6 Q "...to help him relocate and set up a new  
7 life."

8 A Yes.

9 Q So this is -- again, I mentioned to you before  
10 that this is Mr. Kovnats and Mr. Miller  
11 progressively moving towards option two?

12 A Yes.

13 Q And then the 9 o'clock meeting takes place. And  
14 you see the second sentence of the note there:

15 "The idea of a relocation fee is not  
16 attractive to Zanidean at all, but he was  
17 promised the sun and moon by the Winnipeg  
18 Police in the first instance and is  
19 sticking with that misconception. I would  
20 imagine..."

21 MR. ABRA: I'm sorry, Mr. Code, what tab are we  
22 at?

23 MR. CODE: I'm at tab 55 of the documents for  
24 this witness.

25 MR. ABRA: Thank you.

1 BY MR. CODE:

2 Q And Orr concludes that he thinks that that's the  
3 way it's going to go, but witness protection is  
4 still formally on the table. Do you see that?

5 A The: "witness protection is out of the picture"?

6 Q "...but we will see"... So I imagine that  
7 that is the way that it will go and that  
8 witness protection is out of the picture,  
9 but we will see."

10 A Yes.

11 Q And, again, this is becoming a little bit  
12 repetitive, but I take it that as Mr. Miller  
13 moved towards that option two and appears to  
14 formally tender the offer on June 19th, that's  
15 the kind of thing you would expect to be briefed  
16 on?

17 A Yes.

18 Q And do you have any recollection today of the  
19 discussions at this period as between yourself  
20 and Mr. Miller?

21 A No, I don't.

22 Q The offer then gets -- although Zanidean does  
23 not accept it at the May -- at the June 16th --  
24 the June 19th meeting, if you go forward two  
25 tabs to tab 57, two days later, on the 21st,

1           there is a letter from Miller to Kovnats?

2     A     Yes.

3     Q     This is the one that says it is subject to  
4           approval by the deputy?

5     A     Yes.

6     Q     But it is a signed letter. He sends it out to  
7           Kovnats on the 21st. And we've got Kovnats' fax  
8           cover sheet here showing that he receives it on  
9           June 21st. It's actually sent to him, even  
10          though it hasn't been approved by the deputy  
11          yet. And it says, in the third paragraph:

12                 "The plan arranged for your client is one  
13                 that has been worked out with the police  
14                 and is one with which your client is  
15                 comfortable."

16          It appears to refer to a final agreement.

17                 "And it caps the relocation costs at  
18                 \$20,000."

19          Do you see that?

20     A     Yes.

21     Q     And, again, I take it, it is self-evident from  
22           the face of the document that this is the kind  
23           of an agreement that would have to go through  
24           you and up to the deputy?

25     A     I would have to take this to the deputy. If I

1 was present at the time, yes, I would have taken  
2 this to the deputy. This would require his  
3 sign-off.

4 Q And if you go forward in that same tab, to the  
5 back of the tab, the very last document in this  
6 volume, is a file copy of the letter in draft  
7 form. It's the very same letter. And you see  
8 it's got a couple of notes on it showing that  
9 that's exactly what happens?

10 A Yes, I do.

11 Q Miller appears to send it to you. The  
12 right-hand note is Miller to you; is that  
13 correct?

14 A Yes.

15 Q Miller appears to send it to you on June 24th  
16 and ask you to review it with the deputy?

17 A Yes.

18 Q And then the left-hand note is the deputy  
19 sending it back to you with his approval?

20 A I see that.

21 Q Is that correct?

22 A Yes.

23 Q And there's a small note below it, July 4th  
24 which perhaps you could assist us with. It is  
25 not apparent what it is?

1 A July 4th, '91?

2 Q Yes, the July 3, '91 note, the third note there,  
3 what does that deal with?

4 A "Copy sent to Stu Whitley, instructions". I  
5 don't know.

6 Q Instructions of Bruce Miller? Instructions from  
7 Bruce Miller?

8 A I'm sorry, I don't recognize the writing. I  
9 recognize the deputy's writing. That may be his  
10 assistant. I'm not sure.

11 Q In any event, the process was followed. And you  
12 took it to the deputy and got his approval --

13 A Yes.

14 Q -- consistent with the tenor of the evidence you  
15 had been giving to now; is that correct?

16 A Yes.

17 Q Now, the only question that I wanted to ask you  
18 about this, Mr. Whitley, is you see the letter  
19 goes out on June 21st to Kovnats signed,  
20 according to the fax cover sheet, without the  
21 deputy's approval. Would that be normal to send  
22 a letter like this to a lawyer negotiating a  
23 witness protection arrangement?

24 A No. In fact, under the Financial Administration  
25 Act, or the Attorney General's Act, prohibits

1 the commitment of this kind of arrangement  
2 without the appropriate signature.

3 Q So the fact of sending this to Kovnats on  
4 June 21st is irregular, to say the least, is  
5 that fair?

6 A Yes.

7 Q Do you recall any explanation for why that  
8 happened? Why was it sent to him in this  
9 apparent haste before the deputy had approved  
10 it?

11 A I can't -- I can't offer you anything on that,  
12 I'm sorry.

13 Q Let me see if I can help you with the fifth and  
14 last event that I want to bring to your  
15 attention. And you've got to go back a tab for  
16 this, back to 56. This is the intervening event  
17 that happens between the June 19th meeting and  
18 the June 21st meeting.

19 A You are referring to a police report?

20 Q Yes. We have got a police report at tab 56.  
21 And if you go two-thirds of the way down the  
22 page, it is referring to the events of  
23 June 20th, which is right in between the  
24 June 19th meeting at tab 55 and the letter  
25 subject to deputy's approval on the 21st. And

1           you see what happens on June 20th, according to  
2           the police report, is that Zanidean threatens to  
3           recant his testimony. Do you see that bullet  
4           for June 20th?

5    A    Yes.

6    Q    He has a blow-up with Sergeant Paul in the hotel  
7           room, ranting and raving about his package. He  
8           believes the police are undermining it. And he  
9           threatens to go to the press and say his  
10          testimony had all been lies. Do you see that?

11   A    I see it.

12   Q    And at the bottom of the page, you see the  
13          police respond by essentially terminating their  
14          witness protection arrangements?

15   A    Yes.

16   Q    So on June 21st, Zanidean's out on his own with  
17          no police protection. And the final event in  
18          the memo is they obtain the phone records and  
19          show that -- would show to Sergeant Paul, over  
20          that page on the second page of that memo, the  
21          police report, that Zanidean called Brodsky  
22          immediately after the blow-out. He traces a  
23          call to Brodsky's number at the time that  
24          immediately followed the blow-up with -- where  
25          he threatened to recant. Do you see that?



1 A Yes. I am just trying to put together when this  
2 happened. On the 21st of June?

3 Q Yes. The 20th of June.

4 THE COMMISSIONER: 20th and 21st.

5 BY MR. CODE:

6 Q The 20th of June.

7 A And then on the 21st?

8 Q The police terminate the protection.

9 A Yes, of '91.

10 Q Now, you see the date of the report? The report  
11 is not prepared until two and a half years  
12 later. Do you see that, September 23rd?

13 A That's what was throwing me off. I was looking  
14 at the bottom of the page and it says '93.

15 Q Well, it is not surprising that throws you off.  
16 There is no contemporaneous report of this  
17 incident. So the first question I have of you  
18 is, is this the sort of development on which you  
19 would have expected to have been informed?

20 A Absolutely. Absolutely, yes.

21 Q A key witness in a major trial, they just got a  
22 conviction and he is threatening to recant in  
23 the middle of witness protection negotiations?

24 A Yes.

25 Q These are unusual and important developments, is

1           that fair?

2    A       Well, that's an understatement, yes.

3    Q       Do you recall being briefed on this matter?

4    A       No, I don't. There is no way that I would be  
5           briefed on something like this and then I simply  
6           forgot about it. This is so unusual.

7    Q       Is that a plausible explanation for why the  
8           letter at the next tab, tab 57, is sent out in  
9           haste on the day that Zanidean is out on the  
10          street without deputy approval?

11   A       I can't deny that it's a plausible explanation.  
12          But I equally can't imagine this letter going  
13          out with all of us understanding the authorities  
14          that are required to be in place before such a  
15          letter could commit the department.

16   Q       Before?

17   A       Before such a letter could commit the  
18          department.

19   Q       Before the proper approvals had been obtained?

20   A       Yes.

21   Q       It's a high-risk tactic is what it is?

22   A       It's an offence.

23   Q       It's contrary to the Attorney General's Act?

24   A       On the Financial Administration Act, one of the  
25          two.

1 MR. CODE: All right. Now, I'm at the last  
2 topic I need to deal with you on, Mr. Whitley,  
3 the Saskatchewan Justice materials. And if you  
4 want to take the recess now, I'm in your hands.

5 THE COURT: This would be a reasonable time to  
6 take it.

7 THE CLERK: All rise. This Commission of  
8 Inquiry is now in recess.

9 (Proceedings recessed at 3:20 and  
10 reconvened at 3:38 p.m.)

11 THE CLERK: All rise. This Commission of  
12 Inquiry is now re-opened.

13 BY MR. CODE:

14 Q All right. Mr. Whitley, the last matter is this  
15 whole business in 1992, 1993, well after the  
16 trial period, concerning the correspondence from  
17 Saskatchewan, from Mr. Quinney. First of all,  
18 you knew Richard Quinney well, I take it?

19 A Very well, yes.

20 Q He was a colleague of yours?

21 A Yes.

22 Q And highly regarded and highly respected  
23 individual?

24 A Yes. We saw each other three or four times a  
25 year.

1 Q You would see him at all of the  
2 Federal/Provincial meetings?

3 A Yes.

4 Q And at some point -- I want to leave aside the  
5 question of timing here because I know this is  
6 the most difficult issue for you. Leaving aside  
7 when you learn of his letters, at some point you  
8 become aware of the two letters that he sends to  
9 Miller in early 1992 while the appeal is still  
10 pending. You know what I'm talking about here?  
11 You know the letters I'm referring to?

12 A Yes. I've seen -- those letters were sent to me  
13 in November of 2003.

14 Q I'm going to carefully come to the timing issue,  
15 don't worry. I just want to deal with some  
16 issues around the content of them and the  
17 process, and then we will come back to the  
18 issue --

19 A Sure.

20 Q -- of when you learn of them. The letters -- if  
21 you've got volume 3 of your materials out,  
22 Mr. Whitley, tabs 61 and 62 is where we find  
23 them.

24 A Yes.

25 Q So it's Exhibit 30C, tab 61 and 62. And let me

1 deal with a number of preliminary points here  
2 before we come to the issue of when you learn of  
3 them. First of all, the subject matter of the  
4 letters, if I can have you have tab 61 open in  
5 front of you, and let me just generally  
6 summarize the content of the letters. There's  
7 three main subjects, substantive subjects, if I  
8 could call it that.

9 On the first page, Mr. Quinney reviews the  
10 RCMP arson investigation. And he concludes, if  
11 you look at the last sentence at the bottom of  
12 the page, the result of the investigations, they  
13 are satisfied that Driskell's statement is  
14 substantially correct and that the motive for  
15 burning the house in Swift Current was reward,  
16 as opposed to revenge. Do you see that at page  
17 1 of the letter?

18 A I see it.

19 Q And what that issue relates to, of course, is  
20 the question of whether Zanidean's evidence at  
21 trial, when he said the motive was revenge, was  
22 perjury on that issue; is that correct?

23 A That's correct.

24 Q And then over the page, the second substantive  
25 issue, page 2, in the second paragraph:

1           "I would also like to advise that you  
2           during the course of the investigation..."

3           Do you see that?

4    A    I see it.

5    Q    He refers to a July 16th call.  In other words,  
6           shortly post-trial, about a month after the  
7           trial, an alleged conversation between Sergeant  
8           Anderson and Zanidean, where Zanidean threatens  
9           to go to the media and state that he told -- he  
10          only told the police what they wanted to hear.  
11          And he threatens to -- in essence, this is  
12          another threat to recant, unless he gets his way  
13          on the Swift Current arson.  Do you see that?

14   A    I do.

15   Q    So the substance of it is somewhat like the  
16          June 20th threat we just went to, where he is  
17          engaging and bargaining over an issue of  
18          interest to him and threatens to use recantation  
19          as leverage.

20                 And then the third and last issue, there is  
21          a discussion of Stinchcombe.  It's the recent  
22          decision in Stinchcombe in the middle.  But  
23          leaving aside that matter of process, the third  
24          substantive issue at the bottom of the second  
25          page is Quinney concludes in the paragraph:

1           "With respect to the arson in this  
2           province, it seems clear that Zanidean is  
3           of the view that he was granted immunity  
4           from prosecution, no matter exactly how  
5           this came about."

6           Do you see that?

7    A       Yes, I'm following you.

8    Q       So the third subject matter of the letter is to  
9           raise this whole issue of was there or wasn't  
10          there immunity granted to Zanidean in relation  
11          to the Swift Current arson. And my question,  
12          given that content of the letter, was there any  
13          issue, serious issue, as to whether this was  
14          discloseable during the appeal period?

15   A       Was there any issue?

16   Q       Yes. What are your views as to whether this was  
17          discloseable during the appeal period?

18   A       Well, I quite clearly understand this. I mean,  
19          the ethical man that he was, he understands the  
20          obligation. In other words, he was quite  
21          pointed in bringing it to the department's  
22          attention.

23   Q       So you agreed with Quinney's analysis?

24   A       Absolutely.

25   Q       The second preliminary point I want to ask you,

1 and again this relates to the content of the  
2 letter, the three substantive points we've just  
3 gone through, potential perjury, a threat to  
4 recant and was there an immunity deal, is the  
5 subject matter of the letter being of sufficient  
6 importance that it's a matter that you would  
7 expect Miller to have brought to your attention?

8 A I would have expected this to be in my hands the  
9 day he got it.

10 Q These are clearly serious issues --

11 A Huge.

12 Q -- that Quinney is raising?

13 A Yes.

14 Q The third preliminary point I wanted to ask you  
15 is, given that disclosure issues are obviously  
16 being raised explicitly by Quinney here, who is  
17 the Crown official who would be responsible for  
18 making that disclosure decision while an appeal  
19 was pending in the Manitoba Court of Appeal?

20 A Oh, I would have expected that George would have  
21 had the primary responsibility for managing that  
22 because he had conduct of the case, but it  
23 shouldn't rest on niceties. This is not some  
24 passing or trivial matter. This should have  
25 been brought to George's attention. It should



1 have been brought to our senior management  
2 committee. This is the kind of thing that we  
3 talked about, issues that materially affected  
4 the administration of justice.

5 Q We know that, according to the file documents,  
6 that if you would flip forward to tab 63, Miller  
7 does send it to Dangerfield. So my question  
8 simply is, was he the appropriate person to send  
9 it to --

10 A Yes.

11 Q -- for the disclosure decision? And similarly,  
12 while we are on this issue of who's responsible  
13 at first instance for the disclosure decision,  
14 leaving aside whether it should also have gone  
15 to your committee, at the post-appeal stage,  
16 this is at a time when the appeal is still  
17 pending. It is not argued until December.  
18 You've got some time still. As matters  
19 developed, we moved into a post-appeal period.  
20 Who would have been responsible for the  
21 disclosure decision at the post-appeal stage?

22 A Once again, this information was in the director  
23 of prosecution's hands. I would have expected  
24 personally to have been briefed on this. I  
25 would have expected that letter, as I said, to

1 be brought into my office. But the primary  
2 obligation is to disclose, to get it out there,  
3 to get it to the person who can address it,  
4 which would have been defence counsel. And I  
5 know that in our interview we talked about the  
6 niceties of whether it should be Dangerfield or  
7 Miller or me. The point is that alarm bells  
8 should have been clanging and something should  
9 have been done about it.

10 Q You're still not directly answering my question.  
11 You're saying the decision is an obvious one,  
12 but -- and that we shouldn't stand on niceties  
13 here. But knowing the personalities involved,  
14 whose decision would it be at the post-appeal  
15 period?

16 A I think it was a decision that could have been  
17 made by Bruce, as Director of Prosecutions.  
18 Equally, he could have brought it to me to make.  
19 He could have taken it to George to make the  
20 disclosure, post-appeal. He had a number of  
21 options open to him.

22 Q In your interview with us at Tab 3, Mr. Whitley,  
23 if I could remind you at page 12 of your  
24 statement, in the middle of page 12,  
25 "Although Driskell's appeal had by this

1           time been dismissed, Whitley considers  
2           Miller to have acted appropriately in his  
3           March 11, 1993 memo by continuing to treat  
4           the disclosure matter as Dangerfield's  
5           decision to make."

6    A    Yes.

7    Q    Now, are you changing your views on this?

8    A    Well, a little bit of context.  And I don't want  
9           to sort of belabour this point.  But in 2003,  
10           November of 2003, I was sent four documents and  
11           asked to comment on them.  These were the Miller  
12           to Dangerfield memo, the Miller to me memo and  
13           the two letters from Mr. Quinney after the  
14           January 16th letter.  I never saw the  
15           January 16th letter.  So the letters that talked  
16           about immunity were the ones that I had an  
17           opportunity to review.  I asked Mr. Olson if  
18           there were other things that could help me put  
19           this in context and he said, no, the file was  
20           missing and the particular drafts.

21           After our interview I went back and  
22           reviewed the -- all of the file that I have been  
23           sent.  I had been sent a huge amount of  
24           documents.  And I really had, for our interview,  
25           focused on the things I had my name on.  For the

1 first time in 2003, I realized we weren't just  
2 talking about immunity or witness protection, we  
3 were talking about perjury, which would have put  
4 bells up.

5 Q Mr. Whitley, I am not interested in 2003. We  
6 interviewed you about a month ago.

7 A I'm sorry, that's what I meant.

8 Q The question is simply are you disagreeing that  
9 you told us this?

10 A No. I am not disagreeing with it. But what I  
11 am saying now is now that I understand the  
12 context of information that Quinney provided to  
13 Bruce Miller. It was open to him to pursue  
14 disclosure himself or take it to George or bring  
15 it to me, but it's not inappropriate to bring it  
16 to me. And, in fact, if I recall the  
17 conversation that you and I had correctly, I  
18 agreed with that.

19 Q Was it inappropriate to give it to  
20 Mr. Dangerfield?

21 A No.

22 Q Knowing the personalities involved, are you  
23 surprised that he gave it to Dangerfield to make  
24 the decision?

25 A I'm -- I'm having difficulty with that question

1           because you're asking me to overlay the  
2           personalities of two very experienced lawyers in  
3           the face of clear, clear indication that there  
4           has been a miscarriage of justice, clear. It's  
5           pointed out to us by another Department of  
6           Justice. Why would there be any sort of  
7           question about personalities entering into this?

8       Q     Let's move on, Mr. Whitley. It's not that  
9           important.

10      A     I'm sorry.

11      Q     The fourth point that I want to bring to your  
12           attention, as a preliminary matter, is that by  
13           the time we get into 1993, in other words, these  
14           letters at tab 61 and 62, go nowhere during 1992  
15           while the appeal was still pending. The memo at  
16           tab 63 elicits no response, and we are now into  
17           1993. We are at tab 64. We've got Sid Lerner  
18           involved. The question from the minister's  
19           office. And we've got Miller sending it to  
20           Dangerfield a second time, almost a year later  
21           in 1993. So I'm at tab 64 now. Is it fair to  
22           say that, by this point, the ministry is in a  
23           seriously embarrassing position, where whoever  
24           it is who is to blame here, as between Miller  
25           and Dangerfield, and I'm not interested in

1 getting into a question of fault between the two  
2 of them, the ministry is clearly -- the  
3 division, the criminal division, has clearly  
4 dropped the ball, is that fair?

5 A I think it's fair to say the ministry has  
6 dropped the ball, yes.

7 Q In other words, what was already a bad situation  
8 of non-disclosure when Quinney sent the  
9 materials has now been compounded?

10 A Yes.

11 Q And furthermore, Driskell has been prejudiced by  
12 the ministry's failure to make disclosure  
13 because his appeal has now been dismissed?

14 A Hugely.

15 Q In those circumstances, I take it, it's now even  
16 more important to bring these matters to the  
17 attention of the most senior officials in the  
18 department?

19 A It is, or was.

20 Q And the last preliminary point I want to make is  
21 is again from these documents at tab 64, in  
22 particular the Lerner memo. Do you have the  
23 handwritten Lerner memo?

24 A I do.

25 Q At the front of tab 64?

1 A Yes.

2 Q Lerner, you knew, to be a counsel in the  
3 department at that time, a prosecutor?

4 A Yes, a very sensible and intelligent man.

5 Q Who went on to become appointed a judge?

6 A Yes.

7 Q And he and Miller, according to this memo, have  
8 had a discussion about the matter and both of  
9 them agree that the documents should have been  
10 disclosed. Lerner discovers them in the file  
11 and discovers that they still haven't been  
12 disclosed. And they make an agreement between  
13 the two of them that Miller's got to go back at  
14 it again, which results in the further memo to  
15 Dangerfield that we see at this tab; is that  
16 correct?

17 A Yes.

18 Q Now, what I'm most interested in here is what  
19 prompts Lerner to get involved. You see in the  
20 first paragraph is a request or an inquiry from  
21 the Minister's office which, in turn, is  
22 responding to a query from a reporter, as Lerner  
23 puts it:

24 "Re the nature of any immunity agreement."

25 Do you see that?

1 A This is the tab for replacement, is that the  
2 one?

3 Q Tab 64.

4 THE COMMISSIONER: Yes, either of those pages,  
5 yes.

6 BY MR. CODE:

7 Q The Sid Lerner letter, the first paragraph, the  
8 reason that he got involved is because Kelly, in  
9 the Minister's office --

10 A Right.

11 Q -- has asked him a question. And she's  
12 following up on a reporter, who has directly  
13 contacted the Minister's office and inquired  
14 about any immunity agreement --

15 A Yes.

16 Q -- for Zanidean. Do you see that?

17 A I do.

18 Q And, again, the obvious point here is the media  
19 and the Minister's office now appear to be on to  
20 the very issue that's in -- is one of the three  
21 substantive points in the Quinney letter; is  
22 that correct?

23 A Yes.

24 Q And do I take it that in a criminal law  
25 division, when the Minister's office and the



- 1 media start asking questions about your cases,  
2 this is always a sensitive matter?
- 3 A It is.
- 4 Q And, again, would make it doubly important to  
5 keep the most senior officials in the department  
6 briefed on the matter?
- 7 A That's why I'm a little or was a little  
8 surprised to see that it went directly to Sid  
9 Lerner. Normally --
- 10 Q The request to the minister's office gets  
11 delegated to Lerner?
- 12 A Yes.
- 13 Q "Normally" you were going to say?
- 14 A Normally it would come to my office.
- 15 Q You would be involved in this?
- 16 A Yes.
- 17 Q Lerner presumably could have been briefed by  
18 Miller. That Miller took this on as the person  
19 who had been most involved, and he got Lerner to  
20 assist him to try to find the documents.
- 21 A That's possible.
- 22 Q Is that a feasible way in which Lerner could  
23 have got involved?
- 24 A Sure.
- 25 Q In any event, three days later, on March 13th,

1 if you turn to tab 65, the obviously pending  
2 media articles, which resulted in the question  
3 to the minister's office, are published. And we  
4 get a series of articles over the weekend, on  
5 the Saturday and Sunday, the 13th and the 14th.  
6 And then the following week on the 21st, there  
7 is another article. And if you turn to the  
8 third article at that tab 65 is the one I'm most  
9 interested in.

10 A "Is he killer", is that the one?

11 Q No. "Conviction review: Was Driskell murder  
12 trial manipulated?" The third article, the  
13 third page. Sorry, fourth page, but third  
14 article.

15 A "Conviction", yes.

16 Q Have you got that?

17 A Yes.

18 Q And you see the lead:

19 "Opposition Justice Critics yesterday  
20 called for a full review of the Justice  
21 Department's handling of the Perry Harder  
22 murder case to determine if key evidence  
23 was withheld from the jury."

24 A Yes.

25 Q "NDP critic Becky Barrett and Liberal Paul

1 Edwards want to know if the department made  
2 a deal without telling the defence or the  
3 jury with Ray Zanidean to drop outstanding  
4 charges against him, in order to get him to  
5 testify against Jim Driskell, because it  
6 goes to the witness's credibility if he  
7 stood to gain from giving evidence, Edwards  
8 said."

9 And it goes on to quote extensively from the two  
10 Justice Critics, Edwards and Barrett, about this  
11 issue of was there or was there not immunity. Do  
12 you see that?

13 A I do.

14 Q So, once again, we've got the media squarely  
15 raising one of the issues to which the Quinney  
16 correspondence spoke; is that correct?

17 A Yes.

18 Q As a result of that, the opposition is raising  
19 questions in the House about the very subject  
20 matter of the Quinney correspondence; is that  
21 correct?

22 A It is.

23 Q Now, I would like you to speak generally and  
24 assist us generally about the role of an  
25 Assistant Deputy Minister in a Criminal Law

1 Division in this country and in most  
2 Commonwealth countries. When a criminal  
3 prosecution becomes the subject matter of  
4 questions in the opposition of your minister in  
5 the House, and was beginning to look like a  
6 political football in the media and in the  
7 legislature, what is the role of the Assistant  
8 Deputy Attorney General in the Criminal Law  
9 Division?

10 A An Assistant Deputy Minister, unlike a Director  
11 of Public Prosecutions, reports to the Deputy  
12 Minister. So in the ordinary course of things,  
13 if a matter has become political, to put it that  
14 way, then the Deputy Minister will coordinate  
15 responses from the department through the  
16 appropriate officials, down through the  
17 organizational chain, that's what would  
18 ordinarily happen.

19 Q Simply put, Mr. Whitley, was this a matter that  
20 the ADM would want to take charge of, that you  
21 would want to get your arms around?

22 A Yes. This is the kind of matter that ordinarily  
23 I would have been expected to lead.

24 Q You were the primary media spokesman for your  
25 division on -- when prosecution matters were

1           being raised in the media?

2     A     Yes, I was.

3     Q     And you were the guardian, if I could put it  
4           that way, of the independence of the prosecution  
5           service when the threat of political pressure,  
6           through the legislature, is brought to bear on  
7           your ministry; is that correct?

8     A     Well, that's a shared responsibility between the  
9           ADM and the Deputy Minister, yes.

10    Q     Fair enough. You would certainly need the  
11           support of your deputy. But it's your duty to  
12           make sure that the prosecution decisions, and  
13           decision about this case, remained protected  
14           from political interference?

15    A     Yes.

16    Q     Is it an unusual event, in an Assistant Deputy  
17           Minister's career, in a Criminal Law Division,  
18           to have one of your major cases, one of your  
19           major prosecutions, become the subject of  
20           questions in the legislature like this?

21    A     Yes, that's not a regular occurrence.

22    Q     And it's not a very happy event, is that fair?

23    A     No. I wouldn't think so, no.

24    Q     Now, those are the five contextual points I  
25           wanted to review with you before turning to the

1 issue of when you learn about this, if you learn  
2 about this, and the difficult issue of timing  
3 that I know you're concerned about.

4           Could you turn to tab 67, please? At tab  
5 67, a month after the media stories have broken,  
6 we have Miller sending you a memo, according to  
7 the paper that we have, attaching a draft letter  
8 to Greg Brodsky, with a joint recommendation to  
9 Mr. Dangerfield and Mr. Miller that this  
10 material be disclosed to the defence. Do you  
11 recall receiving this memo?

12 A No.

13 Q Do you have any recollection of the whole  
14 controversy over the Driskell case in the  
15 legislature and in the media around this time?

16 A No, I don't.

17 Q The memo states, in its opening line, that,  
18           "Miller and Whitley..."  
19           that the two of you,  
20           "...have spoken, on a couple of occasions,  
21           regarding the issue of the provision of  
22           additional information to Mr. Brodsky,  
23           which was shared with us by our colleagues  
24           in Saskatchewan."

25 Do you see that?

1 A Yes.

2 Q That is, presumably, what you would expect in  
3 the circumstances?

4 A I would expect that, yes.

5 Q That Miller would have been having a lot of very  
6 serious discussions with you about this matter;  
7 is that correct?

8 A I would expect to be briefed on the situation.  
9 I would expect to be made aware of the Quinney  
10 letter, yes.

11 Q Do you recall any discussions with Mr. Miller,  
12 around this time, about this subject?

13 A Not at all, no.

14 Q Could I have Madam Registrar provide you with an  
15 exhibit that is not in the book? Exhibit 34,  
16 Madam Registrar, which we just put into the  
17 record this morning, late in Mr. Dangerfield's  
18 evidence. And I apologize for not including  
19 this initially. It's a memo dated March 19th,  
20 shortly before the April 13th memo. And you see  
21 Mr. Dangerfield has identified his writing on  
22 the right-hand side?

23 A Yes.

24 Q In which he appears to confirm -- according to  
25 his evidence, he confirms what's in the

1 April 13th memo, namely that he wants the  
2 Brodsky -- the material to be sent to Brodsky  
3 with an explanation. Do you see that?  
4 A Yes. Yes, I read that.  
5 Q It's a note with a star beside it?  
6 A Yes.  
7 Q It says:  
8 "We send material to Brodsky with an  
9 explanation."  
10 A Yes.  
11 Q There is also a handwritten note on the  
12 left-hand side. Can you assist us with that  
13 note as to whose writing that is?  
14 A No. I was shown that this morning. I don't  
15 recognize the handwriting at all.  
16 Q The March 24th note?  
17 A The little sticky on the left or the note on the  
18 left?  
19 Q There is a note on the left saying:  
20 "Bruce, March 24, '93, can we discuss this  
21 tomorrow?"  
22 A I see that. I don't recognize the handwriting.  
23 I recognize the one on the right as George's.  
24 Q So the -- so whoever it is in the left-hand side  
25 is some other official who wants to discuss the



1 matter with Miller five days after he sends this  
2 memo; is that correct? It's not you, I take it,  
3 is what you're saying?

4 A It's not me. It's not my handwriting.

5 Q So Miller is discussing the matter with  
6 Dangerfield and with somebody else, but not with  
7 you, according to your recollection?

8 A That's right.

9 Q Going back to the memo at tab 67, Mr. Whitley,  
10 if you could. Those are all of my questions on  
11 Exhibit 34. If you go back to the memo at tab  
12 67, you see the penultimate paragraph of the  
13 memo, from Mr. Miller to you, raises the  
14 question of who should be signing off on the  
15 matter. Do you see that?

16 A Yes, I see that.

17 Q And does it make sense that Miller and  
18 Dangerfield, having reviewed the matter and both  
19 come to the conclusion that the material should  
20 be disclosed, given the history of the matter,  
21 that they might well want to you sign off on?

22 A That would make sense.

23 Q There has, obviously, been a failure in the  
24 department for which they are responsible,  
25 either individually or collectively, that they

1           have dropped the ball and have embarrassed the  
2           department. This is the kind of situation where  
3           the ADM often steps up to the plate and takes it  
4           on the chin for the department, is that fair?

5    A       Yes, that's a reasonable scenario.

6    Q       So it makes sense that they have come to the  
7           conclusion it should be sent to you and ask you  
8           to determine the question of the signature, who  
9           should sign off?

10   A       Yes.

11   Q       Now, this assertion of yours that you don't  
12           believe you ever received the memo, we see from  
13           your response to the Enns report, some two or  
14           three years ago, that the belief that you never  
15           received it is something that develops for the  
16           first time in late 2003; is that correct? If  
17           you want to turn to tab 80, it is your response  
18           to the Enns report, which sort of traces through  
19           your thought processes, is that fair?

20   A       Yes. This was a note that I wrote to myself  
21           shortly after the call. I simply replicated it  
22           for Judge Enns.

23   Q       This is the covering e-mail at tab 80, is that  
24           what you are referring to?

25   A       Yes. You are referring to tab 80?

1 Q Tab 80?

2 A Yes.

3 Q There is an e-mail on June 30th from you to  
4 Judge Enns?

5 A That's right.

6 Q And I am more interested in the attached  
7 document, April 29, 2004, which is your  
8 substantive response to Judge Enns?

9 A I have it.

10 Q And it refers to the conversation or a message  
11 and some discussions that you had with Mr. Olson  
12 in late 2003; is that correct?

13 A Yes.

14 Q And this is when the matter is brought to your  
15 attention. He sends you the documents?

16 A Yes.

17 Q And you come to believe, if you turn over the  
18 page to page 508, that you never saw the --

19 A Yes.

20 Q -- memos in question?

21 A Yes.

22 Q You see at page 508 at this tab?

23 A Yes.

24 Q Yes?

25 A Yes, I see it.

1 Q About a quarter of the way down the page:

2 "I don't believe that I ever saw the memo  
3 of April 13th."

4 and you set out seven bullets explaining your  
5 reasoning for why you don't think you received  
6 it?

7 A Yes.

8 Q So this state of mind of yours is one that's  
9 been -- that first developed in this time period  
10 late 2003, early 2004; is that correct?

11 A That's fair.

12 Q So, in other words, you were looking back from  
13 the perspective of ten years, to events that  
14 happened ten years earlier, and saying to  
15 yourself: I can't recall this, and I don't  
16 believe it ever came to me?

17 A That's right.

18 Q Leaving aside the question of whether you ever  
19 received the memo, do you also believe that  
20 Miller never discussed the matter orally with  
21 you? He never briefed you orally?

22 A I don't have any recollection of these kinds of  
23 discussions, so -- but, at the same time, he may  
24 very well have raised the matter with me  
25 generally. But it wasn't in such a way as to

1           communicate any kind of urgency or communicate  
2           any kind of imperative in such a way that I  
3           would remember it 10 or 12 years later. So I  
4           can't deny that he may have discussed this with  
5           me in a very general way or a very reassuring  
6           way or in a passing way, but certainly not in  
7           the context of making me aware that this witness  
8           had perjured himself in the view of the  
9           Department of Justice of Saskatchewan.

10        Q       Well, there is evidence that he perjured  
11           himself. It's not up to them to judge the  
12           matter. Quinney is saying, and the RCMP is  
13           saying, there is evidence from which you can  
14           infer that he perjured himself.

15        A       Well, that certainly would have created a  
16           fireworks display.

17        Q       But just to -- I just want to be clear about  
18           this issue of whether he briefed you orally.  
19           Leaving aside the question of whether you got  
20           the memo, because his memo asserts that he has  
21           spoken to you on a couple of occasions about  
22           that.

23        A       I'm sorry.

24        Q       And you've agreed with me that that's common  
25           sense that he would do that?

1 A Yes.

2 Q So are you saying that he may well have spoken  
3 to you about it, but you didn't appreciate its  
4 significance?

5 A That's possible, yes.

6 Q Because you see in your -- in your interview  
7 with us at Tab 3, page 14, the second to last  
8 sentence of the interview, you state:

9 "Whitley's recollection is the matter was  
10 never brought to his attention, either  
11 orally or in writing, either by Dangerfield  
12 or Miller."

13 I want to be clear whether that's your position  
14 or not?

15 A That's to the best of my recollection.

16 Q You see, if we go to the Enns -- your response  
17 to Judge Enns three years ago, two years ago,  
18 tab 80, you seem to be less categorical about  
19 it?

20 A Yes, I was.

21 Q At page 508 you say -- at the bottom of page  
22 508, the second to last paragraph, tab 80, page  
23 508 you say,

24 "Of course, because I have no memory of it,  
25 I cannot deny that it is possible that I

1 received the note. And there may have been  
2 discussions with Miller that resulted in  
3 the follow-up request to Saskatchewan on  
4 April 16th",  
5 which we will come to in a minute.

6 "Moreover, Miller may have discussed the  
7 case with me as the letter suggests, but if  
8 so, it was of such a nature in passing that  
9 it did not impress itself on my memory."

10 Was that your belief at the time in your response  
11 to Judge Enns?

12 A Yes, it is. And as I indicated, that because of  
13 the documents I was given, I couldn't really  
14 made head or tails out of what the issue was in  
15 respect of the disclosure. I understood it to  
16 be from the exchange between Miller and Quinney  
17 on the -- to be an immunity issue. But an  
18 immunity issue was given after the fact, as a  
19 result of the Saskatchewan Department of Justice  
20 construing that it would be an abuse of process  
21 to proceed. That, taken together with  
22 Mr. Miller's memo, which I believe I saw for the  
23 first time three years ago, which was -- I won't  
24 say inconsequential, but certainly not of an  
25 urgent nature, well, maybe I did see this. I

1 just wanted to be as fair as possible as I could  
2 be to my colleague.

3 Q So what's happening here is there is a process  
4 of hardening of your recollection here?

5 A No. It's a process of getting more information,  
6 having a better context within which to trigger  
7 my recollection.

8 Q Okay. As a result of having more information,  
9 you are now of the view that you positively were  
10 not briefed, either orally or in writing?

11 A It's the issue of perjury that for me is the  
12 trigger, for me is the red flag.

13 Q You keep saying that, Mr. Whitley. And if you  
14 look at tab 61, the letter from Quinney, I don't  
15 think uses the word "perjury".

16 A No it, doesn't.

17 Q It simply says we have two conflicting accounts,  
18 Driskell's account and Zanidean's account. And  
19 the RCMP come to the conclusion that Driskell's  
20 is the one that's substantially correct.

21 They don't use the big "perjury" word in either  
22 of the two letters that Miller is allegedly  
23 passing along to you on April 13th. So, in any  
24 event, your belief now is you were neither  
25 orally, nor in writing, briefed on the matter?



1 A Thoroughly briefed, yes.

2 Q Well, was there any briefing at all?

3 A I don't recall any briefing, no. I think I've  
4 said that.

5 Q Because, you see, if there wasn't even an oral  
6 briefing, then the document at tab 67, the  
7 letter from Miller to Whitley dated April 18,  
8 aside from going astray somewhere, as your  
9 account suggests you didn't receive it, it also  
10 turns it into a false document, does it not?

11 A I am not sure I follow.

12 Q He says he has had a couple of discussions with  
13 you?

14 A And I have conceded that we had a couple of  
15 discussions. Your question is, was I briefed?  
16 I don't recall being briefed on this issue.

17 Q So going back to your statement at Tab 3, page  
18 14, you say:

19 "Whitley's recollection is the matter was  
20 never brought to his attention, either  
21 orally or in writing."

22 Is that your position?

23 A That -- well, that's my recollection, it was not  
24 brought to my attention. That's my  
25 recollection.

1 Q So then Miller's document at tab 67 is a false  
2 document when he says he has had a couple of  
3 discussions with you about it?

4 MR. TAPPER: Mr. Commissioner, Mr. Code is  
5 entitled to examine the witness. He is entitled  
6 to cross-examine the witness. He is not  
7 entitled to ask him to speculate, to draw legal  
8 conclusions, to draw factual conclusions, or  
9 anything of the sort. Nor is he entitled to  
10 repeat himself, make speeches or do anything of  
11 the sort in that regard. He has the witness's  
12 evidence. He should move on.

13 MR. CODE: With the greatest respect, I'm trying  
14 to get his evidence. I keep hearing him move  
15 back and forth between two positions, that he  
16 wasn't briefed orally and then sometimes he says  
17 he might have been briefed orally. I just want  
18 to know which it is and then I'll move on.

19 MR. TAPPER: With all due respect,  
20 Mr. Commissioner, Mr. Code is not characterizing  
21 the evidence appropriately. The witness said,  
22 very clearly: I have no recollection of being  
23 briefed. I cannot say emphatically that I  
24 have -- that he didn't have a passing  
25 conversation with me. He has been consistent on

1           that.

2           BY MR. CODE:

3       Q     Mr. Whitley, has your counsel accurately  
4           summarized your evidence?

5           MR. TAPPER: Oh, for gosh sakes. I need to hold  
6           up the Prober sign.

7           MR. PROBER: Yes, either one of them.

8           BY MR. CODE:

9       Q     I'm serious. I want to know what your evidence  
10          is? Are you saying you made --

11      A     I told you during our interview, I told Judge  
12          Enns when I spoke with him and when I wrote to  
13          him, I have no recollection of being briefed on  
14          this issue. This is not something that I would  
15          likely forget. But at the same time, I can't  
16          deny that Bruce didn't speak to me about the  
17          issue. How he characterized it, how much time  
18          he took, or whether he laughed it off, or  
19          whether he was casual about it, I can't tell  
20          you. I don't have a recollection of it.

21      Q     Thank you. Tab 69, Mr. Whitley, the matter  
22          moves on. It doesn't end with the April 13th  
23          memo. Three days later, on April 16th,  
24          Mr. Miller writes a letter, follows up with  
25          Quinney, asking him to assist the department in

1           responding to the media articles. Do you see  
2           that letter?

3    A       Yes.

4    Q       You're familiar with this letter?

5    A       Yes.

6    Q       He's asking him, if you look at the bottom of  
7           the first page:

8                        "I would respectfully request that you  
9                        briefly outline your consideration of the  
10                      matter in response to these media  
11                      articles."

12           Is that correct?

13   A       Yes.

14   Q       And over the page, the second page is what I'm  
15           interested in, he says:

16                      "As I'm sure you can appreciate, we are in  
17                      the process of briefing our Minister of  
18                      Justice and Attorney General so as to allow  
19                      him to respond to the various suggestions  
20                      which have been made. In order to do so,  
21                      it is necessary for us to consult with all  
22                      of the individuals to whom direct or  
23                      indirect reference has been made."

24           So he's referring Quinney to the fact that you've  
25           got an ongoing process of briefing your minister

1 to allow the minister to respond to the questions  
2 in the media and the questions in the  
3 legislature. And my question for you simply is,  
4 would you have been involved in those briefings?

5 A In the ordinary course of things, I think I  
6 would have been, yes.

7 Q Do you have any recollection?

8 A No.

9 Q Quinney responds 12 days later. We are now into  
10 late April, the 28th. And Quinney's letter this  
11 time is much more detailed on the immunity  
12 issue, which is Miller's main focus in the  
13 media, and the opposition's main focus in the  
14 legislature. And Quinney then sets out, in  
15 substantial detail in the April 28th letter, the  
16 Winnipeg Police Service account, the one I just  
17 reviewed with you, of a secret deal prior to his  
18 testimony, informing him about the deal after  
19 the testimony. This is at the bottom of page 1  
20 and over on to the top of page 2. Do you see  
21 that?

22 A Yes.

23 Q And then the first new paragraph at the top of  
24 page 2:

25 "As a result, there is considerable

1           confusion as to whether or not immunity was  
2           granted, or if it was granted, when it was  
3           granted and by whom. There appears to be  
4           no doubt, however, that Zanidean certainly  
5           thought that he had been granted immunity  
6           from prosecution for the arson offences."  
7           Now, once again, is it fair to say that that is  
8           the very issue on which the opposition and the  
9           media have been questioning the minister, the  
10          question of whether Zanidean did or didn't have  
11          immunity?

12    A     I think that's right. There is reference in the  
13          materials to a deal, a secret deal.

14    Q     And this is the matter on which Miller is trying  
15          to gather material in order to brief the  
16          minister; is that correct?

17    A     Yes. I imagine that's so.

18    Q     And the somewhat brief comment about it in the  
19          two earlier Quinney letters has now been fleshed  
20          out in detail. And you know that there is a  
21          conflicting picture about whether he did or  
22          didn't have immunity, when he got it and how he  
23          got it?

24    A     At least in Mr. Quinney's mind, yes.

25    Q     And, again, in briefing the minister on this

1 kind of a matter in late April of 1993, is it  
2 likely that you would have been involved?

3 A It's likely, yes.

4 Q Tab 70. It doesn't stop there. Miller writes a  
5 similar letter to Corporal Orr on April 15th,  
6 again drawing his attention to the articles and  
7 asking for his help in responding. And if you  
8 look -- have you got tab 70 there?

9 A Yes, I do.

10 Q If you look at the second paragraph there from  
11 the bottom.

12 "As you can appreciate, the Minister of  
13 Justice wishes to respond to the various  
14 issues that have been raised. It is also  
15 our desire to do so in as timely a fashion  
16 as possible."

17 And he's specifically asking him to deal with a  
18 quote in the media attributed to Staff Sergeant  
19 Ferguson that implied that there was an immunity  
20 deal. Do you see that?

21 A Yes, I do.

22 Q Which we can see back at tab 65, in the article  
23 I read to you, as one of the bases for the  
24 media's theory that there was a deal. Orr then  
25 responds, through his boss, Chief Superintendent

1 Callans. If you carry on in this tab, Callans  
2 sends a place holding letter on April 6th,  
3 saying that the response is coming shortly. Do  
4 you see that?

5 A Yes.

6 Q And, finally, on April 29th --

7 THE COMMISSIONER: I'm sorry?

8 MR. CODE: I'm in the same tab, tab 70.

9 THE COMMISSIONER: Okay.

10 BY MR. CODE:

11 Q We have Mr. Miller's letter of the 15th. And  
12 then we have Superintendent Callans' response on  
13 the 26th, which is just a place holder. And  
14 then on April 29th, we get the substantive  
15 response which attaches two reports, is that  
16 correct, Mr. Whitley?

17 A That is the one dated the 29th of May?

18 Q May 29th:

19 "Attached, in response to your inquiries,  
20 is a copy of correspondence..."

21 A Yes.

22 Q "...I received from the OIC of F division."  
23 And the response from Leatherdale, the CROPS  
24 officer, attaches a report from Ferguson  
25 himself. Do you see that? A two-page report at



1 the very end of the tab signed by Staff Sergeant  
2 Ferguson?

3 A Yes, I see it.

4 Q He is a witness we have heard from in this  
5 inquiry, who was in charge of the investigation  
6 of the arson. So by the end of April,  
7 April 29th, Miller has now got the responses  
8 back from Quinney and from the RCMP and is armed  
9 to brief the Minister; is that correct?

10 A That seems to be the case, yes.

11 Q Would you have been involved in those briefings?

12 A In the ordinary course of things, I would have  
13 been involved in the briefings of the Minister,  
14 yes.

15 Q Do you recall them?

16 A No, I don't.

17 Q Finally, the last development. It is still not  
18 over at this point. There is one final  
19 development. If you turn to tab 71, we have  
20 Inspector Hall and Ewatski's notes of their  
21 interview with Bruce Miller on May 13th. Did  
22 you become aware of the fact that the Winnipeg  
23 Police Service had responded to the storm in the  
24 media by agreeing to conduct a high-level review  
25 of the case, headed up by two senior inspectors,

1 Hall and Ewatski?

2 A No. The first time -- I have no recollection of  
3 that. The first time I heard, or came to  
4 understand that the Winnipeg Police Department  
5 was interviewing members of my staff, was when I  
6 spoke to counsel last night and was shown these  
7 documents.

8 Q My question to you is, in April and May of 1993,  
9 in the immediate aftermath of the media storm  
10 and these briefings of the minister and  
11 questions in the legislature, would you have  
12 been aware at that time?

13 A I don't have any recollection of it, no. I  
14 don't know why I wasn't in the loop on this  
15 particular case, but, no, I don't.

16 Q So you have no recollection of Hall and Ewatski  
17 conducting a high-level review of the Perry  
18 Harder homicide case?

19 A No.

20 Q And you see, at tab 71, on the 13th of May, in  
21 other words, within two weeks of Miller having  
22 collected all of this material from  
23 Saskatchewan, additional material from  
24 Saskatchewan, Hall and Ewatski come to meet with  
25 him. And they raise the perjury issue with him

1 directly. Do you see that, the very first note  
2 there in Hall's notebook:

3 "Perjury concern with Zanidean in arson."

4 Do you have that?

5 A I have the note.

6 Q Tab 71?

7 A Yes. I have the note.

8 Q "Thursday, May 13th, meet with Miller..."

9 A I see it, yes, "perjury concern".

10 Q "Perjury concern with Zanidean in arson."

11 And according to Chief Ewatski, who has  
12 testified on the matter, the next note:

13 "Brought to Miller's attention by  
14 Saskatchewan Justice."

15 That's Miller replying to the officers. The  
16 officers are raising their concern about the  
17 perjury. And Miller immediately says:

18 "I already know about it. Saskatchewan  
19 Justice has briefed me on it. Supporting  
20 D, Driskell, more than Z, Zanidean. Passed  
21 on to Dangerfield."

22 Do you see that?

23 A I see it.

24 Q And, again, according to Ewatski, they have a  
25 discussion with Miller about the fact that he is

1 alive to this issue.

2 "Saskatchewan Justice briefed him on it,  
3 and he has passed it on to Dangerfield to  
4 deal with."

5 Was the discussions with Hall and Ewatski about  
6 the perjury issue something that you would have  
7 expected to be brought to your attention?

8 A Absolutely, yes.

9 Q The fact that two senior inspectors had real  
10 concerns about this issue would be something  
11 that you would expect to be briefed about?

12 A Yes. Even informally, yes.

13 Q And I won't take you to the rest of their notes.  
14 But their notes -- they have met with Deputy  
15 Chief Klippenstein. And there clearly is a very  
16 serious concern about the perjury issue that  
17 they then come to discuss with Miller.

18 So where we end up at the end of the day,  
19 Mr. Whitley, as I see it, by mid-May, we know  
20 that Miller has definitely received the Quinney  
21 materials. In fact, he has received -- he has  
22 received them with supplements, is that fair?

23 A Yes.

24 Q He gets them back in '92. And then he gets a  
25 further batch of more detailed material in April

1 of '93; is that correct?

2 A Yes.

3 Q He has definitely passed them on to Dangerfield,  
4 because we have Dangerfield's note on Exhibit 34  
5 stating that he agrees the materials should be  
6 passed on to Brodsky; is that correct?

7 A Yes.

8 Q He has, obviously, definitely reviewed them with  
9 Sid Lerner, according to Sid Lerner's memo; is  
10 that correct?

11 A That seems to be the case, yes.

12 Q And Sid Lerner agrees they should be disclosed?

13 A Yes.

14 Q And according to what Miller says in the  
15 April 13th memo, whether you got it or not, he  
16 is of the view they should be disclosed?

17 A Yes.

18 Q In fact, he has told Lerner that and he has also  
19 told Dangerfield that?

20 A Yes.

21 Q And, finally, he has discussed the matter with  
22 Hall and Ewatski. And he has told Hall and  
23 Ewatski that he has received material about this  
24 issue from Saskatchewan Justice?

25 A Yes, that's what it says.

1 Q So where we end up is that -- and the minister  
2 is being briefed on the matter, as you would  
3 expect, given the kind of questions in the  
4 legislature and the media storm that's broken  
5 out; is that correct?

6 A As I indicated, I don't have any recollection of  
7 the minister being briefed, but the minister had  
8 asked for a report.

9 Q If the minister was being asked questions by the  
10 opposition about an immunity agreement and  
11 demands being made for a review of the case, one  
12 would expect the minister to be briefed on the  
13 matter?

14 A Yes.

15 Q So, it appears that Miller is openly discussing  
16 the issue and the Quinney materials with at  
17 least four other senior police officers and  
18 ministry officials, Hall, Ewatski, Lerner and  
19 Dangerfield; is that correct?

20 A Yes.

21 Q And yet your recollection is that he kept you  
22 completely in the dark; is that correct?

23 A I have -- I have no recollection of him bringing  
24 these matters to my attention, no.

25 Q Given that he was openly discussing it with

1           everybody else, is it -- is it possible that he  
2           would leave you out of the loop on a matter like  
3           this, in this context?

4    A       I can't understand -- I can't understand much  
5           about him in this case. I don't know why I  
6           wasn't in the loop on this case. I don't know  
7           why I wasn't the media spokesman. I don't know  
8           why the documents were not routed through me. I  
9           don't know why reports went directly from line  
10          Crown attorneys to the minister's office or to  
11          the deputy's office, rather. I don't have an  
12          answer for you.

13   Q       Is it possible, Mr. Whitley, that you were in  
14          the loop and you've just forgotten?

15   A       No, that is absolutely not true. This goes  
16          against everything that I was trying to do in  
17          the department, everything that I was trying to  
18          do. It makes no sense.

19   Q       You have forgotten about a lot in this case,  
20          have you not, Mr. Whitley?

21   A       Yes, I have.

22           MR. CODE: Thank you very much.

23           MR. TAPPER: I think this is what they call a  
24          pregnant pause.

25           THE COMMISSIONER: Or there is no

1 cross-examination.

2 MR. LOCKYER: Mr. Commissioner, for the first  
3 time, I am not -- I wouldn't want to go now. I  
4 would be ready to go first thing in the morning.  
5 There is a couple of things I would like to look  
6 into overnight.

7 THE COMMISSIONER: Any volunteers?

8 MR. LOCKYER: That's the first time I've said  
9 that, so hopefully I can get away with it.

10 MR. PROBER: We might be conscripting a  
11 volunteer. A little inconsistency here.

12 MR. KENNEDY: I should be able to finish in 12  
13 minutes.

14 THE COMMISSIONER: Terrific. Thank you,  
15 Mr. Kennedy.

16 BY MR. KENNEDY:

17 Q Good day, Mr. Whitley. My name is Jerome  
18 Kennedy.

19 A Sir.

20 Q I am counsel for the Association for the Defence  
21 of the Wrongly Convicted. I wanted to ask you a  
22 couple of questions about systemic issues.  
23 First, Mr. Whitley, I would like to clarify your  
24 present position. In the summary of your  
25 interview with Commission Counsel, you are



1 referred to as the Senior Regional Director for  
2 the Department of Justice or Federal Department  
3 of Justice for Northern Canada?

4 A Yes.

5 Q Does that still involve, sir, overseeing  
6 prosecutions?

7 A Yes.

8 Q And working with Crown counsel?

9 A Yes.

10 Q So essentially, for all of your career, you've  
11 worked either as a prosecutor, Assistant Deputy  
12 Minister or at the level you now work at with  
13 criminal prosecutions?

14 A For about five and a half years I was a Deputy  
15 Minister in the Yukon.

16 Q Mr. Whitley, there is a couple of -- there is a  
17 comment I want to read to you, sir, and ask your  
18 comment. There has recently been an inquiry in  
19 Newfoundland that was presided over by former  
20 Chief Justice Antonia Lamer. He reviewed the  
21 role of the Crown in R. v. Boucher, which you  
22 would be familiar with, sir, and R. v. Cook, the  
23 concept of being fair and not winning or losing.  
24 And I don't know if Justice Rand used the term  
25 Min. of Justice or Minister of Justice, but

1 that's the term that is used, right?

2 A Yes.

3 Q Sir, Chief Justice -- Commissioner Lamer stated:

4 "The dual responsibility of acting as an  
5 advocate in an adversarial process, but  
6 never winning or losing, appears to be  
7 inherently contradictory."

8 Sir, would you agree with that statement from  
9 Commissioner Lamer?

10 A Yes.

11 Q In your experience, Mr. Whitley, how does one  
12 reconcile these inherently contradictory  
13 responsibilities of being fair, trying to be  
14 objective, avoid being competitive? Can you  
15 offer any comment on that, sir?

16 A I was an adjunct professor at the faculty of law  
17 for -- through all of this time, for about seven  
18 or eight years. And in our discussions around  
19 this very issue, what I would talk to students  
20 about was -- and this goes back to what I said  
21 earlier about being always fearful of things  
22 that can go wrong. We talked about  
23 professionalism. Professionalism, and by that I  
24 mean, in addition to keeping current with the  
25 law, following the rules, it meant mastery of a

1 file, that you really had to have a good  
2 understanding of the file, but also have the  
3 capacity to stand back from it and not parse it  
4 into finite legal issues.

5 And I know that during my time as an ADM in  
6 the Department of Prosecutions here in Manitoba,  
7 we didn't talk about that very much. We had no  
8 time to talk about it. When one moves into  
9 management, your mastery of the file is then  
10 passed to other people. And the only thing to  
11 do is just cross your hands or just fold your  
12 arms and cross your fingers and you hope that  
13 people will have mastery of the file.

14 But, in addition, you create an environment  
15 in which things will be done properly. You  
16 establish clear guidelines, policies. You  
17 establish, as I powerfully believe, a code of  
18 conduct or a system of ethics, which still  
19 doesn't seem to have caught on too much here in  
20 Canada. But these are all part of ensuring that  
21 when you manage prosecutors, they do things in a  
22 way that you reasonably expect.

23 So to balance the -- the competing roles,  
24 if you like, of advocate and Minister of  
25 Justice, you need to have the capacity to be

1           able to step back from the file. And that's how  
2           I thought we had set up the department, in terms  
3           of the various divisions and the management  
4           groups that oversaw the divisions. There has to  
5           be a clear means by which the prosecutors are  
6           managed and a clear understanding of roles. But  
7           there will always be that inherent conflict.

8                     And I can tell that you there were a number  
9           of examples, in the course of my career, where  
10          we had expressed concern about the conduct of a  
11          case by a prosecutor seemed to be too zealous.  
12          And yet cases are almost always in the hands of  
13          counsel. So when does one intervene? It's a  
14          very difficult question.

15        Q        Sir, at any time during your tenure in Manitoba,  
16                  or even in your present position, have you ever  
17                  seen success as a prosecutor determined or  
18                  measured by the number of cases won or lost?

19        A        No.

20        Q        Sir, have you ever seen a situation, either in  
21                  Manitoba or in your present situation, where  
22                  promotion was related to winning cases?

23        A        No. No. I never even heard of it.

24        Q        Sir, the second concern I wish to bring to you  
25                  that ties into the first role of the prosecutor

1 and these inherently contradictory  
2 responsibilities is a second quote, sir, from  
3 the Lamer report. I will read it very quickly:

4 "The second concern relates to  
5 "psychological and personal barriers" that  
6 it is suggested are shared by many  
7 prosecutors.

8 "A commitment to public service and  
9 protection, personal morality, a  
10 certain 'gung-ho', 'macho' or  
11 'crimefighter persona', an ideological  
12 identification with law enforcement."

13 Sir, did such attitudes, in your experience,  
14 exist in Manitoba Justice while you were there?

15 A Yes, there was some of that.

16 Q Would those kinds of attitudes, sir, lead to a  
17 loss of objectivity and overzealousness or  
18 potentially a desire to win that could  
19 contribute to or result in a miscarriage of  
20 justice?

21 A I believe that. I believe that when I was given  
22 the position of Director of Prosecutions in '87  
23 or '88, whenever it was, I was given the mandate  
24 to change the culture. There was a strong  
25 belief in the minister of the time, and his

1 deputy, that we, as prosecutors, were far too  
2 close to the police, that we had to distance  
3 ourself from the police. And that there is  
4 almost a seductiveness about the closeness with  
5 which one can handle a relationship with police  
6 officers to the point where, as a matter of  
7 instinct, you trust what the police officer  
8 tells you without the ordinary kind of  
9 second-guessing that would go on when you look  
10 at a file and try to do an analysis.

11 Q Mr. Whitley, in terms of these first two points  
12 I've raised, if I read you this comment, is this  
13 one of the difficulties or the inherent  
14 difficulties in an adversarial system that  
15 involves human beings:

16 "Human nature often makes it difficult for  
17 professionals working in an adversarial  
18 system under such conditions to avoid being  
19 competitive."

20 Would you agree with that comment, sir?

21 A Yes.

22 Q So at the end of the day, we're left with a  
23 situation where Crown prosecutors, who are given  
24 a lot of power and discretion within our  
25 criminal justice system, sir, correct --

1 A Yes.

2 Q -- are expected to act as Ministers of Justice,  
3 yet can be adversarial and present their case in  
4 a strong manner, correct?

5 A Yes.

6 Q So is it -- all of these comments, sir, is it --  
7 the Boucher comments, are they easily -- more  
8 easily understood in theory than in practice?  
9 Because that's what we're dealing with, sir, is  
10 the practices that lead to miscarriages of  
11 justice or wrongful convictions?

12 A It's a very difficult balance to make. And the  
13 only way in which I think it can be accomplished  
14 is to ensure that there are means by which  
15 prosecutors can test their own conclusions about  
16 things, which means participatory management,  
17 which means committee consideration of these  
18 kinds of issues, because colleagues are able to  
19 reflect back points of view that may be  
20 different than the one being expressed by the  
21 lead prosecutor. But, absolutely, it's a  
22 difficult balance to strike.

23 Q Which leads me, sir, naturally and logically to  
24 my next comment, or my next point, in your  
25 interview with Commission Counsel, you talked

1 about bringing a code of ethics, about bringing  
2 in new disclosure policies, of having internal  
3 discipline, I think was -- the possibility of  
4 internal discipline, I think, was a term you  
5 used?

6 A Yes.

7 Q Sir, were you, in essence, bringing or trying to  
8 bring into the framework accountability on the  
9 part of the prosecutors?

10 A Yes. In my work, when I was Director of  
11 Constitutional Law for a number of years for the  
12 department, one thing very quickly became  
13 apparent, and that was the absence, from time to  
14 time, in statutes of standards by which citizens  
15 were able to understand when their obligations  
16 were triggered. So vague kinds of directory  
17 legislative provisions weren't helpful, and that  
18 resulted in successful charter challenges. So  
19 one of the things that we instituted was a  
20 review of legislation with that precisely in  
21 mind.

22 From there, I started to think about the  
23 importance of understanding our ethical role.  
24 Now, it's true that the Law Societies have their  
25 own strictures which address all counsel, and



1           there is many areas in which those kinds of  
2           rules overlap. I felt it was very important to  
3           have a clear understanding of what our ethical  
4           obligations were as prosecutors. I still  
5           believe that. I've lectured in China on this  
6           point. I spoke in Montreal last fall on this  
7           point. I am speaking in Juneau on this point.  
8           I believe passionately in this.

9       Q     So --

10      A     But there is resistance.

11      Q     So would you agree with me, then, sir, if we  
12           extend our discussion, that transparency within  
13           the system, in other words, that despite Supreme  
14           Court of Canada rulings. I am not saying  
15           despite, Commissioner. They are the Supreme  
16           Court of Canada rulings.

17           THE COMMISSIONER: You sound like a trial judge.

18           BY MR. KENNEDY:

19      Q     That prosecutors have discretion, it's a  
20           necessary and important point in our criminal  
21           justice system. Would you agree with me, sir,  
22           that certain transparency, in terms of given  
23           reasons for the preferred indictment, for the  
24           stay of proceedings, would be helpful to allow  
25           accused persons and the public to understand why

1 prosecutors make decisions they make?

2 A Yes. I don't believe a stay of proceedings  
3 should ever be entered without reasons. And  
4 there may be cases in which there are arguable  
5 exceptions. But I think, as a general rule,  
6 stays of proceedings should be justified, for  
7 example.

8 THE COMMISSIONER: Mr. Kennedy, this is really  
9 interesting. And I don't -- and I really am  
10 reluctant to interrupt it. But we have a crew  
11 of workers who are, I think, all waiting to come  
12 in here to move all of this furniture. And were  
13 it not for that, I would give you --

14 MR. KENNEDY: No. I have tried to do it in 12  
15 minutes, Mr. Commissioner. I will try to do it  
16 in five in the morning.

17 THE COMMISSIONER: They are all very good  
18 questions.

19 MR. KENNEDY: Thank you, Mr. Whitley.

20 THE COMMISSIONER: Okay. Until tomorrow  
21 morning.

22 THE CLERK: All rise. This Commission of  
23 Inquiry is now adjourned.

24 (Proceedings adjourned at 4:47 p.m.)

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CECELIA REID and LISA REID, duly appointed  
Official Examiners in the Province of Manitoba,  
do hereby certify the foregoing pages are a true  
and correct transcript of our Stenotype notes as  
taken by us at the time and place hereinbefore  
stated.

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Cecelia Reid  
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Lisa Reid  
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<p style="text-align: center;"><b>A</b></p> <p><b>ability</b> 4499:6  <b>able</b> 4409:22  4436:12 4525:3  4546:22 4627:12  4631:1 4634:18  4635:15  <b>Abra</b> 4381:14  4382:5 4384:6,7  4385:19 4393:13  4393:14 4428:5  4573:21,25  <b>absence</b> 4635:13  <b>absolute</b> 4395:25  4505:6  <b>absolutely</b> 4425:13  4428:18 4485:10  4504:2,4 4505:13  4511:10 4512:7  4515:20 4529:17  4563:14,21  4568:11 4570:13  4580:20,20  4586:24 4623:8  4626:15 4634:21  <b>abuse</b> 4610:20  <b>accept</b> 4486:25  4574:23  <b>accepted</b> 4486:15  4486:22 4514:10  <b>access</b> 4427:21  4433:5,21  4473:20 4494:16  4560:24 4561:2,3  <b>accommodation</b>  4545:6  <b>accommodations</b>  4407:8  <b>accompanied</b>  4496:13  <b>accompanying</b>  4443:7  <b>accomplished</b>  4634:13  <b>account</b> 4481:24  4568:22 4571:15  4611:18,18  4612:9 4616:16  <b>accountability</b>  4635:8  <b>accounts</b> 4548:17  4611:17  <b>accuracy</b> 4433:1  4450:20 4451:8  4475:3  <b>accurate</b> 4415:22</p>	<p>4427:10 4447:21  4489:24 4561:3  <b>accurately</b> 4463:23  4557:2 4614:3  <b>accused</b> 4409:12,14  4496:16 4498:25  4508:17 4509:5,7  4516:13 4517:11  4636:25  <b>acknowledge</b>  4415:1 4563:17  <b>acknowledged</b>  4479:7  <b>acknowledgment</b>  4429:1  <b>acquired</b> 4427:24  <b>act</b> 4409:13 4489:25  4500:20 4524:1  4577:25,25  4581:23,24  4634:2  <b>acted</b> 4590:2  <b>acting</b> 4396:15  4563:6 4568:14  4629:4  <b>actively</b> 4490:3  <b>activity</b> 4542:6,20  <b>actual</b> 4391:17  4540:24 4541:3  <b>adage</b> 4570:15  <b>adamant</b> 4480:5  <b>addendum</b> 4452:11  <b>addition</b> 4476:16  4629:24 4630:14  <b>additional</b> 4460:24  4461:2 4601:22  4621:23  <b>address</b> 4444:8  4514:2 4571:9  4589:3 4635:25  <b>addressing</b> 4398:24  4529:23  <b>adjacent</b> 4485:25  <b>adjourned</b> 4520:20  4637:23,24  <b>adjunct</b> 4629:16  <b>ADM</b> 4478:3  4488:16 4499:14  4599:20 4600:9  4605:3 4630:5  <b>administration</b>  4577:24 4581:24  4588:4  <b>Administrative</b>  4381:4,5,6,7  <b>admissions</b> 4467:19  <b>admit</b> 4466:17</p>	<p>4467:12  <b>admits</b> 4417:8  <b>admitted</b> 4415:17  4417:4 4465:24  4466:2,6 4467:21  4542:9  <b>advance</b> 4496:20  4532:3  <b>advancing</b> 4525:5  4526:7  <b>advent</b> 4476:4  <b>adversarial</b> 4629:5  4633:14,17  4634:3  <b>advert</b> 4444:19  <b>adverted</b> 4408:11  4507:25  <b>advice</b> 4386:9  <b>advise</b> 4449:20  4585:1  <b>advised</b> 4424:9,21  4424:23 4430:13  4430:16 4502:17  4506:19 4510:4  <b>advising</b> 4534:3  <b>advocate</b> 4629:5  4630:24  <b>affair</b> 4555:12  4566:11  <b>aftermath</b> 4621:9  <b>agenda</b> 4490:20  <b>agent</b> 4409:24  <b>ago</b> 4424:20  4459:16 4467:11  4591:6 4605:14  4609:17,17  4610:23  <b>agree</b> 4389:6  4405:23 4442:18  4594:9 4629:8  4633:20 4636:11  4636:21  <b>agreed</b> 4408:8  4451:15 4502:4  4505:2 4540:11  4543:6 4568:3  4586:23 4591:18  4608:24  <b>agreeing</b> 4509:9  4620:24  <b>agreement</b> 4401:10  4401:15 4402:7  4404:3,10,11,17  4405:19,23  4415:20 4448:21  4472:3 4508:23  4508:25 4509:4,6</p>	<p>4511:1,8 4513:13  4514:7,14,16,21  4516:6 4521:18  4544:4 4568:1,6  4568:17 4569:7  4569:10,20,21  4571:12,22,24  4575:16,23  4594:12,24  4595:14 4625:10  <b>agreements</b>  4507:24 4518:15  <b>agrees</b> 4443:5  4569:24 4624:5  4624:12  <b>ahead</b> 4407:5  <b>ain't</b> 4491:23  <b>AI</b> 4439:6  <b>Alan</b> 4381:10  <b>alarm</b> 4589:7  <b>Alberta</b> 4409:22  4564:11  <b>alerted</b> 4418:12  4432:3  <b>alive</b> 4623:1  <b>Allan</b> 4452:13  <b>allege</b> 4386:9  <b>alleged</b> 4394:17  4476:24 4479:23  4585:7  <b>allegedly</b> 4611:22  <b>allow</b> 4505:4 4519:9  4615:18 4616:1  4636:24  <b>allowed</b> 4401:22  4402:23 4481:24  4522:6  <b>alluded</b> 4416:4  4428:24  <b>amiable</b> 4519:3  <b>amicus</b> 4487:12  <b>amount</b> 4480:19  4499:20 4590:23  <b>amounts</b> 4423:6  <b>analysis</b> 4399:11,12  4407:14,16  4408:2 4450:1  4511:9 4512:9  4531:20 4586:23  4633:10  <b>analysts</b> 4450:5  <b>Anderson</b> 4385:16  4386:2,11 4388:7  4388:24 4406:18  4409:2 4412:14  4412:18 4432:15  4437:11 4439:6</p>	<p>4540:21 4568:21  4568:24 4569:1  4585:8  <b>Anderson's</b> 4413:2  4550:24  <b>angry</b> 4520:7  <b>answer</b> 4423:2  4424:1 4426:16  4432:10 4437:20  4441:4 4442:3  4462:4 4465:8,19  4465:23 4466:11  4467:12 4516:16  4525:8 4526:3  4537:5 4560:25  4566:23 4626:12  <b>answering</b> 4589:10  <b>answers</b> 4387:9  4430:8 4508:1  <b>Antonia</b> 4628:20  <b>anybody</b> 4387:20  4439:7  <b>anyway</b> 4385:13  4408:19 4434:24  4438:18 4439:18  4466:10 4473:24  4484:20  <b>apart</b> 4425:19  <b>apartment</b> 4514:11  4514:12  <b>apologize</b> 4468:9  4602:18  <b>apparent</b> 4464:6  4554:25 4576:25  4578:9 4635:13  <b>apparently</b> 4389:23  4417:8 4424:8  4447:25 4521:2,6  <b>appeal</b> 4455:8  4583:9 4586:14  4586:17 4587:18  4587:19 4588:16  4589:25 4592:15  4593:13  <b>appear</b> 4402:10  4405:5 4417:11  4426:5 4436:7  4445:2 4487:12  4512:24 4524:1  4526:14 4528:5  4528:15 4546:15  4572:13 4595:19  <b>APPEARANCES</b>  4381:9  <b>appeared</b> 4389:10  4396:17 4444:10  4459:1</p>
---	---	---	---	---

<p><b>appearance</b> 4394:14</p> <p><b>appears</b> 4402:6 4404:11 4406:13 4409:4 4410:14 4435:2 4459:9 4469:6 4471:15 4472:16,18 4498:2 4502:4 4505:24 4512:4 4522:14 4523:15 4523:19 4528:1 4531:2,3 4533:13 4533:23 4535:16 4536:18,19 4537:6 4540:14 4540:25 4544:1 4545:8,14 4548:9 4548:13 4549:2,5 4551:20 4555:16 4558:1 4564:10 4572:15 4574:13 4575:16 4576:11 4576:15 4602:24 4617:3 4625:15 4629:6</p> <p><b>appellate</b> 4480:24 4480:24 4481:4,6 4481:7,8</p> <p><b>appends</b> 4523:18</p> <p><b>application</b> 4494:18 4494:21,22 4540:18,24 4541:3</p> <p><b>appointed</b> 4477:18 4478:13 4489:8 4594:5 4638:5</p> <p><b>appreciate</b> 4411:6 4609:3 4615:16 4618:12</p> <p><b>apprised</b> 4527:15</p> <p><b>approach</b> 4463:25 4480:4 4486:15 4486:18 4487:21 4487:24 4492:9 4492:13 4498:22 4510:3</p> <p><b>approachable</b> 4519:6</p> <p><b>appropriate</b> 4530:17 4545:23 4578:2 4588:8 4599:16</p> <p><b>appropriately</b> 4553:25 4590:2 4613:21</p> <p><b>approval</b> 4500:21</p>	<p>4502:6,12 4511:4 4514:18 4553:21 4572:1,3 4575:4 4576:19 4577:12 4577:21 4578:25 4581:10</p> <p><b>approvals</b> 4581:19</p> <p><b>approved</b> 4392:9 4575:10 4578:9</p> <p><b>approves</b> 4569:23</p> <p><b>approximately</b> 4392:25 4393:6</p> <p><b>April</b> 4384:22 4409:4 4410:14 4410:16,18 4411:7,8,8 4431:22 4433:17 4472:15 4473:10 4549:24 4552:1 4553:11 4569:5 4602:20 4603:1 4606:7 4607:3 4610:4 4611:23 4612:7 4614:22 4614:23 4616:10 4616:15 4618:1,5 4619:2,6,14 4620:6,7 4621:8 4623:25 4624:15</p> <p><b>area</b> 4397:1 4403:3 4413:19,23 4417:16 4451:2 4468:1 4481:14 4551:17</p> <p><b>areas</b> 4417:18 4636:1</p> <p><b>arguable</b> 4637:4</p> <p><b>argued</b> 4487:16 4588:17</p> <p><b>argument</b> 4413:3 4513:4 4564:15</p> <p><b>arising</b> 4448:5</p> <p><b>armed</b> 4620:8</p> <p><b>arms</b> 4599:21 4630:12</p> <p><b>Arnason</b> 4500:15 4526:25</p> <p><b>arose</b> 4506:10</p> <p><b>arrange</b> 4537:23</p> <p><b>arranged</b> 4575:12</p> <p><b>arrangement</b> 4456:24 4504:25 4507:21 4517:20 4518:4 4562:19 4569:3 4570:5,10 4570:20,25 4571:13,14,17</p>	<p>4577:23 4578:1</p> <p><b>arrangements</b> 4403:24,25 4404:11 4405:17 4405:22 4414:1 4498:11 4504:17 4508:22 4515:16 4515:18 4555:25 4560:15 4562:5 4563:1 4571:7 4579:14</p> <p><b>arrears</b> 4403:11,20</p> <p><b>arrested</b> 4564:11</p> <p><b>arrived</b> 4486:22</p> <p><b>arrives</b> 4546:21</p> <p><b>arson</b> 4386:1 4387:16 4389:24 4445:17 4446:4 4446:13 4447:20 4515:11 4517:17 4542:8,25 4557:21 4569:6 4571:21 4584:10 4585:13 4586:1 4586:11 4617:6 4620:6 4622:3,10</p> <p><b>article</b> 4597:7,8,12 4597:14 4618:22</p> <p><b>articles</b> 4597:2,4 4615:1,11 4618:6</p> <p><b>artiling</b> 4479:17</p> <p><b>artifice</b> 4570:22</p> <p><b>aside</b> 4457:16 4485:11 4502:19 4503:11 4529:13 4530:16 4544:21 4571:11 4583:4,6 4585:23 4588:14 4607:18 4608:19 4612:8</p> <p><b>asked</b> 4386:7 4387:11 4397:16 4397:23 4418:3 4437:21 4448:6 4454:16 4467:16 4521:1 4541:14 4545:14 4590:11 4590:17 4595:11 4625:8,9</p> <p><b>asking</b> 4464:18 4469:25 4470:25 4471:11 4472:11 4495:9,9,14,19 4521:22,23 4525:18 4533:24 4545:15 4561:10 4592:1 4596:1</p>	<p>4614:25 4615:6 4618:7,17</p> <p><b>asks</b> 4405:16 4433:5 4461:8 4463:3,3 4464:22 4465:5 4529:8</p> <p><b>aspect</b> 4505:16 4554:19</p> <p><b>aspects</b> 4380:2 4459:4,6 4506:7 4518:12</p> <p><b>assertion</b> 4605:11</p> <p><b>asserts</b> 4608:20</p> <p><b>assessment</b> 4510:15 4511:6,23</p> <p><b>assessments</b> 4551:11</p> <p><b>assiduously</b> 4480:12</p> <p><b>assigned</b> 4479:18</p> <p><b>assist</b> 4495:24 4523:6 4546:23 4549:10 4560:9 4576:24 4596:20 4598:24 4603:12 4614:25</p> <p><b>assistance</b> 4508:7 4512:13</p> <p><b>assistant</b> 4381:5,6 4477:18 4533:19 4577:10 4598:25 4599:7,10 4600:16 4628:11</p> <p><b>assistants</b> 4386:25</p> <p><b>assisted</b> 4487:9</p> <p><b>assisting</b> 4427:1,3 4473:15 4548:1</p> <p><b>Associate</b> 4381:3</p> <p><b>associated</b> 4552:1</p> <p><b>associates</b> 4409:13</p> <p><b>Association</b> 4381:20,21 4627:20</p> <p><b>assume</b> 4428:14 4539:4</p> <p><b>assumed</b> 4415:2</p> <p><b>assuming</b> 4385:6 4495:1 4506:25 4518:17 4544:5 4553:18</p> <p><b>assumption</b> 4531:13</p> <p><b>assure</b> 4423:5</p> <p><b>astray</b> 4532:12 4612:8</p> <p><b>attached</b> 4440:21 4440:24 4441:10</p>	<p>4441:22 4442:2 4443:5,10,15 4502:9 4524:17 4606:6 4619:19</p> <p><b>attaches</b> 4619:15,24</p> <p><b>attaching</b> 4444:12 4601:7</p> <p><b>attain</b> 4478:17</p> <p><b>attempt</b> 4548:25 4567:19</p> <p><b>attempted</b> 4548:21 4548:21</p> <p><b>attempts</b> 4549:7</p> <p><b>attend</b> 4534:4 4538:4 4546:17 4558:2</p> <p><b>attended</b> 4534:14 4534:15</p> <p><b>attention</b> 4387:13 4387:21 4388:11 4396:25 4397:7,9 4422:22 4444:9 4446:11 4447:15 4468:4,15 4487:5 4503:14 4513:12 4514:5,6,8 4515:5 4523:12 4525:15 4526:13 4539:12 4557:4 4558:6,21 4564:5 4565:6,9 4572:7 4578:15 4586:22 4587:7 4587:25 4592:12 4593:17 4606:15 4609:10 4612:20 4612:24 4618:6 4622:13 4623:7 4625:24</p> <p><b>attitudes</b> 4632:13 4632:16</p> <p><b>attorney</b> 4480:6 4489:6 4499:10 4500:20 4504:24 4510:4,13,14,25 4518:8 4544:12 4565:22 4577:25 4581:23 4599:8 4615:18</p> <p><b>attorneys</b> 4519:4 4626:10</p> <p><b>attractive</b> 4573:16</p> <p><b>attributed</b> 4618:18</p> <p><b>audio</b> 4463:2</p> <p><b>August</b> 4380:17 4384:1</p> <p><b>authored</b> 4527:4</p> <p><b>authorities</b> 4581:13</p>
---	---	--	--	--

<p><b>authority</b> 4499:25  <b>authorizes</b> 4546:14  <b>authorizing</b>  4498:18  <b>available</b> 4493:14  4523:9  <b>Avenue</b> 4551:6  <b>avoid</b> 4397:13  4399:3 4629:14  4633:18  <b>await</b> 4531:25  <b>awaiting</b> 4433:18  <b>aware</b> 4391:10,21  4392:18 4404:9  4410:6 4429:10  4429:11 4446:7  4515:10 4520:8  4561:15 4564:2,3  4583:8 4602:9  4608:7 4620:22  4621:12  <b>awareness</b> 4531:16  <b>A.A</b> 4396:3  <b>a.m</b> 4384:2 4454:23</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>B</b> 4424:13 4560:5  <b>baby</b> 4479:23  <b>babysitting</b> 4388:8  <b>back</b> 4386:21  4403:7 4406:2  4408:1,16 4418:3  4425:2 4431:21  4435:7 4438:7  4456:4 4457:23  4465:5,12 4466:5  4466:12 4469:9  4469:20 4473:9  4476:8 4489:22  4494:1 4502:10  4502:18 4510:17  4512:13 4531:18  4536:12 4544:22  4545:1 4550:17  4554:8 4557:9  4564:12 4568:25  4569:1 4572:21  4576:5,19  4578:15,16  4583:17 4590:21  4594:13 4604:9  4604:11 4607:12  4612:17 4613:15  4618:22 4620:8  4623:24 4629:20  4630:3 4631:1  4634:19</p>	<p><b>background</b>  4396:23 4475:15  4570:24  <b>backlog</b> 4487:10  <b>bad</b> 4593:7  <b>bailees</b> 4497:9  <b>balance</b> 4510:11  4630:23 4634:12  4634:22  <b>ball</b> 4593:4,6  4605:1  <b>ballistic</b> 4520:6  <b>bar</b> 4489:18  4492:20 4519:12  4566:18,20,25  <b>bargaining</b> 4585:17  <b>Barrett</b> 4597:25  4598:10  <b>barriers</b> 4632:5  <b>based</b> 4405:24  4437:18,24  4480:14 4507:15  4551:10  <b>bases</b> 4618:23  <b>basically</b> 4439:15  4488:25  <b>basis</b> 4390:10,12  4391:3 4438:8  4494:19 4499:1  4499:17 4512:25  4523:23 4560:18  4563:5,12  <b>bat</b> 4570:18  <b>batch</b> 4623:25  <b>battle</b> 4399:18  4400:1  <b>bear</b> 4402:16  4600:6  <b>beaten</b> 4395:13  <b>Becky</b> 4597:25  <b>becoming</b> 4574:11  <b>began</b> 4394:24  4416:5 4475:19  <b>beginning</b> 4451:2  4599:5  <b>begins</b> 4539:7  <b>behalf</b> 4406:22  4409:14 4528:10  4545:10 4557:1  <b>behaviour</b> 4565:25  <b>behest</b> 4514:12  <b>beings</b> 4633:15  <b>belabour</b> 4590:9  <b>belief</b> 4478:11  4491:11 4605:14  4610:10 4611:24  4632:25</p>	<p><b>believe</b> 4385:19  4386:22 4415:6  4421:8 4422:16  4430:18 4437:13  4446:7 4448:15  4448:23 4449:22  4451:16,20,23  4463:12 4468:6  4475:17 4476:20  4477:4,15 4499:1  4537:10,16  4572:9 4573:3  4605:12 4606:17  4607:2,16,19  4610:22 4630:17  4632:21,21  4636:5,8 4637:2  <b>believed</b> 4422:4  4450:23  <b>believes</b> 4579:8  <b>believing</b> 4423:12  <b>Bell</b> 4412:15,15,16  <b>bells</b> 4589:7 4591:4  <b>benefit</b> 4392:21  4399:8,15  4407:12,13,15  4414:5,25 4511:9  4511:19 4512:9  4531:20 4570:1  <b>benefited</b> 4487:14  <b>benefits</b> 4410:3,6  4411:13 4467:6  4509:19 4528:22  <b>Bergmann</b> 4381:5  <b>best</b> 4421:4,8  4428:10 4451:1  4451:11 4453:21  4523:6,12 4557:7  4609:15  <b>better</b> 4611:6  <b>Betty</b> 4395:15  <b>beware</b> 4482:23  <b>beyond</b> 4395:17  4425:7  <b>big</b> 4491:19  4611:21  <b>bill</b> 4498:3  <b>bills</b> 4392:4,8  <b>bit</b> 4386:21 4396:22  4402:17 4451:3  4457:15 4462:7  4480:2,12,23  4482:15 4488:10  4505:23 4508:13  4536:1 4541:23  4559:18 4568:12  4574:11 4590:8</p>	<p><b>blame</b> 4592:24  <b>blind</b> 4570:16,16,18  <b>blind-sided</b> 4417:24  <b>block</b> 4514:11,12  <b>bloody-mindedness</b>  4491:8  <b>blowing</b> 4514:22,24  <b>blown</b> 4515:11  <b>blow-out</b> 4579:22  <b>blow-up</b> 4579:6,24  <b>blue</b> 4452:16  4559:4  <b>board</b> 4414:3,13  4492:12  <b>boardroom</b> 4491:19  <b>Bob</b> 4381:4  <b>body</b> 4428:19  4429:10 4460:25  4461:17 4462:10  4464:8,12 4465:6  4466:13 4532:17  <b>book</b> 4388:1  4400:12 4408:23  4424:4 4447:6  4452:14,16  4453:3 4460:20  4460:20 4467:1,2  4467:3 4469:3,4  4534:22 4552:6  4556:14 4602:15  <b>booking</b> 4487:5,8  <b>boss</b> 4618:25  <b>bother</b> 4473:6,10  <b>bottom</b> 4401:1  4412:14 4432:22  4433:12 4434:8  4442:6 4453:9  4470:4,5 4533:9  4534:1 4536:14  4536:17 4539:20  4541:19,24  4556:17,20  4559:13,17,21  4579:12 4580:14  4584:11 4585:24  4609:21 4615:6  4616:19 4618:11  <b>Boucher</b> 4628:21  4634:7  <b>bought</b> 4528:24  4529:1  <b>bows</b> 4489:25  <b>box</b> 4420:7 4434:2  4567:21  <b>boy</b> 4394:11  <b>break</b> 4434:11  4440:8 4520:17</p>	<p><b>bricks</b> 4396:4  <b>brief</b> 4459:13  4569:22 4617:15  4617:18 4620:9  <b>briefed</b> 4515:13  4541:12 4543:24  4544:7,9 4553:24  4560:23 4561:14  4566:5,13 4568:9  4568:10,15  4570:3,6,7,10  4571:20 4574:15  4581:3,5 4588:24  4596:6,17 4602:8  4607:21 4608:18  4611:10,25  4612:1,15,16  4613:16,17,23  4614:13 4622:19  4623:2,11 4625:2  4625:7,12  <b>briefing</b> 4438:13  4572:4,5 4612:2,3  4612:6 4615:17  4615:25 4617:25  <b>briefings</b> 4437:9  4616:4 4620:11  4620:13 4621:10  <b>briefly</b> 4475:18  4507:25 4533:9  4534:21,24,24  4539:12 4615:9  <b>bring</b> 4438:19  4486:20 4508:24  4539:11 4572:6  4578:14 4591:14  4591:15 4592:11  4593:16 4631:24  4635:8  <b>bringing</b> 4491:6  4509:4,5 4586:21  4625:23 4635:1,1  4635:7  <b>brings</b> 4428:25  <b>brinkmanship</b>  4555:16 4565:18  <b>broad</b> 4563:18  <b>Brodsky</b> 4384:12  4384:22 4385:6  4387:10 4389:10  4397:5 4400:12  4400:23 4401:4  4401:13,14  4402:3,6,13  4404:9 4411:22  4411:24 4412:5  4412:10,19,21</p>
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<p>4414:9 4415:17 4417:12 4419:4 4420:22 4422:18 4426:1 4427:15 4428:10,19 4429:6,17 4430:6 4432:11,17 4433:5,16 4434:6 4435:7 4443:7 4444:23 4446:2,7 4448:7,16,18 4450:15 4451:11 4456:12 4457:15 4460:23 4461:9 4461:19 4462:9 4463:3 4464:1,16 4464:22 4465:17 4465:21 4471:1 4471:18,21,24 4472:9 4473:8,9 4562:24 4563:7 4579:21 4601:8 4601:22 4603:2,2 4603:8 4624:6 <b>Brodsky's</b> 4388:20 4389:22 4400:19 4403:5 4405:5,7 4430:9 4435:1,6 4445:20 4448:11 4456:1 4460:21 4467:5 4579:23 <b>broke</b> 4491:23 <b>broken</b> 4601:5 4625:4 <b>brought</b> 4444:9 4449:16 4468:4 4487:5 4503:13 4505:9 4511:1 4513:12,25 4514:5 4515:4 4526:13 4557:3 4564:4,12 4565:6 4587:7,25 4588:1 4589:1,18 4600:6 4606:14 4609:10 4612:20,24 4622:13 4623:7 <b>Bruce</b> 4381:14 4384:16,25 4385:7 4390:8 4391:11 4401:23 4402:24 4442:9 4470:14 4484:6 4484:11,22,23 4485:4,6,14,20 4486:13 4506:18 4512:22 4519:2</p>	<p>4520:10 4537:14 4541:10 4547:12 4548:21,25 4549:4,5 4556:1 4556:21 4558:9 4558:15 4561:4 4561:17 4565:19 4568:13 4577:6,7 4589:17 4591:13 4603:20 4614:16 4620:21 <b>Bruce's</b> 4513:3 <b>Bruni</b> 4381:8 <b>budget</b> 4498:12 4499:15 <b>build</b> 4491:25 <b>building</b> 4398:8,16 4422:6,10 4438:9 4486:14 4491:20 4493:22 4564:16 <b>bullet</b> 4579:3 <b>bullets</b> 4607:4 <b>bullshit</b> 4416:24 4461:23 4464:25 <b>burning</b> 4584:15 <b>Burton</b> 4543:1,6 <b>business</b> 4413:25 4414:2 4482:9 4483:7 4560:12 4582:15 <b>busy</b> 4399:22 <b>B.C</b> 4529:4 4561:11</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>Cadieux</b> 4450:6,7,8 <b>Calgary</b> 4409:22 <b>call</b> 4388:19,19 4401:24 4449:10 4491:10 4492:25 4496:15 4506:1 4513:3 4544:5 4548:22 4564:18 4571:12 4579:23 4584:8 4585:5 4605:21 4626:23 <b>Callans</b> 4537:15 4619:1,1,12 <b>called</b> 4395:12 4439:16 4455:4 4479:20 4482:1 4493:16 4505:14 4514:14 4579:21 4597:20 <b>calling</b> 4549:15,16 4549:16 4567:12 4567:23 <b>calls</b> 4549:3</p>	<p>4554:23 <b>Canada</b> 4411:3 4489:1 4628:3 4630:20 4636:14 4636:16 <b>can-says</b> 4496:17 <b>capacity</b> 4558:1 4630:3,25 <b>Capote</b> 4396:18 <b>caps</b> 4575:17 <b>car</b> 4528:25 <b>card</b> 4567:4 <b>care</b> 4404:13,19 <b>career</b> 4395:3 4396:10 4475:19 4600:17 4628:10 4631:9 <b>careful</b> 4420:10 4437:2 4508:19 4553:21 <b>carefully</b> 4583:14 <b>caring</b> 4425:9,11 <b>carried</b> 4394:25 4395:2 4538:22 <b>carry</b> 4619:1 <b>carrying</b> 4439:15 <b>CARSELL</b> 4410:20 <b>Carswell</b> 4381:17 4426:13 <b>case</b> 4387:6 4389:5 4394:25 4395:12 4395:15 4417:11 4421:19 4422:8,8 4429:20,23 4438:9 4450:24 4454:11 4455:4 4476:22 4477:1,4 4477:5,6 4478:7 4478:10 4479:20 4479:24 4482:1 4484:7,7,10 4487:1 4496:13 4497:24 4499:11 4502:20,25 4505:18 4506:8 4511:12 4513:2 4514:22 4515:24 4517:13 4519:16 4519:17 4521:19 4523:15 4524:23 4531:14 4540:3 4559:3 4567:12 4567:13,24 4587:22 4597:22 4600:13 4601:14 4610:7 4620:10 4620:25 4621:15</p>	<p>4621:18 4624:11 4625:11 4626:5,6 4626:19 4631:11 4634:3 <b>cases</b> 4394:12 4395:10,18 4420:17 4422:10 4449:24 4475:22 4476:18 4477:11 4479:20 4480:14 4480:23 4481:11 4483:8,18 4484:3 4485:13,15 4496:4,5,6,9 4497:11,19 4517:25 4518:1 4596:1 4600:18 4631:12,18,22 4637:4 <b>cash</b> 4503:5,7 4553:19 4557:17 4572:16 <b>casual</b> 4614:19 <b>categorical</b> 4609:18 <b>caught</b> 4630:19 <b>caused</b> 4521:6 <b>cease</b> 4564:20 <b>Cece</b> 4533:19,21,23 4534:1,3 4536:23 4559:24 <b>Cecelia</b> 4533:20,21 4559:24 4638:5 4638:15 <b>Centre</b> 4380:13 <b>certain</b> 4380:2 4381:18,20 4425:13 4479:4 4494:19 4518:11 4632:10 4636:22 <b>certainly</b> 4386:23 4389:15 4393:3 4458:20 4481:18 4493:1 4518:20 4540:4 4600:10 4608:6,15 4610:24 4617:4 <b>CERTIFICATE</b> 4638:1 <b>certify</b> 4638:7 <b>chain</b> 4511:4 4599:17 <b>chaired</b> 4512:22 4513:20 <b>challenge</b> 4396:14 <b>challenged</b> 4451:16 <b>challenges</b> 4488:19 4635:18</p>	<p><b>chance</b> 4454:14 4468:24 <b>change</b> 4504:12 4509:1 4632:24 <b>changing</b> 4590:7 <b>character</b> 4511:18 <b>characterization</b> 4538:19 <b>characterized</b> 4541:18 4564:14 4614:17 <b>characterizing</b> 4613:20 <b>charge</b> 4505:2 4515:1 4524:12 4543:11 4599:20 4620:5 <b>charged</b> 4397:14 4399:3 4428:2 4524:10 4564:23 <b>charges</b> 4495:11 4510:5 4511:17 4569:16 4598:4 <b>charging</b> 4386:13 4524:12 <b>charter</b> 4476:5 4635:18 <b>chat</b> 4483:24 4485:25 <b>check</b> 4403:22 <b>Chelsea</b> 4551:6 <b>cheque</b> 4500:8,18 4526:19 4527:5 <b>cheques</b> 4408:3,5 4527:1 <b>Cherniak</b> 4458:2,5 4459:10 <b>chief</b> 4381:4 4420:20 4422:21 4471:10,11 4498:1,2 4505:10 4509:4,6 4618:25 4622:11 4623:15 4628:20 4629:3 <b>children</b> 4394:1,8 <b>chin</b> 4605:4 <b>China</b> 4636:5 <b>chooses</b> 4509:3 <b>chose</b> 4435:4 <b>Christian</b> 4450:6 <b>Christianson</b> 4450:7,8 <b>chronologically</b> 4533:13 <b>chronology</b> 4523:6 4538:14 4554:2 4557:6</p>
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<p><b>circulated</b> 4474:22  <b>circumstances</b>  4417:21 4593:15  4602:3  <b>citation</b> 4487:1  <b>cited</b> 4487:4  <b>citizens</b> 4635:14  <b>city</b> 4410:11  4492:19 4512:16  <b>civil</b> 4545:19  <b>claim</b> 4504:14  <b>clanging</b> 4589:8  <b>clarification</b>  4414:21  <b>clarify</b> 4417:13  4456:17 4517:2  4522:10 4627:23  <b>class</b> 4485:7  <b>classmates</b> 4520:11  <b>clear</b> 4385:19  4444:14,23  4446:14 4481:17  4493:21,24  4495:16 4516:3  4517:6 4521:1  4536:25 4543:9  4569:6 4586:2  4592:3,3,4  4608:17 4609:13  4630:16 4631:5,6  4636:3  <b>clearing</b> 4436:11  <b>clearly</b> 4443:5  4562:19,20  4586:18 4587:10  4593:2,3 4613:22  4623:15  <b>clerk</b> 4384:4  4400:11 4416:7  4416:13 4454:20  4454:24 4520:19  4520:23 4548:10  4582:7,11  4637:22  <b>client</b> 4401:8,23,24  4402:23 4428:14  4428:16 4429:7  4434:13 4524:24  4548:24 4555:11  4575:12,14  <b>client's</b> 4555:13  <b>close</b> 4393:15  4486:5 4560:19  4567:13 4633:2  <b>closeness</b> 4633:4  <b>closest</b> 4385:17  4469:5</p>	<p><b>code</b> 4381:2 4382:7  4382:10 4388:12  4397:9,17,22  4398:4,14 4403:3  4403:19 4404:1  4406:3,14  4408:20 4413:20  4414:1,4,17  4417:17 4419:16  4427:13 4434:11  4434:14,20  4435:13 4436:16  4436:25 4437:5  4444:10,15  4453:3,21 4454:5  4454:17 4455:3,9  4457:1 4460:5,14  4460:17 4466:23  4468:20,23  4472:21 4474:4  4474:12 4488:21  4516:25 4517:5  4520:16,25  4522:11 4523:1  4547:21,23,24  4550:11,12,14,18  4550:20,22,25  4551:2 4566:22  4567:1,8 4573:21  4573:23 4574:1  4580:5 4582:1,13  4595:6 4613:4,13  4613:20 4614:2,8  4619:8,10  4626:22 4630:17  4635:1  <b>Code's</b> 4408:8  <b>codified</b> 4488:21  <b>coin</b> 4561:22  <b>collaboration</b>  4481:12  <b>collaborative</b>  4483:21 4486:17  4487:20,24  <b>colleague</b> 4582:20  4611:2  <b>colleagues</b> 4482:17  4490:14 4601:23  4634:18  <b>collected</b> 4621:22  <b>collectively</b> 4604:25  <b>colours</b> 4493:18  <b>combination</b> 4562:2  <b>come</b> 4394:15  4396:3 4401:7  4432:5,6 4438:7  4439:13 4449:15</p>	<p>4456:18 4479:25  4480:1 4492:7  4498:16 4499:2  4499:13 4510:2  4511:3 4514:7  4534:17 4544:10  4551:12 4565:9  4583:14,17  4584:2 4596:14  4604:19 4605:6  4606:17 4610:5  4611:19 4621:24  4623:17 4637:11  <b>comes</b> 4440:15  4459:15 4460:8  4471:8 4472:6  4488:13 4505:19  4513:5 4523:11  4564:24  <b>comfortable</b>  4575:15  <b>coming</b> 4438:4  4455:18 4501:6  4556:6 4619:3  <b>command</b> 4511:4  <b>commencement</b>  4456:1  <b>commencing</b> 4384:2  <b>comment</b> 4410:8  4446:10 4455:8  4590:11 4617:18  4628:17,18  4629:15 4633:12  4633:20 4634:24  <b>commentaries</b>  4491:22  <b>commented</b> 4497:4  4528:8  <b>comments</b> 4634:6,7  <b>Commission</b> 4380:1  4380:12 4381:1,2  4381:3 4384:4  4393:4 4431:17  4454:20,24  4488:20 4489:6  4520:19,23  4582:7,11  4627:25 4634:25  4637:22  <b>Commissioner</b>  4380:5 4384:6,8  4393:11,13,15,16  4393:17,21  4396:23 4402:16  4402:19,25  4403:14,15,17  4410:12,20,23</p>	<p>4411:1 4412:4,12  4413:4 4416:6,10  4416:21 4424:3,6  4426:4 4433:12  4434:10,18  4445:11 4449:23  4452:5,19,25  4453:18 4454:4,9  4454:19 4455:1  4460:13,15,19  4468:6,18  4472:24 4473:22  4473:25 4474:7  4474:11 4516:17  4516:23 4520:18  4520:25 4522:11  4522:13 4547:22  4550:11,17,19,21  4550:23 4551:1  4552:5 4566:16  4566:24 4580:4  4595:4 4613:4,20  4619:7,9 4626:25  4627:2,7,14  4629:3,9 4636:15  4636:17 4637:8  4637:15,17,20  <b>commit</b> 4427:25  4581:15,17  <b>commitment</b> 4578:1  4632:8  <b>committed</b> 4480:19  <b>committee</b> 4512:21  4512:24 4513:3,6  4513:16,17,19,25  4588:2,15  4634:17  <b>committees</b> 4490:3  4512:14  <b>common</b> 4495:20  4504:5,5 4507:16  4525:7,21,25  4530:21 4561:17  4563:12 4608:24  <b>commonplace</b>  4525:19  <b>Commonwealth</b>  4599:2  <b>common-law</b>  4409:9  <b>communicate</b>  4608:1,1  <b>communicating</b>  4536:19  <b>communication</b>  4518:6 4533:1  <b>communications</b></p>	<p>4555:6  <b>comparative</b>  4551:17  <b>comparing</b> 4407:16  4465:9  <b>compensated</b>  4404:5,18  4420:13  <b>compensation</b>  4407:7 4419:25  4420:6  <b>competing</b> 4630:23  <b>competitive</b>  4629:14 4633:19  <b>complete</b> 4442:8  4505:14 4521:14  4543:16  <b>completed</b> 4449:5  4474:21 4546:22  4569:8 4571:25  4572:9  <b>completely</b> 4502:19  4503:11 4625:22  <b>completes</b> 4472:23  4557:6 4568:23  <b>complex</b> 4512:17  <b>component</b> 4569:10  4571:18,21  <b>compounded</b>  4593:9  <b>con</b> 4513:5  <b>conceded</b> 4612:14  <b>concedes</b> 4464:12  <b>concept</b> 4414:18  4628:23  <b>conceptually</b>  4508:5 4509:10  <b>concern</b> 4453:25  4622:3,9,10,16  4623:16 4631:10  4631:24 4632:4  <b>concerned</b> 4453:19  4601:3  <b>concerning</b> 4424:10  4459:14 4535:17  4582:16  <b>concerns</b> 4524:18  4525:10,18,21  4623:10  <b>concluded</b> 4543:8  <b>concludes</b> 4453:17  4531:23 4574:2  4584:10 4585:25  <b>conclusion</b> 4455:24  4489:13,16  4604:19 4605:7  4611:19</p>
--	--	--	--	---



<p><b>conclusions</b> 4613:8 4613:8 4634:15 <b>concurrence</b> 4445:25 <b>conditions</b> 4633:18 <b>conduct</b> 4411:3 4437:24 4484:2 4499:10 4531:14 4587:22 4620:24 4630:18 4631:10 <b>conducted</b> 4479:8 <b>conducting</b> 4558:4 4621:17 <b>confer</b> 4483:17 4530:18 4545:15 <b>conference</b> 4389:23 <b>conferred</b> 4532:2 4544:12 4556:5 <b>confidence</b> 4511:25 <b>confidential</b> 4559:11,12,14,17 4559:20,21 4560:14 <b>confidentiality</b> 4521:10 <b>confirm</b> 4404:12 4602:24 <b>confirmation</b> 4420:22 4429:18 4453:10 <b>confirmed</b> 4397:23 4398:5 4409:6 4417:20 <b>confirms</b> 4602:25 <b>conflict</b> 4631:7 <b>conflicting</b> 4611:17 4617:21 <b>confrontation</b> 4388:13 4398:8 <b>confusion</b> 4521:6 4617:1 <b>connected</b> 4439:7 <b>connection</b> 4508:10 <b>conscripting</b> 4627:10 <b>consensus</b> 4486:14 4486:22 4487:6 4491:25 4544:13 <b>consider</b> 4482:7,7 4482:23 <b>considerable</b> 4499:8 4616:25 <b>consideration</b> 4514:16 4516:21 4615:9 4634:17 <b>considered</b> 4479:15 4482:8 4494:13</p>	<p><b>considering</b> 4412:23 <b>considers</b> 4590:1 <b>consisted</b> 4513:19 <b>consistent</b> 4479:2 4497:6 4498:4 4500:24 4501:15 4501:23 4502:14 4504:18 4528:5 4528:15 4535:16 4536:6 4540:23 4541:2 4551:21 4556:4,11 4577:14 4613:25 <b>Constable</b> 4543:1,6 <b>constant</b> 4423:8 <b>constantly</b> 4487:11 4555:24 <b>consternation</b> 4480:3 <b>constitutes</b> 4566:20 <b>Constitutional</b> 4476:1 4477:10 4635:11 <b>construing</b> 4610:20 <b>consult</b> 4400:2 4434:11 4615:21 <b>consultants</b> 4512:13 <b>consultative</b> 4558:1 <b>consulted</b> 4400:21 <b>contacted</b> 4388:14 4389:2 4409:24 4595:13 <b>contacts</b> 4425:8 <b>contain</b> 4561:9 <b>contained</b> 4535:24 <b>contains</b> 4460:24 <b>contemporaneous</b> 4535:4 4580:16 <b>contempt</b> 4487:2,4 4487:14 <b>content</b> 4468:12 4475:3 4541:7 4583:16 4584:6 4586:12 4587:1 <b>contents</b> 4529:15 <b>context</b> 4405:22 4435:15 4437:13 4461:19 4462:8 4469:13 4470:24 4565:17 4590:8 4590:19 4591:12 4608:7 4611:6 4626:3 <b>contextual</b> 4552:3 4600:24 <b>continuation</b></p>	<p>4554:10,11 4572:23 <b>continue</b> 4414:12 4418:1 4434:22 4440:7 4526:13 4543:7 4571:17 <b>continued</b> 4382:4 4430:8 4458:19 <b>continues</b> 4404:10 <b>continuing</b> 4404:15 4414:17 4590:3 <b>contradictory</b> 4629:7,12 4632:1 <b>contrary</b> 4581:23 <b>contrasting</b> 4465:6 <b>contribute</b> 4632:19 <b>control</b> 4395:3 4561:5 <b>controversy</b> 4601:14 <b>Convention</b> 4380:13 <b>conversation</b> 4425:15 4471:11 4510:12 4585:7 4591:17 4606:10 4613:25 <b>conversing</b> 4462:2 <b>convicted</b> 4381:23 4489:14 4627:21 <b>conviction</b> 4380:3 4580:22 4597:11 4597:15 <b>convictions</b> 4634:11 <b>Cook</b> 4628:22 <b>cooperating</b> 4564:20 <b>cooperation</b> 4509:17,20 <b>coordinate</b> 4599:14 <b>coordination</b> 4532:25 <b>coordinator</b> 4438:21 4439:11 4537:2 <b>cope</b> 4518:25 <b>copied</b> 4526:19 4527:4 4546:8 <b>copies</b> 4416:6 4493:19 4494:6 <b>copy</b> 4384:16 4385:5 4412:6 4440:21,24 4441:23 4445:7 4493:17 4522:15 4522:17 4576:6 4577:4 4619:20</p>	<p><b>cordial</b> 4485:21 4486:3 <b>corner</b> 4541:20,25 <b>Corporal</b> 4540:22 4540:25 4542:23 4548:7 4554:13 4572:22 4618:5 <b>correct</b> 4384:17 4397:24 4448:1 4462:3 4471:13 4471:19 4472:4 4474:19,23,24 4475:7,16 4476:3 4476:20 4477:3 4488:14 4489:3,9 4490:6,7,22 4513:8 4523:14 4523:21,24 4524:4 4527:2 4530:8 4531:1 4532:21 4535:18 4539:9 4545:11 4545:17 4576:13 4576:21 4577:15 4584:14,22,23 4594:16 4595:22 4598:16,21 4600:7 4602:7 4604:2 4605:16 4606:12 4607:10 4611:20 4615:12 4617:16 4619:16 4620:9 4624:1,6 4624:10 4625:5 4625:19,22 4633:25 4634:4 4638:8 <b>correction</b> 4411:6 4447:5 <b>corrections</b> 4475:1 <b>correctly</b> 4412:17 4526:4 4591:17 <b>Correia</b> 4458:13,22 <b>correspondence</b> 4530:2 4582:16 4598:16,20 4619:20 <b>corroborate</b> 4510:20 <b>cost</b> 4392:1 4393:1 4393:5 4511:9,12 4512:6,8 4531:19 <b>costs</b> 4392:21 4405:1,2,3 4406:22 4414:19 4414:22 4527:6 4528:25 4529:2</p>	<p>4563:3 4575:17 <b>counsel</b> 4381:2,3 4389:5,5 4395:23 4412:25 4416:7 4442:19 4446:1 4451:18 4453:15 4455:5,15 4457:3 4457:4,22 4461:3 4467:10 4473:2,6 4475:6,20 4478:9 4478:13,15,16,21 4479:5,8,19 4481:6,8,10,17,20 4481:21 4482:16 4483:9 4484:14 4487:2,7 4492:19 4494:21 4496:14 4496:21 4497:16 4509:2 4515:24 4515:25 4516:12 4516:13,14,19,24 4516:25 4517:3 4519:5 4523:20 4545:21 4565:11 4571:8 4589:4 4594:2 4614:3 4621:6 4627:20 4627:25 4628:8 4631:13 4634:25 4635:25 <b>counsel's</b> 4467:23 <b>count</b> 4394:14 <b>counter</b> 4562:8,9 <b>countless</b> 4432:21 <b>countries</b> 4599:2 <b>country</b> 4488:22 4489:7 4490:5,14 4499:8 4509:14 4599:1 <b>couple</b> 4395:12 4455:17 4472:15 4503:17 4532:8 4541:4 4559:24 4569:4 4576:8 4601:20 4608:21 4612:12,14 4613:2 4627:5,22 4628:16 <b>course</b> 4387:2,22 4392:4 4398:11 4437:25 4464:19 4491:1 4498:20 4508:12 4509:3 4515:13 4535:7 4557:11 4558:16 4561:7 4584:19 4585:2 4599:12</p>
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4609:24 4616:5 4620:12 4631:9 <b>court</b> 4395:4,6 4415:11 4416:23 4420:20 4437:12 4437:21 4449:15 4449:16 4450:11 4455:8 4461:8 4464:24 4465:7 4465:14,15 4466:13 4485:17 4487:7 4489:1 4494:18 4546:15 4582:5 4587:19 4636:14,16 4638:1,16,20 <b>courtroom</b> 4396:11 <b>courts</b> 4481:4 4494:24 <b>cover</b> 4408:4 4424:9 4468:1 4559:7 4560:4 4575:8 4577:20 <b>covered</b> 4392:22 4406:17 4447:4 4467:25 4475:15 4493:8 <b>covering</b> 4605:23 <b>cow-towed</b> 4563:19 <b>create</b> 4512:14 4630:14 <b>created</b> 4608:15 <b>creating</b> 4511:17 <b>credibility</b> 4417:23 4418:7 4436:20 4511:13 4512:3 4512:11 4571:9 4598:6 <b>credits</b> 4396:20 <b>crew</b> 4637:10 <b>crime</b> 4476:23 4509:17 <b>crimefighter</b> 4632:11 <b>crimes</b> 4427:25 4428:1 4496:23 <b>criminal</b> 4420:11 4427:18 4475:22 4476:8 4477:19 4478:9,18 4486:11 4488:21 4496:22,22 4509:14 4542:5 4542:19 4593:3 4595:24 4598:25 4599:2,8 4600:17 4628:13 4633:25	4636:20 <b>critic</b> 4597:25 <b>critical</b> 4390:4 <b>Critics</b> 4597:19 4598:10 <b>CROPS</b> 4619:23 <b>cross</b> 4630:11,12 <b>cross-examination</b> 4387:10 4397:4 4400:20 4403:4,6 4413:21,22 4414:8 4415:18 4416:5,9 4428:6 4448:4 4456:1,3,7 4456:20 4457:10 4460:9 4461:1,5 4463:23 4464:7 4464:19 4466:17 4466:21 4467:5 4521:4 4627:1 <b>cross-examine</b> 4613:6 <b>cross-examined</b> 4462:9 <b>cross-examines</b> 4467:6 <b>cross-examining</b> 4397:8,22 4398:4 4461:16 <b>Crown</b> 4429:19 4453:9,10 4475:20 4478:18 4480:6,11 4489:15 4493:13 4493:22 4494:3,7 4504:24 4506:7 4508:16 4510:25 4519:4,16 4535:8 4564:21 4565:10 4565:22 4567:11 4587:17 4626:10 4628:8,21 4633:23 <b>Crowns</b> 4492:14 4498:10 <b>Crown's</b> 4492:12 4517:6 <b>culture</b> 4490:24 4491:2 4492:5 4496:8 4632:24 <b>curious</b> 4474:1 <b>current</b> 4386:1 4387:16 4389:24 4397:14 4417:6 4428:9,17,22 4445:17 4447:20 4463:8 4466:1,8,9	4514:25 4517:17 4541:9 4542:8,24 4555:12 4557:20 4569:4,6 4571:20 4584:15 4585:13 4586:11 4629:24 <b>currently</b> 4409:7 <b>custody</b> 4564:13 <b>cut</b> 4492:2 4559:17 <hr/> <b>D</b> <b>D</b> 4381:14,16 4622:20 <b>daily</b> 4391:3 4506:9 <b>damage</b> 4511:16,24 4512:2,10 <b>damaged</b> 4436:20 <b>danger</b> 4505:14 <b>Dangerfield</b> 4381:13 4382:4 4383:7 4384:8 4393:18,24 4396:20,25 4404:21 4413:7 4416:22 4424:4 4440:7 4443:5 4444:7 4445:11 4446:18 4447:19 4452:6 4453:18 4459:19,21 4460:7 4461:4 4462:21 4468:2,9 4468:22,25 4469:21 4472:2 4472:23 4474:8 4478:8,25 4479:7 4486:10 4502:24 4506:2,13 4517:15 4518:22 4519:18,20 4520:2 4521:4,25 4523:16 4531:8 4531:11,13 4544:8 4552:24 4558:10,18 4560:23 4561:14 4561:19,23 4563:1 4564:17 4564:21 4567:23 4567:25 4570:3 4588:7 4589:6 4590:12 4591:20 4591:23 4592:20 4592:25 4594:15 4601:9 4602:21 4604:6,18	4609:11 4622:21 4623:3 4624:3,19 4625:19 <b>Dangerfield's</b> 4485:19 4492:8 4492:15 4521:13 4523:18 4544:19 4558:6 4590:4 4602:17 4624:4 <b>dark</b> 4519:20,23,25 4520:3,7 4625:22 <b>date</b> 4410:13 4436:11 4471:6 4472:8 4535:17 4540:22 4547:22 4566:3 4580:10 <b>dated</b> 4383:7 4384:12,22 4400:24 4402:1 4409:4 4433:16 4435:16 4436:14 4468:21 4469:12 4470:2 4475:7 4523:14 4526:17 4602:19 4612:7 4619:17 <b>dates</b> 4410:22 4541:1 <b>daughter</b> 4394:2,11 4479:24 <b>daughters</b> 4394:8,9 <b>Dave</b> 4401:7 <b>David</b> 4381:8 <b>Dawe</b> 4381:3 4434:11 4522:16 4522:24 <b>day</b> 4394:4 4410:22 4413:5 4422:20 4436:18 4449:9,9 4449:12 4466:19 4479:21 4482:1 4486:1 4512:23 4524:3,7 4546:20 4555:1,14 4559:25 4566:19 4566:21 4581:9 4587:9 4623:18 4627:17 4633:22 <b>days</b> 4394:25 4469:11 4471:8 4487:11 4489:23 4493:20 4536:16 4547:10 4548:6,7 4550:9 4555:21 4567:7,12 4572:11,25 4574:25 4596:25	4604:1 4614:23 4616:9 <b>day-to-day</b> 4385:20 4415:10 <b>deal</b> 4385:22 4390:18 4397:13 4399:2 4400:5,6,8 4400:20,22,22 4409:18,19 4413:25 4414:14 4420:5,6 4446:25 4449:3,5,9 4455:10 4457:18 4462:13 4467:23 4468:13 4488:19 4493:9 4496:7 4511:14,18 4513:7 4521:16 4541:15 4556:1 4558:23 4571:1 4572:13 4577:3 4582:2 4583:15 4584:1 4587:4 4598:2 4616:17 4616:18 4617:13 4617:13 4618:17 4618:20,24 4623:4 <b>dealing</b> 4390:14 4391:11 4408:18 4440:10 4459:3 4471:9 4510:9,10 4517:16 4568:13 4634:9 <b>dealings</b> 4386:1 4535:7 <b>deals</b> 4514:3 4517:21 4551:4 4571:6 <b>dealt</b> 4420:8 4446:21 4545:4 4554:16 <b>death</b> 4395:13 <b>debate</b> 4492:2 4519:9 <b>debated</b> 4487:16 <b>deceased</b> 4459:22 <b>December</b> 4399:13 4409:11 4505:22 4526:24 4527:22 4528:12 4539:16 4557:13 4588:17 <b>decent</b> 4519:2,13 <b>decide</b> 4480:5 <b>decided</b> 4457:18 <b>decipher</b> 4533:18 <b>decision</b> 4398:25
---	---	--	--	--

<p>4419:19 4481:13 4486:11 4510:1 4513:6,10 4515:3 4524:13 4544:1 4544:18 4585:22 4587:18 4588:11 4588:13,21 4589:11,14,16 4590:5 4591:24 4600:13 <b>decisions</b> 4395:1 4419:21,24 4481:21,25 4483:10 4506:4 4520:4 4600:12 4637:1 <b>decision-making</b> 4486:18 <b>defence</b> 4381:22 4412:25 4446:1 4451:18 4491:18 4493:11 4494:21 4495:21,22 4504:18 4509:2 4516:12,13,24,25 4517:3,7 4519:5 4532:23 4571:8 4589:4 4598:2 4601:10 4627:20 <b>definitely</b> 4623:20 4624:3,8 <b>degree</b> 4420:14 <b>delegated</b> 4596:11 <b>deliberately</b> 4462:15 <b>deliberations</b> 4453:25 <b>delicate</b> 4543:19 <b>delivered</b> 4401:11 4401:13 <b>demand</b> 4557:20 <b>demanding</b> 4524:25 4534:18 <b>demands</b> 4397:24 4398:1,3,17,23 4399:4,10,14 4419:18,21 4448:17 4517:16 4525:5,25 4526:7 4527:19,21 4528:2,10,20 4530:25 4531:16 4536:8 4540:11 4548:2 4555:7 4556:25 4625:11 <b>demonstrated</b> 4389:21</p>	<p><b>deny</b> 4581:11 4608:4 4609:25 4614:16 <b>denying</b> 4534:14 4547:18 <b>department</b> 4394:24 4430:17 4431:6 4440:24 4442:1 4443:16 4443:17 4473:13 4476:5 4479:14 4479:16 4482:8 4482:21,23 4484:20 4487:25 4488:2 4490:15 4490:25 4491:3 4498:13,14 4505:9 4512:12 4512:15 4513:15 4520:12 4539:25 4545:9 4561:19 4581:15,18 4592:5 4593:18 4594:3 4596:5 4598:1 4599:15 4604:24 4605:2,4 4608:9 4610:19 4614:25 4621:4 4626:17 4628:2,2 4630:6 4631:2 4635:12 <b>departments</b> 4489:7 <b>department's</b> 4586:21 4597:21 <b>dependent</b> 4568:20 <b>depending</b> 4499:20 <b>depends</b> 4566:19 <b>deputies</b> 4500:21 <b>deputy</b> 4477:18 4499:19,22,23 4501:11,22 4502:6,10 4546:5 4549:16 4553:23 4565:21 4572:4,5 4575:4,10,24,25 4576:2,16,18 4577:12 4578:9 4581:10 4598:25 4599:8,10,11,14 4600:9,11,16 4623:14 4628:11 4628:14 4633:1 <b>deputy's</b> 4500:2 4502:12 4514:6 4515:5 4572:3 4577:9,21</p>	<p>4578:25 4626:11 <b>describe</b> 4503:7 4506:16 <b>described</b> 4395:6 4427:13 4436:10 4438:21 4489:24 4492:5 4495:4 4501:16 4502:22 4510:3 <b>describes</b> 4562:1 <b>DESCRIPTION</b> 4382:3 <b>deserve</b> 4395:16 <b>desire</b> 4618:15 4632:18 <b>despite</b> 4636:13,15 <b>detail</b> 4530:13 4556:19 4616:15 4617:20 <b>detailed</b> 4399:12 4407:13,16 4556:12 4616:11 4623:25 <b>details</b> 4423:3 4439:22 4446:8 4464:3 4495:10 4562:4,25 4563:4 <b>detectives</b> 4385:21 <b>determine</b> 4597:22 4605:8 <b>determined</b> 4482:4 4631:17 <b>develop</b> 4490:10,16 <b>developed</b> 4493:3,5 4495:25 4588:19 4607:9 <b>development</b> 4527:17 4546:25 4580:18 4620:17 4620:19 <b>developments</b> 4417:21 4418:6 4568:4 4580:25 <b>develops</b> 4605:15 <b>devious</b> 4418:24 <b>dicey</b> 4412:22 <b>dictates</b> 4535:3 <b>die</b> 4395:16 <b>died</b> 4459:22 <b>different</b> 4400:9 4406:16 4419:22 4434:1 4473:23 4480:17 4488:5 4493:18 4497:12 4499:7 4506:2,7 4570:8 4634:20 <b>differently</b> 4508:11</p>	<p><b>difficult</b> 4390:18 4395:11 4462:7 4495:19 4512:19 4519:7 4534:18 4556:22 4583:6 4601:2 4631:14 4633:16 4634:12 4634:22 <b>difficulties</b> 4391:8 4633:13,14 <b>difficulty</b> 4556:24 4591:25 <b>digit</b> 4548:11 <b>direct</b> 4396:25 4397:7 4422:22 4447:14 4484:18 4496:5,6 4497:10 4497:19 4507:10 4523:13,17,23 4524:3,8,11 4525:22 4526:10 4528:9 4545:14 4562:24 4615:22 <b>directed</b> 4397:9 4413:20 4429:23 4446:11 4448:7,8 <b>direction</b> 4395:8 4452:8 4515:25 <b>directions</b> 4444:20 4571:5 <b>directly</b> 4392:21 4402:14 4429:4 4446:22 4462:20 4558:17 4589:10 4595:12 4596:8 4622:1 4626:9 <b>director</b> 4476:1,9 4476:12,13,15 4477:9 4499:12 4511:2,22 4514:17 4518:2 4544:11 4588:22 4589:17 4599:10 4628:1 4632:22 4635:10 <b>directors</b> 4477:23 4484:13 4513:20 4559:12,16 <b>directorships</b> 4477:22 <b>directory</b> 4635:16 <b>disagree</b> 4405:23 <b>disagreeing</b> 4591:8 4591:10 <b>discipline</b> 4635:3,4 <b>disclose</b> 4436:13 4457:10,11</p>	<p>4516:4 4517:7 4562:4 4589:2 <b>discloseable</b> 4435:16 4437:5 4503:22 4504:1,3 4504:6,13 4507:3 4507:17,22 4515:17,20 4516:8 4526:2 4529:16 4557:18 4557:22 4562:16 4562:20 4586:14 4586:17 <b>disclosed</b> 4412:10 4444:23 4445:18 4471:1 4472:4 4504:9,18 4505:11 4515:22 4517:8 4518:12 4542:24 4594:10 4594:12 4601:10 4604:20 4624:12 4624:16 <b>disclosing</b> 4507:4 <b>disclosure</b> 4420:21 4421:10 4422:15 4427:14 4430:9 4432:5,11 4434:3 4437:7 4451:19 4488:10,21 4491:4,7,17,18 4492:9,14 4497:5 4497:23 4498:4 4503:18 4505:11 4506:4 4515:15 4515:22 4517:24 4518:10 4529:14 4532:20 4533:1,6 4557:15 4558:8 4558:14 4587:15 4587:18 4588:11 4588:13,21 4589:20 4590:4 4591:14 4593:12 4610:15 4635:2 <b>disclosures</b> 4452:12 <b>discovers</b> 4424:24 4447:4 4468:3 <b>discovers</b> 4594:10 4594:11 <b>discretion</b> 4633:24 4636:19 <b>discuss</b> 4385:1,7,14 4425:21 4426:2 4453:21 4454:5 4470:14 4472:11 4483:18 4509:23</p>
--	---	--	---	---

<p>4563:7 4603:20 4603:25 4623:17 <b>discussed</b> 4389:24 4389:25 4428:22 4468:11 4501:11 4536:7 4543:22 4554:18 4555:19 4558:15 4607:20 4608:4 4610:6 4624:21 <b>discussing</b> 4459:14 4522:12 4554:23 4604:5 4625:15 4625:25 <b>document</b> 4459:11 4492:3 4501:21 4514:21 4521:18 4531:4 4542:8 4550:2 4554:13 4585:21 4594:8 4622:25 4636:12 <b>discussions</b> 4390:20 4486:21 4530:7 4530:12 4539:3 4552:21 4553:2 4557:25 4558:7 4558:12,17 4572:25 4574:19 4602:6,11 4606:11 4607:23 4610:2 4612:12 4612:15 4613:3 4623:5 4629:18 <b>disdain</b> 4486:12 <b>dishonesty</b> 4496:24 <b>dismissed</b> 4590:1 4593:13 <b>display</b> 4608:16 <b>dispose</b> 4409:23 <b>dispute</b> 4410:12 4564:15,25 <b>disputes</b> 4568:1 <b>distance</b> 4437:16 4633:2 <b>distinct</b> 4508:5 4509:10 <b>distinction</b> 4407:3 <b>distracting</b> 4434:12 4434:19 <b>distributed</b> 4416:6 4468:7 4522:3,8 <b>disturbed</b> 4395:14 <b>division</b> 4385:17 4439:8 4476:8 4477:19,22 4478:9,18 4485:9 4517:22 4593:3,3</p>	<p>4595:25 4599:1,9 4599:25 4600:17 4619:22 <b>divisions</b> 4631:3,4 <b>divulged</b> 4542:4,15 4542:20 <b>doable</b> 4532:4 <b>docket</b> 4548:11,24 4549:1,2 <b>dockets</b> 4547:2,7,8 4547:11 4548:5,7 4548:19 4549:6 4550:16 4567:16 4567:16 <b>document</b> 4383:7 4453:3 4468:2,8 4468:10,11,18,21 4469:13 4470:2 4532:7 4537:19 4538:13 4541:5,6 4541:15,22,23 4549:21 4554:1,3 4554:25 4575:22 4576:5 4606:7 4612:6,10 4613:1 4613:2 <b>documentary</b> 4564:9 <b>documented</b> 4539:4 <b>documents</b> 4399:11 4407:14,16 4408:2,20,23 4419:3 4424:5 4447:24 4460:21 4460:23 4469:4,7 4474:14,17 4478:12 4506:15 4515:10 4523:3,7 4523:9 4534:22 4537:6,8 4547:5 4553:10,12 4554:21 4556:10 4559:1 4572:17 4573:23 4588:5 4590:10,24 4593:21 4594:9 4596:20 4606:15 4610:13 4621:7 4626:8 <b>doing</b> 4391:17 4396:2 4418:25 4457:7 4461:15 4462:11 4463:21 4464:7 4477:10 4481:5 4483:12 4490:11 4506:3 4507:1,4,4 4558:2</p>	<p><b>donkey</b> 4570:16 <b>door</b> 4390:8 <b>double</b> 4487:4,8 <b>doubly</b> 4596:4 <b>doubt</b> 4397:21 4421:12 4432:25 4617:4 <b>doubted</b> 4422:7,11 <b>doubting</b> 4450:20 4451:7 <b>doubts</b> 4480:1 <b>downwards</b> 4552:23 <b>draft</b> 4445:3,7 4472:16 4474:22 4502:9 4576:6 4601:7 <b>drafted</b> 4530:8 <b>drafting</b> 4541:16 <b>drafts</b> 4535:3 4590:20 <b>drank</b> 4454:15 <b>draw</b> 4613:7,8 <b>drawing</b> 4387:21 4468:14 4531:11 4618:6 <b>drawn</b> 4388:11 4558:6 <b>drew</b> 4387:12 4558:20 <b>Driskell</b> 4380:3 4381:11 4424:10 4426:18 4427:4 4429:1 4438:23 4454:7 4462:2,14 4462:16,17 4464:8 4478:1,10 4484:7 4490:25 4493:5 4496:11 4502:25 4514:22 4524:10 4559:3 4593:11 4597:11 4598:5 4601:14 4622:20 <b>Driskell's</b> 4446:1,3 4446:8 4447:18 4584:13 4589:25 4611:18,19 <b>drop</b> 4598:3 <b>dropped</b> 4505:2 4593:4,6 4605:1 <b>dropping</b> 4511:17 <b>drug</b> 4459:3,4,6 <b>drugs</b> 4458:18 <b>dual</b> 4629:4 <b>due</b> 4392:4 4444:6 4613:19</p>	<p><b>duly</b> 4474:10 4638:5 <b>Duncan</b> 4445:3 4471:12 <b>duties</b> 4392:7 <b>duty</b> 4395:1,5 4517:7 4600:11 <hr/><b>E</b><hr/><b>ear</b> 4507:14 <b>earlier</b> 4427:22 4454:13 4456:9 4510:3 4530:7 4533:14 4569:5 4607:14 4617:19 4629:21 <b>earliest</b> 4523:11 4529:24 <b>early</b> 4410:17 4467:5 4477:8 4522:1 4523:9 4525:6 4526:11 4527:11 4536:7 4538:15 4540:23 4553:11 4556:15 4583:9 4607:10 <b>earnest</b> 4456:8 <b>ease</b> 4499:8 <b>easier</b> 4433:13 4508:24 <b>easily</b> 4634:7,8 <b>Eastgate</b> 4401:8 <b>easy</b> 4419:1,11 4491:6 4519:2 <b>Ed</b> 4439:6 <b>Edwards</b> 4598:1,7 4598:10 <b>effect</b> 4420:16 4464:10,11 4516:20 4564:18 <b>effective</b> 4481:8 <b>efforts</b> 4420:24,25 4430:8 <b>eight</b> 4394:7 4469:11 4471:7 4520:13 4529:8 4629:18 <b>either</b> 4386:11 4392:13 4418:9 4454:1 4458:6 4473:13 4516:18 4522:19 4595:4 4604:25 4609:10 4609:11 4611:10 4611:21 4612:20 4614:7 4628:11 4631:20</p>	<p><b>elaborate</b> 4570:19 <b>element</b> 4511:15 <b>elicit</b> 4462:16 <b>elicits</b> 4592:16 <b>elite</b> 4478:20 <b>embarked</b> 4396:9 <b>embarrassed</b> 4605:1 <b>embarrassing</b> 4592:23 <b>emotional</b> 4395:17 <b>emphatically</b> 4613:23 <b>employing</b> 4511:19 <b>empowered</b> 4510:25 <b>enamored</b> 4486:14 4487:20 <b>encourage</b> 4487:23 <b>ended</b> 4494:7 <b>enforcement</b> 4632:12 <b>engage</b> 4404:16 4521:17 4549:7 <b>engaged</b> 4404:13,19 4525:14 4549:17 4557:24 <b>engaging</b> 4585:17 <b>Enns</b> 4441:4,6 4442:3 4447:14 4447:14 4556:13 4556:15 4605:13 4605:18,22 4606:4,8 4609:16 4609:17 4610:11 4614:12 <b>ensues</b> 4564:14 <b>ensure</b> 4496:12 4504:17 4525:10 4555:13 4558:5 4634:14 <b>ensuring</b> 4630:20 <b>enter</b> 4552:14 <b>entered</b> 4637:3 <b>entering</b> 4592:7 <b>entire</b> 4476:13 <b>entirely</b> 4478:14 4495:8 4539:6 4566:7 <b>entitled</b> 4613:5,5,7 4613:9 <b>entitlement</b> 4498:3 <b>entries</b> 4548:20 <b>entry</b> 4552:10 <b>environment</b> 4630:14 <b>equally</b> 4581:12</p>
---	---	---	--	---

<p>4589:18  <b>equity</b> 4413:10  4551:5  <b>eras</b> 4395:24  <b>erroneous</b> 4477:13  <b>erroneously</b> 4474:4  4513:16  <b>especially</b> 4517:17  4541:8  <b>essence</b> 4538:17  4585:11 4635:7  <b>essentially</b> 4465:5  4465:11 4476:6  4526:20 4556:18  4579:13 4628:10  <b>establish</b> 4496:8  4630:16,17  <b>estate</b> 4381:14  4409:24  <b>estimate</b> 4394:18  <b>estimated</b> 4393:5  <b>ethical</b> 4571:3  4586:19 4635:23  4636:3  <b>ethics</b> 4516:2  4630:18 4635:1  <b>evaluating</b> 4509:25  <b>evaluation</b> 4511:6  <b>eve</b> 4555:18 4565:2  <b>evening</b> 4398:22  4567:17  <b>event</b> 4411:12  4422:22 4425:1  4439:16 4451:17  4464:3 4502:22  4503:3 4525:6,19  4525:21 4537:20  4548:12 4553:6  4565:1 4567:9  4568:20 4572:6  4577:11 4578:14  4578:16 4579:17  4596:25 4600:16  4600:22 4611:24  <b>events</b> 4523:8  4558:16 4563:22  4564:1,5 4578:22  4607:13  <b>everybody</b> 4468:7  4626:1  <b>evidence</b> 4386:8  4389:8 4396:24  4399:9 4407:17  4408:10 4412:7  4413:2 4419:4,5,8  4420:15 4423:22  4427:3 4437:11</p>	<p>4437:15 4454:3  4464:14 4465:7  4466:19 4472:23  4479:25 4480:2  4505:13 4508:18  4510:16,19,22  4517:11 4543:12  4548:13 4552:3  4553:12,15  4561:25 4564:9  4567:19 4568:22  4577:14 4584:20  4597:22 4598:7  4602:18,25  4608:10,13  4613:12,14,21  4614:4,9  <b>evidentiary</b> 4498:23  <b>Ewatski</b> 4447:1  4621:1,16,24  4622:11,24  4623:5 4624:22  4624:23 4625:18  <b>Ewatski's</b> 4620:20  <b>exact</b> 4472:8  <b>exactly</b> 4446:16  4455:5 4458:24  4469:24 4495:14  4500:11 4506:9  4558:7 4569:18  4569:20 4576:9  4586:4  <b>examination</b> 4383:4  4412:19 4416:14  4434:12 4453:17  4454:10 4460:22  4521:14  <b>examination-in-c...</b>  4455:25  <b>examine</b> 4613:5  <b>Examiners</b> 4638:6  <b>example</b> 4390:16  4427:17 4480:17  4487:18 4494:5  4508:22 4514:3  4554:21 4637:7  <b>examples</b> 4631:9  <b>exceptional</b> 4502:21  <b>exceptions</b> 4637:5  <b>excerpt</b> 4383:4  4416:14 4461:4  4464:21  <b>excerpted</b> 4461:20  <b>exchange</b> 4543:11  4610:16  <b>excitement</b> 4396:14  <b>excuse</b> 4410:12</p>	<p><b>executive</b> 4513:17  <b>exhibit</b> 4400:15,16  4416:14,18  4452:6 4455:17  4457:21 4460:19  4460:23 4461:3,6  4462:21 4464:22  4467:24 4468:19  4468:21 4470:2  4472:6 4474:5,6  4474:14 4500:5  4521:5 4522:13  4534:21 4546:4  4547:4,8 4549:21  4550:14 4554:8,9  4556:13 4572:19  4572:22 4583:25  4602:15,15  4604:11 4624:4  <b>exhibits</b> 4383:1  4400:12 4447:6  4455:16  <b>exist</b> 4632:14  <b>expect</b> 4393:21  4411:22 4418:11  4426:25 4440:3  4495:10 4503:13  4507:11 4514:7  4516:15,19  4517:3,8 4518:2  4530:12,20  4543:21 4544:11  4551:21 4552:20  4565:5 4570:5,7  4574:15 4587:7  4602:2,4,8,9  4623:11 4625:3  4625:12 4630:22  <b>expectation</b>  4506:17 4507:15  4510:24 4513:21  4518:6  <b>expected</b> 4415:10  4418:5 4420:1  4430:24 4515:4,6  4541:12 4543:24  4544:8 4565:23  4568:10,15  4580:19 4587:8  4587:20 4588:23  4588:25 4599:23  4623:7 4634:2  <b>expedite</b> 4498:1  <b>expended</b> 4423:12  <b>expenditure</b>  4499:17 4500:22  4503:12 4527:14</p>	<p><b>expenditures</b>  4498:19 4502:19  4503:18 4527:12  4545:10  <b>expenses</b> 4406:15  4406:25 4408:4  4415:11 4545:6  <b>experience</b> 4386:23  4473:1 4483:5  4484:24 4495:6  4510:18 4514:9  4629:11 4632:13  <b>experienced</b> 4485:8  4485:12 4592:2  <b>expertise</b> 4451:15  <b>experts</b> 4450:3,9,12  <b>explain</b> 4498:15  <b>explaining</b> 4607:4  <b>explanation</b> 4443:8  4471:22,24  4546:10 4578:7  4581:7,11 4603:3  4603:9  <b>explicitly</b> 4587:16  <b>explored</b> 4521:25  <b>explores</b> 4567:1  <b>exposed</b> 4496:20  <b>express</b> 4484:5  <b>expressed</b> 4486:12  4556:1 4631:10  4634:20  <b>expressing</b> 4563:15  <b>expression</b> 4384:14  <b>extend</b> 4636:12  <b>extended</b> 4435:5  <b>extensively</b> 4462:9  4598:9  <b>extent</b> 4458:24  <b>extraordinary</b>  4513:23 4525:13  4566:15  <b>extravagant</b>  4556:25  <b>extreme</b> 4565:10  <b>Extremely</b> 4481:3  <b>e-mail</b> 4521:22  4605:23 4606:3  <b>E.W</b> 4381:12</p>	<p>4391:21 4392:3  4392:18 4401:14  4421:19 4437:6  4442:9 4447:2  4494:8 4497:24  4502:25 4504:1,3  4504:8,13 4507:3  4507:17,22  4516:7,9 4524:21  4525:4 4526:2,5,6  4527:11 4529:16  4530:7,16 4538:1  4546:20 4556:3  4561:10 4562:19  4577:24 4578:3  4591:16 4610:18  4615:24 4620:22  4622:25 4623:9  4623:21 4624:18  <b>facts</b> 4503:22  4515:17,20  4529:15  <b>factual</b> 4613:8  <b>faculty</b> 4629:16  <b>failure</b> 4593:12  4604:23  <b>fair</b> 4390:7 4394:13  4436:22 4437:7  4470:17 4472:19  4480:22 4482:13  4484:1,4 4489:16  4489:19 4504:9  4510:17 4511:7  4519:13 4538:19  4540:8,13  4557:13 4578:5  4581:1 4592:21  4593:4,5 4600:10  4600:22 4605:4  4605:19 4607:11  4611:1 4617:7  4623:22 4628:23  4629:13  <b>fairly</b> 4491:21  4492:20 4493:8  4506:16 4516:4  4524:7,13  4564:15 4566:17  <b>fairness</b> 4395:21  4436:16 4480:8,9  4519:12  <b>fake</b> 4541:20  <b>fall</b> 4636:6  <b>false</b> 4407:20  4408:10 4415:15  4462:15 4612:10  4613:1</p>
--	---	--	---	--

<p><b>familiar</b> 4537:19 4615:4 4628:22 <b>family</b> 4568:13 <b>far</b> 4386:18 4392:12 4410:9 4451:17 4484:24 4485:14 4512:17 4633:1 <b>fashion</b> 4618:15 <b>fast</b> 4433:10 <b>fault</b> 4551:1 4593:1 <b>favour</b> 4435:5 <b>fax</b> 4430:2 4521:20 4575:7 4577:20 <b>faxed</b> 4522:1 <b>fear</b> 4411:17 4420:13 4423:4 4508:6 <b>fearful</b> 4482:15 4498:24 4508:16 4525:9 4629:21 <b>feasible</b> 4596:22 <b>featured</b> 4458:21 <b>February</b> 4384:12 4422:17 4505:23 <b>federal</b> 4427:24 4499:5 4628:2 <b>Federally</b> 4489:8 <b>Federal/Provincial</b> 4490:5 4583:2 <b>fee</b> 4573:4,15 <b>feel</b> 4416:17 <b>feeling</b> 4497:15 <b>feels</b> 4510:6 <b>feet</b> 4405:13 4423:14 <b>Felderhoff</b> 4455:5 <b>fellow</b> 4396:3 4519:3 4527:1 4545:19 <b>felt</b> 4479:25 4483:13 4496:19 4636:2 <b>Ferguson</b> 4618:19 4619:24 4620:2 <b>fetching</b> 4439:14 <b>fiber</b> 4450:5 <b>field</b> 4429:12 4486:24 <b>fifteen</b> 4529:1 <b>fifth</b> 4412:13 4485:23 4578:13 <b>figure</b> 4482:23 <b>file</b> 4413:18 4424:9 4424:11,18 4434:5 4440:24 4441:1,2,25 4442:1,7 4443:16</p>	<p>4443:18 4447:25 4473:13 4494:3,8 4507:12 4534:24 4535:1 4537:17 4549:23 4550:20 4559:22 4560:11 4560:24 4561:2,4 4561:8 4572:23 4576:6 4588:5 4590:19,22 4594:10 4630:1,2 4630:9,13 4631:1 4633:10 <b>files</b> 4421:3 4422:1 4422:6 4426:17 4426:23,24,24 4433:6,22 4434:1 4434:1 4445:7 4559:1 <b>fill</b> 4455:3 <b>filled</b> 4534:2 <b>film</b> 4396:18 <b>final</b> 4413:19 4481:20 4568:4,6 4568:16 4569:11 4571:18,22 4575:16 4579:17 4620:18 <b>finally</b> 4385:3 4416:4 4501:18 4503:16 4531:23 4535:10 4546:3 4567:25 4619:6 4620:17 4624:21 <b>financial</b> 4410:3,6 4411:13 4528:21 4529:4 4577:24 4581:24 <b>financing</b> 4498:10 <b>find</b> 4474:17 4475:5 4541:22 4545:1 4583:22 4596:20 <b>finding</b> 4487:13 <b>fine</b> 4393:10 4407:1 4434:21 4440:9 4457:13 4548:15 4571:1 <b>fingers</b> 4630:12 <b>finish</b> 4627:12 <b>finished</b> 4415:13 4417:25 4434:20 <b>finite</b> 4630:4 <b>fire</b> 4428:9,22 4429:4 4435:4 4446:9 4463:8 4466:8 4514:11 4515:8</p>	<p><b>fires</b> 4428:6 4431:23,25 <b>fireworks</b> 4608:16 <b>firm</b> 4481:11 <b>firmly</b> 4492:6 <b>first</b> 4384:11 4392:5 4396:20 4397:1 4406:13 4409:8 4413:24 4417:16 4417:20 4420:24 4422:15 4424:21 4430:11 4442:11 4442:19 4444:8 4455:13,21 4457:2 4463:6 4469:15 4470:3 4474:9 4475:15 4479:15,19 4488:18 4493:9 4494:23 4500:4 4501:20 4502:4 4503:1 4505:5,6 4505:21 4507:22 4511:7 4522:14 4522:18,21 4526:11 4527:17 4533:12 4539:13 4539:14,20 4545:4 4550:1 4552:4,9 4559:13 4564:7 4573:18 4580:17 4582:17 4584:3,9 4588:13 4591:1 4594:20 4595:7 4605:16 4607:9 4610:23 4615:7 4616:23 4621:2,3 4622:1 4627:2,4,8,23 4631:25 4633:11 <b>Firstly</b> 4384:9 <b>fit</b> 4472:18 <b>fits</b> 4471:25 <b>five</b> 4393:14 4394:10 4528:24 4548:6 4564:5 4567:12 4572:11 4600:24 4604:1 4628:14 4637:16 <b>fix</b> 4491:23 <b>flag</b> 4611:12 <b>fleshed</b> 4617:19 <b>flip</b> 4471:25 4541:21 4561:22 4588:6 <b>floor</b> 4485:22,23,23 <b>floors</b> 4491:20</p>	<p><b>focus</b> 4396:24 4478:2 4616:12 4616:13 <b>focused</b> 4590:25 <b>fold</b> 4630:11 <b>folder</b> 4559:4,4 <b>follow</b> 4469:6 4473:2,4 4495:8 4516:17 4569:13 4612:11 <b>followed</b> 4417:13 4577:11 4579:24 <b>following</b> 4478:3 4557:8 4562:12 4586:7 4595:12 4597:6 4629:25 <b>follows</b> 4405:18 4463:5 4474:10 4528:4,11 4548:18 4614:24 <b>follow-up</b> 4610:3 <b>fond</b> 4488:8 <b>football</b> 4599:6 <b>force</b> 4498:10 <b>forceful</b> 4482:11 <b>forcefully</b> 4523:20 <b>foregoing</b> 4638:7 <b>foreman</b> 4396:18 <b>forensic</b> 4480:2 <b>forget</b> 4423:19 4458:14 4510:11 4566:14 4614:15 <b>forgot</b> 4581:6 <b>forgotten</b> 4390:16 4412:7 4456:13 4626:14,19 <b>form</b> 4412:20 4413:1 4436:7 4439:23 4528:1 4529:13 4576:7 <b>formal</b> 4496:2 4502:21 4503:8 4504:21 4540:17 4540:24 4541:3 4542:22 4552:10 4561:13 <b>formally</b> 4574:4,14 <b>formal-type</b> 4541:6 <b>former</b> 4429:15 4473:1 4628:19 <b>forms</b> 4483:16 <b>forth</b> 4406:2 4502:10 4613:15 <b>forward</b> 4438:5 4471:25 4487:15 4574:24 4576:4 4588:6</p>	<p><b>found</b> 4388:19 4397:2 4451:5 4523:10 <b>four</b> 4478:3,21,24 4479:1 4493:18 4539:11 4543:4 4572:14 4582:24 4590:10 4625:17 <b>fourth</b> 4436:17 4545:13 4546:16 4572:6 4592:11 4597:13 <b>FPS</b> 4427:23 <b>frame</b> 4517:10 <b>framed</b> 4528:1 <b>framework</b> 4500:1 4635:8 <b>fraternize</b> 4486:8 <b>friend</b> 4482:7 <b>friends</b> 4418:17 4482:6 4486:3 <b>front</b> 4417:9 4462:22 4469:19 4584:5 4593:25 <b>frustrated</b> 4565:19 <b>frustration</b> 4555:22 4556:2 <b>fulfilled</b> 4387:6 4421:7,8 <b>full</b> 4491:18 4498:4 4531:16 4597:20 <b>fully</b> 4446:7 4456:19 4516:4 4569:22 <b>full-time</b> 4483:2 <b>function</b> 4485:18 <b>funds</b> 4500:22 <b>funny</b> 4482:18 4567:5 <b>furniture</b> 4637:12 <b>further</b> 4393:11 4401:17 4425:7 4452:11 4471:16 4472:1 4475:5 4531:25 4594:14 4623:25 <b>furthermore</b> 4593:11 <b>future</b> 4504:8</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gain</b> 4598:7 <b>Garson</b> 4526:19 4546:5 4548:25 4549:9 <b>Gates</b> 4381:16 <b>gather</b> 4385:23</p>
---	---	---	--	---

4444:6 4446:6 4617:15 <b>gathered</b> 4392:24 <b>gathering</b> 4429:13 <b>general</b> 4478:9,13 4478:15,16,20 4479:5 4489:7 4490:24 4492:8 4496:8 4503:16 4530:11,14 4543:22 4551:8 4551:19 4557:10 4563:2 4599:8 4608:5 4615:18 4637:5 <b>generally</b> 4394:22 4479:7,11 4496:4 4512:17,18 4541:2,7,13 4560:12 4584:5 4598:23,24 4607:25 <b>General's</b> 4500:20 4577:25 4581:23 <b>generous</b> 4519:10 <b>George</b> 4381:13 4382:4 4384:21 4425:22 4426:3 4447:18 4470:8 4479:15,20,24 4480:19 4482:1 4482:13,17 4486:13,21 4487:15 4492:16 4497:18 4506:18 4519:17 4520:5 4520:12 4558:16 4561:1 4562:11 4587:20 4589:19 4591:14 <b>George's</b> 4483:5 4587:25 4603:23 <b>getting</b> 4392:8,8 4407:2 4463:13 4483:15 4536:9 4567:13 4593:1 4611:5 <b>Giasson</b> 4381:4 <b>girls</b> 4394:11 <b>give</b> 4385:24 4396:8 4400:15 4420:15 4420:22 4452:1 4454:14 4466:24 4484:5 4544:2 4562:21 4563:4 4571:24 4591:19 4637:13	<b>given</b> 4386:8 4388:23 4416:10 4437:18,19 4441:1,2 4445:25 4446:5 4489:6 4494:16 4505:3 4524:6,10 4548:2 4555:11,14 4560:19,21 4562:7 4563:13 4586:12 4587:15 4604:20 4610:13 4610:18 4625:3 4625:25 4632:21 4632:23 4633:23 4636:22 <b>gives</b> 4412:9 4482:19 4563:1 <b>giving</b> 4396:1 4400:15 4421:13 4422:11 4423:4 4427:3 4435:3 4454:3 4494:15 4562:6 4577:15 4598:7 <b>go</b> 4384:9 4387:24 4391:15 4407:5 4408:1 4411:9 4412:16,19,21,24 4418:3 4419:14 4421:21 4422:5,6 4428:4 4429:18 4431:21 4432:3 4438:6 4439:25 4441:13 4442:23 4445:12 4469:15 4480:4,18 4486:24 4489:22 4495:5 4510:12 4519:9 4520:6 4531:18 4536:13 4544:22 4547:8 4548:16 4550:17 4552:20 4554:8 4555:2 4561:10 4565:20,21 4566:22 4567:21 4574:3,7,24 4575:23 4576:4 4578:15,21 4579:9 4585:9 4592:14 4594:13 4604:11 4609:16 4627:3,4 4629:22 4633:9 <b>God</b> 4497:7 <b>goes</b> 4404:12	4429:20 4492:22 4510:7 4577:19 4598:6,9 4626:15 4629:20 <b>going</b> 4386:12,13 4391:2 4393:2 4398:6,17 4401:12 4403:14 4410:3,7 4415:2,5 4418:8 4419:19 4420:11 4423:16 4432:24 4434:10 4440:14 4444:4 4452:5,7 4454:2 4454:12 4473:2,4 4483:8 4485:17 4492:4,7 4497:15 4502:10 4504:12 4506:17 4510:18 4511:12 4518:9 4519:2 4523:7 4526:25 4528:20 4531:17 4532:23 4533:3,5 4537:23 4539:18,25 4540:21,21 4544:23 4549:11 4553:9 4555:17 4564:22 4565:16 4565:20,21 4566:22 4567:2 4570:25 4573:3 4574:3 4581:12 4583:14 4596:13 4604:9 4612:8,17 <b>good</b> 4384:6 4393:16,17,18 4414:14 4418:17 4474:11 4482:18 4482:19 4484:14 4486:9 4492:18 4492:24 4519:3 4519:22 4542:7 4556:1 4570:16 4627:17 4630:1 4637:17 <b>goods</b> 4421:23 <b>gosh</b> 4614:5 <b>gossip</b> 4492:22 4566:17,20 <b>gotten</b> 4427:19 <b>government</b> 4392:6 <b>grace</b> 4497:7 <b>Graeme</b> 4546:5 <b>grandchildren</b> 4394:6 <b>granddaughters</b>	4394:7 <b>grandson</b> 4394:8 <b>grant</b> 4473:20 <b>granted</b> 4446:15 4558:14 4586:3 4586:10 4617:2,2 4617:3,5 <b>grateful</b> 4468:14 <b>grave</b> 4437:16 <b>great</b> 4462:13 4489:6 <b>greater</b> 4511:18 4551:4 <b>greatest</b> 4496:18 4613:13 <b>Greg</b> 4446:1 4601:8 <b>grip</b> 4481:11 <b>group</b> 4478:20,21 4478:21 4481:13 <b>groups</b> 4631:4 <b>guarantee</b> 4543:17 <b>guardian</b> 4600:3 <b>guess</b> 4405:14 4421:21 4439:25 4466:14 <b>guessing</b> 4483:10 <b>guidelines</b> 4630:16 <b>guilty</b> 4572:10 <b>Gumieny</b> 4391:12 4424:10 4559:8 4559:15 <b>gung-ho</b> 4632:10 <hr/> <b>H</b> <hr/> <b>Haasbeek</b> 4458:13 4458:14,25 4459:9,20 <b>habits</b> 4479:12 <b>haggle</b> 4516:21 <b>haggling</b> 4506:14 4507:5 <b>Hague</b> 4545:16,19 4545:24 4546:8 <b>hair</b> 4449:25 4450:5 4451:4 <b>hairs</b> 4451:1,5 <b>half</b> 4580:11 4628:14 <b>halfway</b> 4402:20 4479:22 4541:21 4541:23 <b>Hall</b> 4447:1 4620:20 4621:1 4621:16,24 4623:5 4624:22 4624:22 4625:18 <b>Hall's</b> 4622:2	<b>hand</b> 4470:7 4510:9 4530:25 4545:15 <b>handle</b> 4633:5 <b>handled</b> 4506:21 <b>handling</b> 4597:21 <b>handout</b> 4416:16 <b>handouts</b> 4416:18 <b>hands</b> 4392:13 4473:24 4496:14 4515:24 4582:4 4587:8 4588:23 4630:11 4631:12 <b>hands-on</b> 4483:6 <b>handwriting</b> 4385:11,12 4470:4,5,10,16 4480:21 4603:15 4603:22 4604:4 <b>handwritten</b> 4452:17,23 4457:21 4469:8,8 4469:16,20,24 4500:6,10,12,14 4533:8 4550:22 4593:23 4603:11 <b>handy</b> 4460:19 4547:4 <b>happen</b> 4489:21 4492:4 4537:7,9 4537:13 4539:18 4599:18 <b>happened</b> 4389:2 4443:22 4467:22 4488:10 4491:24 4509:22 4518:5 4521:12 4537:11 4547:19 4563:23 4565:1 4578:8 4580:2 4607:14 <b>happening</b> 4450:24 4506:19 4533:24 4541:13 4611:3 <b>happens</b> 4564:7 4565:12 4576:9 4578:17 4579:1 <b>happy</b> 4418:1 4487:9 4600:22 <b>hard</b> 4395:14 4489:22 <b>hardening</b> 4611:4 <b>Harder</b> 4597:21 4621:18 <b>harm</b> 4499:2 <b>Hassbeek</b> 4458:1 <b>haste</b> 4578:9 4581:9 <b>hate</b> 4476:23 <b>head</b> 4409:15
--	--	---	--	---

<p>4518:16 4610:14  <b>headed</b> 4489:8  4620:25  <b>heading</b> 4542:2,7  4542:14,22  <b>hear</b> 4508:15,15  4585:10  <b>heard</b> 4399:10  4412:14 4413:9  4423:22 4430:12  4446:22 4521:15  4548:14 4549:18  4620:4 4621:3  4631:23  <b>hearing</b> 4399:9  4422:21 4424:18  4424:23 4613:14  <b>heat</b> 4399:17  4400:1  <b>held</b> 4448:24  4478:8 4498:12  4560:20  <b>help</b> 4423:6  4463:25 4509:6  4525:17 4531:20  4533:9 4538:13  4546:13 4547:15  4556:9 4573:6  4578:13 4590:18  4618:7  <b>helpful</b> 4468:11  4500:3 4549:20  4556:18 4635:17  4636:24  <b>helping</b> 4534:19  4538:5  <b>hereinbefore</b>  4638:9  <b>hesitate</b> 4442:18  <b>hesitation</b> 4563:15  <b>Hewak</b> 4420:21  4422:22 4498:1,2  <b>hidden</b> 4388:2  4458:18  <b>highest</b> 4478:16  4553:22  <b>highlight</b> 4475:13  4493:7 4533:11  <b>highly</b> 4582:22,22  <b>high-level</b> 4549:7  4560:9 4620:24  4621:17  <b>high-risk</b> 4581:21  <b>hindsight</b> 4399:8,16  4407:12  <b>hired</b> 4525:4  <b>hiring</b> 4467:8</p>	<p><b>history</b> 4604:20  <b>hold</b> 4435:7  4549:22 4614:5  <b>holder</b> 4619:13  <b>holding</b> 4619:2  <b>holds</b> 4567:4,23  <b>home</b> 4539:16,17  4551:6  <b>homicide</b> 4385:17  4439:2 4458:11  4459:2,6,7  4477:11 4515:2  4525:5,19  4568:21 4621:18  <b>honest</b> 4570:23  <b>honestly</b> 4397:18  <b>honesty</b> 4450:20  4451:7  <b>Honourable</b> 4380:5  <b>hook</b> 4545:9  <b>hope</b> 4393:22  4409:24 4475:13  4565:7,8 4567:1  4630:12  <b>hopefully</b> 4627:9  <b>horse</b> 4570:17  <b>hospital</b> 4460:1  <b>hot</b> 4490:18  4566:17,20  <b>hotel</b> 4388:7,10,18  4568:25 4569:1  4579:6  <b>hour</b> 4393:22  4467:11  <b>hours</b> 4547:13  <b>house</b> 4401:8  4403:22 4404:10  4405:17,22  4406:7,10,15,24  4409:9,10,23,25  4413:10,11  4414:1 4417:5  4437:16 4458:17  4465:25 4514:25  4515:9 4528:23  4539:19 4551:13  4584:15 4598:19  4599:5  <b>huge</b> 4480:19  4519:7 4566:10  4587:11 4590:23  <b>Hugely</b> 4593:14  <b>human</b> 4633:15,16  <b>humour</b> 4482:18</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> 4497:6 4573:15</p>	<p><b>identification</b>  4632:12  <b>identified</b> 4458:1  4602:21  <b>identify</b> 4470:3  <b>identities</b> 4499:7  4560:16  <b>identity</b> 4404:25  4504:11,12  4518:13 4529:4  4532:23 4561:11  4562:16  <b>ideological</b> 4632:11  <b>illegal</b> 4562:22  <b>illogical</b> 4562:14  <b>imagine</b> 4458:22  4461:18 4519:19  4519:25 4573:20  4574:6 4581:12  4617:17  <b>immediate</b> 4493:4  4621:9  <b>immediately</b>  4405:18 4473:20  4545:2 4548:18  4563:23,24  4579:22,24  4622:17  <b>immunity</b> 4387:17  4390:21 4419:25  4420:5 4439:20  4446:6,15  4507:24 4508:3,6  4508:22,23  4509:6,12 4511:1  4511:8 4513:13  4514:3,6,14,15,22  4514:24 4515:18  4516:8 4517:17  4517:21,23  4518:1,14,19  4519:15 4521:16  4521:18 4529:8  4541:9,17  4543:10,16  4544:2 4555:11  4555:17 4557:20  4562:17,19  4569:2,16  4571:17,20,25  4586:3,10 4587:4  4590:16 4591:2  4594:24 4595:14  4598:11 4610:17  4610:18 4616:11  4617:1,5,11,22  4618:19 4625:10</p>	<p><b>impact</b> 4395:18  <b>impatient</b> 4482:5  <b>imperative</b> 4608:2  <b>implicating</b> 4426:18  <b>implication</b> 4449:4  <b>implicit</b> 4571:1  <b>implied</b> 4618:19  <b>imply</b> 4444:10  <b>importance</b>  4552:18 4587:6  4635:23  <b>important</b> 4438:14  4475:14 4511:11  4512:9 4565:3  4580:25 4592:9  4593:16 4596:4  4636:2,20  <b>impress</b> 4610:9  <b>impressed</b> 4480:6  <b>impression</b> 4414:3  4414:24 4415:15  4480:14 4492:17  4492:23  <b>improper</b> 4570:20  <b>inappropriate</b>  4396:12 4548:1  4591:15,19  <b>incendiary</b> 4508:17  <b>incident</b> 4388:7  4566:1 4580:17  <b>Incidentally</b> 4412:2  4413:7  <b>incidents</b> 4431:12  <b>inclined</b> 4491:25  <b>include</b> 4451:3  4528:20 4531:7  <b>included</b> 4468:15  <b>including</b> 4554:19  4602:18  <b>inconsequential</b>  4610:24  <b>inconsistency</b>  4627:11  <b>increasingly</b>  4553:13,19  4554:22  <b>independence</b>  4394:22 4395:20  4481:9 4600:4  <b>independent</b> 4427:2  4481:15,16  4486:19  <b>independent-min...</b>  4487:22  <b>INDEX</b> 4382:1  4383:1  <b>indicate</b> 4415:8</p>	<p>4425:5 4459:9  4498:22 4517:10  4522:16  <b>indicated</b> 4610:12  4625:6  <b>indicating</b> 4540:9  <b>indication</b> 4592:3  <b>indictment</b> 4496:5,6  4497:10,19  4501:2 4523:13  4523:24 4524:3,8  4524:11 4526:10  4527:20 4528:9  4636:23  <b>indictments</b>  4525:22  <b>indirect</b> 4615:23  <b>individual</b> 4492:13  4582:23  <b>individually</b>  4604:25  <b>individuals</b> 4615:22  <b>inexperience</b>  4492:1  <b>infer</b> 4608:14  <b>informal</b> 4425:15  4539:2  <b>informally</b> 4623:12  <b>information</b>  4385:25 4388:24  4392:23 4393:3  4421:4,14,16  4422:4 4427:5,20  4428:10 4429:6,9  4429:13,21  4432:17 4435:3  4437:18 4438:7  4445:16,21  4453:22 4459:19  4508:20,21  4509:2 4529:15  4542:4,15  4560:19 4561:6  4588:22 4591:12  4601:22 4611:5,8  <b>informed</b> 4507:19  4538:18,23  4545:8 4558:10  4568:4,24 4569:9  4580:19  <b>informing</b> 4616:18  <b>inherent</b> 4392:1  4631:7 4633:13  <b>inherently</b> 4629:7  4629:12 4632:1  <b>initial</b> 4491:6  4492:6 4505:18</p>
--	--	--	--	--



4511:5,6 4513:4 4526:15 4527:12 <b>initially</b> 4487:6 4498:17 4499:9 4500:6 4573:1 4602:19 <b>initiate</b> 4526:14 <b>initiating</b> 4509:24 <b>injuries</b> 4459:23 <b>input</b> 4483:19 4544:14 <b>inquired</b> 4595:13 <b>inquiries</b> 4619:19 <b>inquiring</b> 4470:25 <b>inquiry</b> 4380:1,20 4384:4 4411:3 4416:8 4436:2 4441:6 4454:21 4454:25 4472:25 4474:19 4488:13 4489:8 4497:16 4520:20,24 4561:24 4564:10 4566:10 4582:8 4582:12 4594:20 4620:5 4628:18 4637:23 <b>inside</b> 4503:24 4559:7,13 <b>inspector</b> 4388:14 4412:15 4458:6 4620:20 <b>inspectors</b> 4620:25 4623:9 <b>instance</b> 4573:18 4588:13 <b>instances</b> 4458:21 <b>instinct</b> 4633:7 <b>instituted</b> 4635:19 <b>instituting</b> 4492:7 <b>instruct</b> 4564:20 <b>instructed</b> 4437:17 <b>instruction</b> 4516:1 <b>instructions</b> 4484:5 4531:25 4562:1,6 4562:7,13,21 4563:6,10,16 4577:4,6,6 <b>intelligent</b> 4594:4 <b>intended</b> 4452:1,3 <b>intention</b> 4389:8 4412:24 <b>intercept</b> 4462:1 <b>intercepts</b> 4461:17 <b>interest</b> 4585:18 <b>interested</b> 4439:14 4591:5 4592:25	4594:18 4597:9 4606:6 4615:15 <b>interesting</b> 4637:9 <b>interests</b> 4491:13 <b>interfere</b> 4483:8 <b>interference</b> 4600:14 <b>interim</b> 4544:4 4545:6 4564:25 <b>interject</b> 4456:22 <b>interjection</b> 4456:4 4456:10 <b>internal</b> 4436:9 4635:2,4 <b>internally</b> 4529:24 <b>interpret</b> 4412:5 <b>interrupt</b> 4637:10 <b>intervene</b> 4545:24 4631:13 <b>intervenes</b> 4564:24 <b>intervening</b> 4578:16 <b>intervention</b> 4513:22 <b>interview</b> 4474:18 4474:21 4476:19 4486:4 4502:17 4519:8 4533:18 4553:1 4589:5,22 4590:21,24 4609:6,8 4614:11 4620:21 4627:25 4634:25 <b>interviewed</b> 4591:6 <b>interviewing</b> 4621:5 <b>intimidated</b> 4482:16 <b>intimidating</b> 4482:21 <b>introduce</b> 4521:7 <b>introduced</b> 4491:15 <b>introduction</b> 4528:2 <b>investigating</b> 4543:2 <b>investigation</b> 4458:19,23 4495:11 4543:8 4543:14 4584:10 4585:2 4620:5 <b>investigations</b> 4584:12 <b>investigator</b> 4429:12 4458:16 4473:14 <b>involve</b> 4391:22 4628:5 <b>involved</b> 4424:16	4476:23 4490:3,9 4497:18 4499:20 4499:21,22,23 4506:7 4511:22 4512:6 4517:16 4518:3 4527:11 4528:10 4541:15 4563:3 4566:9 4589:13 4591:22 4592:18 4594:19 4595:8 4596:15 4596:19,23 4616:4 4618:2 4620:11,13 <b>involvement</b> 4402:11 4436:18 4448:12 4458:11 4459:1 4505:21 4565:5 <b>involves</b> 4633:15 <b>involving</b> 4487:1 4565:2 <b>irregular</b> 4578:4 <b>isolated</b> 4406:1 <b>isolates</b> 4403:5 4413:21 <b>issue</b> 4399:21 4416:2 4423:17 4437:8 4438:14 4441:19 4444:8 4448:20 4449:25 4453:18,23 4492:17 4499:12 4501:6 4508:13 4511:21,24 4512:2,19 4513:2 4513:11,21 4539:18 4541:9 4541:17 4555:17 4558:23 4562:18 4583:6,14,18 4584:2,19,22,25 4585:17,20,24 4586:9,13,13,15 4588:12 4595:20 4598:11 4601:1,2 4601:21 4608:18 4610:14,17,18 4611:11 4612:16 4614:14,17 4616:12 4617:8 4621:25 4623:1,6 4623:10,16 4624:24 4625:16 4629:19 <b>issues</b> 4389:20 4390:13 4434:3	4484:18 4488:9 4498:16,17 4501:3,23 4504:2 4508:5,9 4513:1 4523:21 4525:12 4526:12 4541:8 4557:15 4559:3 4568:2,12 4571:9 4583:16 4587:10 4587:15 4588:3 4598:15 4618:14 4627:22 4630:4 4634:18 <b>item</b> 4540:16,19 <b>items</b> 4528:3 4550:2 4550:3 4558:14 <hr/> <b>J</b> <b>J</b> 4381:21 4458:1 <b>Jack</b> 4484:13,13 4497:20,20 <b>James</b> 4380:3 4381:11,11 4382:9 4452:12 4474:9 <b>Janie</b> 4445:3 4471:12 <b>January</b> 4505:22 4532:9 4533:15 4534:6 4535:12 4535:24 4536:15 4536:21 4538:12 4538:12 4540:10 4590:14,15 <b>Jay</b> 4381:13 <b>jeopardy</b> 4508:8 4551:16 <b>Jeremy</b> 4382:4 4396:20 <b>Jerome</b> 4627:17 <b>Jim</b> 4426:18 4463:11 4598:5 <b>job</b> 4387:6 4488:19 4529:3 <b>Jobling</b> 4479:20 <b>jobs</b> 4495:13 <b>John</b> 4458:15 <b>Johnson</b> 4388:14,14 <b>joint</b> 4601:8 <b>jointly</b> 4473:15 <b>Jonathan</b> 4381:3 <b>judge</b> 4420:15 4441:6 4447:14 4449:8 4556:12 4556:15 4594:5 4605:22 4606:4,8 4608:11 4609:17	4610:11 4614:11 4636:17 <b>judges</b> 4489:9 <b>judicial</b> 4494:12 <b>July</b> 4441:20,21 4474:22 4475:7 4571:16 4576:23 4577:1,2 4585:5 <b>jumped</b> 4399:16,24 4407:18,23 4415:8,24 4433:10 <b>jumps</b> 4487:17 <b>jumpy</b> 4524:24 4525:11 4526:5 <b>June</b> 4388:16 4400:25 4401:25 4402:1 4404:8 4448:13 4491:2 4502:5 4546:4,21 4553:11 4557:9 4567:10,14,17,22 4567:22 4568:12 4568:23 4571:16 4572:8,11,24 4574:14,23,24 4575:9 4576:15 4577:19 4578:4 4578:17,18,23,24 4579:1,4,16 4580:2,3,6 4585:16 4606:3 <b>Juneau</b> 4636:7 <b>junior</b> 4481:17,21 4482:16,22 4483:9 4484:22 <b>jurisdiction</b> 4503:20 4515:1 <b>jury</b> 4396:18 4417:9 4420:9 4480:5 4508:14 4597:23 4598:3 <b>jury's</b> 4572:10 <b>justice</b> 4420:20 4422:21 4440:24 4442:1 4443:16 4443:18 4490:4 4498:1,2,9,13,14 4509:14 4511:25 4564:23 4582:3 4588:4 4592:4,6 4597:19,20 4598:10 4608:9 4610:19 4615:18 4618:13 4622:14 4622:19 4623:2 4624:24 4628:2,3
---	--	---	---	---

<p>4628:20,24,25,25 4629:3 4630:25 4632:14,20 4633:25 4634:2 4634:11 4636:21 <b>justified</b> 4637:6 <b>justifies</b> 4563:5 <b>Juxtaposing</b> 4465:14</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>K</b> 4381:17 <b>Karamchand</b> 4381:6 <b>Kathy</b> 4381:6 <b>Kee</b> 4484:12 <b>keep</b> 4439:24 4494:3 4507:18 4519:22 4558:9 4560:23 4561:14 4561:19 4596:5 4611:13 4613:14 <b>keeping</b> 4516:1 4519:20 4520:3 4538:18,23 4545:8 4629:24 <b>keeps</b> 4464:17 <b>Kelly</b> 4595:8 <b>Kennedy</b> 4381:21 4382:11 4627:12 4627:15,16,18 4636:18 4637:8 4637:14,19 <b>kept</b> 4427:22 4456:19 4506:18 4519:25 4520:6 4527:15 4559:2 4560:13,17 4569:7 4625:21 <b>key</b> 4480:21 4515:2 4516:7 4519:15 4520:4 4524:23 4525:4 4555:7 4568:7 4580:21 4597:22 <b>killed</b> 4479:23 <b>killer</b> 4597:10 <b>killing</b> 4426:19 <b>kind</b> 4391:9 4456:23 4479:13 4481:10 4483:9 4483:15 4484:19 4486:14,18 4494:20 4495:3 4499:25 4504:22 4504:23,25 4507:7,20</p>	<p>4508:18,19,21 4509:18 4510:12 4510:14,16,19 4511:17,20 4512:8 4514:20 4515:3,22 4518:4 4519:1 4520:2 4521:15,17 4529:13 4530:19 4538:21 4543:21 4544:6,9 4548:2 4551:19 4554:21 4555:16 4556:5 4561:13 4562:7 4563:19 4564:21 4565:1,9,19,24 4568:8 4570:4 4574:15 4575:22 4578:1 4588:2 4599:22 4605:2 4608:1,2 4618:1 4625:3 4633:8 <b>kindly</b> 4468:4 <b>kinds</b> 4515:16 4536:6 4556:2 4562:6 4564:3 4571:4,6,7 4607:22 4632:16 4634:18 4635:16 4636:1 <b>Klan</b> 4476:23,24 <b>Klippenstein</b> 4471:10,11 4623:15 <b>Klux</b> 4476:23,24 <b>knew</b> 4397:23 4398:6,14 4401:14 4402:6 4420:7 4423:15 4429:14,15 4447:19 4448:12 4451:14 4456:23 4483:6,7 4520:6 4520:14 4582:18 4594:2 <b>know</b> 4385:2,13 4386:23 4391:17 4394:15 4396:13 4399:4 4400:8,10 4400:22 4401:4 4401:12 4402:2 4402:13 4405:4,8 4405:9 4406:16 4406:25 4407:1,1 4407:2,9 4411:25 4412:11,23 4413:13 4415:3,4</p>	<p>4415:5,14,21 4417:21 4419:2 4423:9,25 4426:9 4428:17 4429:10 4429:14,16 4431:19 4435:21 4435:24 4438:5 4439:22 4440:15 4441:9 4443:22 4444:2,13,14,17 4446:23,24 4447:23 4453:6 4453:12,23 4457:6,6 4458:19 4460:10 4462:6 4466:15 4470:15 4471:6,7 4476:19 4488:6,6,8 4492:20,20 4494:22 4511:11 4511:16 4516:13 4516:14,19 4517:3 4519:16 4519:18 4527:18 4534:18 4536:24 4540:24 4553:9 4561:7 4562:3 4564:8 4565:23 4567:2,14 4577:5 4583:5,10,11 4588:5 4589:5 4598:1 4601:3 4613:18 4614:9 4617:20 4621:14 4622:18 4623:19 4626:5,6,7,9 4628:24 4630:5 <b>knowing</b> 4519:18 4544:19 4570:1 4571:10 4589:13 4591:22 <b>knowledge</b> 4398:1 4398:11,21,22 4399:3 4412:3 4413:8 4423:11 4425:19 4445:21 4446:18 4453:14 4459:10 4519:1 4520:9 4539:23 4540:3 4571:23 <b>knowledgeable</b> 4481:2,7 <b>known</b> 4389:11,13 4427:23 4439:2 4440:6 4479:14 4479:14 <b>knows</b> 4402:11</p>	<p><b>Kovnats</b> 4390:13,17 4390:18 4398:7 4398:15 4399:9 4399:13 4401:5,7 4401:21 4402:3 4413:17 4419:5 4420:1 4446:20 4448:13,18 4517:19 4518:21 4527:18,21 4529:22 4530:3,9 4530:19,25 4534:4,10,18,22 4534:23 4539:8 4540:5,10 4544:2 4545:16 4546:3,5 4546:12 4547:2,5 4547:7,11,16 4548:2,6,14,19 4549:15 4553:17 4554:4,5,6 4555:1 4555:6,23,23 4557:11 4564:16 4564:17,20,23 4565:13 4567:15 4569:12,14 4571:19 4572:14 4573:10 4575:1,7 4575:7 4577:19 4578:3 <b>Ku</b> 4476:23,24</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>laden</b> 4512:19 <b>lam</b> 4564:11 <b>Lamer</b> 4628:20 4629:3,9 4632:3 <b>lapses</b> 4452:3 <b>large</b> 4499:4 4511:20 4541:5 <b>larger</b> 4511:24 <b>Larry</b> 4537:15 <b>last-minute</b> 4567:20 <b>late</b> 4477:1,7 4489:3 4538:12 4553:11 4557:13 4602:17 4605:16 4606:12 4607:10 4616:10 4618:1 <b>latest</b> 4516:2 <b>laughed</b> 4614:18 <b>launch</b> 4540:17 <b>law</b> 4476:1 4477:10 4477:19 4478:9 4478:18 4481:2,8 4595:24 4598:25 4599:8 4600:17</p>	<p>4629:16,25 4632:12 4635:11 4635:24 <b>Lawlor</b> 4408:3 4420:25 4424:4 4425:24 4426:10 4429:20 4430:5 4430:15 4431:2 4433:2 4435:2 4479:1 4505:20 4506:3 4518:23 4523:16,16 4524:20 4526:18 4527:5,19 4528:6 4528:7,8,18 <b>Lawlor's</b> 4426:5 4501:1 <b>lawyer</b> 4397:11 4399:2 4400:21 4404:13,16,19 4415:18 4467:8 4481:15,16 4517:18 4524:24 4525:4,10,17 4526:7 4527:19 4528:10 4543:15 4557:1 4577:22 <b>lawyers</b> 4525:24 4592:2 <b>lay</b> 4392:7 <b>layer</b> 4513:24 <b>lead</b> 4385:21 4389:5 4458:16 4459:6 4478:7 4481:6,20 4505:6 4508:18 4508:20 4597:18 4599:23 4632:16 4634:10,21 <b>leading</b> 4479:8 4487:2 4490:8 4493:4 4554:2 4572:25 <b>leads</b> 4634:23 <b>learn</b> 4392:15 4398:22 4482:9 4532:23 4583:7 4583:20 4584:2 4601:1,1 <b>learned</b> 4510:23 <b>Leatherdale</b> 4619:23 <b>leave</b> 4475:12 4551:15 4566:24 4583:4 4626:2 <b>leaving</b> 4415:15 4529:13 4530:16 4571:11 4583:6</p>
--	--	--	--	--

<p>4585:23 4588:14 4607:18 4608:19 <b>lectured</b> 4636:5 <b>left</b> 4414:3,23 4416:17 4470:12 4486:24 4536:17 4539:17 4603:17 4603:18,19 4633:22 <b>left-hand</b> 4536:14 4576:18 4603:12 4603:24 <b>leg</b> 4558:3 <b>legal</b> 4381:8 4613:7 4630:4 <b>legislate</b> 4488:21 <b>legislation</b> 4635:20 <b>legislative</b> 4489:2 4490:20 4635:17 <b>legislature</b> 4599:7 4600:6,20 4601:15 4616:3 4616:14 4621:11 4625:4 <b>length</b> 4388:12 4423:15 <b>lengthy</b> 4449:11 4567:18 <b>Lerner</b> 4469:8,19 4592:17 4593:22 4593:23 4594:2 4594:10,19,22 4595:7 4596:9,11 4596:17,19,22 4624:9,12,18 4625:18 <b>Lerner's</b> 4624:9 <b>Les</b> 4484:11,12 <b>LeSage</b> 4380:5 <b>letter</b> 4384:11,16,18 4384:25 4399:13 4422:17 4423:1 4425:1,25 4426:4 4426:14 4427:14 4430:5 4431:2,22 4433:5,16 4440:16 4444:21 4445:3,9,10,20 4446:10 4447:10 4447:13 4471:10 4471:12 4473:10 4502:5 4522:14 4522:19,24 4527:22 4528:9 4528:11,15 4529:13,16,18,20 4530:3,19</p>	<p>4536:10 4545:16 4546:2,4,11,14,21 4575:1,6 4576:6,7 4577:18,22 4578:24 4581:8 4581:12,15,17 4584:17 4586:8 4586:12 4587:2,5 4588:25 4590:14 4590:15 4595:7 4595:21 4601:7 4602:10 4610:7 4611:14 4612:7 4614:24 4615:2,4 4616:10,15 4618:5 4619:2,11 <b>letters</b> 4422:15 4443:13 4472:16 4545:20 4583:7,8 4583:11,12,20 4584:4,6 4590:13 4590:15 4592:14 4611:22 4617:19 <b>let's</b> 4400:9 4427:12 4441:13 4445:9 4484:21 4494:25 4592:8 <b>level</b> 4482:20 4484:20 4490:5 4490:12 4628:12 <b>levels</b> 4553:22 <b>leverage</b> 4585:19 <b>liaison</b> 4391:15 <b>Liberal</b> 4597:25 <b>Libman</b> 4381:10 4452:13 <b>lie</b> 4463:9,17 <b>lied</b> 4464:8,12 <b>lies</b> 4465:14,15 4466:12,13,19 4467:12 4579:10 <b>lieu</b> 4393:6 4503:8 <b>life</b> 4508:17 4513:18 4573:7 <b>lifestyle</b> 4551:17 <b>light</b> 4480:12 <b>likable</b> 4519:6 <b>liked</b> 4481:10,14,16 <b>likelihood</b> 4439:9 4451:4 <b>limited</b> 4423:11 4497:8 <b>line</b> 4403:9,19 4406:4 4416:9,21 4456:3,5,8,10 4461:20 4464:22 4466:12 4501:8,9</p>	<p>4505:20 4506:3 4511:7 4513:5 4517:15,23 4533:2 4535:22 4546:16 4601:17 4626:9 <b>lines</b> 4396:19 4404:15 4414:6 4414:11 4494:25 4543:4 4556:20 4558:11,13 <b>Lisa</b> 4638:5,19 <b>list</b> 4399:14 4500:19 4528:3 4536:8 4540:11 <b>listed</b> 4409:25 4428:1,2 <b>listening</b> 4407:4 <b>literally</b> 4570:23 <b>little</b> 4392:12 4396:22 4412:22 4433:10 4438:24 4462:7 4482:5,15 4482:16 4488:9 4500:3 4505:23 4526:23 4538:14 4541:23 4550:15 4556:11,19 4559:10,18 4574:11 4590:8 4596:7,7 4603:17 4627:11 <b>live</b> 4421:1 4529:2 <b>lived</b> 4409:10 <b>living</b> 4409:9 <b>load</b> 4458:18 <b>locally</b> 4490:15 <b>location</b> 4412:9,23 4504:7 4518:13 4562:17 <b>Lockyer</b> 4381:11 4416:5 4448:6,15 4448:24 4449:24 4452:12,20 4455:14 4456:2,9 4456:19 4457:25 4459:18 4460:1,4 4468:3,14 4521:8 4521:19,24 4522:5,5,6,12,20 4550:13 4627:2,8 <b>Lockyer's</b> 4448:4 4522:24 <b>logic</b> 4504:19 4507:16 <b>logical</b> 4410:24 4411:1 4531:14</p>	<p><b>logically</b> 4634:23 <b>long</b> 4391:6 4392:17 4414:12 4423:16 4455:12 4459:16 4494:23 4504:24 <b>longer</b> 4393:22 4492:4 4519:9 4520:13 4549:2 <b>longest</b> 4494:12 <b>long-term</b> 4409:19 4409:20 4537:24 <b>look</b> 4384:10 4396:19 4400:9 4400:10,17,23 4403:6,9 4414:6 4422:13 4427:12 4440:11 4441:1,3 4443:3 4445:9,19 4447:7 4449:7 4452:10 4463:1 4466:5,24 4470:17,23 4500:2 4501:18 4510:8,19 4514:19 4526:16 4528:22 4529:21 4533:8 4534:25 4541:16 4546:1 4548:19 4550:4 4554:16 4556:9 4556:17 4558:25 4559:7,22 4584:11 4599:5 4611:14 4615:6 4618:8,10 4627:5 4633:9 <b>looked</b> 4413:15 4443:16 4497:2 4506:16 4545:20 <b>looking</b> 4408:15 4413:15 4442:19 4465:8 4473:6,11 4491:12 4495:17 4528:13 4580:13 4607:12 <b>looks</b> 4457:15 4470:8 4538:3 <b>loop</b> 4561:19 4621:14 4626:2,6 4626:14 <b>lose</b> 4395:8,8,9 <b>losing</b> 4403:22 4628:23 4629:6 <b>loss</b> 4632:17 <b>lost</b> 4550:11 4631:18</p>	<p><b>lot</b> 4394:16 4461:25 4481:12 4523:4 4553:16 4602:5 4626:19 4633:24 <b>loud</b> 4434:17 <b>Lovelace</b> 4455:25 4456:24 4459:14 <b>Lovelace's</b> 4453:15 <b>lump</b> 4552:13 <b>lunch</b> 4531:19 <b>lurch</b> 4551:16 <b>lying</b> 4411:23 4417:5,9 4464:9 4464:13 4465:25 4466:3,6 4467:21</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>M</b> 4381:10 <b>macho</b> 4632:10 <b>Madam</b> 4400:11 4468:5 4534:21 4602:14,16 <b>main</b> 4392:7 4523:23 4584:7 4616:12,13 <b>maintain</b> 4395:11 4395:14,19 <b>maintained</b> 4395:7 <b>major</b> 4427:14 4476:17 4484:3 4485:13,14 4502:20 4515:2 4525:5 4527:17 4565:2 4568:7 4580:21 4600:18 4600:19 <b>making</b> 4384:13 4397:13,24 4399:2,4,22 4402:17 4419:18 4419:20,20,21 4448:17 4481:13 4486:11 4506:3 4511:13 4517:24 4525:24 4527:19 4528:10 4533:6 4548:3 4551:20 4564:17 4587:18 4608:7 <b>man</b> 4391:15 4392:13 4415:17 4418:24 4420:10 4479:23 4482:19 4482:21 4487:22 4519:10,14 4563:19 4586:19 4594:4</p>
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<b>manage</b> 4483:2 4508:19 4630:21 <b>managed</b> 4499:5 4631:6 <b>management</b> 4476:16 4477:12 4477:21 4483:6 4485:18 4512:14 4512:21 4513:16 4513:17,19,24 4518:25 4588:1 4630:9 4631:3 4634:16 <b>manager</b> 4438:21 4439:11 4485:17 4517:14 4520:3 <b>managerial</b> 4439:1 <b>managing</b> 4483:16 4483:17 4484:1 4487:10 4499:15 4507:12 4587:21 <b>mandate</b> 4632:23 <b>mandating</b> 4491:18 <b>manipulated</b> 4597:12 <b>Manitoba</b> 4380:14 4381:12 4475:20 4494:24 4495:6 4587:19 4630:6 4631:15,21 4632:14 4638:6 <b>manner</b> 4480:10 4501:7 4532:4 4634:4 <b>manslaughter</b> 4479:22 4514:10 <b>man's</b> 4458:15 <b>March</b> 4383:7 4441:17 4468:21 4469:10,12 4470:3,13 4472:7 4472:10,14 4538:15,16 4540:23 4547:1,9 4547:25 4548:9 4548:19,20 4549:24 4550:4 4550:10 4551:3 4590:3 4596:25 4602:19 4603:16 4603:20 <b>marked</b> 4460:10 4474:14 4532:14 <b>market</b> 4409:25 4551:12 <b>marshal</b> 4387:1 <b>Marshall</b> 4488:13	4488:20 4489:5 4489:13 4490:6 4490:10,19 4491:24 <b>mastery</b> 4629:25 4630:9,13 <b>material</b> 4388:22 4408:15 4412:8 4440:20,23 4442:2,13,21 4443:6 4444:12 4444:18 4462:19 4469:22,25 4471:1,3,18,21,24 4472:3,9 4480:19 4489:16 4519:24 4532:11 4554:4,6 4564:12 4601:10 4603:2,8 4604:19 4617:15 4621:22 4621:23 4623:25 4624:23 <b>materially</b> 4510:21 4588:3 <b>materials</b> 4413:15 4441:9,21 4443:4 4443:10 4455:14 4455:19 4468:16 4500:3 4521:3,23 4554:7,9 4556:14 4557:14 4572:19 4582:3 4583:21 4593:9 4617:13 4623:21 4624:5 4625:16 <b>matter</b> 4385:18 4390:3 4423:22 4446:16 4459:11 4460:6 4471:9 4472:12 4499:22 4503:21 4508:24 4513:10 4514:2,4 4515:12 4521:2 4524:2,17 4525:23 4529:23 4532:10 4538:7 4543:2,19,21,23 4544:6,9 4545:5 4545:13 4551:22 4552:18 4553:21 4555:18,22 4557:3 4565:5 4566:21 4581:3 4582:14 4584:3 4585:23 4586:4,8 4587:5,6,24 4590:4 4592:12	4594:8 4596:2,6 4598:20 4599:3 4599:13,19,22 4602:6 4604:1,5 4604:15,18,20 4606:14 4607:20 4607:24 4608:12 4609:9 4611:25 4612:19 4614:21 4615:10 4617:14 4618:1 4622:12 4624:21 4625:2 4625:13 4626:2 4633:6 <b>matters</b> 4390:14 4391:7 4421:2 4440:10 4447:3 4455:10 4467:10 4503:12 4508:8 4529:5,9 4536:7 4539:11 4542:23 4545:4 4549:17 4551:4 4558:20 4588:18 4593:16 4599:25 4625:24 <b>mean</b> 4405:11 4408:1 4417:8 4418:20 4421:15 4422:8 4429:19 4430:15 4434:3 4435:24 4437:23 4438:4,19 4442:3 4446:23 4450:15 4457:11 4464:2 4481:22 4486:6 4499:23 4515:18 4557:25 4571:4 4586:18 4629:24 <b>meaning</b> 4401:21 <b>means</b> 4406:15 4462:6 4631:5 4634:14,16,17 <b>meant</b> 4405:8,9,14 4449:13 4591:7 4629:25 <b>measured</b> 4631:18 <b>measures</b> 4409:18 4409:19 <b>media</b> 4585:9 4595:18 4596:1 4597:2 4598:14 4599:6,24 4600:1 4601:5,15 4615:1 4615:10 4616:2 4616:13 4617:9 4618:18 4620:24 4621:9 4625:4	4626:7 <b>media's</b> 4618:24 <b>meet</b> 4401:22 4402:23 4439:10 4472:11 4483:17 4572:12 4621:24 4622:8 <b>meeting</b> 4401:4 4402:2 4490:13 4490:15 4491:19 4531:7 4533:15 4534:3,9,15,25 4535:8,10,15,17 4535:21,23,25 4536:8,9,15,20 4537:3,7,8,11,14 4537:18,20 4538:2,2,9 4539:7 4540:5,10 4547:2 4547:12,16 4548:7,13,16,21 4567:17 4572:8 4573:1,13 4574:24 4578:17 4578:18,24 <b>meetings</b> 4385:23 4490:9 4538:11 4558:2 4567:15 4567:16,18 4583:2 <b>meets</b> 4548:14 <b>members</b> 4381:18 4381:20 4385:16 4476:24 4621:5 <b>memo</b> 4400:24 4401:17 4402:1 4402:20 4404:8 4412:25 4435:1 4440:14,15,25 4441:17,21,22 4442:2,5,25 4443:15,15 4444:13 4448:11 4469:5,8,10,11,19 4469:21 4470:23 4470:24 4471:8 4471:16 4472:1,6 4474:5 4475:16 4500:4,15 4501:1 4501:9,15,21 4523:17,18 4524:21 4526:17 4526:24 4527:20 4530:6 4531:6 4532:14,17 4534:23,24 4535:1,16	4536:12,13 4538:16,17 4539:4,7 4540:23 4544:22 4547:2 4547:11 4550:9 4550:10 4579:18 4579:20 4590:3 4590:12,12 4592:15 4593:22 4593:23 4594:7 4594:14 4601:6 4601:11,17 4602:19,20 4603:1 4604:2,9 4604:11,13 4605:12 4607:2 4607:19 4608:20 4608:20 4610:22 4614:23 4624:9 4624:15 <b>memorandum</b> 4389:22 4436:9 4457:4 4469:23 <b>memory</b> 4442:17 4476:21 4480:20 4609:24 4610:9 <b>memos</b> 4400:24 4515:25 4523:12 4524:6 4526:16 4526:25 4550:20 4606:20 <b>men</b> 4423:13 <b>mentioned</b> 4389:1 4390:15 4405:2 4414:22 4424:1 4519:8 4573:9 <b>mentor</b> 4482:9 <b>mere</b> 4485:11 <b>message</b> 4488:3 4606:10 <b>met</b> 4398:17 4424:20 4448:12 4448:18,18 4512:24 4623:14 <b>meticulous</b> 4480:11 <b>Michael</b> 4381:2 4394:2,3 <b>middle</b> 4416:1 4463:1 4491:1 4496:1 4514:23 4542:2,19 4554:17 4573:2 4580:23 4585:22 4589:24 <b>mid-March</b> 4541:1 <b>mid-May</b> 4623:19 <b>Mike</b> 4484:11,12
--	--	--	---	--

<b>Miller</b> 4381:14 4383:7 4384:16 4384:25 4385:7 4386:9 4398:7 4399:14 4400:2 4401:23 4402:14 4402:18,24 4407:25 4416:2 4418:4,4,5 4419:12,14 4420:1,2 4423:23 4424:13 4432:3,6 4440:1 4441:7 4443:1 4446:21 4446:22 4448:7,8 4448:9 4467:18 4468:22 4469:10 4469:11,21 4470:24 4471:16 4472:3,8,11,15 4484:6,22,23 4485:5,12,16,20 4486:10 4501:20 4502:5,11 4505:24 4512:22 4517:14 4518:18 4519:20 4520:8 4529:18 4530:18 4531:6,11,23 4532:9 4533:5,23 4534:2,19 4535:15 4536:13 4536:19 4537:15 4538:3,15,17 4540:2 4541:6 4543:16,22 4544:9,23 4545:23 4547:3 4547:10,12 4548:1 4549:8,22 4550:20 4551:8 4551:20 4554:14 4554:18 4555:1,5 4555:14 4556:4 4556:21 4557:24 4558:2 4559:25 4560:5,20 4561:18 4562:2 4564:24,24 4569:11,12,23,23 4571:19 4572:13 4572:15,25 4573:3,10 4574:12,20 4575:1 4576:11 4576:12,15 4577:6,7 4583:9	4587:7 4588:6 4589:7 4590:2,11 4590:12 4591:13 4592:19,24 4594:7 4596:18 4596:18 4601:6,9 4601:18 4602:5 4602:11 4604:1,5 4604:13,17 4607:20 4609:12 4610:2,6,16 4611:22 4612:7 4614:24 4617:14 4618:4 4620:7,21 4621:21 4622:8 4622:15,17,25 4623:17,20 4624:14 4625:15 <b>Miller's</b> 4390:8 4392:7 4402:11 4448:12 4472:1 4500:7 4518:24 4532:25 4547:1 4555:22 4594:13 4610:22 4613:1 4616:12 4619:11 4622:13 <b>Min</b> 4628:25 <b>mind</b> 4451:7 4456:14 4464:3 4497:22 4517:10 4571:2 4607:8 4617:24 4635:21 <b>minded</b> 4481:16 <b>mindset</b> 4489:23 <b>mine</b> 4388:1 4398:19 4426:12 4470:6 4536:18 <b>minister</b> 4477:19 4501:11 4502:7 4524:2 4549:5,6,9 4549:16 4553:23 4598:25 4599:4 4599:10,12,14 4600:9 4615:17 4615:25 4616:1 4617:9,16,25 4618:12 4620:9 4620:13 4621:10 4625:1,7,9,12 4628:12,15,25 4630:24 4632:25 <b>Ministerial</b> 4513:22 <b>Ministers</b> 4634:2 <b>minister's</b> 4551:22 4592:18 4594:21 4595:9,13,19,25	4596:10 4597:3 4600:17 4626:10 <b>Ministries</b> 4490:4 <b>ministry</b> 4476:2 4503:3 4526:8 4529:6 4532:5 4545:21 4552:19 4559:2 4560:10 4592:22 4593:2,5 4600:7 4625:18 <b>ministry's</b> 4593:12 <b>minor</b> 4474:25 <b>minute</b> 4438:3 4496:7 4511:3 4548:6 4549:22 4567:24 4610:5 <b>minutes</b> 4393:14 4627:13 4637:15 <b>miscarriage</b> 4592:4 4632:19 <b>miscarriages</b> 4634:10 <b>misconception</b> 4573:19 <b>mislead</b> 4430:24 <b>missed</b> 4396:11 4516:16 <b>missing</b> 4442:15 4522:15 4590:20 <b>mistake</b> 4506:22 <b>mistaken</b> 4437:3 <b>misunderstood</b> 4435:10 4525:20 <b>mis-tabbed</b> 4452:21 <b>mitigates</b> 4487:13 <b>moment</b> 4402:10,17 4406:19 4448:24 4484:21 4492:8 4527:24 <b>Monday</b> 4468:17 4521:13,20,21 4557:8 4567:11 4567:14,17 <b>money</b> 4387:18 4391:19,22 4392:2,9,12 4404:2,3 4458:18 4499:20,25 4502:19 4505:4 4527:15 <b>monies</b> 4423:6,12 4429:3 4499:17 4503:12,19,25 4526:15 4529:2 4562:17 <b>Montgomery</b> 4478:25 4484:14	4497:20 <b>month</b> 4410:22 4442:25 4524:12 4526:12,23 4537:16 4538:15 4585:6 4591:6 4601:5 <b>months</b> 4413:12 4440:15 4505:22 4535:3 4546:2,11 4569:5 <b>Montreal</b> 4636:6 <b>moon</b> 4573:17 <b>morality</b> 4632:9 <b>morning</b> 4384:6 4393:16,17,18 4423:18 4452:9 4453:20 4467:11 4474:11 4487:3 4521:21,22 4522:2 4567:21 4602:17 4603:14 4627:4 4637:16 4637:21 <b>mortgage</b> 4403:11 4403:20 4539:14 4539:19 4540:1 <b>motion</b> 4498:1 <b>motivation</b> 4467:8 <b>motive</b> 4417:23 4426:17 4449:2 4459:7 4584:14 4584:21 <b>motives</b> 4427:2 <b>mouths</b> 4507:23 <b>move</b> 4406:6 4409:21 4411:18 4456:19 4499:7 4526:20 4592:8 4613:12,14,18 4637:12 <b>moved</b> 4477:11 4510:23 4539:15 4553:13 4574:13 4588:19 <b>moves</b> 4614:22 4630:8 <b>moving</b> 4406:10,14 4406:15,21,23,24 4410:11,11 4511:3 4527:6 4528:24 4547:1 4553:19 4573:11 <b>murder</b> 4477:1,4,15 4543:18 4597:11 4597:22 <b>murderer</b> 4510:9	<b>murders</b> 4394:17 4394:17 <b>mythology</b> 4491:11 <b>M'h</b> 4550:8 <b>M.R</b> 4412:15 <hr/> <b>N</b> <hr/> <b>name</b> 4396:19,21 4424:14 4429:12 4458:15 4533:19 4534:1 4556:22 4590:25 4627:17 <b>named</b> 4396:3 <b>names</b> 4450:6 4458:1 <b>Nancy</b> 4381:7 <b>narrow</b> 4454:10 <b>narrower</b> 4512:2 <b>national</b> 4490:12 <b>nationally</b> 4490:13 <b>naturally</b> 4634:23 <b>nature</b> 4389:3 4418:24 4499:6 4530:11 4531:15 4594:24 4610:8 4610:25 4633:16 <b>NDP</b> 4597:25 <b>near</b> 4390:25 4566:22 <b>necessarily</b> 4392:2 4513:14 4516:14 <b>necessary</b> 4423:14 4615:21 4636:20 <b>need</b> 4440:8 4457:13 4487:12 4498:23 4499:1 4510:15 4511:6,8 4534:8 4560:22 4565:20 4582:2 4600:10 4614:5 4630:25 <b>needed</b> 4387:2 4404:25 4414:16 4449:14 4480:21 4483:10 4489:25 4492:24 4511:21 4512:18,20 4513:24 4514:13 4561:4 <b>Needless</b> 4533:5 <b>need-to-know</b> 4560:18 <b>negotiated</b> 4392:25 4401:15 4569:11 <b>negotiating</b> 4391:18 4419:19,21 4505:25 4506:24
---	---	--	---	---

<p>4507:1,18 4517:23 4518:19 4519:15 4572:13 4577:22 <b>negotiations</b> 4390:13,17 4398:6,12 4453:15 4516:5 4517:18 4527:17 4547:1 4557:11 4558:4 4565:4 4571:16 4580:23 <b>neither</b> 4518:17 4525:22 4611:24 <b>nervous</b> 4411:17 <b>nervous</b> 4524:25 4526:5 <b>never</b> 4386:16,18 4388:23 4389:1,1 4405:2 4410:15 4414:22 4415:5 4424:18 4445:7 4472:24 4482:6 4486:12 4489:20 4494:3 4504:9 4521:15 4571:2 4590:14 4605:14 4606:18 4607:20 4607:21 4609:10 4612:20 4629:6 4631:23 <b>new</b> 4396:10 4404:24 4447:3 4468:2 4470:2 4476:1,5 4503:20 4529:3,3 4532:9 4560:16 4561:11 4562:16,17 4573:6 4616:23 4635:2 <b>Newfoundland</b> 4628:19 <b>Niakawa</b> 4388:10 <b>nice</b> 4399:10 4407:13,15 <b>nicely</b> 4471:25 4493:6 <b>niceties</b> 4587:23 4589:6,12 <b>night</b> 4402:3 4521:13,20 4621:6 <b>nod</b> 4570:16 <b>non-disclosure</b> 4593:8 <b>non-management</b> 4478:17</p>	<p><b>non-sequitor</b> 4536:1 <b>normal</b> 4503:2 4517:20,24,25 4518:1 4530:17 4577:21 <b>normally</b> 4473:16 4527:15 4564:4 4596:9,13,14 <b>Northern</b> 4628:3 <b>note</b> 4402:17 4425:21 4428:4 4433:4 4437:20 4442:6 4446:25 4452:18 4453:6 4457:21 4459:9 4469:16,24 4470:12,13,19 4471:15,23 4472:10 4524:20 4533:13,18,23 4535:16 4536:14 4536:15 4550:1,5 4550:10,24 4551:3,21,25 4552:2 4554:13 4556:18 4572:24 4573:14 4576:12 4576:18,23 4577:2,2 4603:5 4603:11,13,16,17 4603:19 4605:20 4610:1 4622:1,5,7 4622:12 4624:4 <b>notebook</b> 4622:2 <b>notebooks</b> 4421:22 4494:10,11,13 4495:2 4497:1,5 <b>noted</b> 4403:9 <b>notes</b> 4399:22 4447:2 4452:24 4469:9,20 4470:5 4480:20 4500:7 4500:10,12,14 4502:9 4533:8 4549:23 4550:22 4551:8,9 4573:1 4576:8 4620:20 4623:13,14 4638:8 <b>notice</b> 4405:15 4441:8 <b>notified</b> 4543:13 <b>notorious</b> 4455:4 <b>November</b> 4410:15 4410:16,25 4411:2,10</p>	<p>4505:22 4523:14 4524:4 4526:18 4583:13 4590:10 <b>nudge</b> 4570:9 <b>number</b> 4388:21 4393:20 4400:15 4400:16 4401:1 4416:11 4427:25 4433:9 4434:8,8 4436:13 4447:17 4464:16 4469:7 4471:15 4478:6 4500:19 4528:21 4528:23,24,25 4529:1,4,8 4550:2 4551:8 4553:20 4554:18 4555:9 4557:15 4579:23 4584:1 4589:20 4631:8,18 4635:11 <b>numbered</b> 4555:7 <b>numbering</b> 4541:19 4541:21 <b>numerous</b> 4384:13</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>oath</b> 4467:21 <b>object</b> 4451:12 <b>objected</b> 4450:15 <b>objection</b> 4455:7 4473:12 4567:4 <b>objective</b> 4629:14 <b>objectivity</b> 4394:21 4395:7,11,19 4632:17 <b>objects</b> 4407:7 <b>obligation</b> 4586:20 4589:2 <b>obligations</b> 4635:15 4636:4 <b>obliged</b> 4499:11 <b>observed</b> 4528:6 <b>obstruct</b> 4564:23 <b>obtain</b> 4579:18 <b>obtained</b> 4524:23 4525:10 4570:2 4581:19 <b>obtaining</b> 4502:11 <b>obtrusive</b> 4483:16 <b>obvious</b> 4411:16 4557:15 4558:8 4558:14 4560:15 4589:11 4595:18 <b>obviously</b> 4422:9 4425:24 4478:2 4493:17 4504:3</p>	<p>4514:4 4530:12 4544:15 4557:18 4557:19,22 4559:22 4587:15 4597:1 4604:23 4624:8 <b>occasions</b> 4601:20 4608:21 <b>occur</b> 4390:23 4504:23 <b>occurred</b> 4413:16 4423:18 <b>occurrence</b> 4506:10 4600:21 <b>Occurring</b> 4418:8 <b>October</b> 4411:10 4435:17 4495:25 4496:3,10 4500:15 4524:11 <b>offence</b> 4581:22 <b>offences</b> 4617:6 <b>offer</b> 4520:1 4574:14,22 4578:11 4629:15 <b>offered</b> 4423:4 <b>office</b> 4390:8 4391:1,5 4434:2 4436:9 4439:19 4479:8 4492:13 4493:22 4522:20 4538:1 4560:14 4589:1 4592:19 4594:21 4595:9 4595:13,19,25 4596:10,14 4597:3 4626:10 4626:11 <b>officer</b> 4381:4 4386:25 4394:3 4429:15 4463:3 4494:15 4619:24 4633:7 <b>officers</b> 4395:6 4408:6 4425:16 4437:10 4449:22 4458:4,8,10 4459:13 4519:5 4542:10 4568:21 4569:22 4622:15 4622:16 4625:17 4633:6 <b>officer's</b> 4571:15 <b>offices</b> 4485:25 4507:13 <b>official</b> 4587:17 4603:25 4638:6 <b>officials</b> 4549:8</p>	<p>4593:17 4596:5 4599:16 4625:18 <b>offing</b> 4536:25 <b>oh</b> 4391:23 4402:19 4418:15,19,22 4485:6 4500:13 4526:9 4541:21 4587:20 4614:5 <b>OIC</b> 4619:22 <b>okay</b> 4384:21 4385:3,15,23 4386:7,20 4387:24 4389:1 4390:2 4391:10 4391:16,21 4392:11 4393:2 4393:10 4395:20 4396:16,22 4398:4 4400:4 4407:5 4421:18 4422:13 4431:24 4432:9 4434:7,21 4440:7 4441:2,9 4442:6,9,23 4452:5 4453:2 4467:4 4473:22 4500:13 4518:4 4550:17,21 4611:8 4619:9 4637:20 <b>old</b> 4393:24 4395:13 4570:15 <b>older</b> 4396:5 <b>Olson</b> 4381:12 4424:24 4447:4 4590:17 4606:11 <b>once</b> 4419:24 4462:5 4494:1 4526:10 4543:8 4569:9 4588:22 4598:14 4617:7 <b>ones</b> 4385:22 4537:23 4590:16 <b>ongoing</b> 4615:25 <b>Ontario</b> 4455:4 <b>open</b> 4395:23 4434:2 4469:2,4 4492:3 4584:4 4589:21 4591:13 <b>opening</b> 4601:17 <b>openly</b> 4625:15,25 <b>openness</b> 4395:21 4395:23 <b>operational</b> 4538:22 <b>opinion</b> 4473:21 4529:16</p>
---	---	--	--	---

<p><b>opportunity</b> 4471:17 4529:24 4590:17 <b>opposed</b> 4466:13 4482:12 4512:10 4517:14 4584:16 <b>opposition</b> 4597:19 4598:18 4599:4 4617:8 4625:10 <b>opposition's</b> 4616:13 <b>option</b> 4552:6,7,9 4552:12 4553:2,5 4553:6,14,20,20 4554:23 4557:17 4572:16 4573:11 4574:13 <b>options</b> 4552:6,19 4589:21 <b>oral</b> 4437:9,24 4438:13 4612:5 <b>orally</b> 4437:17,19 4607:20,21 4608:18 4609:11 4611:10,25 4612:21 4613:16 4613:17 <b>order</b> 4439:24 4446:5 4462:16 4495:3 4563:20 4598:4 4615:20 4617:15 <b>ordinarily</b> 4497:17 4599:18,22 <b>ordinary</b> 4508:12 4515:12 4538:24 4558:16 4561:18 4599:12 4616:5 4620:12 4633:8 <b>organization</b> 4483:1 <b>organizational</b> 4599:17 <b>original</b> 4440:16 4444:13 4529:20 4532:10 4544:22 <b>ornery</b> 4486:23 <b>Orr</b> 4446:22 4536:21 4537:1 4537:15 4540:22 4540:25 4542:23 4548:8,14 4553:16 4555:5 4574:2 4618:5,24 <b>Orr's</b> 4548:9 4554:13 4572:22 <b>Osborne</b> 4395:15</p>	<p><b>Ostrowski</b> 4455:14 4458:12 4521:3 4521:19 <b>Ostrowski's</b> 4458:17 <b>other's</b> 4492:21 <b>Ottawa</b> 4521:11 <b>ought</b> 4497:23 <b>ourself</b> 4633:3 <b>outcome</b> 4543:13 <b>outline</b> 4615:9 <b>outside</b> 4503:25 4545:21 <b>outstanding</b> 4529:9 4598:3 <b>overall</b> 4498:9 4557:10 <b>overcome</b> 4507:6 <b>overlap</b> 4636:2 <b>overlay</b> 4592:1 <b>overlooking</b> 4468:10 <b>overly</b> 4486:2 4487:20 4563:18 <b>overnight</b> 4627:6 <b>overruled</b> 4570:8 4570:14 <b>oversaw</b> 4631:4 <b>overseeing</b> 4439:5 4628:5 <b>oversight</b> 4444:7,11 4444:12,16 <b>overstating</b> 4486:20 <b>overzealousness</b> 4632:17 <b>owed</b> 4429:3 <b>owner</b> 4514:12 <b>owns</b> 4539:16 <b>o'clock</b> 4401:25 4454:22 4520:20 4573:13</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>pack</b> 4460:25 4461:17 4462:10 4464:8,13 4465:6 4466:13 <b>package</b> 4506:1 4518:20 4579:7 <b>packs</b> 4428:19 4429:10 <b>page</b> 4382:3 4383:4 4397:10 4401:1 4403:6,9,15 4404:14 4406:2,3 4412:13,13 4413:23 4414:6</p>	<p>4414:11,18 4416:8,15 4422:25 4423:1 4430:11 4431:3 4433:9,10,12 4434:8 4441:15 4445:14 4446:12 4447:15 4453:9 4455:24 4456:7 4460:10 4461:5 4461:11,21 4462:8 4463:1,2 4464:21 4465:6 4465:12,12 4466:11 4477:2 4477:13 4486:4 4496:1 4502:18 4502:22 4503:6 4514:19,23 4522:14,18,21 4524:21 4535:5 4539:14,21 4540:16 4541:22 4542:2,12,14,19 4547:8,9,11 4550:4 4552:2,4 4554:17 4555:3 4556:17,20 4559:7,13 4560:3 4560:4 4573:2 4578:22 4579:12 4579:20,20 4580:14 4584:9 4584:12,16,24,25 4585:25 4589:23 4589:24 4597:13 4597:13 4606:18 4606:18,22 4607:1 4609:7,21 4609:21,22 4612:17 4615:7 4615:14,14 4616:19,20,24 <b>pages</b> 4397:7 4401:2 4424:2 4466:5,18 4467:5 4475:16 4493:7 4500:6,12 4595:4 4638:7 <b>paid</b> 4392:4,5,9,20 4393:7 4406:9,10 4406:11,12,14,22 4406:23,25 4407:8 4410:3,7 4413:9 4415:10 <b>panel</b> 4478:22 <b>paper</b> 4401:11</p>	<p>4601:7 <b>paragraph</b> 4409:8 4422:23 4423:2 4425:1,2 4426:3 4426:16,21,22 4427:17 4428:4 4430:11 4431:13 4431:22 4433:4 4433:11,16,17 4436:17 4443:3 4444:4 4445:23 4446:12 4531:9 4535:6 4542:16 4542:17 4543:4 4575:11 4584:25 4585:25 4594:20 4595:7 4604:12 4609:22 4616:23 4618:10 <b>paragraphs</b> 4426:14 <b>pardon</b> 4389:12 4433:4 4537:15 <b>parse</b> 4630:3 <b>part</b> 4397:4 4398:9 4408:4 4413:22 4442:11 4458:14 4458:23 4485:22 4491:8 4522:9 4569:10 4571:18 4571:21 4630:20 4635:9 <b>participation</b> 4385:25 4446:8 4481:24 <b>participatory</b> 4634:16 <b>particular</b> 4387:6 4389:20 4390:3 4397:10 4400:25 4413:22 4420:24 4441:15 4449:9 4495:23 4513:1 4557:17 4564:6 4590:20 4593:22 4621:15 <b>particularly</b> 4438:14 4462:18 4486:13 4507:13 4550:3 4553:6 4555:9 4561:8 <b>particulars</b> 4384:14 <b>parties</b> 4460:18 4518:7 4553:13 4553:18 4572:12 4572:12 <b>parts</b> 4475:14,19</p>	<p><b>party</b> 4391:19 <b>pass</b> 4518:18 4571:2 <b>passage</b> 4389:14 4397:10 4403:5 4405:15 4406:1 4428:24 4429:2 <b>passages</b> 4406:3 <b>passed</b> 4401:19 4402:22 4431:5 4541:23 4622:20 4623:3 4624:3,6 4630:10 <b>passes</b> 4529:19 4530:2 <b>passing</b> 4587:24 4608:6 4610:8 4611:23 4613:24 <b>passionately</b> 4636:8 <b>Patrick</b> 4380:5 <b>Paul</b> 4385:16 4386:11 4388:6 4388:13,24 4409:2 4432:15 4437:14,15 4438:2 4439:6 4568:21 4569:2 4579:6,19 4597:25 <b>Paulyshyn</b> 4439:6 <b>pause</b> 4626:24 <b>pausing</b> 4464:18 4511:5 <b>pay</b> 4414:13 4527:6 4552:13 <b>payable</b> 4408:5 <b>payment</b> 4392:16 4392:20,24 4404:23 4413:17 4502:3 4503:5,7 4503:25 4553:20 4557:17 4572:16 <b>payments</b> 4387:18 4403:11,20 4414:2 4504:4 4539:14,19 4540:1 <b>payout</b> 4554:20,23 <b>Pelletier</b> 4381:7 <b>pending</b> 4425:11 4540:17 4545:7 4545:10 4583:10 4587:19 4588:17 4592:15 4597:1 <b>penitentiary</b> 4427:25 <b>penultimate</b></p>
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4604:12 <b>people</b> 4424:16 4439:5 4459:4 4482:15,20,22 4492:24 4499:7 4509:17,18 4511:20 4519:7 4560:16 4630:10 4630:13 <b>perfect</b> 4520:16 <b>perfectly</b> 4486:25 4543:9 <b>period</b> 4405:12 4418:23 4441:4 4476:15 4488:11 4488:12 4491:2 4492:11 4493:4 4494:11 4495:23 4497:8,13 4523:4 4526:11 4549:24 4552:4 4557:8 4574:19 4582:16 4586:14,17 4588:19 4589:15 4607:9 <b>periods</b> 4391:6 <b>perjured</b> 4608:8,10 4608:14 <b>perjury</b> 4584:22 4587:3 4591:3 4611:11,15,21 4621:25 4622:3,9 4622:10,17 4623:6,16 <b>permitted</b> 4454:10 <b>Perry</b> 4597:21 4621:17 <b>persistent</b> 4556:25 <b>persisting</b> 4544:3 <b>person</b> 4499:10,11 4507:17,18 4514:11 4517:22 4536:3,22 4556:22 4588:8 4589:3 4596:18 <b>persona</b> 4632:11 <b>personal</b> 4396:22 4486:17 4488:1 4519:4 4525:12 4632:5,9 <b>personalities</b> 4519:19 4589:13 4591:22 4592:2,7 <b>personality</b> 4482:2 4482:3,10 4518:24 <b>personally</b> 4588:24	<b>persons</b> 4636:25 <b>person's</b> 4451:4 <b>perspective</b> 4400:10 4517:6,8 4607:13 <b>phenomenon</b> 4505:17 <b>phone</b> 4452:9 4579:18 <b>phoned</b> 4389:10 <b>photocopied</b> 4522:2 <b>picture</b> 4574:5,8 4617:21 <b>piece</b> 4459:18 4460:9 4566:17 <b>pink</b> 4493:16,17 <b>pinks</b> 4434:5 4493:16,19 <b>place</b> 4491:1 4494:23 4496:10 4504:16,22 4507:5,9,11 4560:22 4569:3 4573:13 4581:14 4619:2,13 4638:9 <b>placed</b> 4388:20 <b>placing</b> 4502:20 <b>plan</b> 4538:3 4575:12 <b>planned</b> 4415:12 4537:7 <b>planning</b> 4410:9 <b>plate</b> 4605:3 <b>plausible</b> 4581:7,11 <b>played</b> 4463:2 <b>playing</b> 4463:4 4464:17 <b>plea</b> 4514:10 <b>please</b> 4384:10 4387:25 4397:8 4416:12 4422:23 4427:13 4440:11 4442:10,23 4445:12 4462:24 4471:3 4516:16 4520:24 4522:23 4601:4 <b>point</b> 4393:2 4395:9 4415:24 4434:18 4438:15 4444:1,2 4445:19 4451:6 4461:15 4470:22 4472:18 4479:5 4496:18 4501:22 4517:13 4522:23 4541:11 4544:1 4548:15 4554:16 4556:8 4558:7,24	4564:25 4571:16 4572:15 4583:4,7 4586:25 4587:14 4589:7 4590:9 4592:11,22 4593:20 4595:18 4620:18 4633:6 4634:24 4636:6,7 4636:7,20 <b>pointed</b> 4586:21 4592:5 <b>pointing</b> 4456:9 <b>points</b> 4470:8 4500:19 4544:24 4554:19 4584:1 4587:2 4595:21 4600:24 4633:11 4634:19 <b>police</b> 4381:17,19 4386:24 4394:3 4408:5 4410:21 4411:9 4419:8 4421:2,11,13,17 4421:21,25 4422:5,6 4425:8 4425:16,20 4426:16,24 4427:2,3,6,21 4429:15,20 4430:17,19,22,25 4431:5,11,18 4432:5,7 4433:1,6 4433:21 4434:1 4437:9 4438:11 4446:20,20 4449:13,22 4458:4 4459:12 4464:5 4466:7 4473:13,21 4489:15 4493:10 4493:13,17,20,23 4493:24 4494:5,9 4494:13,14 4495:1,5,7 4496:12,13,25,25 4497:5,9 4498:10 4498:21 4510:3,8 4519:5 4542:9,25 4542:25 4564:13 4569:3,20,20 4573:18 4575:13 4578:19,20 4579:2,8,13,17,21 4580:8 4585:10 4616:16 4620:23 4621:4 4625:17 4633:2,3,5,7	<b>policies</b> 4491:4 4493:3 4518:10 4630:16 4635:2 <b>policy</b> 4487:12 4488:9 4491:7,17 4492:7 4493:5 4495:24 4496:2 4496:10 4497:1 4504:16,21 4506:5,23,25 4507:9,10 4511:20 4515:25 4551:22 4571:5 <b>political</b> 4599:6,13 4600:5,14 <b>Pollock</b> 4566:10 <b>portions</b> 4464:17 <b>position</b> 4391:19 4421:6 4444:22 4476:9 4478:8,15 4487:16 4490:16 4506:14 4510:24 4518:21 4551:5 4592:23 4609:13 4612:22 4627:24 4631:16 4632:22 <b>positions</b> 4486:24 4613:15 <b>positively</b> 4611:9 <b>possibility</b> 4635:3 <b>possible</b> 4457:8 4509:16 4539:6 4566:7,13 4596:21 4609:5 4609:25 4611:1 4618:16 4626:1 4626:13 <b>possibly</b> 4571:8 <b>post</b> 4440:10 <b>post-appeal</b> 4588:15,19,21 4589:14,20 <b>post-Marshall</b> 4488:11 <b>post-trial</b> 4447:3 4571:13,22 4585:6 <b>potential</b> 4587:3 <b>potentially</b> 4409:13 4513:21 4632:18 <b>power</b> 4633:24 <b>powerfully</b> 4630:17 <b>practical</b> 4494:6 <b>practice</b> 4410:22 4487:9 4493:12 4494:10 4495:4 4496:8 4497:11	4498:21 4502:14 4504:5 4505:9 4506:5 4512:23 4521:17 4561:18 4562:9,21 4634:8 <b>practices</b> 4479:12 4488:10 4491:4 4493:3 4634:10 <b>precedes</b> 4470:23 <b>preceding</b> 4545:2 <b>precisely</b> 4635:20 <b>prefer</b> 4449:11 <b>preferred</b> 4501:2 4527:20 4636:23 <b>pregnant</b> 4626:24 <b>prejudice</b> 4509:5 <b>prejudiced</b> 4593:11 <b>preliminary</b> 4497:16 4584:1 4586:25 4587:14 4592:12 4593:20 <b>preoccupying</b> 4566:12 <b>preparation</b> 4480:10,13,23 <b>prepare</b> 4444:21 <b>prepared</b> 4385:6 4388:5 4409:2 4420:14 4432:14 4434:21 4444:20 4445:8 4449:15 4480:11,15,16 4493:19 4541:4 4580:11 <b>preparing</b> 4498:20 <b>presence</b> 4401:23 4402:24 4435:2 <b>present</b> 4487:3 4556:14 4576:1 4627:24 4631:16 4631:21 4634:3 <b>presentation</b> 4513:1 <b>presenting</b> 4392:7 <b>presided</b> 4628:19 <b>press</b> 4579:9 <b>pressed</b> 4563:17 <b>pressing</b> 4555:24 <b>pressure</b> 4600:5 <b>pressuring</b> 4464:4 <b>presumably</b> 4411:24 4435:6 4459:7 4525:25 4526:25 4561:8 4596:17 4602:2 <b>presume</b> 4443:12 4443:25 <b>pretty</b> 4393:15
---	---	---	--	--



4395:16 4414:13 4437:4 4489:24 4491:17 4516:3 <b>previous</b> 4404:8 <b>pre-Stinchcombe</b> 4488:11 4491:16 4492:11 4493:11 4495:23 4497:13 <b>pre-trial</b> 4389:23 4422:20,21 4435:1 4493:4 4523:4 4557:7 4571:11,13 <b>price</b> 4551:13 <b>primary</b> 4478:2 4505:25 4509:25 4587:21 4589:1 4599:24 <b>principally</b> 4499:23 <b>prior</b> 4418:9 4438:10 4543:18 4616:17 <b>prison</b> 4505:3 4510:7 <b>pristine</b> 4570:1 <b>privilege</b> 4504:14 <b>privileged</b> 4504:8 <b>pro</b> 4509:19 4513:5 <b>probably</b> 4407:19 4407:20 4408:10 4413:3 4424:20 4435:3 4453:20 4473:19,19 4484:4 4486:20 4495:15 4497:18 4508:14 4519:10 4562:22 <b>Prober</b> 4381:13 4382:6 4393:16 4393:17,18,19,20 4393:23 4402:19 4403:1,2,18 4410:25 4411:6 4411:11 4412:11 4413:6 4416:12 4416:16,20 4417:25 4418:2 4424:7 4426:6 4433:15 4434:10 4434:16,19,21,23 4442:7 4452:23 4453:5,17 4454:7 4454:12 4455:1,3 4455:15 4457:22 4460:11,12 4468:12 4474:2,3 4516:16 4522:12	4522:22,25 4567:1,2,4,7 4614:6,7 4627:10 <b>Prober's</b> 4460:8 <b>problem</b> 4486:15,21 4487:10 4507:2 4517:22 <b>problems</b> 4558:8 <b>procedure</b> 4500:17 4515:21 <b>proceed</b> 4610:21 <b>proceeded</b> 4543:23 <b>proceeding</b> 4532:4 <b>proceedings</b> 4380:11,20 4382:1 4454:22 4474:15 4520:21 4546:17 4582:9 4636:24 4637:2,6 4637:24 <b>proceeds</b> 4539:11 <b>process</b> 4419:20 4489:2 4498:15 4501:14 4509:23 4515:22 4521:12 4538:11,21,24 4558:5 4560:22 4561:14 4577:11 4583:17 4585:23 4610:20 4611:3,5 4615:17,25 4629:5 <b>processes</b> 4505:12 4605:19 <b>prodding</b> 4494:12 <b>produced</b> 4522:4,7 <b>professionalism</b> 4629:23,23 <b>professionals</b> 4633:17 <b>professor</b> 4629:16 <b>program</b> 4393:1 4398:10 4404:14 4404:20 4415:3,4 4415:5,6,7,12,19 4420:12 4499:4 4502:21 4503:2 4503:25 4552:11 4552:15 4556:24 <b>progressively</b> 4573:11 <b>prohibition</b> 4395:25 <b>prohibits</b> 4577:25 <b>promised</b> 4420:22 4535:8,23 4536:2 4536:4 4573:17 <b>promises</b> 4401:10	<b>promoted</b> 4475:25 4476:9 <b>promotion</b> 4631:22 <b>prompt</b> 4415:25 <b>prompted</b> 4400:1 4407:24 4419:14 <b>prompts</b> 4594:19 <b>proof</b> 4451:3,14 4480:1 <b>proper</b> 4446:6 4536:3 4581:19 <b>properly</b> 4525:11 4630:15 <b>property</b> 4493:24 4494:14,14 <b>proposition</b> 4465:11 <b>propriety</b> 4571:3,11 <b>prosecute</b> 4398:20 <b>prosecuted</b> 4394:12 4394:18 4395:24 4475:22 4476:17 4477:1,4 4519:17 4529:11 <b>prosecuting</b> 4421:16 4485:13 4499:10 4506:3 4507:19 4510:4 4510:13,14 4518:8,23 4544:12 <b>prosecution</b> 4438:23,25 4446:16 4477:15 4489:18 4490:25 4493:25 4494:1,4 4498:20 4515:3 4543:17 4555:12 4568:7 4586:4 4599:3,25 4600:4 4600:12 4617:6 <b>prosecutions</b> 4476:10 4479:9 4486:11 4499:13 4511:2 4512:15 4512:20,21 4514:17 4559:16 4589:17 4599:11 4600:19 4628:6 4628:13 4630:6 4632:22 <b>prosecution's</b> 4588:23 <b>prosecutor</b> 4394:21 4394:25 4478:7 4478:18 4479:13 4479:13,16	4483:3 4485:8 4493:14 4498:22 4501:8 4507:3 4511:7 4512:23 4513:5 4517:15 4517:23 4520:2 4531:20 4594:3 4628:11 4631:11 4631:17,25 4634:21 <b>prosecutors</b> 4491:9 4505:20 4506:2 4507:12 4533:2 4630:21 4631:5 4632:7 4633:1,23 4634:15 4635:9 4636:4,19 4637:1 <b>protect</b> 4423:13 4499:2 4503:19 <b>protected</b> 4423:7 4559:9 4561:6 4600:13 <b>protecting</b> 4491:13 4491:13 4508:5 4563:2 <b>protection</b> 4388:15 4391:12,25 4392:1,19 4393:5 4398:10 4401:9 4401:15 4402:7 4404:9,14,20 4409:16 4410:18 4411:15,19 4415:3,19 4420:12 4423:3,5 4423:17,21 4424:11 4448:20 4467:7 4498:8,11 4498:15,17 4499:4,18 4501:3 4501:6,10,23 4503:8,17 4504:17 4505:19 4506:1 4508:2,12 4508:25 4509:4 4517:25 4518:12 4518:19 4523:20 4524:18 4525:18 4525:21 4526:12 4536:3,22 4537:1 4537:24 4540:18 4542:23 4552:10 4555:14 4556:23 4559:3 4560:5,13 4562:5,25 4563:3 4565:4 4568:2 4574:3,5,8	4577:23 4579:14 4579:17 4580:8 4580:23 4591:2 4632:9 <b>protective</b> 4446:5 <b>provide</b> 4384:15 4423:3 4433:20 4468:5 4471:3 4473:8 4497:4 4602:14 <b>provided</b> 4421:4 4496:9 4591:12 <b>providing</b> 4508:6 4508:12 <b>province</b> 4381:12 4446:14 4476:13 4509:15 4586:2 4638:6 <b>provinces</b> 4489:11 <b>Provincial</b> 4453:8 4453:10 <b>provision</b> 4423:6 4601:21 <b>provisions</b> 4635:17 <b>psychological</b> 4632:5 <b>public</b> 4398:8,15 4422:9 4493:22 4533:11 4559:15 4564:16 4599:11 4632:8 4636:25 <b>publicity</b> 4513:23 <b>published</b> 4597:3 <b>pulled</b> 4463:6,7,9 4466:6 <b>purchased</b> 4512:4 <b>pure</b> 4485:16 <b>purely</b> 4485:18 <b>purport</b> 4467:17 <b>purpose</b> 4393:8 4527:6 <b>purposes</b> 4493:25 4494:6 <b>pursue</b> 4543:6,10 4591:13 <b>pursuing</b> 4495:12 <b>pushing</b> 4494:24 <b>put</b> 4393:1,4 4402:9 4403:19 4408:20 4409:6 4412:18 4414:18 4425:10 4452:20 4455:14 4456:13,22 4459:18 4460:15 4461:4 4465:12 4480:22 4499:6 4503:1 4504:16
--	---	--	--	--

<p>4507:16 4529:5                  4544:21 4548:15                  4548:15 4561:21                  4580:1 4590:18                  4591:3 4599:13                  4599:19 4600:3                  4602:16  <b>puts</b> 4405:21                  4572:16 4594:23  <b>putting</b> 4419:11                  4425:23 4435:14                  4462:14 4465:11  <b>p.m</b> 4520:21,22                  4582:10 4637:24</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qualified</b> 4450:11  <b>quality</b> 4509:1  <b>quarter</b> 4607:1  <b>queries</b> 4431:4  <b>query</b> 4594:22  <b>question</b> 4399:7,24                  4404:2 4405:6                  4406:23 4421:13                  4423:9 4424:2                  4427:9 4432:21                  4433:1 4437:8,21                  4437:23 4457:20                  4458:10 4459:11                  4465:5,9 4467:17                  4473:1,9,11                  4479:10 4483:6                  4495:15 4506:22                  4507:10 4515:14                  4525:20 4526:4                  4534:8 4539:24                  4549:10 4556:3                  4560:25 4570:4                  4571:3 4577:17                  4580:17 4583:5                  4584:20 4586:11                  4588:7 4589:10                  4591:8,25 4592:7                  4592:18 4593:1                  4595:11 4597:2                  4604:14 4605:8                  4606:20 4607:18                  4608:19 4612:15                  4616:3 4617:10                  4621:8 4631:14  <b>questioned</b> 4388:11                  4455:16 4457:4                  4457:25 4463:7                  4466:8,9  <b>questioner</b> 4411:24  <b>questioning</b>                  4419:16 4435:13</p>	<p>4617:9  <b>questions</b> 4384:9                  4385:5 4393:12                  4393:20 4417:16                  4432:11,12                  4435:6 4441:5                  4442:3 4448:5                  4452:6 4454:16                  4455:18 4456:13                  4461:3 4463:4,5                  4464:18 4465:10                  4472:22 4478:7                  4503:17 4557:10                  4563:25 4572:8                  4596:1 4598:19                  4599:4 4600:20                  4604:10 4616:1,2                  4621:11 4625:3,9                  4627:22 4637:18  <b>quickly</b> 4431:9,15                  4524:1 4528:22                  4632:3 4635:12  <b>quid</b> 4509:19  <b>quietly</b> 4483:18  <b>Quinney</b> 4440:16                  4443:12 4445:9                  4445:16 4582:17                  4582:18 4584:9                  4585:25 4587:12                  4587:16 4590:13                  4591:12 4593:8                  4595:21 4598:15                  4598:20 4602:9                  4608:12 4610:16                  4611:14 4614:25                  4615:24 4616:9                  4616:14 4617:19                  4620:8 4623:20                  4625:16  <b>Quinney's</b> 4586:23                  4616:10 4617:24  <b>quite</b> 4394:16                  4462:6 4477:5                  4480:2 4494:7                  4497:21 4516:17                  4562:12 4586:18                  4586:20  <b>quo</b> 4509:19  <b>quote</b> 4598:9                  4618:18 4632:2  <b>quoting</b> 4487:19  <b>Q.C</b> 4380:5 4381:12                  4381:14,15,16,19                  4381:21</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>R</b> 4381:15,19</p>	<p>4424:10 4628:21                  4628:22  <b>raid</b> 4458:17  <b>raise</b> 4499:11                  4523:20 4557:14                  4558:24 4586:9                  4621:25  <b>raised</b> 4432:11                  4499:9 4556:8                  4587:16 4600:1                  4607:24 4618:14                  4633:12  <b>raises</b> 4501:2                  4604:13  <b>raising</b> 4441:19                  4447:3 4498:17                  4510:1 4587:12                  4598:15,18                  4622:16  <b>rambling</b> 4460:2  <b>Rand</b> 4628:24  <b>Randy</b> 4412:16  <b>ranging</b> 4549:8  <b>rank</b> 4478:17  <b>ranting</b> 4579:7  <b>rare</b> 4497:14  <b>rat</b> 4510:6  <b>rate</b> 4479:15  <b>rational</b> 4498:25  <b>raving</b> 4579:7  <b>Ray</b> 4528:4 4548:22                  4598:3  <b>RCM</b> 4502:21  <b>RCMP</b> 4381:16                  4386:2,12                  4391:25 4392:5                  4428:17 4429:15                  4435:4 4446:21                  4450:5 4499:5                  4503:2,8,24                  4536:2,9 4537:2                  4537:21 4543:1                  4543:13 4544:5                  4552:11 4569:4                  4572:23 4584:10                  4608:12 4611:19                  4620:8  <b>reach</b> 4567:19                  4569:20  <b>reached</b> 4544:13                  4568:2,6 4569:4  <b>read</b> 4404:2                  4405:15 4410:21                  4427:18 4432:24                  4432:24 4440:14                  4442:9,10                  4444:15,15</p>	<p>4456:2 4463:23                  4466:11,21                  4468:24 4471:15                  4478:11 4497:3                  4506:15 4536:5                  4537:16 4538:18                  4540:8 4566:14                  4603:4 4618:23                  4628:17 4632:3                  4633:12  <b>reading</b> 4434:15,16                  4515:9  <b>ready</b> 4449:1,13,21                  4455:1 4627:4  <b>real</b> 4409:24 4623:9  <b>realize</b> 4408:14                  4457:5  <b>realized</b> 4408:11,17                  4591:1  <b>really</b> 4385:19                  4464:2 4511:9                  4525:8 4590:24                  4610:13 4630:1                  4637:8,9  <b>reason</b> 4418:25                  4421:12,20                  4422:3 4427:9                  4430:21 4432:25                  4519:22 4558:24                  4570:19 4595:8  <b>reasonable</b> 4498:25                  4551:11,17                  4582:5 4605:5  <b>reasonably</b> 4630:22  <b>reasoning</b> 4504:19                  4563:12 4607:5  <b>reasons</b> 4498:23                  4503:11 4506:23                  4560:15,21                  4636:23 4637:3  <b>reassuring</b> 4608:5  <b>recall</b> 4386:4,5                  4387:7,19                  4388:17 4390:19                  4391:7,10                  4397:16 4398:18                  4399:22 4404:1                  4412:17 4416:3                  4417:11 4419:15                  4421:20 4436:3,8                  4436:21 4437:14                  4438:22 4439:15                  4441:11 4442:13                  4442:21 4448:7                  4450:21,23                  4451:23 4455:19                  4456:5 4459:16</p>	<p>4462:9,11,11,13                  4466:23 4469:22                  4471:3 4477:10                  4479:19 4483:12                  4484:8,9 4491:9                  4491:18 4492:10                  4496:24 4497:3                  4512:23 4521:8                  4530:11,13,17                  4534:9,13 4537:3                  4546:12 4547:15                  4555:21 4556:21                  4558:12 4562:5                  4562:10 4565:18                  4566:1,6 4568:3                  4578:7 4581:3                  4591:16 4601:11                  4602:11 4607:15                  4612:3,16                  4620:15  <b>recalled</b> 4534:17                  4562:8  <b>recant</b> 4389:9                  4579:3,25                  4580:22 4585:12                  4587:4  <b>recantation</b>                  4585:18  <b>receive</b> 4444:18                  4451:18 4612:9  <b>received</b> 4385:5,10                  4392:24 4427:5                  4437:20 4452:12                  4522:17 4524:6                  4555:1 4561:25                  4605:12,15                  4607:5,19 4610:1                  4619:22 4623:20                  4623:21,22                  4624:23  <b>receives</b> 4575:8  <b>receiving</b> 4414:25                  4436:3 4442:21                  4467:7 4530:18                  4601:11  <b>recess</b> 4454:13,21                  4468:7 4520:17                  4531:19 4582:4,8  <b>recessed</b> 4454:22                  4520:21 4582:9  <b>recognize</b> 4577:8,9                  4603:15,22,23  <b>recollection</b> 4385:8                  4385:20 4387:12                  4389:25 4390:1                  4390:20 4438:24                  4439:12 4448:6</p>
--	---	---	--	--

<p>4451:11 4458:25 4479:2,3 4488:15 4530:14 4541:10 4547:21 4549:13 4556:4 4557:2 4565:8 4568:16 4574:18 4601:13 4604:7 4607:22 4609:9,15 4611:4 4611:7 4612:19 4612:23,25 4613:22 4614:13 4614:20 4616:7 4621:2,13,16 4625:6,21,23 <b>recommend</b> 4573:3 <b>recommendation</b> 4513:4,7 4543:25 4544:10,14 4601:8 <b>recommendations</b> 4488:20 4489:5 4490:19 <b>reconcile</b> 4629:12 <b>reconstruct</b> 4523:5 4557:7 <b>reconvened</b> 4454:23 4520:22 4582:10 <b>record</b> 4420:11 4425:8 4440:20 4456:23 4474:4 4521:2,8 4533:12 4602:17 <b>recorded</b> 4548:11 <b>records</b> 4388:18 4427:18,22,24 4496:22,22,23 4548:9 4579:18 <b>red</b> 4611:12 <b>reduce</b> 4438:16,18 <b>refer</b> 4522:6 4554:24 4575:16 <b>reference</b> 4402:18 4447:2 4449:12 4453:8 4466:24 4502:1 4535:21 4537:14 4615:23 4617:12 <b>referred</b> 4394:3 4421:2 4423:25 4428:5,7 4432:20 4440:4 4441:22 4449:24 4513:17 4533:10 4565:18 4628:1 <b>referring</b> 4436:17</p>	<p>4436:25 4443:12 4446:3 4453:12 4456:16 4466:12 4466:16 4474:5 4496:2 4536:15 4539:7 4554:22 4578:19,22 4583:11 4605:24 4605:25 4615:24 <b>refers</b> 4402:2 4412:23 4431:19 4473:9 4524:21 4530:6 4532:17 4533:14 4534:25 4585:5 4606:10 <b>reflect</b> 4533:1 4557:2 4634:19 <b>reflecting</b> 4506:11 <b>reflects</b> 4524:16 4532:1 <b>refresh</b> 4442:17 <b>refusal</b> 4563:18 <b>refuses</b> 4563:4 <b>regard</b> 4454:9 4572:18 4613:11 <b>regarded</b> 4395:24 4519:13 4582:22 <b>regarding</b> 4601:21 <b>regardless</b> 4564:2 <b>regards</b> 4436:23 <b>regime</b> 4488:22 4559:23 <b>Regional</b> 4628:1 <b>registrar</b> 4468:5 4534:22 4602:14 4602:16 <b>regular</b> 4390:10,12 4454:13 4518:9 4600:21 <b>Reid</b> 4638:5,5,15,19 <b>reimbursing</b> 4551:5 <b>reject</b> 4530:25 <b>relate</b> 4429:4 4454:7 <b>related</b> 4386:8 4387:16,16 4388:6 4390:2,13 4410:18 4451:21 4471:17 4496:23 4518:20,22 4631:22 <b>relates</b> 4410:2,10 4411:15 4433:21 4584:19 4587:1 4632:4 <b>relating</b> 4411:18 4417:17,22</p>	<p>4424:9 4431:22 <b>relation</b> 4400:5 4438:2 4443:14 4455:13 4456:23 4459:13 4484:2,9 4485:24 4491:3 4508:7 4517:20 4518:14 4555:17 4563:25 4586:10 <b>relationship</b> 4484:15,19,21 4485:19,21 4486:9 4492:18 4492:24 4519:4 4633:5 <b>relatively</b> 4497:14 <b>released</b> 4561:7 <b>relevant</b> 4418:6 4452:10 4453:23 4454:6 4475:19 4489:15 4495:11 4523:3 <b>reliance</b> 4510:15 <b>relied</b> 4418:16 4421:17 4427:7 4431:18 4450:9 4451:9,9 4561:17 <b>relieve</b> 4521:23 <b>relieved</b> 4563:9 <b>relieving</b> 4522:5 <b>relocate</b> 4393:8 4503:19 4573:6 <b>relocated</b> 4551:18 <b>relocating</b> 4560:16 <b>relocation</b> 4404:24 4539:15 4552:14 4559:15 4561:10 4573:4,15 4575:17 <b>reluctant</b> 4637:10 <b>rely</b> 4437:9 4498:23 <b>remainder</b> 4431:4 <b>remained</b> 4478:3 4600:13 <b>remark</b> 4449:7 <b>remember</b> 4386:19 4387:20 4389:18 4390:4,5,16,22,24 4390:25 4395:12 4400:19 4435:9 4438:1 4451:17 4456:15,16 4458:24 4459:20 4459:21 4462:18 4463:25 4467:13 4467:22 4476:21 4479:21 4480:3</p>	<p>4487:1 4488:22 4494:19 4504:24 4556:1 4558:7,17 4565:17 4608:3 <b>remembered</b> 4570:12 <b>remind</b> 4466:20 4589:23 <b>renege</b> 4389:8 <b>reopened</b> 4454:25 <b>repaid</b> 4392:5 <b>repeat</b> 4516:18 4553:14 4613:10 <b>repeats</b> 4464:16 <b>repetitive</b> 4574:12 <b>replacement</b> 4595:1 <b>replicated</b> 4605:21 <b>replied</b> 4467:20 <b>reply</b> 4433:18 4457:12 <b>replying</b> 4622:15 <b>report</b> 4408:25 4409:15 4411:21 4432:10,14 4436:23 4440:2 4482:25 4484:6 4488:13 4489:13 4489:21 4490:10 4493:17 4494:9 4496:14 4497:9 4554:10,11 4572:23 4578:19 4578:20 4579:2 4579:21 4580:10 4580:10,16 4605:13,18 4619:24,25 4625:8 4632:3 <b>reported</b> 4483:1 <b>reporter</b> 4594:22 4595:12 4638:16 4638:20 <b>REPORTER'S</b> 4638:1 <b>reporting</b> 4477:24 4538:23 <b>reports</b> 4410:21 4425:14 4438:11 4495:1,5,7 4496:25 4497:5 4599:11 4619:15 4626:9 <b>represent</b> 4544:14 <b>representations</b> 4437:25 <b>reputation</b> 4480:8,9 4492:9 4519:12</p>	<p><b>reputations</b> 4492:23 <b>request</b> 4384:13,22 4387:17,17 4401:20 4402:22 4433:19 4473:7 4473:17 4495:3 4505:19 4510:1,1 4522:7 4562:24 4563:7 4594:20 4596:10 4610:3 4615:8 <b>requested</b> 4543:16 <b>requests</b> 4421:11 4430:9 4508:7 4509:12 4526:15 <b>require</b> 4513:22 4553:21 4576:2 <b>required</b> 4483:13 4572:1,3 4581:14 <b>requires</b> 4500:21 4528:4 <b>requisitioning</b> 4500:8,18 <b>resistance</b> 4492:6 4492:16 4493:1 4496:18 4636:10 <b>resistant</b> 4562:12 4562:13 <b>resolved</b> 4413:11 4543:20 4568:1 <b>respect</b> 4392:14 4425:9 4426:22 4430:11 4434:2 4437:11 4446:13 4486:10 4542:5 4586:1 4610:15 4613:13,19 <b>respected</b> 4582:22 <b>respectfully</b> 4615:8 <b>respond</b> 4471:13,18 4472:8 4473:17 4490:6 4555:15 4579:13 4615:19 4616:1 4618:13 <b>responded</b> 4471:2 4530:22 4620:23 <b>responding</b> 4469:24 4594:22 4615:1 4618:7 <b>responds</b> 4529:18 4564:21 4616:9 4618:25 <b>response</b> 4398:19 4471:7 4490:2,10 4529:19,21 4530:4,9,24</p>
---	---	--	---	--

<p>4534:2 4556:12  4556:15 4563:2  4592:16 4605:13  4605:17 4606:8  4609:16 4610:10  4615:10 4619:3  4619:12,15,19,23  <b>responses</b> 4462:17  4599:15 4620:7  <b>responsibilities</b>  4476:17 4500:2  4629:13 4632:2  <b>responsibility</b>  4509:25 4516:3  4587:21 4600:8  4629:4  <b>responsible</b> 4491:12  4498:8,16,18  4499:15 4539:25  4565:24 4587:17  4588:12,20  4604:24  <b>rest</b> 4411:4 4458:23  4587:23 4623:13  <b>rests</b> 4543:14  <b>result</b> 4398:7  4420:14 4476:4  4489:14 4584:12  4598:18 4610:19  4611:8 4616:25  4632:19  <b>resulted</b> 4597:2  4610:2 4635:18  <b>results</b> 4594:14  <b>resume</b> 4520:25  <b>retained</b> 4415:18  4526:6 4545:21  <b>retainer</b> 4536:4,10  4545:16,20  4546:2,11,14,21  <b>retaining</b> 4525:17  4525:24 4546:6  <b>retired</b> 4396:9  <b>retiring</b> 4482:12  <b>return</b> 4516:21  4568:15  <b>returned</b> 4475:1  4494:4  <b>reveal</b> 4426:17  4427:1  <b>revealed</b> 4436:19  <b>revenge</b> 4584:16,21  <b>review</b> 4419:2  4441:25 4443:17  4447:1,25  4475:11 4514:1  4530:22 4537:5,6</p>	<p>4537:8 4539:13  4541:15 4549:25  4564:6 4576:16  4590:17 4597:11  4597:20 4600:25  4620:24 4621:17  4625:11 4635:20  <b>reviewed</b> 4467:10  4468:16 4474:25  4512:19,20  4540:10 4541:7  4557:12,14  4590:22 4604:18  4616:17 4624:8  4628:20  <b>reviewing</b> 4408:15  4473:12 4541:10  <b>reviews</b> 4584:9  <b>revisions</b> 4475:1  <b>reward</b> 4584:15  <b>Re-exam</b> 4382:7  <b>re-examination</b>  4454:17 4455:11  4460:7 4468:13  4472:22 4521:5  <b>re-opened</b> 4520:24  4582:12  <b>re-sends</b> 4532:10  <b>re-sent</b> 4521:21  <b>Richard</b> 4582:18  <b>right</b> 4387:4  4389:19 4390:6  4392:14 4395:2  4396:6,15 4397:6  4397:7,12,19  4398:21 4402:19  4402:21 4403:11  4403:20 4406:8  4406:23 4408:7  4408:25 4409:18  4410:10 4411:23  4412:22 4413:14  4413:19 4417:16  4418:14 4419:1  4420:5,19 4421:6  4422:2 4428:16  4429:24 4430:9  4430:10 4431:21  4432:1 4433:14  4433:24 4434:7  4435:19 4436:10  4436:14 4437:15  4437:22 4439:4  4439:23 4440:18  4445:1,4 4448:3  4448:13,21  4449:6,18</p>	<p>4450:17 4451:15  4451:22,25  4453:2 4454:12  4457:19 4459:17  4459:24 4461:13  4463:16,18  4467:14 4470:7  4470:19,21  4474:7 4475:17  4478:5,6,15,19,23  4479:10 4487:25  4488:2,16 4493:2  4493:23 4494:17  4497:10 4498:3,7  4504:7,15  4507:20 4511:3  4514:9 4515:14  4516:5,11  4520:17 4537:25  4543:4 4544:21  4546:21,25  4548:5 4557:6  4578:23 4582:1  4582:14 4595:10  4603:23 4604:8  4606:5 4607:17  4617:12 4629:1  <b>right-hand</b> 4401:18  4470:20 4533:13  4541:20,24  4576:12 4602:22  <b>ringing</b> 4491:22  <b>rise</b> 4450:19 4451:7  4454:20,24  4520:19,23  4582:7,11  4637:22  <b>robbery/homicide</b>  4439:3  <b>role</b> 4394:20,21  4438:20,22,25  4439:1 4481:22  4490:8 4505:25  4598:24 4599:7  4628:21 4631:25  4635:23  <b>roles</b> 4481:19  4507:6 4518:5  4630:23 4631:6  <b>room</b> 4414:2,13  4568:25 4569:1  4579:7  <b>rotate</b> 4481:4  <b>routed</b> 4626:8  <b>routine</b> 4483:24  4493:12 4496:9  4504:23</p>	<p><b>routinely</b> 4494:16  4495:1,2 4496:9  <b>rule</b> 4637:5  <b>rules</b> 4629:25  4636:2  <b>rulings</b> 4516:2  4636:14,16  <b>run</b> 4407:24  4415:25  <b>runs</b> 4562:8,9  <b>R.L</b> 4381:4</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 4424:13 4560:5  <b>safe</b> 4458:18  <b>safeguarded</b>  4525:11  <b>safehouse</b> 4526:15  4526:21 4527:7  4527:13 4539:16  <b>safety</b> 4398:8,16  4422:10 4493:22  4525:9,12  4564:16  <b>sakes</b> 4614:5  <b>sale</b> 4413:11  <b>Sanderson</b> 4449:25  <b>Sarchuck</b> 4396:3  <b>Saskatchewan</b>  4471:1 4569:17  4582:3,17  4601:24 4608:9  4610:3,19  4621:23,24  4622:14,18  4623:2 4624:24  <b>sat</b> 4459:24  <b>satisfied</b> 4499:16  4584:13  <b>Saturday</b> 4597:5  <b>Saul</b> 4479:1,3  <b>Savage</b> 4429:12,14  <b>saw</b> 4404:8 4415:17  4424:18 4442:5  4448:11 4530:24  4582:24 4590:14  4606:18 4607:2  4610:22  <b>saying</b> 4387:13,19  4390:23 4399:23  4416:23 4422:7  4431:2 4434:14  4437:2 4438:5  4461:25 4464:24  4470:13 4471:2  4472:8 4492:3  4508:23 4517:2,9</p>	<p>4525:16 4531:24  4535:6 4540:14  4563:18 4589:11  4591:11 4603:19  4604:3 4607:14  4608:12,13  4609:2 4611:13  4614:10 4619:3  4636:14  <b>says</b> 4407:7 4433:20  4436:17 4461:10  4461:19 4463:2  4465:3,17,21  4466:14 4472:2  4473:8 4500:19  4529:22 4530:10  4535:15,20  4539:21 4540:2  4543:5 4551:9,14  4554:17 4556:18  4559:11,11  4560:4 4575:3,11  4580:14 4603:7  4611:17 4612:12  4613:2,16  4615:15 4622:17  4624:14,25  <b>scenario</b> 4605:5  <b>scope</b> 4454:10  <b>screen</b> 4434:15  <b>Scullion</b> 4521:10,20  4522:1,4,18  <b>searched</b> 4388:18  <b>searching</b> 4476:21  <b>seated</b> 4520:24  <b>second</b> 4399:7,24  4403:3 4408:17  4413:25 4421:21  4427:14 4431:3  4436:18 4445:14  4452:25 4453:1,3  4457:20 4460:6  4470:22 4471:8  4483:10 4536:14  4540:16 4547:2,8  4547:16 4548:24  4550:4 4551:3  4552:12 4567:9  4567:11 4573:14  4579:20 4584:24  4584:25 4585:24  4586:25 4592:20  4609:7,22  4615:14 4618:10  4631:24 4632:2,4  <b>second-guessing</b>  4633:9</p>
---	--	--	---	---

<b>secret</b> 4521:16 4569:8 4616:17 4617:13 <b>secretary</b> 4441:8 <b>section</b> 4439:2,3 4476:1 4500:20 <b>secure</b> 4568:25 <b>secures</b> 4526:19 <b>security</b> 4560:10 <b>seductiveness</b> 4633:4 <b>see</b> 4388:4 4390:9 4390:11 4401:13 4402:4,20,25 4407:2,25 4408:2 4409:15 4410:9 4412:15 4417:3 4421:22 4425:21 4426:7 4431:7,13 4431:21 4433:14 4435:17 4436:24 4443:4,14 4445:4 4445:23 4447:24 4451:25 4452:10 4452:16 4457:12 4461:5 4463:1 4465:1,22 4477:2 4482:22 4486:7 4494:25 4497:24 4500:5,13,17 4501:12,14 4502:7,9 4505:17 4505:20 4517:13 4522:15 4523:12 4524:2 4525:1 4526:4,10,17,21 4527:9 4528:2 4529:6,21,25 4530:4 4531:8 4532:12,14 4533:15 4535:5 4535:13 4540:6 4540:19 4541:19 4541:24 4543:2 4546:1,6,14,16 4547:9,13 4548:6 4548:8,18 4550:4 4551:6 4552:7,16 4554:17 4555:7 4556:20 4559:1,8 4559:12,14,23 4560:1,7 4562:24 4572:24 4573:2 4573:14 4574:4,6 4574:9 4575:19 4576:7,20 4577:18 4578:13	4579:1,3,10,11,12 4579:25 4580:10 4580:12 4583:1 4584:16,18 4585:3,4,13 4586:6 4594:15 4594:19,25 4595:16 4596:8 4597:18 4598:12 4601:25 4602:20 4603:3,22 4604:12,15,16 4605:12 4606:22 4606:25 4609:6 4609:16 4610:25 4612:5 4615:1 4616:20 4618:20 4618:22 4619:4 4619:25 4620:3 4621:20 4622:1,9 4622:22,23 4623:19 <b>seeing</b> 4392:9 4436:3,8 4441:11 <b>seek</b> 4473:21 4509:18 <b>seeking</b> 4496:21 4516:8 <b>seen</b> 4419:3 4422:23 4434:6,7 4435:24 4443:25 4445:7 4447:23 4457:2 4462:19 4519:24 4583:12 4631:17,20 <b>selected</b> 4478:21 <b>self-defeating</b> 4494:20 <b>self-evident</b> 4575:21 <b>send</b> 4439:17 4442:19 4469:25 4471:21,23 4472:9 4488:3 4526:24 4576:11 4576:15 4577:21 4588:7,8 4603:8 <b>sending</b> 4501:20 4576:19 4578:3 4592:19 4601:6 <b>sends</b> 4523:17 4538:16 4575:6 4583:8 4604:1 4606:15 4619:2 <b>senior</b> 4458:6 4477:11 4478:13 4478:16 4479:18	4482:20 4484:14 4484:22,24 4485:8 4489:9 4492:19 4507:11 4513:15,18 4588:1 4593:17 4596:5 4620:25 4623:9 4625:17 4628:1 <b>seniority</b> 4485:1 <b>sense</b> 4411:7,9 4418:20 4419:17 4482:18 4495:20 4504:6 4506:20 4507:16 4530:21 4561:17 4562:10 4562:15,23 4563:12 4604:17 4604:22 4605:6 4608:25 4626:18 <b>sensible</b> 4506:13,23 4594:4 <b>sensitive</b> 4541:8,18 4555:10 4561:9 4596:2 <b>sensitivities</b> 4518:11,14 <b>sensitivity</b> 4561:12 <b>sent</b> 4384:12 4425:25 4427:14 4443:6 4447:10 4447:13 4470:24 4471:18 4489:16 4489:17 4521:20 4530:19 4533:23 4547:10 4550:9 4575:9 4577:4 4578:8 4581:8 4583:12 4590:10 4590:23,23 4593:8 4603:2 4605:7 <b>sentence</b> 4401:17 4402:21 4444:5 4461:11 4539:20 4573:2,14 4584:11 4609:8 <b>separate</b> 4470:5 4471:9 4489:11 4496:6 4506:24 4507:1 4508:1,9 <b>separation</b> 4507:6 4518:5 <b>September</b> 4580:12 <b>sequence</b> 4523:8 4554:2 <b>sergeant</b> 4437:15	4439:1 4458:7 4540:21 4568:24 4569:1,2 4579:6 4579:19 4585:7 4618:18 4620:1 <b>series</b> 4563:22 4572:7 4597:4 <b>serious</b> 4479:9 4480:1 4515:1,12 4564:15 4586:13 4587:10 4602:6 4614:9 4623:16 <b>seriously</b> 4592:23 <b>service</b> 4458:4 4459:13 4485:2,4 4485:11 4494:5 4600:5 4616:16 4620:23 4632:8 <b>Services</b> 4381:18 <b>session</b> 4384:5 <b>set</b> 4435:4 4476:5 4490:4 4493:6 4504:19 4507:2,7 4512:12 4513:14 4514:11 4515:8 4528:1 4534:3 4536:20,23,24 4538:1,12 4555:25 4573:6 4607:4 4631:2 <b>sets</b> 4500:17 4527:21 4550:1 4552:6 4555:6 4616:14 <b>setting</b> 4462:15 4536:8 4561:13 4566:10 <b>settlement</b> 4567:20 4569:11 4571:18 <b>settles</b> 4564:25 <b>seven</b> 4394:7 4607:4 4629:17 <b>share</b> 4571:7 <b>shared</b> 4481:3 4600:8 4601:23 4632:6 <b>sheet</b> 4575:8 4577:20 <b>shock</b> 4489:17 <b>shoplifting</b> 4510:10 4514:3 <b>shopping</b> 4399:14 <b>shored</b> 4510:22 <b>short</b> 4454:13 4533:21 4537:5 4560:25 <b>shortfall</b> 4551:10	<b>shortly</b> 4528:11 4548:12 4585:6 4602:20 4605:21 4619:3 <b>short-term</b> 4409:18 <b>shot</b> 4489:24 4507:14 <b>show</b> 4384:15,25 4579:19,19 <b>showed</b> 4448:17 <b>showing</b> 4442:18 4575:8 4576:8 <b>shown</b> 4388:9 4449:14 4603:14 4621:6 <b>Sid</b> 4469:7 4592:17 4595:7 4596:8 4624:9,9,12 <b>side</b> 4396:8 4401:18 4425:10 4433:20 4470:20 4482:11 4482:12 4487:13 4495:21 4511:17 4545:19 4561:22 4565:13 4602:22 4603:12,24 <b>sign</b> 4499:24 4500:21 4553:23 4604:21 4605:9 4614:6 <b>signature</b> 4578:2 4605:8 <b>signed</b> 4401:9,11 4404:3 4405:18 4415:20 4441:7,8 4470:6 4526:11 4575:6 4577:19 4620:1 <b>significance</b> 4609:4 <b>significant</b> 4389:20 4418:6 4438:14 4453:24 4454:1 4513:11 4514:6 4550:3 <b>signing</b> 4499:25 4559:24 4560:1 4604:14 <b>signs</b> 4408:3 4524:3 <b>sign-off</b> 4576:3 <b>sign-out</b> 4559:23 <b>similar</b> 4451:1 4518:14 4618:5 <b>similarly</b> 4384:21 4501:1 4588:11 <b>simple</b> 4495:15 <b>simply</b> 4389:17 4390:3,5,15,23
---	--	--	---	--

4391:7,18 4449:13 4455:6 4459:12 4485:1 4493:7 4507:15 4522:6,17 4529:22 4533:11 4545:8 4550:1 4553:17 4561:17 4563:5 4566:6 4581:5 4588:8 4591:8 4599:19 4605:21 4611:17 4616:3 <b>single</b> 4554:19,23 <b>sir</b> 4393:10 4416:25 4460:4 4465:4 4566:19 4627:19 4628:5,17,22 4629:3,8,15 4631:15,20,24 4632:2,13,16 4633:20,25 4634:6,9,23 4635:7 4636:11 4636:21 <b>sit</b> 4491:5 <b>site</b> 4437:17 <b>sitting</b> 4380:12 4399:17,25 4407:4,19 <b>situated</b> 4469:14 4512:8 <b>situation</b> 4398:24 4481:18 4504:22 4504:23 4506:6 4506:10 4518:17 4519:1 4593:7 4602:8 4605:2 4631:20,21 4633:23 <b>six</b> 4536:16 4548:7 4567:12 <b>sixth</b> 4485:23 <b>six-month</b> 4557:11 <b>slightly</b> 4471:9 <b>slim</b> 4460:22 <b>smack</b> 4491:1 <b>small</b> 4460:22 4478:20 4492:19 4510:12 4576:23 <b>smell</b> 4571:2 <b>social</b> 4482:6 4486:2 <b>socialized</b> 4390:11 <b>Societies</b> 4635:24 <b>solely</b> 4423:13 4481:6	<b>solve</b> 4509:16 <b>solving</b> 4486:15,21 <b>somebody</b> 4389:7 4410:14 4411:2 4437:19 4438:4 4440:1 4445:2 4455:2 4472:11 4483:4 4505:4 4506:21,23 4507:1 4604:6 <b>somebody's</b> 4437:16 <b>somewhat</b> 4471:17 4549:20 4585:15 4617:18 <b>son</b> 4394:2 4395:13 <b>son's</b> 4394:8 <b>soon</b> 4409:22 4410:1 <b>sophisticated</b> 4495:18 <b>Sophonow</b> 4477:5 4477:16 <b>sorry</b> 4387:15 4388:4 4389:22 4403:7 4433:10 4456:12 4457:14 4466:23 4467:16 4469:3 4495:17 4500:9 4501:18 4517:4 4528:7,13 4542:11 4544:17 4544:25 4546:13 4546:24 4547:17 4547:22 4550:12 4550:14,21,23,24 4550:25 4566:3 4570:17 4572:20 4573:21 4577:8 4578:12 4591:7 4592:10 4597:13 4608:23 4619:7 <b>sort</b> 4387:1 4394:22 4395:17 4396:10 4396:11 4412:25 4414:5,25 4419:20 4460:2 4491:14 4493:21 4496:21 4505:5 4506:10 4507:9 4513:23 4518:20 4544:4,13 4560:9 4565:21 4580:18 4590:9 4592:6 4605:18 4613:9 4613:11 <b>sound</b> 4499:17	4636:17 <b>sounds</b> 4396:12 4405:25 <b>speak</b> 4388:8 4467:14 4487:12 4598:23 4614:16 <b>speaking</b> 4394:23 4396:19 4485:1 4512:17,18 4514:15 4570:23 4636:7 <b>special</b> 4406:17 4436:7 4440:4 4512:25 4514:16 <b>specials</b> 4440:5,6 <b>specific</b> 4393:7 4398:11,21 4484:7 4514:20 4562:1,6 <b>specifically</b> 4618:17 <b>specifics</b> 4451:23,25 4462:12 <b>speculate</b> 4613:7 <b>speeches</b> 4613:10 <b>speedy</b> 4524:7,13 <b>spend</b> 4488:7 <b>spent</b> 4481:5 <b>spite</b> 4491:24 <b>split</b> 4477:22 <b>spoke</b> 4453:19 4527:20 4598:16 4614:12 4621:6 4636:6 <b>spoken</b> 4532:11 4601:20 4608:21 4609:2 <b>spokesman</b> 4599:24 4626:7 <b>spring</b> 4478:4 4566:9,12 <b>squarely</b> 4598:14 <b>staff</b> 4381:1,7,8 4439:1 4618:18 4620:1 4621:5 <b>stage</b> 4485:2 4511:5 4525:6 4527:12 4531:4,12 4549:11 4588:15 4588:21 <b>stamped</b> 4559:20 <b>stamps</b> 4502:5 <b>stand</b> 4568:18 4589:12 4630:3 <b>standard</b> 4410:22 4542:22 4563:25 <b>standards</b> 4635:14 <b>standstill</b> 4544:4	<b>star</b> 4603:5 <b>Starr</b> 4449:24 <b>start</b> 4400:14 4449:11 4463:13 4469:7 4508:4 4554:22 4572:21 4596:1 <b>started</b> 4468:17 4479:16 4494:24 4503:20 4635:22 <b>starting</b> 4416:9,21 4456:3 4488:16 <b>starts</b> 4388:1 4401:17 4402:21 4456:8 4500:11 4529:3 4557:8 4567:10 <b>start-up</b> 4405:1,2,3 4414:19,22 4529:2 <b>state</b> 4570:1 4585:9 4607:8 4609:8 <b>stated</b> 4476:25 4528:18 4629:3 4638:10 <b>statement</b> 4386:22 4415:1 4428:16 4446:3 4458:13 4458:22 4459:22 4460:3 4464:4 4474:18 4475:5 4475:12 4476:25 4493:6 4496:1 4503:6 4514:19 4514:24 4516:2 4533:10 4534:12 4561:24 4584:13 4589:24 4612:17 4629:8 <b>statements</b> 4396:1 4425:6 4430:14 4449:14 4450:25 4475:9 4496:16 4496:16,19 <b>states</b> 4601:17 <b>stating</b> 4543:18 4624:5 <b>station</b> 4422:5 4493:23 <b>stature</b> 4483:5 <b>statutes</b> 4635:14 <b>statutory</b> 4500:1 <b>stay</b> 4459:15 4548:5 4636:24 4637:2 <b>stayed</b> 4491:22 <b>staying</b> 4388:9 4449:17	<b>stays</b> 4637:6 <b>stead</b> 4568:14 <b>Stenotype</b> 4638:8 <b>step</b> 4451:3 4511:8 4557:9 4631:1 <b>steps</b> 4532:25 4538:22 4555:13 4558:5 4605:3 <b>sticking</b> 4531:6 4573:19 <b>sticky</b> 4603:17 <b>Stinchcombe</b> 4473:24 4489:3 4585:21,22 <b>stood</b> 4455:6 4598:7 <b>stop</b> 4442:14 4463:3 4618:4 <b>stopped</b> 4404:1 <b>stopping</b> 4464:17 <b>stories</b> 4462:16 4601:5 <b>storm</b> 4620:23 4621:9 4625:4 <b>story</b> 4428:15 4463:15 4472:18 <b>straight</b> 4421:23 4439:25 4503:7 4553:19 4557:17 4572:16 <b>strategy</b> 4569:24 <b>street</b> 4407:25 4416:1 4581:10 <b>strengths</b> 4492:21 <b>stretch</b> 4481:23 <b>strictly</b> 4514:15 4559:11,14,20 4560:17 4561:2 4570:23 <b>strictures</b> 4635:25 <b>strike</b> 4634:22 <b>strikes</b> 4454:5 <b>strong</b> 4480:9 4482:3,11 4632:24 4634:4 <b>struck</b> 4566:15 <b>structure</b> 4477:21 <b>Stu</b> 4547:12 4548:21 4577:4 <b>Stuart</b> 4381:15 4382:9 4474:9 <b>student</b> 4479:17 <b>students</b> 4629:19 <b>stuff</b> 4385:20 4417:4 4465:24 4510:12 <b>stupid</b> 4563:20 <b>style</b> 4479:12
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<p>4480:17 4481:9 4481:13 4486:17 4488:1 4518:25 <b>subject</b> 4413:3 4453:10 4455:8 4455:19 4502:6 4503:16 4507:24 4508:2,3 4575:3 4578:25 4584:3 4586:8 4587:5 4598:19 4599:3 4600:19 4602:12 <b>subjects</b> 4584:7,7 <b>submit</b> 4540:22 <b>submitted</b> 4392:4 4475:6 4540:25 <b>subordinate</b> 4481:22 <b>subsequent</b> 4553:10 <b>subsequently</b> 4505:14 <b>substance</b> 4464:13 4535:20 4551:4 4552:18 4585:15 <b>substantial</b> 4616:15 <b>substantially</b> 4584:14 4611:20 <b>substantive</b> 4552:21 4584:7,24 4585:24 4587:2 4595:21 4606:8 4619:14 <b>subtler</b> 4483:16 <b>success</b> 4631:17 <b>successful</b> 4557:21 4635:18 <b>sufficient</b> 4529:2 4587:5 <b>sufficiently</b> 4467:25 <b>suggest</b> 4419:1 4454:4 4525:12 <b>suggested</b> 4410:13 4414:4,23 4421:24 4448:15 4506:25 4632:6 <b>suggesting</b> 4410:15 4445:16 4541:14 <b>suggestion</b> 4408:9,9 4444:11 4448:23 4449:2 4465:15 4467:24 <b>suggestions</b> 4467:19 4615:19 <b>suggests</b> 4501:21 4531:7 4610:7 4612:9 <b>sum</b> 4552:13</p>	<p><b>summarize</b> 4475:18 4542:4,14 4584:6 <b>summarized</b> 4495:25 4614:4 <b>summary</b> 4474:18 4496:12 4627:24 <b>sun</b> 4573:17 <b>Sunday</b> 4402:3 4597:5 <b>Superintendent</b> 4618:25 4619:12 <b>superior</b> 4436:23 4563:20 <b>superseded</b> 4537:18 <b>supervisory</b> 4557:25 <b>supp</b> 4409:15 4410:2 4412:17 4412:21 4413:1 <b>supplemental</b> 4408:25 4425:14 4432:10,14 4440:2 <b>supplementary</b> 4388:5,10 4411:20 4438:19 4460:20 <b>supplements</b> 4623:22 <b>supply</b> 4425:14 4497:17 <b>support</b> 4381:8 4423:7,13 4600:11 <b>supporting</b> 4405:12 4622:19 <b>suppose</b> 4394:14 4411:18 4534:8 <b>supps</b> 4440:6 <b>Supreme</b> 4489:1 4636:13,15 <b>sure</b> 4385:4 4396:5 4412:4 4437:3,4 4438:16 4452:22 4454:8 4466:4 4477:5 4478:14 4485:24 4490:2 4492:2,10 4495:8 4497:22 4525:8 4532:3 4537:11 4558:9 4560:22 4577:10 4583:19 4596:24 4600:12 4612:11 4615:16 <b>surmised</b> 4423:16 <b>surprised</b> 4591:23 4596:8</p>	<p><b>surprising</b> 4580:15 <b>surrounding</b> 4560:10 <b>surveillance</b> 4423:8 <b>Susan</b> 4394:2 <b>suspicious</b> 4463:14 <b>Swift</b> 4386:1 4387:16 4389:23 4397:14 4417:5 4428:9,17,22 4445:17 4447:19 4463:8 4465:25 4466:8,9 4514:25 4517:17 4541:9 4542:8,24 4555:12 4557:20 4569:4,6 4571:20 4584:15 4585:13 4586:11 <b>sworn</b> 4465:7 4474:10 4561:25 <b>synopsis</b> 4496:15 <b>system</b> 4411:5 4498:9 4504:16 4507:5,8 4509:14 4511:25 4630:18 4633:14,18,25 4636:13,21 <b>systemic</b> 4627:22</p> <hr/> <p style="text-align: center;"><b>T</b></p> <p><b>tab</b> 4384:11,21 4385:3 4387:24 4389:21 4397:2 4400:17,25 4401:2 4403:7,16 4406:19 4408:21 4408:22 4412:12 4412:17 4414:8 4422:16 4423:19 4424:3 4425:2 4427:12 4429:18 4429:24 4430:1,3 4431:2,7,9,13 4432:8 4433:4,8 4434:7,24 4435:10 4440:11 4441:13 4442:23 4445:10 4447:8 4447:10 4452:25 4453:1 4455:21 4460:16 4467:3 4469:2,3,6,9,17 4469:20 4470:23 4471:25 4473:5,7 4473:10 4474:17 4475:5 4486:5</p>	<p>4498:2 4500:4,4,5 4500:5,9 4501:2,3 4501:18,19 4502:2,3,18 4503:6 4514:19 4523:17,18 4524:2,20 4526:17,23 4527:4,22 4529:21,25 4530:2,6,24 4531:6 4532:7,8 4535:1,1,17 4536:12 4538:14 4538:16 4541:5 4541:20 4542:12 4542:14 4544:25 4545:1,2 4546:3,4 4547:7,9 4550:1 4550:18 4551:25 4552:5 4554:3,7,7 4554:8,11 4556:10,14,14 4559:1,4 4572:21 4572:21 4573:21 4573:23 4574:25 4576:4,5 4578:15 4578:20,24 4581:8,8 4583:25 4584:4 4588:6 4589:22 4592:14 4592:16,17,21 4593:21,25 4594:15 4595:1,3 4597:1,8 4601:4,4 4604:9,11 4605:17,23,25 4606:1,22 4609:7 4609:18,22 4611:14 4612:6 4612:17 4613:1 4614:21 4618:4,8 4618:22 4619:1,8 4619:8 4620:1,19 4621:20 4622:6 <b>tabbed</b> 4452:17 <b>table</b> 4531:3 4572:17 4574:4 <b>tabs</b> 4384:11 4388:2 4452:19 4473:5 4501:19 4523:13 4526:16 4549:25 4572:19 4574:25 4583:22 <b>tactic</b> 4581:21 <b>tactics</b> 4556:2 <b>tails</b> 4610:14</p>	<p><b>take</b> 4397:19 4404:13,19 4422:13 4430:22 4456:4 4458:23 4461:15 4462:20 4481:10 4483:11 4486:19,23 4487:24 4493:2 4497:15,25 4498:2 4501:14 4501:19 4503:3 4505:24 4509:9 4509:12 4510:7 4524:7,16 4532:1 4533:6 4534:21 4537:21 4538:4 4544:16,18 4545:14 4547:18 4549:15 4553:1,9 4553:15 4554:1 4555:13 4558:4 4563:22 4566:1 4567:7 4572:17 4574:12 4575:21 4575:25 4582:4,6 4582:18 4591:14 4593:15 4595:24 4599:20 4604:2 4623:13 <b>taken</b> 4406:2 4407:14 4425:6 4459:21 4480:4 4481:23 4558:13 4576:1 4589:19 4610:21 4638:9 <b>takes</b> 4482:19 4491:1 4546:2 4573:13 4605:3 <b>talk</b> 4416:2 4417:18 4422:10 4440:1 4448:9 4484:21 4488:9 4507:12 4629:19 4630:7,8 <b>talked</b> 4397:11 4399:2 4476:19 4515:7 4588:3 4589:5 4590:15 4629:22 4634:25 <b>talking</b> 4396:13 4400:19 4417:14 4419:17 4423:21 4429:3 4441:3 4459:5 4484:11 4488:8 4496:4 4511:24 4512:2 4517:1 4531:18 4583:10 4591:2,3</p>
--	---	---	--	--

<p><b>talks</b> 4411:17  <b>tape</b> 4463:2  4464:17  <b>Tapper</b> 4381:15  4454:18 4613:4  4613:19 4614:5  4626:23  <b>tasks</b> 4479:18  <b>team</b> 4458:14  4486:18  <b>teams</b> 4481:12  <b>telephone</b> 4388:19  4388:21 4548:25  4549:3  <b>tell</b> 4386:12,14,16  4392:23 4393:21  4421:19 4433:21  4441:11 4448:16  4479:11 4482:2  4490:24 4491:5,5  4509:22 4514:9  4518:23 4525:3  4536:23 4569:2  4614:19 4631:8  <b>telling</b> 4386:10  4390:17 4399:5  4415:9 4417:7  4421:22 4427:10  4433:2 4536:20  4555:5 4561:23  4562:11 4569:24  4598:2  <b>tells</b> 4524:24 4633:8  <b>temper</b> 4520:5,8  <b>temporary</b> 4414:5  4414:25  <b>ten</b> 4520:13  4528:25 4607:13  4607:14  <b>tend</b> 4480:17  <b>tended</b> 4481:4  4482:4 4519:8  <b>tender</b> 4574:14  <b>tenor</b> 4551:19  4553:12 4577:14  <b>tenure</b> 4485:11  4631:15  <b>term</b> 4423:14,15  4628:24 4629:1  4635:4  <b>terminate</b> 4580:8  <b>terminating</b>  4579:13  <b>terms</b> 4394:21  4395:20 4410:17  4413:24 4420:16  4420:21 4421:10</p>	<p>4421:14 4433:18  4451:19 4453:24  4477:21 4481:9  4481:14 4482:10  4484:24 4485:1  4486:10 4488:1  4493:12 4500:1  4506:5 4509:2  4511:13 4518:6  4518:10 4561:13  4631:2 4633:11  4636:22  <b>Terrific</b> 4627:14  <b>test</b> 4571:2 4634:15  <b>testified</b> 4386:11,14  4386:17,20  4387:5,9 4389:17  4399:1 4400:4  4414:19 4450:3  4474:10 4502:24  4521:15 4622:12  <b>testifies</b> 4403:10  4546:15,20  4567:22 4569:19  <b>testify</b> 4398:17,25  4448:25 4449:1  4449:21 4454:2  4510:5 4568:3  4569:25 4570:24  4598:5  <b>testimony</b> 4546:18  <b>testimony</b> 4404:6  4404:18 4415:13  4450:21,22  4494:15 4512:4  4514:13 4516:22  4546:22 4568:23  4569:9 4571:25  4579:3,10  4616:18,19  <b>thank</b> 4384:8  4385:15 4393:10  4393:11,13  4402:25 4403:1  4416:18 4433:13  4453:4 4454:16  4457:13 4460:4  4460:14 4468:20  4472:21 4474:8  4522:11,25  4526:10 4573:25  4614:21 4626:22  4627:14 4637:19  <b>theory</b> 4456:25  4457:8 4618:24  4634:8  <b>thing</b> 4394:22</p>	<p>4395:16 4396:2  4434:4 4453:21  4482:13 4483:24  4491:14 4496:22  4505:5,5,7  4506:13 4508:18  4565:9,22 4568:8  4574:15 4588:2  4627:4 4630:10  4635:12  <b>things</b> 4389:17  4390:2 4391:2  4417:6 4419:22  4421:3 4466:1,14  4466:15 4480:21  4483:25 4535:24  4555:21 4560:17  4564:4 4570:25  4571:4 4590:18  4590:25 4599:12  4616:5 4620:12  4627:5 4629:21  4630:15,21  4634:16 4635:19  <b>think</b> 4385:2 4391:1  4392:3 4402:2  4405:11 4406:17  4407:6 4410:23  4411:2 4412:16  4413:4,12  4418:25 4420:3  4421:24 4422:20  4423:15 4424:1  4424:18,23  4425:10,25  4426:10,13  4427:21 4428:5  4428:25 4429:2  4429:23 4434:5,6  4436:8,16 4437:1  4437:4 4438:5,18  4438:20 4439:2  4439:12,18  4442:5 4449:4  4450:6,15,22  4451:2,13  4452:21,25  4453:20 4454:15  4454:19 4458:5  4460:13 4467:14  4467:16,16,20,24  4468:10 4469:12  4470:15 4472:22  4473:25 4474:6  4477:17 4481:5  4482:13,16  4483:12 4484:4</p>	<p>4485:14 4486:1,2  4486:12,13  4487:3 4489:19  4489:22 4493:18  4495:9 4504:5,21  4506:22 4510:17  4510:23 4515:12  4516:25 4518:16  4519:7,13  4520:13 4526:3  4537:12 4538:9  4558:13 4560:14  4560:25 4561:2  4562:11 4570:15  4589:16 4593:5  4600:23 4607:5  4611:15 4612:3  4616:5 4617:12  4626:23 4634:13  4635:3,4,22  4637:5,11  <b>thinking</b> 4411:7  <b>thinks</b> 4574:2  <b>third</b> 4413:23  4443:3 4545:5  4549:1 4552:2  4568:20 4575:11  4577:2 4585:20  4585:23 4586:8  4587:14 4597:8  4597:12,13,13  <b>thorough</b> 4480:11  <b>Thoroughly</b> 4612:1  <b>thought</b> 4391:18  4392:6 4396:2,6  4398:9 4406:21  4410:17 4412:8  4418:12 4437:2  4457:1 4467:20  4478:23 4485:21  4489:20 4542:13  4550:23 4605:19  4617:5 4631:2  <b>thousands</b> 4394:12  4394:16  <b>threat</b> 4389:9  4564:22 4565:23  4585:12,16  4587:3 4600:5  <b>threatened</b> 4579:25  <b>threatening</b>  4565:11,13  4580:22  <b>threatens</b> 4579:2,9  4585:8,11,18  <b>threats</b> 4564:18  <b>three</b> 4384:11</p>	<p>4401:2 4419:22  4424:2 4428:6  4431:25 4455:10  4474:13 4477:23  4477:23 4478:23  4489:9,11  4505:21 4513:19  4546:2,10  4548:20 4550:9  4555:6 4556:20  4582:24 4584:7  4587:2 4595:20  4596:25 4605:14  4609:17 4610:23  4614:23  <b>three-year</b> 4395:13  <b>thrill</b> 4396:12  <b>throwing</b> 4580:13  <b>throws</b> 4580:15  <b>Thursday</b> 4622:8  <b>tidy</b> 4448:3  <b>ties</b> 4631:25  <b>tight</b> 4480:20  <b>time</b> 4389:14  4391:6 4392:17  4405:10,12  4407:10,20  4408:12 4412:2  4418:23 4419:13  4420:24 4424:20  4428:12 4436:21  4437:6 4444:19  4447:18,21  4454:14 4457:2  4459:16 4463:7  4472:5 4473:17  4476:12 4478:1  4478:10,14,24  4479:1 4480:3  4482:8 4483:2,25  4483:25 4484:8,8  4485:16,25  4486:1 4488:7  4491:3,6 4492:2  4494:12 4496:11  4497:2,8,13  4503:1 4506:12  4520:16 4539:3,3  4540:5 4541:11  4543:7 4544:3  4549:23 4552:4  4553:16 4556:22  4562:9 4566:21  4576:1 4579:23  4582:5 4588:16  4588:18 4590:1  4591:1 4592:13</p>
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<p>4592:20 4594:3  4601:15 4602:12  4605:16 4607:9  4607:23 4610:10  4610:23 4614:15  4614:17 4616:11  4621:2,3,12  4627:3,8 4629:17  4630:5,8 4631:15  4632:25 4635:13  4635:14 4638:9  <b>timely</b> 4618:15  <b>times</b> 4391:5  4427:19 4432:21  4464:16 4559:24  4582:24  <b>timid</b> 4482:12  <b>timing</b> 4583:5,14  4601:2  <b>today</b> 4414:15  4416:24 4418:18  4421:6 4464:25  4473:18,23  4574:18  <b>told</b> 4386:16,18  4388:15 4389:2,6  4389:7 4398:14  4400:23 4401:19  4402:22 4420:3  4421:10 4425:20  4428:14 4430:19  4436:21 4439:19  4463:11 4478:25  4500:24 4501:7  4501:24 4502:15  4517:25 4518:11  4532:2 4533:2,17  4542:22 4543:12  4549:4 4553:5  4561:24 4567:25  4569:14,15,21  4571:14 4585:9  4585:10 4591:9  4614:11,11  4624:18,19,22  <b>tolerance</b> 4519:7  <b>tolerate</b> 4520:3  <b>Tom</b> 4406:18  4439:6 4536:21  4536:25 4537:15  <b>tomorrow</b> 4401:25  4414:16 4470:14  4472:14 4603:21  4637:20  <b>ton</b> 4396:4  <b>Tony</b> 4458:2,5  <b>top</b> 4397:10</p>	<p>4445:20,23  4461:5,20 4477:2  4477:13 4486:4  4518:16 4532:15  4547:11 4555:2  4616:20,23  <b>topic</b> 4471:17  4488:5,6 4490:18  4498:7 4582:2  <b>torch</b> 4514:13  <b>total</b> 4463:17  <b>touch</b> 4536:2  4543:1  <b>touched</b> 4426:13  <b>town</b> 4505:4  <b>trace</b> 4538:14  <b>traces</b> 4579:22  4605:18  <b>track</b> 4386:21  <b>tradition</b> 4505:8  <b>training</b> 4396:17  <b>transcript</b> 4380:11  4417:12 4449:7  4455:22 4457:3  4457:11 4460:9  4461:6,16  4462:20 4467:14  4497:25 4638:8  <b>transcripts</b> 4460:25  4460:25 4461:1  4462:10  <b>transfer</b> 4451:4  4505:3  <b>transferred</b>  4391:20  <b>transparency</b>  4636:12,22  <b>treat</b> 4590:3  <b>treating</b> 4437:5  4508:11  <b>tremendous</b>  4492:11  <b>trial</b> 4380:2 4387:2  4387:22 4389:5  4389:16 4399:1  4399:17,25  4407:18,21,23  4408:12,19,19  4412:2 4413:7,12  4415:7,14,21,25  4416:1 4418:8,9  4418:10,10  4425:11 4435:16  4435:19 4436:6  4436:13,15  4437:14,24  4438:10 4440:10</p>	<p>4447:18 4451:21  4467:21 4478:1  4479:22 4496:11  4543:8,18 4545:7  4545:11 4546:17  4554:3 4555:18  4557:8 4563:23  4564:8 4565:2  4566:4 4567:10  4567:10,11  4572:9 4580:21  4582:16 4584:21  4585:7 4597:12  4636:17  <b>trials</b> 4391:6  <b>tried</b> 4395:23  4427:22 4637:14  <b>trigger</b> 4611:6,12  <b>triggered</b> 4398:19  4635:16  <b>trivial</b> 4587:24  <b>true</b> 4387:14  4407:19 4417:6  4440:22 4462:2  4509:21 4626:15  4635:24 4638:7  <b>trust</b> 4418:18,20  4633:7  <b>trusted</b> 4418:14  <b>truth</b> 4399:5 4415:9  <b>truthful</b> 4399:19  4427:10  <b>try</b> 4395:18 4462:16  4475:13 4488:7  4490:6,9 4596:20  4633:10 4637:15  <b>trying</b> 4432:17  4456:21 4457:9  4467:23 4487:23  4488:3 4490:16  4496:7 4516:20  4538:10 4551:12  4571:5 4580:1  4613:13 4617:14  4626:16,17  4629:13 4635:7  <b>Tuesday</b> 4521:22  4522:2 4567:22  <b>Turk</b> 4395:12  <b>turn</b> 4400:13  4412:12 4413:5  4471:20 4481:3  4498:7 4527:23  4594:21 4597:1,7  4601:4 4605:17  4606:17 4620:19  <b>turning</b> 4488:5</p>	<p>4495:21 4497:10  4507:24 4515:14  4536:12 4549:20  4600:25  <b>turns</b> 4473:25  4538:9 4612:10  <b>turn-around</b> 4524:8  4524:14  <b>twice</b> 4559:21  <b>two</b> 4385:16 4388:6  4390:9 4391:1  4394:2,11  4417:25 4455:16  4456:13 4458:1  4470:4,7 4481:5  4490:18 4497:21  4500:6,12  4501:19 4505:21  4506:6 4507:11  4508:4 4518:7  4519:19 4523:12  4526:16 4529:18  4533:14 4534:4  4536:21 4538:11  4539:8 4545:4  4552:6,7,19  4553:2,6,14,20  4558:3,18 4559:8  4562:2 4567:15  4567:16 4568:20  4573:11 4574:13  4574:24,25  4580:11 4581:25  4583:8 4590:13  4592:2 4593:1  4594:13 4598:9  4601:19 4605:13  4609:17 4611:17  4611:22 4613:15  4617:19 4619:15  4620:25 4621:21  4623:9 4633:11  <b>two-page</b> 4619:25  <b>two-thirds</b> 4535:5  4578:21  <b>two-year</b> 4488:12  4488:25  <b>typo</b> 4548:23  4549:4</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ulterior</b> 4449:2  <b>ultimate</b> 4500:8  4513:10  <b>ultimately</b> 4392:15  4498:13 4499:13  4499:19 4505:18</p>	<p>4505:24 4513:3  4515:5 4516:6  4565:25  <b>ultimatum</b> 4554:25  4556:6  <b>Um-hum</b> 4401:6  4490:21  <b>uncovered</b> 4458:17  <b>undated</b> 4552:1  <b>undermined</b>  4505:15  <b>undermining</b>  4579:8  <b>understand</b>  4384:15 4388:22  4391:4 4393:9  4394:10 4406:13  4410:15 4440:23  4456:21 4459:20  4462:8 4464:3  4503:21 4508:14  4516:12 4526:4  4531:15 4533:17  4537:4 4538:10  4561:12 4586:18  4591:11 4621:4  4626:4,4 4635:15  4636:25  <b>understandable</b>  4389:15  <b>understanding</b>  4400:5 4404:21  4405:21 4413:2  4413:14 4428:10  4430:16 4445:19  4498:5 4581:13  4630:2 4631:6  4635:23 4636:3  <b>understands</b>  4586:19  <b>understatement</b>  4581:2  <b>understood</b> 4391:14  4405:11 4406:21  4429:7 4456:18  4481:19 4507:20  4515:8 4570:25  4610:15 4634:8  <b>undertake</b> 4552:13  <b>undertaken</b> 4540:4  <b>undertaking</b>  4455:20 4521:9  4521:24 4522:6,9  4551:15  <b>undertakings</b>  4420:19 4421:1,7  4551:20</p>
--	--	--	---	---

<p><b>unethical</b> 4562:22  <b>unfortunately</b>              4460:15 4509:21  <b>Unger</b> 4449:25  <b>unheard</b> 4509:13  <b>uniform</b> 4411:4  <b>unintentional</b>              4452:4  <b>unit</b> 4521:11  <b>unpleasant</b> 4491:21  <b>unsavory</b> 4509:17              4509:18 4511:18  <b>unsuccessful</b> 4516:6  <b>unusual</b> 4503:9              4525:6,13              4527:13,14              4538:5,7 4545:25              4553:3,4,6,7              4565:10 4580:25              4581:6 4600:16  <b>update</b> 4538:18              4547:10  <b>updates</b> 4518:9  <b>upfront</b> 4507:21  <b>upper</b> 4491:20  <b>upwards</b> 4552:23  <b>up-to-date</b> 4516:1  <b>urgency</b> 4524:16              4532:18,20              4608:1  <b>urgent</b> 4532:14              4610:25  <b>use</b> 4384:14              4396:20 4438:8              4454:15 4471:16              4510:21,22              4585:18 4611:21  <b>uses</b> 4611:15  <b>usual</b> 4436:7 4455:6              4504:22 4513:24              4549:9 4567:4  <b>usually</b> 4386:24</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 4424:10 4628:21              4628:22  <b>vacant</b> 4539:17  <b>vague</b> 4635:16  <b>value</b> 4430:22              4551:13  <b>Vancouver</b> 4568:12  <b>Vandergraaf</b>              4386:20 4387:5              4387:12,20              4429:24 4437:10              4439:9,19,21              4553:17 4570:3</p>	<p><b>Vandergraaf's</b>              4438:20  <b>variation</b> 4492:12  <b>various</b> 4390:2,12              4395:18 4406:3              4490:3 4615:19              4618:13 4631:3  <b>verdict</b> 4572:10  <b>verge</b> 4403:21  <b>verified</b> 4392:8  <b>version</b> 4491:15,16  <b>vice</b> 4458:5,6  <b>victims</b> 4491:14  <b>view</b> 4390:7              4394:20,20              4395:2,9 4446:15              4446:19 4487:8              4503:21 4514:13              4515:15 4563:15              4570:21 4586:3              4608:8 4611:9              4624:16 4634:19  <b>views</b> 4481:23              4505:17 4544:19              4586:16 4590:7  <b>violence</b> 4568:13  <b>visited</b> 4409:12  <b>viva</b> 4564:9  <b>vividly</b> 4479:21  <b>voce</b> 4564:9  <b>volatile</b> 4508:13  <b>volume</b> 4380:18              4388:2 4397:2              4400:12 4408:23              4422:16 4423:19              4424:3 4425:2              4427:12 4435:11              4440:12 4447:11              4460:22 4467:3              4469:3 4500:2,4              4501:4 4502:2,2,3              4523:8 4546:1,4              4550:15 4554:9              4556:10,13              4558:25 4559:5              4572:18 4576:6              4583:21  <b>volumes</b> 4474:13  <b>volunteer</b> 4627:11  <b>volunteers</b> 4627:7</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wait</b> 4403:14  <b>waiting</b> 4449:4              4637:11  <b>walk</b> 4523:2  <b>want</b> 4397:1</p>	<p>4409:21 4416:17              4417:21 4422:13              4423:19 4437:8              4439:22 4463:13              4468:1 4469:2              4478:6 4484:10              4484:17 4488:9              4493:2,9 4498:7              4499:16 4501:19              4505:16 4508:1              4509:23 4514:20              4522:21 4523:5              4528:22 4530:21              4539:12 4553:14              4553:17 4554:1              4557:9 4563:22              4564:6 4572:6              4578:14 4582:4              4583:4,15              4586:25 4590:8              4592:11 4593:20              4598:1 4599:20              4599:21 4604:21              4605:17 4608:17              4609:13 4613:17              4614:9 4627:3              4628:17  <b>wanted</b> 4417:24              4432:18 4448:3              4456:2,4,17,22              4460:6 4470:22              4486:16 4511:22              4517:2 4522:9              4541:2 4549:24              4554:24 4564:19              4565:14 4577:17              4585:10 4587:14              4600:25 4611:1              4627:21  <b>wanting</b> 4456:19  <b>wants</b> 4528:23,24              4528:25 4529:1              4603:1,25  <b>warm</b> 4486:2  <b>warrant</b> 4564:12  <b>wasn't</b> 4398:16              4404:21,23              4412:16,24              4415:4,4,8,21              4423:16 4437:2              4442:7 4451:16              4463:9 4482:21              4483:5,9 4486:23              4487:9 4491:7              4495:15,19              4503:2 4506:9              4514:15 4515:10</p>	<p>4541:14 4586:9              4607:25 4612:5              4613:16 4621:14              4626:6,7  <b>water</b> 4454:16  <b>Watson</b> 4484:12  <b>waves</b> 4489:17  <b>way</b> 4395:17              4401:11 4438:5              4442:7 4444:15              4450:22 4458:20              4480:16 4481:14              4482:4 4483:21              4484:2 4489:23              4502:22 4506:8              4508:9,10 4510:2              4510:21 4512:12              4513:14,23              4521:21,22              4533:18 4535:5              4538:24 4543:23              4544:7 4560:19              4570:22 4574:3,7              4578:21 4581:4              4585:12 4596:22              4599:14 4600:4              4607:1,25 4608:2              4608:5,6,6              4630:22 4634:13  <b>weaknesses</b> 4492:21  <b>Wednesday</b>              4380:17 4384:1  <b>week</b> 4512:25              4564:8 4566:4              4567:11 4568:11              4597:6  <b>weekend</b> 4597:4  <b>weeks</b> 4472:15              4529:18 4532:8              4541:4 4567:7              4621:21  <b>weighed</b> 4511:21  <b>weight</b> 4489:6  <b>Weinstein</b> 4452:9              4453:20 4454:1  <b>Wendy</b> 4381:5  <b>went</b> 4402:13              4413:24 4420:7              4421:3,11              4441:25 4443:17              4447:25 4476:8              4514:17 4545:21              4585:16 4590:21              4594:5 4596:8              4626:9  <b>weren't</b> 4385:4              4391:2 4419:5,6,8</p>	<p>4443:19 4481:23              4481:24 4483:8              4494:16 4565:16              4591:1 4635:17  <b>we're</b> 4542:22              4549:4 4563:2              4568:20 4633:22              4634:9  <b>we've</b> 4538:2              4553:2,16              4554:16 4575:7              4587:2 4592:17              4592:19 4598:14  <b>whatsoever</b>              4549:14  <b>white</b> 4559:4  <b>Whitley</b> 4381:15              4382:9 4423:23              4424:13 4442:25              4472:1 4474:9,13              4488:5 4502:1,18              4503:18 4507:25              4521:1 4523:2              4532:7 4538:13              4538:17 4544:22              4547:12 4548:25              4553:10 4556:9              4560:6 4561:21              4567:9 4577:4,18              4582:2,14              4583:22 4589:22              4590:1 4591:5              4592:8 4599:19              4601:18 4604:9              4611:13 4612:7              4614:3,21              4619:16 4623:19              4626:13,20              4627:17,23              4628:16 4629:11              4633:11 4637:19  <b>Whitley's</b> 4424:4              4609:9 4612:19  <b>wife</b> 4409:10,21  <b>willing</b> 4486:25              4552:20  <b>willingly</b> 4487:15  <b>win</b> 4632:18  <b>window</b> 4488:25  <b>wink</b> 4570:9,15  <b>winning</b> 4628:23              4629:6 4631:22  <b>Winnipeg</b> 4380:13              4380:14 4381:17              4381:19 4431:5              4431:11 4446:20              4458:4,8 4459:12</p>
--	--	--	--	--

<p>4473:13 4494:5 4512:16,21 4525:19 4564:13 4566:17,20,25 4569:3 4573:17 4616:16 4620:22 4621:4 <b>wiretap</b> 4462:1,14 <b>wise</b> 4506:25 <b>wish</b> 4631:24 <b>wishes</b> 4618:13 <b>withdraw</b> 4388:15 <b>withdrew</b> 4479:24 <b>withheld</b> 4597:23 <b>withholding</b> 4489:15 <b>witness</b> 4391:12,24 4392:1,19 4393:5 4393:19 4398:9 4400:11 4401:9 4401:15 4402:7 4404:9,14,20 4409:16 4410:18 4411:15,18 4415:2,19 4418:7 4420:9,12 4423:17,21 4424:11 4433:13 4438:4 4448:20 4449:11 4452:21 4453:2,4 4459:24 4460:2 4467:7 4473:19,23 4498:8,11,15,17 4499:2,4 4501:3,6 4501:10,22 4502:20 4503:1,7 4503:8,16 4504:7 4504:11,17 4505:1,6,19,25 4506:15,20 4507:21,23 4508:2,6,7,11,13 4508:16,24,25 4511:11,13 4512:3,9,10 4515:2 4516:8,19 4516:20 4517:2 4518:12 4519:16 4523:20 4524:17 4524:23 4525:4,9 4525:17,20 4526:5,12 4536:3 4536:22 4537:1 4540:17 4542:5 4542:20,23 4543:10 4551:16</p>	<p>4552:10 4556:23 4559:2,14 4560:5 4560:13 4562:4 4562:25 4564:12 4565:3,3,16 4566:19 4567:5 4568:7 4569:25 4569:25 4570:22 4571:10 4573:24 4574:3,5,8 4577:23 4579:14 4580:21,23 4591:2 4608:7 4613:5,6,21 4620:4 <b>witnesses</b> 4387:1 4417:22 4423:4 4432:20 4439:16 4449:8 4491:12 4496:17,19,20,23 4499:18 4503:19 4509:12 4520:4 4525:24 4531:17 4532:24 4559:9 4561:6 <b>witness's</b> 4417:23 4598:6 4613:11 <b>Wolson</b> 4381:19 <b>won</b> 4631:18 <b>Woodsworth</b> 4491:20 <b>word</b> 4442:15 4455:2 4611:15 4611:21 <b>words</b> 4405:3,5,7 4490:18 4498:12 4514:25 4522:3 4585:5 4586:20 4592:13 4593:7 4607:12 4621:21 4636:13 <b>work</b> 4404:17 4438:11 4439:5 4480:22,24,25 4481:6,7,12,14 4484:11,17,17 4486:8 4490:11 4538:25 4558:3 4628:12 4635:10 <b>worked</b> 4386:23 4480:15 4481:19 4516:7 4520:10 4520:11,12,14 4571:19 4575:13 4628:11 <b>workers</b> 4637:11 <b>working</b> 4385:17</p>	<p>4405:13 4458:5 4473:18 4484:15 4485:22 4486:9 4492:18 4628:8 4633:17 <b>world</b> 4411:4 <b>worry</b> 4480:18 4583:15 <b>worth</b> 4517:11 <b>wouldn't</b> 4392:2 4399:6 4411:8 4415:12,16,23 4417:24 4425:23 4426:11,12 4436:11 4437:25 4439:12,17 4473:19,20 4484:18 4506:14 4525:12 4526:1 4533:5 4544:18 4545:25 4561:1 4600:23 4627:3 <b>write</b> 4527:1 <b>writes</b> 4614:24 4618:4 <b>writing</b> 4425:24 4426:2,5,9 4438:16,18 4475:13 4493:8 4536:16 4549:23 4577:8,9 4602:21 4603:13 4609:11 4611:10,25 4612:21 <b>written</b> 4439:24 4445:2,3 4457:5 4473:7 4496:2 4543:17 <b>wrong</b> 4419:17 4425:10 4435:14 4463:22 4480:18 4525:16 4548:11 4629:22 <b>wrongful</b> 4634:11 <b>wrongly</b> 4381:22 4489:14 4627:21 <b>wrote</b> 4605:20 4614:12</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>X</b> 4498:24,24</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>yeah</b> 4391:23 4392:17 4396:11 4418:15 4484:4 4510:20</p>	<p><b>year</b> 4410:22 4424:19 4441:19 4441:20 4481:5 4532:9 4582:25 4592:20 <b>years</b> 4388:6 4389:16 4396:17 4457:3 4475:23 4478:4 4481:5 4485:2,4,11 4488:3 4490:19 4491:23 4493:15 4520:12,13 4580:11 4605:14 4607:13,14 4608:3 4609:17 4609:17 4610:23 4628:14 4629:18 4635:11 <b>yesterday</b> 4385:4 4385:15 4386:7 4455:2 4597:19 <b>young</b> 4395:16 4480:6 <b>Yukon</b> 4628:15</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>Z</b> 4622:20 <b>Zanidean</b> 4383:4 4386:10,13 4387:9,13 4388:8 4388:13,16,20 4391:13,24 4392:14,19 4397:5,24 4398:2 4398:15 4399:1 4399:18 4400:4,7 4400:20 4402:10 4403:10 4404:13 4408:7 4409:7,16 4409:21 4410:4,7 4410:8 4411:23 4413:9 4414:4,8 4414:21,24 4416:15 4417:13 4417:22 4419:18 4420:6,10 4424:10 4425:7 4428:25 4429:3 4435:3,5 4436:19 4439:20 4446:14 4446:19 4448:16 4448:25 4449:10 4449:12 4461:16 4461:25 4462:14 4464:12 4466:2 4514:22,24</p>	<p>4518:21 4526:20 4527:7 4528:11 4542:9,24 4543:7 4545:7 4546:15 4546:18 4551:5 4554:20 4556:23 4557:12 4559:8 4559:15 4564:10 4564:19 4567:20 4568:3,17 4569:13 4571:14 4571:17,24 4572:14 4573:16 4574:22 4579:2 4579:21 4581:9 4585:8,8 4586:2 4586:10 4595:16 4598:3 4617:4,10 4622:3,10,20 <b>Zanidean's</b> 4385:25 4407:17 4408:9 4408:10 4413:22 4416:8 4517:16 4539:14 4543:15 4545:10 4557:1 4579:16 4584:20 4611:18 <b>zealous</b> 4631:11</p> <hr/> <p style="text-align: center;"><b>\$</b></p> <hr/> <p><b>\$1,300</b> 4526:20 <b>\$20,000</b> 4392:16 4393:6,7 4500:8 4500:18 4502:3 4575:18 <b>\$7,700</b> 4413:8 <b>\$853</b> 4527:5</p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p><b>0.7</b> 4547:13</p> <hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p><b>1</b> 4408:23 4435:11 4471:15 4475:16 4501:4 4523:9 4554:9 4584:17 4616:19 <b>1.7</b> 4549:2 <b>10</b> 4400:25 4416:9 4416:21 4464:23 4475:22 4526:16 4526:17 4608:3 <b>10th</b> 4402:1 4567:14,17 <b>11</b> 4404:15 4441:17 4469:10 4527:23 4532:9 4590:3</p>
--	---	---	---	---

<p><b>11th</b> 4409:4 4546:21 4567:22 4567:22 4568:23 <b>11:00</b> 4454:22 <b>11:15</b> 4454:23 <b>1180</b> 4455:24 4456:7 <b>12</b> 4412:18 4414:6 4414:11 4456:5 4456:10 4526:17 4526:23 4527:4 4549:25 4550:1 4550:18 4589:23 4589:24 4608:3 4616:9 4627:12 4637:14 <b>12th</b> 4546:4 <b>12:45</b> 4520:21 <b>121</b> 4462:8 <b>122</b> 4383:4 4416:8 4416:15 4460:10 4461:6 4464:21 4465:12 4466:11 <b>13</b> 4406:4 4529:21 4529:25 4530:24 4535:17 4549:25 4551:25 4552:5 <b>13th</b> 4472:15 4596:25 4597:5 4602:20 4603:1 4607:3 4611:23 4614:22 4620:21 4621:20 4622:8 4624:15 <b>14</b> 4501:18,20 4530:2,6 4531:6 4609:7 4612:18 <b>14th</b> 4399:13 4527:22 4528:12 4572:10 4597:5 <b>15</b> 4389:15 4404:15 4500:20 4528:3 4532:7 4534:21 4536:12 4547:4 4549:21 <b>15A</b> 4534:23 4547:7 4547:9 4550:14 <b>15th</b> 4552:1 4618:5 4619:11 <b>16</b> 4380:17 4384:1 4425:1,3 4426:3 4430:12 4433:4 4433:11,16 4466:12 4547:9 <b>16th</b> 4572:24 4574:23 4585:5 4590:14,15</p>	<p>4610:4 4614:23 <b>17</b> 4403:9,19 <b>18</b> 4403:19 4538:14 4538:16 4545:1 4612:7 <b>19</b> 4380:18 4383:7 4468:21 4541:20 4542:12,14 4572:8 <b>19th</b> 4469:12 4470:3 4472:7 4523:14 4524:4 4526:24 4572:11 4574:14,24 4578:17,24 4602:19 <b>1965</b> 4394:24 <b>1973</b> 4479:17 <b>1974</b> 4475:20 <b>1980s</b> 4477:2,7 <b>1984</b> 4475:25 <b>1987</b> 4476:8,15 <b>1989</b> 4409:11 4476:16 4477:18 4488:13 <b>1990</b> 4399:13 4409:4 4491:7,15 4495:25 4496:3 4496:10 <b>1991</b> 4384:13 4398:16 4400:25 4401:25 4478:1 4485:16 4489:3 4491:2 4497:13 4532:9 4541:1 4550:7 4566:7 4572:8 <b>1992</b> 4582:15 4583:9 4592:14 <b>1993</b> 4383:7 4468:21 4582:15 4590:3 4592:13 4592:17,21 4618:1 4621:8 <b>1994</b> 4560:1 <b>1995</b> 4478:4 4559:25</p> <hr/> <p style="text-align: center;"><b>2</b></p> <hr/> <p><b>2</b> 4388:2 4397:2 4400:12 4422:17 4425:2 4446:12 4447:15 4467:3 4475:16 4477:2 4477:13 4500:19 4502:2,3 4540:19 4546:1,4 4547:7,9</p>	<p>4547:9 4556:17 4556:20 4572:18 4584:25 4616:20 4616:24 <b>2nd</b> 4404:8 4448:13 <b>2:00</b> 4401:25 4520:20,22 <b>20</b> 4435:10 4456:3,8 4457:3 <b>20B</b> 4400:12,16 <b>20C</b> 4460:19,24 4462:21 <b>20th</b> 4388:16 4547:9,25 4578:23 4579:1,4 4580:3,4,6 4585:16 <b>2003</b> 4583:13 4590:9,10 4591:1 4591:5 4605:16 4606:12 4607:10 <b>2004</b> 4556:15 4557:3 4606:7 4607:10 <b>2006</b> 4380:17 4384:1 <b>21</b> 4403:10 4433:17 <b>21st</b> 4500:15 4502:5 4574:25 4575:7,9 4577:19 4578:4 4578:18,25 4579:16 4580:2,4 4580:7 4597:6 <b>22</b> 4426:14,16 4520:12 <b>22nd</b> 4524:11 4533:15 4534:6 4535:12 4540:10 <b>23</b> 4426:14,21,22 <b>23rd</b> 4580:12 <b>24</b> 4554:3,7,8 4603:20 <b>24th</b> 4470:13 4472:10 4576:15 4603:16 <b>25</b> 4433:17 <b>25th</b> 4384:22 4431:22 4472:14 4473:10 4548:10 <b>26</b> 4398:16 4400:14 <b>26th</b> 4526:18 4548:9 4564:7 4566:4 4619:13 <b>27</b> 4498:2 <b>28</b> 4384:11 <b>28th</b> 4529:19 4536:15,21</p>	<p>4548:19,20 4616:10,15 <b>29</b> 4422:16 4425:2 4606:7 <b>29th</b> 4475:7 4555:2 4619:6,14,17,18 4620:7 <b>291</b> 4433:12,14</p> <hr/> <p style="text-align: center;"><b>3</b></p> <hr/> <p><b>3</b> 4423:1,19 4424:3 4431:13 4440:12 4447:11 4455:21 4460:23 4469:3 4474:17 4486:4,5 4493:7 4500:3,4 4502:18 4503:6 4514:19 4535:1,1 4555:9 4556:10 4556:13 4558:25 4559:5 4577:2 4583:21 4589:22 4609:7 4612:17 <b>3rd</b> 4401:25 4557:9 4567:10 <b>3(a)</b> 4447:17 <b>3:20</b> 4582:9 <b>3:38</b> 4582:10 <b>30</b> 4474:14 <b>30A</b> 4554:8,9,11 <b>30B</b> 4546:4 4572:19 4572:22 <b>30C</b> 4500:5 4556:13 4583:25 <b>30th</b> 4606:3 <b>31C</b> 4455:17,21 <b>31D</b> 4452:7,11 4455:17 4457:21 4457:23 4521:5 <b>33</b> 4383:4 4384:21 4400:17,18 4416:13,14,18 4427:12 4460:13 4460:16 4461:6 4464:22 4467:24 4470:2 4472:6 4473:10 4474:5 <b>332</b> 4434:8 <b>34</b> 4383:7 4429:18 4429:24 4430:1 4468:19,21 4474:6,7 4602:15 4604:11 4624:4 <b>35</b> 4430:3 <b>36</b> 4431:2,7 <b>37</b> 4431:9,13 <b>3826</b> 4422:25</p>	<p style="text-align: center;"><b>4</b></p> <hr/> <p><b>4</b> 4433:10,12 4475:5 4493:7 4496:1 4542:16,17 <b>4th</b> 4410:15 4538:16 4547:1 4550:10 4576:23 4577:1 <b>4:47</b> 4637:24 <b>404</b> 4401:1 <b>41</b> 4432:8 <b>419</b> 4412:14 <b>42</b> 4397:8 4466:18 4467:5 <b>43</b> 4385:3 4397:8,10 4433:4,8 4473:5,7 <b>4384</b> 4382:5 <b>4393</b> 4382:6 <b>44</b> 4406:2,4 4434:7 4434:24 <b>4416</b> 4383:4 <b>4455</b> 4382:7 <b>4468</b> 4383:7 <b>4474</b> 4382:10 <b>45</b> 4403:6,9,15 4413:23 4414:6 4414:11 <b>46</b> 4404:15 4414:18 4466:18 4467:6 <b>4627</b> 4382:11 <b>481</b> 4541:22,24 4542:12,14</p> <hr/> <p style="text-align: center;"><b>5</b></p> <hr/> <p><b>5</b> 4412:13 4427:17 4502:18,22 4503:6 <b>508</b> 4606:18,22 4609:21,22,23 <b>52</b> 4397:2 4403:7,16 4414:8 4460:16 4460:16 4467:3 <b>54</b> 4546:3,4 <b>55</b> 4572:19,21,21 4573:23 4578:24 <b>56</b> 4387:24 4389:21 4462:23 4578:16 4578:20 <b>57</b> 4462:24,25 4502:2 4572:19 4574:25 4581:8 <b>58</b> 4388:1 4500:4,5 4500:9 <b>59</b> 4423:19 4424:3 4559:1,5</p>
---	---	--	--	--

<b>6</b>	4431:22 4514:20 4514:23 4541:5 4573:13 <b>9:30</b> 4384:2 <b>90</b> 4411:8,10 <b>91</b> 4384:23 4411:8 4435:18,19 4566:9,12 4568:12 4577:1,2 4580:9 <b>92</b> 4441:21 4623:24 <b>93</b> 4441:17 4580:14 4603:20 4624:1			
<b>6</b> 4422:23 4423:2 4432:21 4500:19 4523:13,18 <b>6th</b> 4619:2 <b>61</b> 4445:10 4583:22 4583:25 4584:4 4592:14 4611:14 <b>62</b> 4583:22,25 4592:14 <b>63</b> 4440:11 4588:6 4592:16 <b>64</b> 4441:13 4469:3,6 4469:9,17,21 4470:23 4592:17 4592:21 4593:21 4593:25 4595:3 <b>65</b> 4597:1,8 4618:22 <b>67</b> 4442:23 4461:11 4469:2 4471:25 4601:4,5 4604:9 4604:12 4612:6 4613:1 <b>69</b> 4614:21 <b>696</b> 4521:10				
<b>7</b>				
<b>7</b> 4501:2,4 4523:13 4523:17 4524:20 <b>7th</b> 4384:12 4474:22 4550:4 4551:3 <b>70</b> 4618:4,8 4619:8 <b>71</b> 4620:19 4621:20 4622:6 <b>73</b> 4393:25				
<b>8</b>				
<b>8</b> 4524:2 <b>8th</b> 4422:17 <b>80</b> 4556:10,14,15 4605:17,23,25 4606:1 4609:18 4609:22 <b>80s</b> 4477:8 <b>81</b> 4447:8,11 <b>87</b> 4463:1,2 4466:5 4512:13 4632:22 <b>88</b> 4465:6,12 4466:5 4512:13 4632:23 <b>89</b> 4401:8				
<b>9</b>				
<b>9</b> 4406:20 4408:21 4408:22 4414:6 4414:11 4428:4				