

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

The Honourable Patrick LeSage, Q.C. Commissioner

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

Thursday, August 17, 2006

Volume 20

INQUIRY PROCEEDINGS

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1 THURSDAY, AUGUST 17, 2006

2 Upon commencing at 9:33

3 THE CLERK: All rise. This Commission of
4 Inquiry is now in session. Please be seated.

5 THE COMMISSIONER: Morning, Mr. Whitley.

6 Ms. Carswell?

7 MS. CARSWELL: Good morning, Mr. Commissioner.

8 I understand Mr. Kennedy is finished.

9 MR. KENNEDY: Yes. Mr. Commissioner, I have no
10 further questions.

11 THE COMMISSIONER: I was looking forward to some
12 more questions.

13 MS. CARSWELL: Well, then, I won't be helping
14 you either. I just wanted to put it on the
15 record that the Winnipeg Police Service has no
16 questions for this witness.

17 THE COMMISSIONER: Okay, thank you.

18 MR. CODE: We know Mr. Gates has no questions,
19 so we are moving along nicely.

20 MR. LOCKYER: Mr. Commissioner, I have a plane
21 to catch fairly soon, so I have some questions,
22 but I have this sort of time limit on me. So it
23 really is a good day.

24 BY MR. LOCKYER:

25 Q Mr. Whitley, first of all, what I am going to

1 start with isn't, actually, what I had planned.
2 But I have spoken to your counsel just a minute
3 ago, and he said that he had no problem with me
4 asking this at the outset, so I want to do that.
5 And I hope this is all right with you, too. But
6 I understand, sir, that this morning you spoke
7 to Mr. Driskell; is that right?

8 A That's right.

9 Q Go ahead.

10 A It was a private conversation. I did tell
11 counsel what I had said.

12 Q No, I know.

13 A But I didn't expect that you would raise it.

14 Q And could you tell us the conversation, sir,
15 unless you prefer not to? I would prefer you
16 did, but that's up to you.

17 A I told him that based on what I've heard so far,
18 and in my opinion only, he did not get a fair
19 trial. He has a constitutional right to a fair
20 trial. It was on my watch. It was my
21 responsibility, as head of Prosecutions for
22 Manitoba to make sure that that happened. It
23 didn't happen, and I regret that. I apologized
24 to him.

25 Q I appreciate that, sir, as does he. I want to

1 talk to you first about something Mr. Code asked
2 you yesterday. You will remember, sir, he asked
3 you about this -- about the evidence that's been
4 heard here through the police officers, two of
5 them, that immediately after Mr. Zanidean had
6 testified at the trial, as he left, or
7 immediately after he walked out of the
8 courtroom, he was advised by them that he had
9 immunity from the arson in Saskatchewan, in one
10 form or another, and he wouldn't be procecuted,
11 whatever way it was put to him. And you were
12 asked about that. And you said, and predicated
13 on the assumption that it happened, that that
14 was really quite improper. It didn't pass the
15 smell test. You referred to it as a wink and a
16 nudge. And I just want to explore that a bit.
17 By that do you mean that really it was a sham if
18 that happened? That, in effect, Mr. Zanidean
19 really would have known only too well that he
20 was going to get -- he was going to be safe from
21 prosecution. And not formally telling him sort
22 of, you might say, put his credibility in the
23 best of both worlds, you might say?

24 A I mean the answer is yes. Yes.

25 Q And one of the claims, sir, put forward was

1 that -- in the evidence by the officers, was
2 that they had a meeting with Mr. Miller, at
3 which Mr. Miller agreed that this was the way to
4 do things in this case with respect to
5 Mr. Zanidean. I should tell you it is not
6 documented anywhere. But let's assume that
7 that's, in fact, what happened. Would
8 Mr. Miller have allowed such a thing, sir,
9 without consulting higher-ups, yourself or
10 beyond you, in the first place, do you think?

11 A The answer to that question is I can't conceive
12 of that happening. This is not the Bruce Miller
13 that I knew and worked with for many years. I
14 can't imagine him doing that. He may well have
15 pursued the details of an arrangement with a
16 witness on his own. He certainly had the
17 experience and the authority to do that. But in
18 the terms that have been described to this
19 inquiry, it seems incomprehensible to me that
20 that would have taken place.

21 Q The further fact, sir -- I don't know about
22 fact, but the further suggestion in the inquiry
23 has been that, if we assume for a moment all of
24 that happened, that Mr. Dangerfield supposedly
25 was not kept informed or was not told that any

1 of this had happened, or any of this had been
2 decided, in other words, trial -- a trial Crown
3 was kept in the dark. And I'm going to ask you,
4 sir, if you think that makes it even more of a
5 sham, potentially, if we take that as a set of
6 given facts?

7 A Well, it does, but it seems incomprehensible to
8 me. We were literally within paces of one
9 another. We saw each other many times
10 during the day when we were all there. The
11 relationship between George and Bruce was a good
12 one, a good working relationship. And there was
13 a lot of give and take and camaraderie in that
14 office. Just -- something is missing for me, and
15 it has been ever since I have pondered this.

16 Q I'm going to suggest, sir, what it seems like,
17 really, is a veil of deniability being created.
18 Supposedly, if this all happened, Mr. Zanidean
19 doesn't know about it, that's the game, you
20 might say. Mr. Dangerfield supposedly doesn't
21 know about it. You have got this veil of
22 deniability about the whole process. Do you
23 follow?

24 And would you think, sir, and again I am
25 going to add a further fact to this, that it

1 would be even more of a sham if Mr. Zanidean's
2 lawyer had been told about this arrangement in
3 advance?

4 A Yes.

5 Q On the theory that he wouldn't tell his client
6 about it?

7 A We are far beyond sham. We're into ethical
8 issues, serious ethical issues, if that
9 happened.

10 Q Well, it's actually not suggested it happened in
11 this case, sir. But we've heard about another
12 case where it is suggested that that's what
13 happened. Do you know the Ostrowski case at
14 all?

15 A Not at all.

16 Q Not at all. You were asked by Mr. Code
17 yesterday, sir, about the newspaper stories that
18 broke in March of 1993 in the summer. Do you
19 remember that?

20 A Yes.

21 Q And, Mr. Commissioner, we have them, those
22 articles, or some of them, filed before you in
23 photocopy form. We have three of the original
24 newspapers, and we thought we might file them.
25 First of all, they are easy to read. Secondly,

1 the news of the day in March of '93 was quite
2 interesting in other regards, too. But,
3 thirdly, it helps show how the -- how big the
4 splash was, so to speak. I think that's one of
5 the things that it shows.

6 THE COMMISSIONER: All right.

7 MR. LOCKYER: Yes. We have the first story was
8 March 13th. And it's basically those two pages,
9 and it's on the front, too.

10 MS. CARSWELL: Mr. Lockyer, we can't hear you
11 again.

12 MR. LOCKYER: Okay. I'm filing the March 13th
13 Winnipeg Sun.

14 THE COMMISSIONER: Now, I wonder, do we want to
15 get -- what was the number of the other, the
16 photostats of the -- were they in 30B or 30C?
17 Mr. Code, do you remember? Forget about it. We
18 will just mark them as new exhibits.

19 MR. LOCKYER: May I just have a minute?

20 THE COMMISSIONER: Yes.

21 MR. CODE: The media articles themselves were in
22 30C at tab 65. So if you want to include them
23 in tab 65, that's possible, or they could be
24 marked as separate exhibits.

25 MR. CODE: I think we're up to 34 or 35?

1 THE CLERK: 35.

2 THE COMMISSIONER: Exhibit 35 will be the
3 May 13th copy of the --

4 MR. LOCKYER: March.

5 THE COMMISSIONER: March of the Winnipeg Sun, is
6 it?

7 (EXHIBIT 35A: Winnipeg Sun article dated
8 March 13, 1993)

9 MR. LOCKYER: And March 14th, Mr. Commissioner,
10 is another two-page spread.

11 THE COMMISSIONER: Right. Then what we will do
12 is the March 13th will be 35A. March 14th will
13 be 35B.

14 MR. LOCKYER: And this is a front page again as
15 well.

16 (EXHIBIT 35B: Winnipeg Sun article dated
17 March 14, 1993)

18 MR. LOCKYER: And I also have March 21st which
19 is another two-page spread and the front as
20 well.

21 THE COMMISSIONER: Exhibit 35C.

22 (EXHIBIT 35C: Winnipeg Sun article dated
23 March 15, 1993)

24 BY MR. LOCKYER:

25 Q One thing that Mr. Code did not ask you

1 yesterday, sir, that arises out of these
2 articles, or they are mostly ones that aren't --
3 I don't have originals for. Mr. Commissioner, I
4 have a bunch of materials that I would like to
5 file, if I may, as one exhibit or a series of
6 exhibits. We may have a bound copy for you,
7 Mr. Commissioner. I'm not sure.

8 MR. LIBMAN: I can undertake to get him one.

9 MR. LOCKYER: We will get you a bound copy. As
10 it is, we are going to file loose. I want to
11 file, if I may, first of all, a bunch of
12 newspaper articles. If you could file those as
13 the next exhibit, please, A?

14 MR. ABRA: Are these separate from the ones that
15 are filed already?

16 MR. PROBER: Which are?

17 MR. LOCKYER: That's the next exhibit?

18 THE CLERK: So this bundle here?

19 MR. LOCKYER: This bundle here, the next
20 exhibit.

21 THE COMMISSIONER: 35D.

22 MR. LOCKYER: No, that will be the next number.

23 THE COMMISSIONER: 35D will be a compilation of
24 newspaper articles.

25

1 (EXHIBIT 35D: Compilation of newspaper
2 articles)

3 MR. LOCKYER: Could Mr. Whitley be given a copy
4 of it?

5 THE CLERK: He has it.

6 MR. LOCKYER: Oh, good.

7 BY MR. LOCKYER:

8 Q Could you turn to the article dated 13th of May
9 which is:

10 "McRae orders review into murder
11 conviction."

12 A I have it.

13 Q And if you -- part of the story is cut off. If
14 you turn to the next page, we actually have it
15 typed out off the web where we have got the
16 whole thing, all right?

17 A Yes.

18 Q So if you look at that, sir, look at the
19 beginning of it, it says:

20 "Manitoba's Justice Minister has our senior
21 Crown attorneys to review their files on a
22 man convicted of killing Perry Dean
23 Harder."

24 A Yes.

25 Q "Jim McRae said the Crown will look into

1 reports the the trial of James Patrick
2 Driskell was littered with tainted evidence
3 and paid informants, as well as police
4 brutality. I don't know if the report will
5 be completed soon, McRae said yesterday.
6 Harder, then 29, went missing in
7 June 1990..."

8 et cetera. Do you -- presumably, sir, that
9 would be something within your bailiwick that a
10 review was going to be conducted of the case?

11 A Ordinarily, I would have expected to be involved
12 in that, yes.

13 Q Right. Now, I understand that your counsel has
14 provided some dates that you were off work, and
15 I'm not going to get into that with you. But
16 just in the normal course of events, certainly
17 you would be aware of something like this?

18 A Oh, yes.

19 Q And if you then, sir, skip from there to:

20 "McRae orders review of Driskell case",
21 three or four pages along, it is essentially the
22 Sun, the Winnipeg Sun's version. The last one I
23 read you was from the Winnipeg Free Press. You
24 will see:

25 "A weekend series of Sun articles has

1 prompted Justice Minister Jim McRae to call
2 for a review of the case of Jim Driskell,
3 who is serving a life sentence for the
4 murder of Perry Dean Harder."

5 Do you remember this happening, sir?

6 A The newspaper coverage?

7 Q No. No. Do you remember the Justice Department
8 deciding that they would conduct an internal
9 review of the case?

10 A No, I don't.

11 Q The next page, sir, which is two pages later --
12 sorry, the next two days later, headed:

13 "A fair review, make it independent
14 Driskell. Is Mr. Driskell..."

15 And I won't read it. But it's essentially
16 Mr. Driskell demanding or asking that the review
17 being conducted be independent of Manitoba
18 Justice?

19 A Yes.

20 Q And I might say that, at this point, the police
21 review, which you certainly know now, if you
22 didn't know before was conducted, has not yet
23 been announced, all right? So we are still --
24 we are not at that stage yet. We are just doing
25 Justice at this point.

1 A Yes.

2 Q And then the following page, sir, which is page,
3 sir, which is from Sunday, March 21st is a very
4 young looking Mr. Brodsky demanding an open
5 trial review. In other words, really
6 reiterating what his client had said in the
7 previous article. Do you see that?

8 A Yes.

9 Q And on that same day, sir, and I think we filed
10 the original of March 21st, Mr. Commissioner,
11 you will see an article by a man called George
12 Stevenson on the right-hand side?

13 A Yes.

14 Q In which he takes us through much of the
15 evidence and much of the case, you might say.
16 And essentially also takes the position that
17 this review must be objective. And says,
18 looking at the bottom, for example:

19 "Based on these findings, Provincial
20 Justice Minister Jim McRae has ordered a
21 review of the case, but that may not be
22 enough. Many of the apparent problems with
23 the case involve the Justice Department.
24 Can it be objective? Who will do the
25 review? How much will be made public? It

1 is odd that the Justice Department would
2 investigate itself, given that McRae does
3 not favour local police forces
4 investigating themselves. We must have a
5 thorough, objective review to settle one
6 way or another what has become, albeit
7 late, a case of reasonable doubt."

8 Do you see that?

9 A I do.

10 Q And then, sir, the following page we have a
11 reference to Minister McRae awaiting the
12 internal review. Do you see that?

13 A Yes.

14 Q And that's dated March 22nd?

15 A Yes.

16 Q So we sort of moved on ten days or so from the
17 original stories. And then, if you go on two
18 pages, sir, to June 6th, you'll see that now the
19 police have announced, for the first time, that
20 they are going to conduct an inquiry, an
21 internal inquiry. Do you see that?

22 A Yes.

23 Q And there is a reference there, at the bottom of
24 the second column, just so we know we are really
25 dealing with two different inquiries here, you

1 will see, just at the bottom of the second
2 column, the three lines:

3 "Justice Minister Jim McRae launched an
4 internal review of the case after the
5 articles appeared."

6 So that's the one review. And then the other
7 review is the one being announced here by the
8 police. And you will see, sir, it says, just
9 carrying on,

10 "The Director of Winnipeg Prosecutions,
11 Bruce Miller, is heading up the probe."

12 Do you see that?

13 A I do.

14 Q Not necessarily the ideal choice, one might
15 think, in the circumstances. But did you
16 remember -- do you remember this at all, sir?

17 A No. No, sir.

18 Q And then, sir, I think I'm -- in fact, I'm sure
19 I'm right in saying that there was never any
20 official announcement by Justice of Manitoba
21 Justice of what happened with their probe. The
22 only reference I think there ever was to it in
23 the media around this time is the last page of
24 this exhibit you will see at March 12, 1994. We
25 didn't date this article before,

1 Mr. Commissioner, but we have got a date for it
2 now.

3 THE COMMISSIONER: Okay.

4 BY MR. LOCKYER:

5 Q So we have moved on a year. This is when the
6 Winnipeg Police announce the results of their
7 internal review. And you will see at the bottom
8 of the first column, it also says:

9 "A similar review by Crown attorneys was
10 also ordered last March by then Justice
11 Minister Jim McRae. A department spokesman
12 said that review also turned up no evidence
13 to support allegations of a faulty police
14 investigation."

15 Do you see that?

16 A Yes, I do.

17 Q And the one other document that we have found,
18 sir, that talks about the justice review is
19 found -- Mr. Commissioner, if I can file this as
20 the next exhibit. It's two documents. One is
21 called a memorandum to Manitoba Justice.

22 THE COMMISSIONER: Yes.

23 MR. LOCKYER: And the next is called a briefing
24 paper.

25 THE COMMISSIONER: All right. Should I run

1 these consecutively with the others?

2 MR. LOCKYER: Yes, please.

3 THE COMMISSIONER: 35E and 35F.

4 (Exhibit 35E: Memorandum to Manitoba
5 Justice)

6 (EXHIBIT 35F: Briefing paper)

7 MR. CODE: Exhibit 35F?

8 MS. CARSWELL: Mr. Lockyer, if you could turn
9 around and show us which are the documents,
10 thank you.

11 MR. CODE: Just to identify them on the record.

12 BY MR. LOCKYER:

13 Q This is 35E. And I will come back to them
14 shortly. 35E is a memo from a law student
15 called Dave Mann. At least I believe he was a
16 student at the time.

17 A Excuse me, is that the briefing paper?

18 THE COMMISSIONER: No. That's the memo, I
19 think.

20 BY MR. LOCKYER:

21 Q He had just been called, apparently, to the bar.

22 MR. LIBMAN: In June.

23 THE WITNESS: Sorry, which one am I given now?

24 MR. LOCKYER: It is from Dave Mann.

25 MR. PROBER: It is dated September 15th.

1 THE COMMISSIONER: Yes, September 15th.

2 BY MR. LOCKYER:

3 Q And this is a memo that's obviously been
4 requested by Mr. Finlayson from Mr. Mann, who I
5 understand has just been called to the bar, I
6 understand June of '97. And the second
7 document, the briefing paper, is taken from what
8 Mr. Mann has written.

9 A Yes, I understand.

10 Q Do you see what I mean?

11 A Yes.

12 Q And it's signed off on by Mr. Finlayson. And I
13 just wanted to refer to the Mr. Finlayson
14 aspect -- to the Mr. Finlayson document, who was
15 then Director of Public Prosecutions. And you
16 will see it is dated on the last page October 8
17 of 1997. Do you see that? And you are gone by
18 this time, am I right?

19 A Yes.

20 Q I don't mean to be offensive by that. You have
21 left Manitoba Justice.

22 A No. I understood the context. Yes. I had been
23 gone for a couple of years.

24 Q Yes. And you will see that on the last page,
25 second to last page, page 4, sir, you will see

1 right at the bottom, the last paragraph:

2 "I have had our administrative file, the
3 ministerial file, on all documents relating
4 to the Driskell case reviewed. There is no
5 documentation that a formal review of the
6 Crown's conduct into this file was ever
7 ordered by any Minister of Justice."

8 MR. CODE: Which document are you referring to?

9 BY MR. LOCKYER:

10 Q The Finlayson document.

11 "There's no documentation that a formal
12 review of the Crown's conduct into this
13 file was ever ordered by any Minister of
14 Justice. However, it appears that the
15 former DPP, Bruce Miller, did informally go
16 over the file in his capacity as director
17 and was satisfied that the file was handled
18 properly by the Crown's office."

19 Do you see that, sir?

20 A I do.

21 Q So I think it's presumably fair to say that
22 that's -- I think we have really pulled together
23 all of the information we can about the review
24 announced by Minister McRae in March 16th of
25 1993.

1 As well, sir, do you remember that in the
2 years following 1993 the -- Mr. Driskell's file
3 kept coming back to you, for one reason or
4 another?

5 A No. I don't recall that. Although, I did see a
6 reference in early '95. But I think it had to
7 do with the payment of a bill that the deputy at
8 the time had some concerns about. I remember
9 reading that document. It was a memo that I had
10 written.

11 MR. LOCKYER: Mr. Commissioner, I would like to
12 file a bundle of documents that have been
13 provided to counsel.

14 THE COMMISSIONER: Thank you. Do you want a new
15 number for these? Are these connected?

16 MR. LOCKYER: A new letter?

17 THE COMMISSIONER: A new series?

18 MR. LOCKYER: Please.

19 THE COMMISSIONER: Exhibit 36 then?

20 MR. LOCKYER: No. I thought 35G.

21 THE COMMISSIONER: Exhibit 35G.

22 MS. CARSWELL: We don't have that, Mr. Lockyer.

23 MR. LOCKYER: Yes, you do.

24 MS. CARSWELL: Not with the crest on the front.

25 MR. WOLSON: Is this from the RCMP?

1 MR. LOCKYER: No.

2 MR. CODE: Can you identify it for the record,
3 please?

4 MS. CARSWELL: Mr. Libman just gave me a copy.

5 MR. LIBMAN: An oversight, sir.

6 MR. WOLSON: This is 35G?

7 BY MR. LOCKYER:

8 Q 35G. Do you have it before you, sir?

9 MR. ABRA: Excuse me, is the previous one the
10 memorandum that Mr. Lockyer has been referring
11 to is 35?

12 THE COMMISSIONER: The memorandum is 35E and the
13 briefing document is 35F.

14 MR. ABRA: I see. Thank you, sir.

15 THE COMMISSIONER: And we're now marking a
16 bundle of documents, the face of which is RCMP.

17 MR. LOCKYER: Don't be misled by that.

18 THE COURT: Okay.

19 (EXHIBIT 35G: Bundle of Documents from Mr.
20 Lockyer)

21 BY MR. LOCKYER:

22 Q What this bundle of documents is, is a bundle of
23 documents we put together from various files to
24 do with this case which, in one way or another,
25 involves you in a series of issues that arise

1 over the next several years. Do you see that?

2 A Yes.

3 Q And I am not going to spend time on them. I
4 thought it would be helpful to have them before
5 the Commission. But you see, for example, it
6 start with a claim by a Mr. Robichaud, who gave
7 a statement in which he purported to identify
8 the real killer of Mr. Harder. I think it's
9 fair to say that Mr. Robichaud's claims were
10 completely discounted, but you were involved in
11 that. I don't know if you remember that. Do
12 you, sir?

13 A No, I don't, sir.

14 Q If you move in through the materials, sir, you
15 will see, and I think you did refer to this, you
16 get called in 1993 to issues surrounding the
17 witness Mr. Gumieny. Do you see that page 8 at
18 the top right-hand corner is where the Gumieny
19 starts? And you will see the memo is addressed
20 to you there from Mr. Miller?

21 A Yes.

22 Q And then, as we move through the documents, sir,
23 you see Ms. Duncan keeps coming back at you.
24 When I say "at you", I mean at Manitoba Justice.
25 And you are frequently pulled into the fray. Do

1 you remember that?

2 A Which one are you referring to?

3 Q Well, it's really a whole bundle of these
4 documents, about 30 pages of them.

5 A I recall, when I reviewed documents that were
6 provided to me by counsel, that I had written to
7 her on the 12th of April. Pardon me, I had
8 written to her indicating that Bruce Miller was
9 working on answers to her inquiries and that she
10 should deal directly with him. She wrote back
11 to me and indicated that she was simply passing
12 it along for information.

13 Q Well, she kept at it, sir, and didn't leave you
14 alone. Didn't leave Mr. Miller alone. She was
15 indefatigable, I think it's fair to say.
16 Perhaps the one letter of yours I will take you
17 to is at page 24 of these materials. If you
18 will look at page 24, you will see that she
19 wrote a letter to the then minister on
20 April 13th, who is now Rosemary Vodrey?

21 A Yes.

22 Q Yes. And the interesting thing about this
23 document, sir, is it's a long letter that she
24 writes. And at 27, if you turn to 27, she is
25 very close to the mark here. If you look at the

1 bottom of 27, she says:

2 "On August 24, 1993..."

3 Are you there?

4 A I have it, yes, sir.

5 Q "I telephoned Mr. Richard Quinney. He is
6 the AD of Saskatchewan Justice. He
7 indicated to me he had a telephone
8 conversation with an official from the
9 Department of Justice in Manitoba after Jim
10 Driskell was sentenced to life
11 imprisonment, but he refused to provide me
12 with the nature of that telephone
13 conversation. On August 28, '93 I sent
14 Mr. Quinney a letter confirming our
15 telephone conversation and advised him that
16 Staff Sergeant Ferguson admitted to my
17 client, as well as Heidi Graham..."

18 she is the Sun reporter from March of '93:

19 "...that there was more than enough
20 evidence to lay arson charges against Ray
21 Zanidean, but that he was ordered not to
22 proceed with charges because of the deal
23 Ray Zanidean had with the Justice
24 Department.

25 On September 10, '93 Mr. Quinney replied,

1 stating that he would not disclose the
2 details of the investigation or the
3 decisions made with anyone. He indicated
4 to me that he provided Manitoba Justice
5 with information after the decision with
6 respect to the Zanidean..."

7 sorry, let's do that one again.

8 "He indicated to me that he provided
9 Manitoba Justice with information after the
10 decision with respect to the Zanidean
11 matter had been made."

12 So unwittingly, if that's the right word, but
13 certainly there Ms. Duncan, of course, has
14 actually found out what was never to be revealed
15 until 2003, that these letters had, in fact,
16 been written by Mr. Quinney. Do you see that?

17 A Yes.

18 Q And this letter, sir, if you look at the next
19 document, 32, would seem to have made its way to
20 you. Because remember the letters received, if
21 you look at 24, the letter to the minister is
22 received April 19, '94. Do you see that?

23 A I'm sorry. I'm looking at page 31.

24 Q Go to page 24 first. Hold 32, please, 31,
25 actually. If you go to 24, Ms. Duncan's letter,

1 the extract that I just read you.

2 A Yes.

3 Q Is received by the minister on April 19th of

4 '94. Do you see that?

5 A Yes.

6 Q We are now at April 20th. We have moved on one

7 day. And it says, "to SW". That's yourself?

8 A Yes.

9 Q "To BM". I don't know if that would be Bruce

10 Miller or Bruce McFarlane?

11 A Bruce Miller.

12 Q Bruce Miller?

13 A Yes.

14 Q "C.c. DAG". I forget who "DAG" is, sorry.

15 MR. LIBMAN: Deputy Attorney General.

16 BY MR. LOCKYER:

17 Q Deputy Attorney General, of course. And it is

18 written there:

19 "Action: Bruce, are we responding to her

20 previous correspondence? How do you

21 propose we deal with this letter? Grant."

22 A Oh, I see.

23 Q Do you see that?

24 A Yes.

25 Q I don't know who "Grant" is?

1 A He is, if I remember correctly, an assistant to
2 Ms. Vodrey.

3 Q So this came to you. Do you have any memory of
4 it, sir?

5 A No. But it wouldn't necessarily come to me in
6 the flow of information. It would come to our
7 office and be logged through my office by my
8 assistant for tracking purposes, but it would be
9 designated for Bruce.

10 Q I think if you turn the next page, sir, you will
11 see an actual handwritten note to you?

12 A Yes.

13 Q "Stu", it looks like --

14 A "Prosecutions has this..."

15 Q "...outstanding. Please check on status.
16 And see when we can expect a response.
17 Thanks."

18 And I don't know who that's from?

19 A That would be -- that would be Bruce McFarlane,
20 I believe.

21 Q Yes, okay. So it does seem likely that you saw
22 this --

23 A Yes.

24 Q -- back in April of '94?

25 A Yes.

1 Q Is any of the handwriting on that page yours,
2 just as a matter of interest?

3 A No.

4 Q And then, sir, just to finish that, on page 37
5 we have the minister's reply to Ms. Duncan's
6 letter May 13 of 1994. Do you see that?

7 A Yes.

8 Q And essentially Ms. Duncan gets told to deal
9 with the Winnipeg Police Department. I'm sorry,
10 Mr. Libman has just pointed out to me something
11 that I hadn't seen. That letter that was sent
12 out on May 13th, if you go back a page, 36, we
13 have a note there. Do you see that? Which was
14 likely in reference do this letter?

15 A Yes.

16 Q Although, it almost certainly is -- I don't
17 think there is any doubt about it.

18 A Yes.

19 Q It says:

20 "B, note SW has approved your letter and it
21 is being sent to minister's office today."

22 A Yes.

23 Q So it would seem that you did review this letter
24 before it went out under the minister's
25 signature; is that right?

1 A Generally, that would be my practice.

2 Q Who is "B", and who is the signatory? Is "B"

3 Bruce Miller or McFarlane, May 3rd there?

4 A "B" probably is Bruce.

5 Q That doesn't help.

6 A Pardon me? I'm sorry. Bruce McFarlane.

7 Q Yes.

8 A The initial at the bottom, I don't recognize

9 the --

10 Q Okay.

11 A No, no. I can't say that that's Bruce

12 McFarlane. It might be Bruce Miller.

13 Q All right.

14 A Because the initials might be my assistant's.

15 Q And these documents are in --

16 A Excuse me. That would make more sense that

17 Bruce had prepared the letter. I had approved

18 the letter. And Cece would have advised him

19 that it had gone forward.

20 Q Okay. The ensuing documents, sir, that take us

21 into '95.

22 THE COMMISSIONER: Now, when you say Bruce would

23 have prepared the letter, which Bruce?

24 THE WITNESS: The handwritten note on page 36 is

25 initialled "B". My best construction of that,

1 sir, is that this is a note from my assistant to
2 Bruce Miller, advising him that I had reviewed
3 his letter and forwarded it on to the minister.

4 THE COMMISSIONER: Okay.

5 BY MR. LOCKYER:

6 Q The continuing pages, sir, take us into '95.

7 A Which page?

8 Q The ensuing pages --

9 A Oh, sorry.

10 Q -- of this exhibit. They are all, I think -- I
11 don't know about all, but certainly they all
12 involve Ms. Duncan in one way or another. Your
13 name appears here and there. There are
14 handwritten notes on some of them, addressed to
15 you, as we go through them. And then at page 51
16 you'll see a memo from Bruce McFarlane. Do you
17 see that? It's to you dated March 28th of '95?

18 A Yes.

19 Q Saying:

20 "I would like this drawn to a conclusion
21 soon. If Ms. Duncan is to satisfy, she can
22 apply under 690 and he will cooperate with
23 Canada -- we will cooperate with Canada
24 fully. Please prepare a letter drawing
25 this to a conclusion. I would like to

1 review it with you before it goes out.

2 Thanks, Bruce."

3 Do you remember any of this, sir?

4 A This I don't remember at all. I had tendered my
5 resignation by then in February of '95. And had
6 left in, I believe, it was in April of '95. So
7 I don't recall this, no.

8 Q And, in fact, that same typed note is
9 handwritten as well, going back a couple of
10 pages at 49. Do you see that?

11 "SW, I would like this drawn to a
12 conclusion,"

13 et cetera?

14 A Yes.

15 Q And then I think it's really the last letter was
16 written March 28th of '95 to Ms. Duncan, this
17 time signed by Sid Lerner. Do you see that?

18 A I do.

19 THE COMMISSIONER: I'm sorry, what page?

20 BY MR. LOCKYER:

21 Q Sorry, 52. And is that your note on that
22 document, sir, at the bottom right there?

23 A Page, sorry?

24 Q 52.

25 A 52, no, it isn't.

1 Q I don't know who -- it looks like "SM",
2 actually. Do you know whose note that is?

3 "As a result of a meeting with SW..."
4 which would be you?

5 A Yes.

6 Q And I imagine Bruce McFarlane?

7 A That's right. That's normally how he endorsed
8 his initials.

9 Q Okay.

10 "SW to discuss with Sid Lerner the status,
11 as it appears we are going in different
12 directions. Duncan should be referred to
13 Federal Government. This info supplied by
14 SM."

15 It looks like "SM". I don't know who that is.

16 A I'm sorry. I can't help you on that.

17 Q And then I think the last time -- before you
18 leave, sir, the last reference to you --

19 THE COMMISSIONER: Just before you move on.

20 MR. LOCKYER: Sorry.

21 THE COMMISSIONER: Who wrote that note? There
22 is an initial at the bottom. It looks a little
23 bit like it could be "JC".

24 MR. LOCKYER: Oh, I am calling it "SM".

25 THE COMMISSIONER: "SM" is in the left, but over

1 on the right?

2 MR. LOCKYER:

3 BY MR. LOCKYER:

4 Q Oh, I see. I see, yes, you're right.

5 A I'm sorry, sir. "JC" doesn't ring a bell,
6 neither does "SM".

7 Q I think the last time we have you in this, sir,
8 is at 54, the last document we could find
9 involving you.

10 If you look at 49, Mr. Commissioner, you
11 might have your answer to "SM". Mr. Dawe just
12 brought this to my attention. Do you see there
13 "from Bruce McFarlane by S. Martarana". And
14 then there is her signature at the bottom, "SM",
15 so she presumably would have been --

16 A What was that name again?

17 Q Look at 49, sir?

18 A Yes, I have it.

19 Q Do you see that? It's a:

20 "Memo to Les Kee from Bruce McFarlane (via
21 S. Martarana)."

22 Do you see that?

23 "Re Janie Duncan."

24 A Yes. I think she was a Crown attorney.

25 Q And we see the initials on two of those pages.

1 And then the final involvement with you is page
2 54, where Mr. Kaplan has come into it and
3 addressed a memo to you dated April 4, 1995
4 advising you of Sid Lerner's correspondence of
5 March 28th, which I just showed you. Are you
6 following this?

7 A I have page 54, yes.

8 Q But do you remember I showed you the Sid Lerner
9 letter to Ms. Duncan?

10 A Yes.

11 Q It was sort of the final attempt to -- I don't
12 want to say to get rid of her, but that does
13 seem to be an impression one gets, as you go
14 through these documents, that that's how
15 Manitoba Justice was viewing her continual
16 correspondence? They didn't like it. And then
17 you're asked:

18 "Please advise how you think this matter
19 should proceed? Thank you."

20 And then there is a note underneath there:

21 "Did McFarlane send out response? Waiting
22 for confirmation from Jean. Says
23 Minister's office closed file?"

24 You don't know who's writing that is, sir?

25 A No.

1 Q Okay. Now, you essentially don't remember any
2 of that, is that right, Mr. Whitley?

3 A No.

4 Q I just want to take you through the two events
5 that happened after that, sir, and then draw to
6 a close. And this is after your -- after you've
7 left Manitoba Justice. The first thing that
8 happened, sir, and I've already referred to it,
9 is Mr. Finlayson had a review or conducted a
10 review of the file with the assistance of Dave
11 Mann. And that is our E and F,
12 Mr. Commissioner. And I want to look at E and
13 F, which is Mr. Finlayson's final document.

14 A Where should I find it?

15 Q It is filed. It should be in front of you.

16 THE COMMISSIONER: They're loose pages. F is
17 the briefing paper.

18 MR. LOCKYER: And as you go through this
19 briefing paper, sir. You don't have it?

20 THE COMMISSIONER: No. Mr. Whitley, it's there.

21 THE WITNESS: I now have it.

22 BY MR. LOCKYER:

23 Q We are now two years after you've gone. So this
24 is more -- I am sort of dealing with you now
25 more systemically than personally now, if I can

1 put it that way. And you will see in this
2 briefing paper, sir, that Mr. Finlayson refers
3 to some of the documents that still haven't made
4 their way to Mr. Driskell. If you look on the
5 front page January 16 of 1992, he makes
6 reference to the letter that Mr. Quinney sent to
7 Mr. Miller. Do you see that?

8 A Yes. On the bottom of the page?

9 Q Right. And he writes that:

10 "Mr. Quinney indicated that the only
11 evidence they had against Driskell was a
12 statement which they could not use. And
13 they were, therefore, not prosecuting him.
14 Quinney also indicated that Zanidean had
15 threatened to go public and say he only
16 told the Winnipeg City Police what they
17 wanted to hear regarding Driskell's murder
18 case, if he was procecuted for the arson.
19 It was Quinney's view that Zanidean somehow
20 felt he had some kind of immunity because
21 he testified in the Driskell case, and that
22 to attempt to prosecute him would likely
23 result in a successful abuse of process
24 argument by his defence counsel. Bruce
25 Miller forwarded all documents from the

1 Department of Justice to George
2 Dangerfield."

3 That's a reference to the July 7th memo, which
4 you saw yesterday. Do you remember that?

5 A Yes.

6 Q "December 7, '92 the appeal was dismissed.
7 George Dangerfield appearing on behalf of
8 the Crown."

9 And then there is a reference to the next letter
10 by Mr. Quinney.

11 "April 28 of '93, Richard Quinney, of
12 Saskatchewan, sent a letter to Miller
13 confirming that at no time did they agree
14 to grant immunity to Zanidean respecting
15 his charges of arson in Saskatchewan."

16 The next two paragraphs are supposedly a
17 synopsis of Mr. Quinney's letter. I think if
18 one goes to the letter, one could argue that
19 they are highly inaccurate synopses of what
20 Mr. Quinney says in his letter, if not downright
21 wrong. But what's written here is:

22 "Mr. Quinney, QC, stated that RCMP officer
23 in Saskatchewan apparently offered Driskell
24 immunity, and that Zanidean was then
25 apparently told about the immunity by the

1 City of Winnipeg Police after he testified
2 in the Driskell case."

3 It might be better said that Mr. Quinney stated
4 that the Winnipeg Police claimed that an RCMP in
5 Saskatchewan had offered Driskell immunity.
6 However, that's what it says, as it is.

7 "As was indicated in his earlier letter..."

8 Mr. Finlayson writes,

9 "Mr. Quinney, QC, did not feel that the DOJ
10 of Saskatchewan could prosecute Zanidean,
11 as he could launch a successful abuse of
12 process motion."

13 That's an accurate reflection of what he said in
14 his letter. It leaves a lot of the letter out.
15 And then at the end, the part I've already read
16 to you, the last paragraph, and you will see the
17 cause of this memo, or this review by

18 Mr. Finlayson, under "Current Issue" he says:

19 "As per the attached July 30, '97 letter,
20 Janie Duncan is now requesting a copy of
21 the internal review conducted by the
22 Winnipeg Police Service, together with a
23 copy of the Crown's review of this matter
24 that she states was ordered by former
25 Minister of Justice Jim McRae."

1 And then that paragraph I've read out already
2 that:

3 "I have had our administrative file, et
4 cetera, reviewed..."

5 And I guess you could fairly say that
6 Mr. Finlayson ends up just saying, and that's
7 the end of that, you might say, is that fair?

8 A It seems to be, yes.

9 MR. TAPPER: I am wondering, Mr. Commissioner,
10 what purpose is served of a cross-examination on
11 reading to the witness material that occurred
12 after his tenure with the department and then
13 asking him whether he read it accurately.
14 That's not proper cross-examination. That's
15 making a speech.

16 THE COMMISSIONER: Well, I think the purpose of
17 this was, as I think Mr. Lockyer indicated,
18 systemic issues. Not this witness's specific
19 involvement because he had already left, but
20 systemic issues. Am I correct, Mr. Lockyer?

21 MR. LOCKYER: That's absolutely right, yes. I
22 introduced it that way. And when I finish this,
23 I am then going to round off my questioning of
24 the witness, taking all of the events since '92
25 into account.

1 The next document, sir, and it's the last
2 set of documents that I am going to take you to.
3 If we can go back to the group of documents,
4 which is G.

5 THE COMMISSIONER: 35G.

6 THE WITNESS: The big package?

7 THE COMMISSIONER: Yes.

8 BY MR. LOCKYER:

9 Q Go to 56 of G. Right at the back, second to
10 last page headed "Privileged and Confidential".
11 Do you see that?

12 A Yes.

13 Q And what you see here, sir, I think it's right
14 to say, are the minutes of a meeting of the
15 Attorney General and Deputy's summary for
16 May 15th of 2000. Do you see that?

17 A Yes.

18 Q And you will see at item 3, sir:

19 "Driskell: An internal review of the file
20 should be completed."

21 So we have moved on three years now from the
22 Finlayson review.

23 "In the event that this issue surfaces at
24 some point in the future, it was suggested
25 that Rick Saull perhaps could lead the

1 review."

2 RF", which is presumably Robin Finlayson,

3 "Rob Finlayson to lead."

4 Do you see that, sir?

5 A Yes.

6 Q And this, to put it in context, sir, it's a fair
7 assumption that the reason for this is that, in
8 the preceding months, the Innocence Project at
9 Osgood Hall has been in contact with Manitoba
10 Justice. And, as well, AIDWYC has now become
11 involved in the case as well. If you look back
12 one page, you will actually see this is the date
13 that AIDWYC became involved. February 9 of 2000
14 Mr. Driskell has signed a release. Do you see
15 that?

16 A I'm sorry. You said back one page?

17 Q 55, back one page.

18 A The handwritten?

19 Q Yes.

20 A Yes.

21 Q Mr. Driskell signed a release for, amongst
22 others, Mr. Libman. Which I can tell you, in
23 February 9 of 2000, is when I can tell that you
24 AIDWYC began an interest in the case, you might
25 say.

1 A M'hm.

2 Q Now we have moved on. If we go back to the
3 memo. You have moved on two months, so that
4 helps explain why Manitoba Justice thinks that
5 this case may be rearing its head yet again. Do
6 you see that?

7 A I do.

8 Q And that, sir, led to, indeed, yet another
9 internal review of the case which was conducted
10 in 2000, although not by Mr. Saull, but by
11 Mr. Schille. And this is the last document that
12 I want to file, Mr. Commissioner.

13 THE COMMISSIONER: Okay. That will be 35H.

14 (EXHIBIT 35H: Internal review conducted by
15 Mr. Schille in 2000)

16 BY MR. LOCKYER:

17 Q And what this is, is a review of the file, sir,
18 that was conducted by Mr. Schille, Crown
19 attorney. Did you know Mr. Schille or did he
20 arrive after you? He came from Ontario. He was
21 a Crown attorney.

22 A He may have arrived just as I was leaving. I
23 can't remember this at all.

24 Q Okay. He came to play a major role in the case
25 after this 2000 report, so right up to March of

1 2005. This report is not dated, sir, but we
2 know it was written in 2000. And I think it's
3 reasonable to suppose -- indeed, we know it was
4 done after that memo of May 2000 that we have
5 just been through. And you'll see, if you look
6 at this document, sir, H, first page,

7 "Scope of the review",

8 Mr. Schille writes:

9 "The writer was asked to review the entire
10 file relating to this prosecution. The
11 purpose of the review was to determine if
12 the manner in which the case was presented
13 was appropriate, given the evidence
14 available at the time. The evidence was
15 also assessed, in light of certain
16 additional facts that came to light
17 post-conviction. The evidence has also
18 been assessed in light of changes to the
19 law of evidence that have occurred
20 post-conviction."

21 So we are now on the umpteenth review of this
22 case. And I just want to refer you to a few
23 things that are said in this review. Could you
24 go, and I'm using the -- go to page 16, would
25 you, sir? The bottom of 16, Mr. Schille writes:

1 "The file does contain correspondence in
2 which the defence requests dozens of
3 additional items of disclosure, together
4 with the Crown response listed item by
5 item."

6 That would be a reference to Mr. Brodsky's
7 letters written pre-trial. At 17, the second
8 paragraph, or first paragraph:

9 "Despite a formal record, the transcripts
10 and correspondence found on file strongly
11 suggest that full disclosure was provided.
12 One disclosure issue was identified in the
13 final review. At trial, Zanidean testified
14 he had an ongoing feud with his sister and
15 had waited until her house insurance
16 lapsed, then burned her house down. After
17 the trial, the Crown came into possession
18 of information indicating that Zanidean's
19 sister was insured and had filed an
20 insurance claim as a result of the house
21 fire. If the defence had this information,
22 it almost certainly would have been used by
23 the defence to discredit the witness. The
24 new information was disclosed to the
25 accused's counsel after the trial. The

1 significance of this evidence must be
2 viewed in context. The trial judge
3 describes Zanidean as being a person of
4 disreputable character and cautioned the
5 jury of the danger of relying on his
6 evidence without first locating evidence to
7 corroborate him."

8 Now, just to make a few comments on that for
9 your benefit, sir, because I do have a question
10 at the end of all of this. I am just sorry it
11 is taking a bit of a while to get there.

12 First of all, Mr. Schille said that:

13 "The Crown came into possession indicating
14 Mr. Zanidean's sister was insured and filed
15 an insurance claim as a result of the house
16 fire."

17 After the trial they came into that information
18 I think could be -- I think likely everyone
19 would agree in here is simply not right. The
20 Crown had that information before the trial, but
21 didn't disclose it, all right?

22 A That's clear.

23 Q That's the first thing. So that's quite wrong.
24 The second thing is:

25 "The new information was disclosed to the

1 accused's counsel after the trial..."
2 is simply false. Heaven knows how Mr. Schille
3 came to that conclusion. If there is one thing
4 we do know, is that nothing was disclosed to the
5 accused's counsel after the trial, absolutely
6 nothing, all right? So heaven's knows where
7 Mr. Schille got that from.

8 And the next item is that -- really, this
9 is the next comment on this, is that this was
10 really the only issue that arose in the context
11 of Zanidean when, of course, from the letters
12 that we've seen from Mr. Quinney, this was one
13 of several issues that had arisen in the Quinney
14 letters, am I right?

15 You are absolutely right.

16 MR. CODE: If I could just intervene for a
17 minute? I'm concerned that Mr. Lockyer
18 accurately state the evidence.

19 MR. LOCKYER: Sorry.

20 MR. CODE: He said two things at this point that
21 I think need to be qualified. First of all, he
22 said that the Crown had the information prior to
23 trial. Now, if one means by the Crown
24 constructively, including the police, then that
25 comment is accurate. But I think, given that we

1 are on a public record here, and this is being
2 published in the media, we should be a little
3 more precise. The evidence is the police had
4 it. Whether the Crown had it is a question of
5 fact that may have to be made by this inquiry.

6 And, secondly, the assertion that, you
7 know, where on earth Mr. Schille got that from,
8 when he said that it was disclosed after the
9 file. Again, we know from the materials
10 accumulated by the inquiry that Mr. Schille has
11 explained where he got that from. And, again, I
12 think there could be a somewhat more fair
13 statement.

14 MR. LOCKYER: Okay. You are talking about the
15 April memo. Sorry, that's fair.

16 MR. PROBER: Before Mr. Lockyer continues, I
17 actually rise to support what Mr. Code has said.
18 It was inaccurately put to this witness that the
19 Crown had the information.

20 THE COMMISSIONER: I agree.

21 MR. PROBER: Thank you.

22 THE COMMISSIONER: I agree.

23 MR. LOCKYER: The April of '93 memo would be --

24 THE COMMISSIONER: But also on the first part
25 that it's clear that the Crown knew that it was

1 fraud fire, as opposed to an arson fire, as
2 opposed to a revenge fire, that may be a fact
3 that could be found, but it is -- the evidence
4 is far from clear on that issue. The police
5 knew, there is no question.

6 MR. LOCKYER: I thought it ultimately got into a
7 Brodsky memo that the Crown had information
8 about the fire and was giving information about
9 it, but I don't -- that's fine.

10 BY MR. LOCKYER:

11 Q Certainly, sir, the Quinney letters contained a
12 great deal more than just the insurance or the
13 motivation.

14 THE COMMISSIONER: I think it's probably time
15 for the question.

16 MR. LOCKYER: Yes, it is. Well, no, not quite.

17 THE COMMISSIONER: All right.

18 MR. LOCKYER: If I can just go to the last page,
19 the conclusion.

20 THE COMMISSIONER: Okay.

21 BY MR. LOCKYER:

22 Q Mr. Schille concludes in 2000, sir, that:

23 "The review of the entire Crown file
24 indicates that this review was conducted in
25 an appropriate manner in all respects."

1 And he actually ends up concluding:

2 "This case would seem to be unusual that in
3 the event a new trial were ordered, for
4 some reason, Crown's case against the
5 accused would likely be stronger than it
6 was originally."

7 Do you see that, sir?

8 A I do.

9 Q So having taken you through that, sir, it would
10 seem fair to say that this case was a major
11 cause of interest and concern in Manitoba
12 Justice from 1992 right through, looking at
13 this, until 2000, is that fair, sir?

14 A That's fair.

15 Q That there were numerous opportunities, then,
16 for Manitoba Justice officials to remedy the
17 apparent wrongs that appeared in the file, is
18 that fair?

19 A That seems to have been the case, yes.

20 Q That there were a large number of officials in
21 Manitoba Justice whose hands came to be on this
22 file, one name after another, all familiar names
23 within Manitoba Justice, is that right, sir?

24 A Yes.

25 Q And all -- I don't know about all, but certainly

1 many of them very senior, right up to the Deputy
2 Minister and, indeed, right up to the Minister
3 in a way, right?

4 A Yes.

5 Q And all these lost opportunities, sir, I'm going
6 to suggest to you, suggest to us, that there are
7 certainly, up until 2000, and there is documents
8 that take us beyond that, but I am just taking
9 us to 2000 now, that there were some serious
10 problems in Manitoba Justice over this case?

11 A That's not -- that can't be disputed.

12 Q One of the things, sir, that was recommended by
13 the Lamer Inquiry in Newfoundland, and I'm sort
14 of synopsising one of the recommendations, is
15 that a person of high repute and high reputation
16 be appointed to review practices and procedures
17 in the Justice Department in that province, by
18 way of recommending changes that could improve
19 the department. And pursuant to that, the
20 Government immediately appointed a retired
21 member of the Newfoundland Court of Appeal, a
22 Mr. Justice Marshall, to conduct that very
23 exercise.

24 I am going to ask you, sir, and I don't
25 know if it's easier for you now you've left here

1 or harder for now you've left here, whether that
2 may not be a good idea for Manitoba Justice as
3 well?

4 A I suppose the answer is going to depend, in
5 part, on how such a review would be undertaken
6 and what would flow from it. I think that
7 looking back over -- even over our discussion
8 yesterday and the questions that were asked of
9 me yesterday, and my reflection of what I tried
10 to do in the department 15 years ago, 20 years
11 ago, is that simply developing new policies and
12 new guidelines and handing them out in a
13 pamphlet or a desk book doesn't necessarily
14 ensure that justice will occur. It doesn't do
15 that. It provides some comfort.

16 But in terms of changing a culture, in
17 terms of changing an orientation towards a job
18 that is in very large part being seen as
19 adversarial, there has to be a different
20 process. There has to be a different process
21 than simply a blue collar -- sorry, a blue
22 ribbon panel establishing guidelines and new
23 sets of instructions. I believe it has to
24 happen at the grass roots level. I think Crown
25 attorneys have to be engaged in discourse around

1 these issues.

2 We can't any longer ignore the fact that
3 simply imposing, as I did, a code of ethics that
4 was developed in our management team, but
5 essentially the rank and file were told: These
6 are instructions you must follow, and these are
7 the standards by which you will be governed. It
8 didn't seem to change very much. And I think
9 they were enforced, well enforced by the time
10 this case took place, yet something happened
11 where they weren't enough. And that's the
12 principal source of my regret to -- as I
13 expressed it this morning to Mr. Driskell. They
14 weren't enough.

15 Is it a good idea? It is always a good
16 idea to take a look at yourself and re-evaluate
17 how you do business, always. But if it's more
18 of the same, I don't see fundamentally the
19 culture changing. What I would see happening,
20 and what I sense is happening now in
21 prosecutions is fear.

22 THE COMMISSIONER: Is which?

23 THE WITNESS: Fear. That prosecutors are
24 saying, my God, I did my job. I pushed this
25 case as hard as I could. I thought I was being

1 fair. Now I am being singled out for
2 crucifixion. I hear that. I go to prosecution
3 meetings. I have prosecutors on staff. It's an
4 irrational fear in many respects, but it is
5 starting to permeate the culture. So what
6 happens is if there is a mistake made, there
7 aren't incentives to come clean with those
8 mistakes. Rather, there are probably thoughts
9 going through the prosecutor's mind, my God,
10 what's going to happen to me now? I am going to
11 be hung out to dry.

12 I think the adversarial system is a good
13 way of getting at the truth, but it's not a good
14 way of changing fundamental attitudes about how
15 we do our work. I expressed yesterday to the
16 last counsel that spoke to me --

17 BY MR. LOCKYER:

18 Q Mr. Kennedy?

19 A Yes.

20 Q Yes.

21 A -- the issue of ethics that I feel very strongly
22 about. And when we drafted a schedule of
23 ethical considerations for the prosecutors to
24 look at, there wasn't a prosecutor in the room
25 that said: We don't agree with this. But there

1 wasn't a prosecutor in the room that was
2 prepared to say: Yeah, this is a good idea.
3 And as one of them laughingly put it: Why
4 should we grow another arm for the bench and bar
5 to beat us with? That's the attitude we have to
6 change. And I'm not suggesting that's the
7 attitude of prosecutors here.

8 I don't know what happened in this case. I
9 worked with these men for 22 years. They were
10 good, decent men. I don't know what happened in
11 this case. But I do know that simply my coming
12 from a constitutional background for the
13 previous three years or so, and having probably
14 a much clearer idea of the way in which the law
15 was going to develop than rank and file
16 prosecutors, was not enough to change the
17 culture. And that may speak to my own
18 limitations and that, ultimately, is why I left.
19 We talked about this briefly yesterday. I left
20 because I felt that this is as far as I can take
21 Manitoba Justice. I did not feel I could do any
22 more to bring the organization along. I thought
23 it was time for new blood.

24 So that's a rambling answer to your
25 question but, yes, potentially it's a good idea,

1 but in the execution of it everything,
2 everything hangs.

3 MR. LOCKYER: Well, I think Justice Marshall may
4 be coming here in September, sir, so he can talk
5 about Newfoundland, perhaps.

6 THE COMMISSIONER: He is coming.

7 MR. LOCKYER: And I thank you for that, sir.
8 And I thank you again for your conversation --
9 and I thank you for your conversation with
10 Mr. Driskell this morning.

11 Mr. Commissioner, could we also file this
12 document, as I am not going to refer to it. It
13 is a book of materials that's primarily a series
14 of letters to Mr. Whitley by AIDWYC in the
15 course of the Enns review. I might just say
16 what they are. In the course of the Enns
17 review, Judge Enns' review of this case, there
18 was reference to a series of what were referred
19 to as private conversations, I think, between
20 Mr. Whitley -- that Judge Enns had with
21 Mr. Whitley and two others whose names have come
22 up in the course of this inquiry. And we asked
23 them, Mr. Whitley, in particular, but the others
24 as well, to provide us with the contents of
25 those conversations. And we thought we should

1 file the fact that Mr. Whitley responded by
2 return mail, that's what it shows.

3 THE COMMISSIONER: Exhibit 35I.

4 (EXHIBIT 35I: Private conversations with
5 Judge Enns sent by Mr. Whitley re review)

6 THE WITNESS: Just so I understand what's being
7 filed, is this the documents that I sent to you
8 after speaking to Judge Enns?

9 MR. LOCKYER: They are, indeed. And they
10 demonstrate that you responded by return mail,
11 sir.

12 THE WITNESS: Thank you, sir.

13 MR. LOCKYER: Thank you very much. And please
14 don't be offended that I am going to walk out
15 now.

16 THE COMMISSIONER: No. I will not be offended.

17 MR. ABRA: Morning, Mr. Commissioner.

18 THE COMMISSIONER: Morning, Mr. Abra.

19 MR. ABRA: I think I left something on my desk,
20 if I might just get it.

21 BY MR. ABRA:

22 Q Mr. Whitley, Mr. Lockyer has already ably
23 covered one of the areas that I wanted to ask
24 you about. As you're aware, we heard
25 evidence -- or you heard yesterday from Mr. Code

1 that, according to three members of the Winnipeg
2 Police Service, Mr. Miller advised them, prior
3 to Mr. Zanidean testifying, that he not be told
4 that he was not going to be charged in Swift
5 Current by the RCMP with the arson until after
6 he had given his evidence.

7 A Yes.

8 Q So the effect of it, of course, was that when he
9 was asked by Mr. Brodsky whether he had received
10 any immunity, he answered "no". Which, it would
11 appear, to his knowledge was accurate, but to
12 the knowledge of others, in particular at least
13 Winnipeg Police and the RCMP in Swift Current,
14 was false.

15 Now, Mr. Lockyer asked you this morning
16 whether you can conceive of Bruce Miller ever
17 giving advice of that nature. And would you
18 agree with me that the Bruce Miller that you
19 knew and that I knew would never give advice of
20 that nature?

21 A Yes.

22 Q Now, just for your information, by the way,
23 Mr. Brodsky said the same thing, and
24 Mr. Dangerfield, in effect, said the same thing.
25 Now, I would like to go next, very briefly, to

1 tab 2 of the book of -- or, sorry, tab 19 of the
2 book of documents.

3 THE COMMISSIONER: That would be Exhibit 15A?

4 MR. ABRA: Yes, thank you. No, I'm sorry,
5 Exhibit 30A.

6 THE COMMISSIONER: Oh, I'm sorry. Did I say --
7 yes.

8 MR. ABRA: The documents that were prepared for
9 Mr. Whitley.

10 THE COMMISSIONER: Thank you. I picked up the
11 wrong ones.

12 MR. ABRA: 15 you had with you yesterday,
13 Mr. Commissioner, for some of the questions that
14 Mr. Code asked Mr. Whitley, but his book of
15 documents is actually 30.

16 THE COMMISSIONER: You are absolutely right.

17 BY MR. ABRA:

18 Q Just very briefly, Mr. Code asked you yesterday,
19 tab 19, page 481, this is the application by
20 Mr. Zanidean to the witness protection program.
21 And you said that you may have discussed this
22 with Bruce Miller, you just can't recall?

23 A That's possible, yes.

24 Q Okay. Now, you also said yesterday that, at
25 least as far as Mr. Kovnats was concerned,

1 Mr. Miller was complaining to you, throughout
2 his dealings with Mr. Kovnats, on behalf of
3 Mr. Zanidean, that he was very difficult to deal
4 with?

5 A Yes. My recollection is that it was more of a
6 joke. Bruce would joke about this. He would
7 laugh about this. He would roll his eyes. He
8 would say: My God, this guy is plaguing me, you
9 know, that kind of thing.

10 Q Right.

11 A So it was in that context.

12 Q But it was very obvious that he and Mr. Kovnats
13 were not on the same wavelength, as far as
14 resolving --

15 A No, absolutely not.

16 Q -- Mr. Zanidean's witness protection is
17 concerned?

18 A Absolutely.

19 Q Now, I know you don't particularly -- you don't
20 recall any of the meetings that you apparently
21 attended. I think there was two that Mr. Code
22 referred you to yesterday. Do you have any
23 recollection at all of having the same
24 perception at those meetings, or do you not
25 remember them at all, or is it fair to say that

1 that's Mr. Kovnats' reputation generally?

2 A Well, as to the first part of the question, I
3 really don't recall them at all. Bruce, as I
4 think you know, has a very generous tolerance
5 for people who tended to be difficult and
6 long-winded. So he and David got along fairly
7 well. I didn't see any or recall any kind of
8 discord between them. But, clearly, Bruce was
9 very, very frustrated. And as I said, he made a
10 number of jokes about it. He tended to --

11 Q Which was often the way he would treat
12 situations of that nature?

13 A Yes.

14 Q Rather than show anger and frustration, he would
15 joke about it, is that fair?

16 A I think that's very fair. He would deprecate
17 the situation, self-deprecate and laugh things
18 off, that was his style.

19 Q Okay. But certainly he made it -- you knew him
20 well enough to realize that he was frustrated
21 with the whole situation?

22 A A stranger would have noticed that, yeah.

23 Q Okay. Now, you said yesterday to Mr. Code that
24 there was the two options that were put -- that
25 were suggested to you that came from notes that

1 Bruce had made. There was the option number one
2 of putting Mr. Kovnats -- or, excuse me,
3 Mr. Zanidean in the Witness Protection Program
4 run by the RCMP. And you were aware of the
5 fact, at the time, that putting a person in
6 witness protection inherent in it is the
7 expenditure of money by Manitoba Justice?

8 A Yes.

9 Q Not necessarily to -- directly to the person who
10 is the subject of witness protection, but a lot
11 of money is paid for the benefit of that person
12 when they are in witness protection?

13 A Yes.

14 Q Now, option number two related, in essence, to
15 the payment of Mr. Zanidean of an amount of
16 money in a lump sum?

17 A Yes.

18 Q And the essence of that was to take the place of
19 witness protection, but, in essence, to give him
20 the money in order to take his own steps to
21 relocate himself?

22 A Yes. The police would have preferred that. It
23 kind of ends their involvement with the
24 individual.

25 Q Right. And you were aware of those two options?

1 A Well, I don't have any specific recollection of
2 it any longer, but I would have been aware of
3 it. And it would not have been unusual to
4 consider those as options.

5 Q Those options?

6 A Yes.

7 Q And as you said, in fact, the second option is
8 one that the police often prefer because they
9 don't have to deal with the person anymore. The
10 person is on his or her own --

11 A Yes.

12 Q -- once they get the money?

13 A Yes.

14 Q Now, you said yesterday that -- well, let me
15 take you to tab 57. It is right at the end of
16 the second book of documents, volume 2,
17 Mr. Commissioner.

18 THE COMMISSIONER: Yes.

19 BY MR. ABRA:

20 Q Now, you made the point yesterday, in the first
21 letter under tab 57, was one that Mr. Miller
22 faxed to Mr. Kovnats dated June 21 of 1991. And
23 it says on it, very clearly, that it is:

24 "strictly confidential, for discussion
25 purposes only, subject to approval of the

1 Deputy Minister of Justice."

2 Correct?

3 A Yes.

4 Q Yes. And that was faxed to Mr. Kovnats. And
5 then the same letter was apparently given to you
6 on June 24th --

7 A Yes.

8 Q -- to be approved by the Deputy Minister?

9 A Yes. So three days later I would have taken it
10 for approval.

11 Q For approval?

12 A Yes.

13 Q Now, I'm suggesting -- you indicated yesterday
14 that you thought the -- in essence, at least you
15 gave me the impression, firstly, that you
16 thought the letter of June 21 of 1991 was a
17 commitment. And I'm suggesting to you it is
18 quite clear that Mr. Miller is just providing to
19 Mr. Kovnats saying: This is what we may be
20 sending to you if the Deputy Attorney General
21 approves it. And it speaks for itself, does it
22 not?

23 A Well, it would certainly raise, in Mr. Kovnats'
24 mind that: This is what the recommendation is
25 going to be, and you are going to get what

1 you've asked for. I don't understand how, you
2 know, with all deference to Bruce, and I fully
3 appreciate he is not here to explain it, but how
4 you send an internal document, that is drafted
5 for the deputy to consider, to the recipient of
6 that intended letter, even with a stamp on it
7 like this, it raises in Mr. Kovnats' mind the
8 virtual certainty that he is going to get what
9 he has asked for. There is nothing wrong with
10 him getting what he asked for. It's just that
11 before we can commit to that, it's absolutely
12 imperative that we have the proper authorization
13 to do it.

14 Q But, in essence, he is not giving Mr. Kovnats
15 what he wanted. All he is -- because
16 Mr. Kovnats, if you go to his letter of
17 June 4th --

18 THE COURT: Well, for instance, he wanted
19 \$30,000.

20 MR. ABRA: Well, he wanted a bunch of other
21 things.

22 THE COMMISSIONER: Oh, yes, I just use that as
23 one example.

24 BY MR. ABRA:

25 Q Yes. The initial proposal was \$30,000.

1 Furthermore, and I think you are familiar with
2 the letters of demand that Mr. Kovnats sent, I
3 can take them to you if you would like, but the
4 last one of June 4th, just before Mr. Zanidean
5 testified, contained some 20 items.

6 A Yes.

7 Q Effectively, it was a shopping list of
8 everything. And Mr. Miller -- well, there is no
9 evidence that Mr. Miller was prepared to accept
10 many of these. But, in essence, what he is
11 saying in the letter of March the 21st, I
12 suggest, is that: Subject to the approval of
13 the Minister or the Deputy Minister of Justice,
14 we are prepared to pay \$20,000. Which,
15 according to the evidence that we have heard,
16 was probably, approximately, the amount that it
17 was going to cost to put Mr. Zanidean in witness
18 protection if option number one were accepted.
19 And that's the evidence that came from Corporal
20 Orr, who as Mr. Code pointed out to you, there
21 was a meeting that was held on June 12th with
22 Corporal Orr, Mr. Kovnats, Mr. Zanidean and
23 Mr. Miller, at which the whole issue was
24 discussed.

25 A Yes.

1 Q June 19th. I'm being corrected. I thought it
2 was June 12th. It was June 19th?

3 A Yes.

4 Q You will recall Mr. Code showing you that
5 yesterday --

6 A Yes.

7 Q -- that memo. And based upon what Corporal Orr
8 testified to before Mr. Commissioner, the
9 \$20,000 figure was effectively what his view was
10 of the approximate amount of what witness
11 protection was going to cost. So all Mr. Miller
12 is saying in his March -- excuse me, in his
13 June 21st letter, effectively, is: We are
14 prepared to pay you what witness protection
15 would have cost us?

16 A Yes.

17 Q And I am suggesting to you that there was
18 nothing wrong with him sending that letter, at
19 the time that he did, as long as he made it
20 clear that it was subject to the approval of the
21 Deputy Minister?

22 A Yes, I'll accept that.

23 Q Okay. Now, of course, it was approved by
24 Mr. Garson. I don't know if you're aware of it
25 or not. It actually wasn't paid for some months

1 after that. But is it fair to say that
2 Mr. Garson, on June 24th, is giving approval to
3 the letter, the content of the letter?

4 A Yes. I think that what took place here is that
5 I would have left the letter with him after
6 giving him a briefing. I don't know why I would
7 have left it with him, but I did. And he would
8 have sent me this note, and it would have been
9 couriered over to me.

10 Q Okay. Now, you also said yesterday, and I guess
11 I can question you on it, although maybe I stand
12 to be educated, but you mentioned that you
13 thought maybe the letter that Mr. Miller sent
14 was contrary to the Financial Administration
15 Act, which led me to go back and review the
16 statute and the regulations. And I couldn't
17 find anything in it that supported what you were
18 saying, but I stand to be corrected. What made
19 you say that?

20 A As I recall it, the Attorney General's Act
21 requires that the -- and I think there is even a
22 reference to it in the materials somewhere,
23 requires that he alone can authorize payments.
24 And if there is a commitment that's been made,
25 without the Deputy Attorney General's

1 authorization, that is an offence under the
2 Financial Administration Act, which is a more
3 generalized rule. I am more familiar with the
4 federal one, but I believe each province and
5 territory has a mirror provision.

6 MR. ABRA: We are not here to debate law.

7 THE COMMISSIONER: Yes.

8 MR. ABRA: But I couldn't find anything in the
9 statute that basically supports the comment that
10 you made yesterday.

11 THE COMMISSIONER: For what it's worth,
12 Mr. Abra, I didn't draw any adverse finding from
13 that.

14 MR. ABRA: Thank you.

15 THE COMMISSIONER: Having spent some years in
16 the public service, I always avoided reading the
17 Financial Administration Act.

18 MR. ABRA: Well, welcome to the club. It's the
19 first time I ever looked at it.

20 THE COMMISSIONER: And I shouldn't confess to
21 that.

22 MR. ABRA: I won't pursue the matter,
23 Mr. Commissioner, thank you.

24 THE COMMISSIONER: And also I think one must
25 consider that letter in the context of the

1 circumstances that existed on June 21st of 1991,
2 that was the day after the blow-up.

3 MR. ABRA: Well, that was the next issue that I
4 want to get to because that was the suggestion
5 that Mr. Code made that they were related to
6 each other. And I'm suggesting, with respect,
7 I'll direct it to you, sir, since you've raised
8 it, that that's really speculation. I mean
9 there is no evidence before us, I'm submitting,
10 with respect, I don't want to argue the matter
11 before you now.

12 THE COMMISSIONER: Well, I thought that would
13 justify it.

14 MR. ABRA: Well, the problem is that Mr. Code
15 tied it into that supplementary that was written
16 by the police two years later. And the concern
17 that I had is that you might draw an inference
18 that if Mr. Miller was told, not only that
19 Winnipeg Police were withdrawing their
20 protection of Mr. Zanidean, but that he was also
21 told everything else that's contained in that
22 supplementary. And I'm submitting, with
23 respect, that that inference ought not to be
24 drawn, specifically that Zanidean was
25 threatening to recant his evidence. Do I make

1 myself clear, sir?

2 THE COMMISSIONER: Absolutely. Absolutely.

3 MR. ABRA: And as I say, that's the concern that
4 I had.

5 THE COMMISSIONER: As you say, that memo, the
6 supplementary, if that's what it is, was two
7 years later?

8 MR. ABRA: Yes, it was, almost exactly. And
9 you'll recall the evidence being that it was
10 actually -- it was never written up by anybody,
11 apparently, in the Winnipeg Police, nor is there
12 any evidence, according to what Mr. Dangerfield
13 and others have testified to, that they knew
14 anything about it. And it was only prepared at
15 the request of Hall and Ewatski, you'll recall,
16 when they first heard what had apparently
17 happened in the Niakwa Hotel on June 20th. But
18 it was simply with connection to the withdrawal
19 of protection. I won't pursue the matter. I am
20 concerned there might be another inference drawn
21 from it.

22 THE COMMISSIONER: Okay. I was not -- I was not
23 too concerned about the financial
24 administration. I was not too concerned about
25 the stamp on there. Now, I realize that's not

1 being a good, careful public servant when I say
2 that, but that didn't concern me too much. I
3 know internally it might. But in the context of
4 what we're looking at here, that's not -- if it
5 was a transgression, I am not concerned about
6 it.

7 MR. ABRA: Okay. Thank you. Thank you. If I
8 might just have a moment, sir.

9 THE COMMISSIONER: Certainly.

10 BY MR. ABRA:

11 Q Now, I would like to take you next, sir, to tab
12 61. And you mentioned yesterday, in your
13 testimony to Mr. Code, that it's your view that
14 the contents of this letter should have been
15 drawn to your attention immediately by
16 Mr. Miller upon its receipt because it refers to
17 perjury, and that a Crown witness may have
18 committed perjury. Now, Mr. Code did indicate
19 to you that the word "perjury" is not in the
20 letter.

21 More significantly, I'm suggesting to you,
22 that on a reading of the letter, all Mr. Quinney
23 is saying, with respect to Zanidean's testimony,
24 is that there is two different stories. One is
25 that he testified -- that Zanidean testified

1 that the revenge for the -- or, excuse me, the
2 motive for the arson was revenge. You're aware
3 of that. And that the RCMP investigation, based
4 only upon Mr. Driskell's statement, that was
5 subsequently given by the RCMP was that, in
6 fact, it was for insurance purposes. So there
7 is, in essence, two different stories.

8 There is no allegation in Mr. Quinney's
9 letter at all, at that juncture that, perjury
10 had been committed. He is just saying in the
11 letter, in essence, I'm submitting, or
12 suggesting to you, that there is two different
13 stories. The essence of the letter is the issue
14 of possible immunity and the disclosure of it to
15 Mr. Brodsky. Do you agree with that?

16 A Well, it seems to be --

17 Q There is no question -- I am not being critical
18 of you, but there is no question, since this
19 letter was sent --

20 MR. TAPPER: Let him finish, please.

21 BY MR. ABRA:

22 Q Sorry, go ahead. Go ahead, please?

23 A It seems to me, with all deference, it seems to
24 be quibbling about whether or not perjury is
25 mentioned in the letter. The letter, as I read

1 it, is that the result of that investigation is
2 that they are.

3 "...satisfied that Driskell's statement is
4 substantially correct."

5 Q Right.

6 A The police are satisfied. And what was
7 expressed at trial is not, in fact, the motive,
8 the true motive. And then over the page,
9 there's a full paragraph that is built around
10 Stinchcombe.

11 Now, I don't know how Bruce read this, and
12 he's not here to explain himself. And I don't
13 know how he read it, but I would suggest to you
14 that any lawyer reading that would have a red
15 flag immediately. And, at the very least, I
16 would have expected that he would have brought
17 it to me and we would have discussed it. Our
18 practice was to use the senior management
19 committee as a safety net, as a sounding board.
20 And when we had issues -- and it worked really
21 well in the years that we were working together.
22 It worked very well. We would table things like
23 this and say, all right, what are we going to do
24 about this? We have advice here now from
25 another Justice Department. He may have read it

1 in the way that you're reading it. I can't deny
2 it. But from my reading of it, it sets off
3 alarms.

4 Q Well, I'm suggesting to you what he, in fact,
5 did was reasonable under the circumstances, that
6 being that he wrote to Mr. Quinney or contacted
7 Mr. Quinney, apparently. Because if you look at
8 tab 62, the last -- the first paragraph, the
9 last sentence, obviously, Bruce had phoned
10 Mr. Quinney because he said that:

11 "You asked that we provide you with the
12 information which led the police to the
13 conclusion that Driskell's version was
14 correct."

15 So I'm suggesting to you what obviously
16 happened, Mr. Whitley, is that Mr. Miller got
17 Mr. Quinney's letter. He saw the allegation
18 that Driskell was alleging it was for financial
19 purposes, or insurance purposes, whereas
20 Zanidean had testified that it was for revenge
21 purposes. And that Miller then phoned Quinney
22 and said: Can you provide us with the evidence,
23 which Quinney then wrote March 9th. Well, Mr.
24 Code, who is always of assistance to me, he has
25 actually pointed out that it is also in the

1 first letter, page 2. When I say the first
2 letter, Stu, I'm sorry, tab 61.

3 A Tab 61, page 2?

4 Q Yes.

5 A Yes.

6 Q In the first paragraph, the second sentence
7 reads:

8 "As advised, in due course I will endeavour
9 to provide you with that information that
10 the RCM Police have which will corroborate
11 Driskell's statement."

12 A Yes.

13 Q So I'm suggesting to you that it was not
14 unreasonable at all for Mr. Miller to wait until
15 he had that information from there -- from
16 Mr. Quinney as to the basis of the RCMP thinking
17 that Driskell's version of events was the
18 correct one, as opposed to Zanidean's?

19 A That was the choice he made.

20 Q Okay. The interesting thing is, I just say
21 parenthetically, I don't want to get into a
22 legal argument on the issue, but all of the
23 evidence that was sent certainly corroborates
24 that there was an arson. I still haven't seen
25 any corroboration anywhere as to -- that

1 supports the RCMP version that it was for
2 insurance purposes, as opposed to revenge or
3 that the revenge motive was false.

4 A I take your word on that.

5 Q The last points I would like to ask you, sir,
6 it's really just by way of clarification or
7 explanation. At the end of your testimony
8 yesterday with Mr. Code, he went through a
9 series of points with you throughout 1993 of the
10 number of things that happened. That Mr. Miller
11 had obviously advised Mr. Dangerfield, at least
12 in 1993, in April, approximately April or a
13 little bit earlier, of the concern that had been
14 raised by Saskatchewan and passed it on to
15 Mr. Dangerfield. And then there is the memo to
16 you that you simply just don't recall having
17 received.

18 But it is quite clear from Mr. Dangerfield
19 that he did receive it at some point. And his
20 recollection is he drafted a letter to go to
21 Mr. Brodsky. Mr. Lerner had a discussion with
22 Mr. Miller. And Mr. Lerner was in agreement it
23 should be disclosed. And Miller told Ewatski
24 and Hall that he had received this information
25 from Saskatchewan.

1 Now, there were also numerous other things
2 that were going on, as Mr. Code pointed out to
3 you, in that period of 1993. There was numerous
4 newspaper articles that were shown to you
5 yesterday, which Mr. Lockyer referred to today.
6 There was a request for a briefing paper from
7 Mr. Dangerfield, which he provided for the
8 minister. Apparently, the issue of
9 Mr. Driskell's -- the possibility of
10 Mr. Driskell having been wrongfully convicted
11 was being raised in the house. And to use
12 Mr. Code's words, there was effectively a fire
13 storm in the media that went on for some period
14 of time. Now, this had to be -- even for an
15 outsider, at that time, had to have been a cause
16 of concern in your department or in what was
17 then called, I believe, the Attorney General's
18 Department, and yet you have no recollection of
19 any of this?

20 A Well, the answer is no. In fact, when
21 Mr. Lockyer wrote to me about it, he made the
22 same point to me in his letters. This is in the
23 media, and obviously it was of some concern to
24 the department, and there were some reviews
25 ordered and so on. The minister, I think, had

1 gotten involved on a Sunday. And I was drawing
2 a complete blank.

3 And in discussion with my wife about, you
4 know, what was happening in 1993 and did she
5 remember any of this? Of course, she doesn't
6 remember many of the cases I was involved with.
7 But she did remember that I was ill. At the
8 time, my focus really was on the period of time
9 between April 13th and April 16th when Bruce
10 wrote his letter and then was working on the
11 file a couple of days later with the police and
12 with the Department in Saskatchewan. So I was
13 wondering, what was I doing or where was I in
14 that period of time? Anyway, she remembered
15 that I was ill.

16 Q And I don't want to cut you off. We are aware
17 of that evidence, and I am obviously not
18 disputing that.

19 A Of what evidence?

20 Q We are aware of what the record -- what you have
21 provided in support of the fact that you were
22 ill from, I believe, March 15th on for some
23 period of time.

24 A Yes.

25 Q And, obviously, seriously ill?

1 A But I was out of the picture.

2 Q No. I understand that. But what I am asking
3 you, though, is eventually you came back to
4 work?

5 A Yes.

6 Q And yet throughout 1993, there was still a lot
7 of developments on Driskell. In particular, as
8 you said yesterday, you apparently weren't aware
9 of the fact that senior officials in your
10 department were meeting with Winnipeg Police in
11 the Ewatski Hall review?

12 A That's true.

13 Q Bruce Miller met with them in May. George
14 Dangerfield and Gregg Lawlor met with them in
15 August. And you expressed surprise about the
16 fact that you were not aware of that?

17 A That's right.

18 Q And there was subsequent happenings in
19 September, October and so on, all related to
20 Mr. Driskell, and yet you don't seem to have any
21 recollection of this. And I am wondering if
22 there is some explanation for why you were,
23 effectively, out of the loop? I am not being
24 critical when I say that. I am asking for some
25 explanation.

1 A It is a reasonable question to ask. I don't
2 know. It would not have been unusual or out of
3 the ordinary for Bruce to meet with the Winnipeg
4 Police, as he did regularly. But it's a
5 surprise to me that that wasn't sort of rolled
6 up the chain.

7 Normally issues like this would have been
8 tabled at our senior management committee. That
9 was the place for us to discuss issues of
10 concern to the department or concerns that
11 directors had that they felt would take on a
12 larger context at some point. I checked with
13 Mike Watson, who was a regular member, and
14 somebody I relied on quite heavily at the time.
15 He has no recollection of it either.

16 MR. CODE: I don't think we should be entering
17 this.

18 BY MR. ABRA:

19 Q I don't really want to get into Mr. Watson,
20 quite frankly, because I've got my own views in
21 that regard. I know you've checked with him.
22 And he says he has no recollection of it, and
23 that's fine. He also said a number of other
24 things that were uncalled for, so let's leave
25 that alone. But you say you have no

1 recollection of it coming up at senior
2 management?

3 A No. And I've asked the previous deputy minister
4 to do a search for our agendas from those dates.
5 And there aren't -- there aren't any records,
6 apparently, or if there were, they are long
7 gone. I don't know. As I said to Mr. Code
8 yesterday, I don't have an answer for that,
9 although it's an entirely reasonable question to
10 ask.

11 Q Okay. And, in essence, is it fair to say, as
12 Mr. Tapper said on your behalf yesterday, and
13 which you told Mr. Code, that it's quite
14 possible that Mr. Miller raised a number of
15 these issues with you, even in passing, in
16 conversation, and you simply don't remember?

17 A That's right.

18 MR. ABRA: That's fine, sir, thank you. I have
19 no further questions. Thank you,
20 Mr. Commissioner.

21 THE COMMISSIONER: Thank you, Mr. Abra.

22 MR. PROBER: Mr. Commissioner, I'll be going
23 next. I am just wondering if we could take the
24 morning break at this point?

25 THE COMMISSIONER: If you would like to, we

1 could.

2 MR. PROBER: Yes, please, if that's okay with
3 the witness.

4 THE WITNESS: Yes.

5 THE COMMISSIONER: Okay.

6 MR. PROBER: Thank you.

7 THE CLERK: All rise. This Commission of
8 Inquiry is now in recess.

9 (Proceedings recessed at 11:15 and
10 reconvened at 11:35 a.m.)

11 THE CLERK: All rise. This Commission of
12 Inquiry is now reopened.

13 MR. PROBER: Mr. Commissioner.

14 THE COMMISSIONER: Mr. Prober.

15 BY MR. PROBER:

16 Q Good morning, Mr. Whitley. You and I know each
17 other.

18 A Long time.

19 Q And you know that I'm representing George
20 Dangerfield at this inquiry.

21 A I do.

22 Q You spoke very highly of Mr. Dangerfield,
23 yesterday, and consistent with other witnesses,
24 in terms of his ability as a prosecutor, and his
25 high standard of fairness and honesty. And I

1 just want to confirm with you that, first of
2 all, in all of the years you worked with him,
3 and that would be about what, about 20 years?

4 A 22 years.

5 Q Had you ever known him to conceal or suppress
6 evidence?

7 A No.

8 Q Not even a hint of that I suggest?

9 A Absolutely not.

10 Q In fact, exactly the opposite, if there was
11 doubt about whether anything should be
12 disclosed, as you said he had a good
13 relationship with senior counsel, I take it he
14 would disclose it?

15 A Yes.

16 Q And you indicated as well, that when you worked
17 with him as a junior, he made the final
18 decisions. And my understanding is that if a
19 mistake were made by a junior or by him, he
20 would accept responsibility for that?

21 A Absolutely.

22 Q Okay. Now, it is unlikely one would know to
23 make a demand for something, or ask for
24 something that one doesn't know exists. I mean,
25 that's sort of axiomatic?

1 A Yes.

2 Q And what is even more unlikely, I submit,
3 suggest, and tougher, is to ask for something
4 that doesn't exist; right?

5 A Yes.

6 Q And I don't know if you are aware of this, but
7 it is my view of the evidence, the Commissioner
8 will have to either agree or disagree in the
9 end, that there was no immunity agreement in
10 place at the time Zanidean testified, at least
11 not according to Kovnats, not according to his
12 documents. Are you aware of that?

13 A I don't feel comfortable commenting on it.

14 Q Let me just direct you to two documents, and
15 give you an idea of what was happening sort of
16 on the eve of the trial. And they are found,
17 Madam Clerk, in Mr. Kovnats' exhibits, I think
18 they are 15A and 15B, Mr. Commissioner. And the
19 first ones that I'm going to refer to are in
20 15B. If you would look at tab 32, please?

21 First of all, you may recall, yesterday,
22 and I may take you to it later, you remember
23 that ultimatum that was presented to Mr. Miller
24 by Mr. Kovnats on May 29th; right? Do you
25 remember that?

1 A Yes, I remember the discussion about it.

2 Q It was in the notes of Thomas Orr, as I recall,
3 and I can take you to that later. But look at
4 what we have at tab 32. We have a letter from
5 Manitoba Justice to Mr. Kovnats, from
6 Mr. Miller, dealing with some minor financial
7 issues, referring to a cheque in the amount of
8 \$500 in the first paragraph, documents
9 pertaining to the Chelsea Avenue transactions in
10 the second; a claim for \$800 to cover the cost
11 of a motorcycle in the third; and four,
12 "The Department of Justice undertakes to
13 continue to provide your client with
14 existing protection until the conclusion of
15 his evidence at trial and subsequently to
16 support his participation in the RCMP
17 Witness Protection Program on terms yet to
18 be arranged."

19 Right?

20 A Yes.

21 Q The trial starts on June 3rd, we know. And this
22 is a letter written by Mr. Miller. Note please,
23 it is not copied to either you or
24 Mr. Dangerfield. Right?

25 A That's correct.

1 Q Then if you would turn, please, in the same book
2 to tab 35? You have Kovnats' response. I don't
3 intend to take you through the whole letter, but
4 look what is happening. The trial has already
5 started. Zanidean is a week away from giving
6 evidence. Paragraph 3, page 2,
7 "My client wishes his full witness
8 protection agreement executed prior to
9 testifying as promised by Constable Orr and
10 to be included in that agreement should be
11 the following items."
12 And he lists new identity, relocation, credit
13 rating. And 5,
14 "Undertaking that there will be no
15 recriminations from my client's past in
16 that the new identity would keep him
17 insulated from any of his past activities."
18 These discussions by letter and perhaps on the
19 phone are still going on and the trial has
20 started; right?
21 A That appears to be the case.
22 Q And I could tell you there is nothing concluded
23 between Kovnats and Miller, unless you can point
24 me to something that indicates there was any
25 deal made; right?

1 A I'm not in a position --

2 Q You wouldn't know. All right. There was
3 nothing in place at the time, according to the
4 documents and according to Kovnats. It is tough
5 to ask for something and get something that
6 doesn't exist; right?

7 A Yes.

8 Q Yeah. You would agree, I think you agreed
9 yesterday that compensation and immunity are
10 different than witness protection?

11 A Yes.

12 Q All right. And just to properly put
13 Mr. Dangerfield's evidence to you, you were
14 asked this by Mr. Code, as Mr. Dangerfield
15 indicated, he had received instructions that
16 neither he nor Lawlor would be involved in
17 witness protection matters in terms of
18 negotiating, but witness protection only. In
19 other words, not compensation, not immunity.
20 When Mr. Dangerfield said that, he wasn't
21 talking about any discussions about him, he was
22 talking about witness protection matters. And
23 that's what he testified to. And you say that
24 you don't recall giving him those instructions;
25 right?

1 A No, I don't.

2 Q No. And while you had already told Mr. Code,
3 and you told all of us that really you can't
4 recall a lot about this particular matter, which
5 is fair. When you say you don't recall, is it
6 perhaps that you did discuss that issue with
7 him, in other words, just restricting it to
8 witness protection?

9 A It may very well have been, yes. It wouldn't
10 have been unusual, which probably is the reason
11 that I don't recall it.

12 Q Okay. Fair enough. And look, if you would,
13 please -- now we are going back to your volume
14 of documents, if I can call them yours, yours,
15 Lawlor's?

16 A Yes.

17 Q And there is a statement by Mr. Finlayson given
18 to the Commission tab 5, that would be volume 1,
19 Mr. Whitley, tab 5?

20 A I don't have anything at tab 5.

21 THE COMMISSIONER: It is the big --

22 MR. PROBER: It is volume 1. I am not sure what
23 you have in front of you.

24 THE WITNESS: Volume 1, tab 5, empty.

25 MR. PROBER: Do we have one that we can give --

1 you know what, I will borrow one of my
2 co-counsel's.

3 THE COMMISSIONER: Actually, Mr. Gates will
4 provide it.

5 MR. PROBER: Thank you, Mr. Gates.

6 BY MR. PROBER:

7 Q Tab 5, volume 1, it is Mr. Finlayson's summary
8 of his interview. And I would direct you,
9 Mr. Whitley, please, to page 6, please, second
10 full paragraph, second sentence.

11 "First, there was a sense that prosecutors
12 generally should not be involved in
13 negotiating benefits with a witness or a
14 witness's lawyer."

15 We are talking about witness protection
16 arrangements there, if you read the previous
17 part of his statement, if we can call it that.

18 "According, there would usually be a
19 Chinese wall of sorts erected between the
20 prosecutors and the negotiators."

21 Do you agree with that or disagree?

22 A No, I would agree.

23 Q You agree?

24 A Yes.

25 Q Thank you. And I'm suggesting to you that

1 Mr. Dangerfield's explanation that he wouldn't
2 be involved in witness protection matters is
3 plausible because, first of all, we have that
4 file, which I'm going to take you to in a
5 moment, that is marked Whitley and Miller only,
6 directors only, strictly confidential and so on.
7 You were taken to that yesterday?

8 A Yes.

9 Q So I say Mr. Dangerfield's explanation is
10 plausible because of that, because of the fact
11 that -- and I will take you to these memos in a
12 moment -- that none of the memos that dealt with
13 witness protection, that were sent to you by
14 Mr. Miller, were copied to Mr. Dangerfield or
15 sent to Mr. Dangerfield, secondly. Thirdly,
16 that Mr. Dangerfield does not appear to be
17 included in any of the meetings between Miller
18 and yourself and Kovnats and Orr. And as well,
19 I cannot find any documents indicating that
20 Mr. Dangerfield was being kept apprised of any
21 of these witness protection developments, but I
22 am going to take you through some of them, and
23 that's why I'm suggesting to you at this stage
24 that Mr. Dangerfield's explanation is plausible.
25 And I will come back to that in a moment once we

1 go through some of the documents. And if you
2 turn, please, in the volume --

3 THE COMMISSIONER: Mr. Prober.

4 MR. TAPPER: I was going to wait for you to take
5 a breath.

6 MR. PROBER: Okay, I will have a glass of water,
7 a drink of water, thank you.

8 MR. TAPPER: Mr. Prober objected to Mr. Code's
9 questioning the other day on the basis that he
10 was making speeches and checking occasionally to
11 see if the witness had a pulse. I accept that
12 objection with respect to Mr. Prober and would
13 ask that a question be put. I would also ask
14 that a question be put as to a question of fact
15 and not argument. Whether this witness believes
16 in the plausibility of something is not his
17 function.

18 MR. PROBER: Well, with respect, in my view it
19 is.

20 THE COMMISSIONER: Yes.

21 MR. PROBER: And I would prefer if Mr. Tapper
22 used the sign that I have on my table.

23 BY MR. PROBER:

24 Q But, in any event, the question is, based on
25 what I have just said to you, would you agree

1 that Mr. Dangerfield's explanation is plausible,
2 acceptable? I was going to save the question
3 until we actually went through all of the
4 documents, but that's fine.

5 A Based on what you just said, yes.

6 Q Now if you could, please, turn to tab 11, which
7 I have noted as the December 14th, '90 letter
8 from Mr. Kovnats to Mr. Miller.

9 A Yes.

10 Q Is there any evidence that you can point to that
11 Mr. Dangerfield got a copy of this?

12 A Nothing appears on the face of the document.

13 Q Or you for that matter?

14 A Nothing appears.

15 Q No. If you go to tab 13, please? We have
16 Miller's response dated December 28th, 1990?

17 A Yes.

18 Q Is there any indication it was sent to
19 Mr. Dangerfield?

20 A Not on the face of the document, no.

21 Q Is there any indication that it was copied to
22 Mr. Dangerfield?

23 A No.

24 Q If you go to tab 14, please, December 28, 1990
25 memo to you, sir. I believe, I'm not opening my

1 book, but I believe it is from Mr. Miller, and
2 with no indication that it was sent to
3 Mr. Dangerfield?

4 A That's correct.

5 Q And no indication that Mr. Dangerfield was even
6 copied this memo; right?

7 A Correct.

8 Q Now, if you look at tab 15, please? This is a
9 memo to you from Mr. Miller with some writing on
10 it. I'm not going to take you through it again.
11 It is marked "urgent." Again, no indication
12 that it was sent to Dangerfield; right?

13 A Correct.

14 Q And no indication that it was copied to
15 Dangerfield; correct?

16 A Right.

17 Q Now, again, if you could go back to Kovnats'
18 exhibits, this would be volume, the first
19 volume, which is marked as exhibit 15A,
20 Mr. Commissioner. Tab 3, please. Just to
21 confirm, you were shown this yesterday, third
22 paragraph from the bottom.

23 "During the course of our dealings with the
24 Crown they promised us a meeting and
25 finally had a meeting on the 22nd of

1 January at 2:00 p.m. we were supposed to
2 meet. They did not meet with me until
3 3:00... "

4 I remember when Mr. Kovnats testified he said
5 that he had been kept waiting an hour.

6 "...there was Messrs. Miller and Stu
7 Whitley. At this meeting they promised me
8 most things contained in the January
9 meeting, promised to get in touch with the
10 RCMP to get the proper witness protection
11 person and promised to get me a retainer
12 letter."

13 Again, no indication that Mr. Dangerfield was at
14 the meeting or was advised of the meeting;
15 right?

16 A That's what it appears from the note, yes.

17 Q I can find no memo advising Mr. Dangerfield of
18 the subject matter of that meeting. Have you --
19 do you have any?

20 A No.

21 Q Tab 18, please. The same -- no, pardon me. It
22 is the March 4, 1990, it is back in volume, I
23 believe volume 1, just to confirm that, of your
24 material, Mr, Whitley.

25 A Sorry, tab --

- 1 Q Tab 18 of volume 1 of your book of documents?
- 2 A Yes.
- 3 Q It is a memo dated March 4th, '91, to you from
- 4 Mr. Miller, Mr. Commissioner.
- 5 A Yes.
- 6 Q Again, no indication that it was sent to George
- 7 Dangerfield or copied to George Dangerfield;
- 8 correct?
- 9 A That's correct.
- 10 Q Look at, if you will, tab 54, please? That
- 11 would be, I believe, in volume 3. No, it is
- 12 volume 2, volume 2 of your book of documents, it
- 13 is a retainer letter to Mr. Kovnats?
- 14 A Yes.
- 15 Q Everybody in the world is copied except
- 16 Mr. Dangerfield. It is signed by Mr. Garson,
- 17 who would have been the Deputy Minister, right,
- 18 at the time?
- 19 A Yes.
- 20 Q And you are copied, Tom Hague is copied, Doreen
- 21 Cane is copied, and Linda Kruk is copied and
- 22 Bruce Miller is copied?
- 23 A Yes.
- 24 Q The trial is going on. Mr. Dangerfield is not
- 25 copied, right?

1 A That's correct.

2 THE COMMISSIONER: Sorry, I missed the tab?

3 MR. PROBER: Sure, tab 54, please. You can see
4 at the bottom left of the letter,

5 Mr. Commissioner, all of the people that were
6 copied, and this witness of course has confirmed
7 the obvious, Mr. Dangerfield was not copied.

8 BY MR. PROBER:

9 Q Again, tab 57, it is the letter you have been
10 shown, I think it is the last tab in this book
11 of documents. It is the June 21st, 1991 letter
12 sent by Mr. Miller. And I say sent by
13 Mr. Miller, there is no indication when that was
14 sent. There is a fax cover sheet dated June
15 21st. There is no indication that I have on any
16 document that I have seen as to when that was
17 faxed. It is dated the 21st, everybody here
18 seems to assume that it was sent on the 21st.
19 It is possible that the fax was prepared, the
20 cover sheet that is, the letter was prepared on
21 the 21st but wasn't faxed or sent until later;
22 isn't that correct? You wouldn't know I don't
23 think?

24 A I wouldn't know, but normally the date --

25 Q Is at the top. I can't see it, is it on your

1 copy?

2 A I only have a portion of the printing, but it
3 says from Public Prosecutions and the preceding
4 information is not there.

5 Q I know, and you can't see the date. So it is
6 hard, unless there is a better copy somewhere,
7 it may not be -- well, now I would be making
8 some comments about that. But you can't say
9 when it was sent or faxed obviously?

10 A No.

11 Q So, by my count, and I may be more or less
12 accurate, there is eight to ten memos, letters,
13 probably more if I include the meetings, where
14 Dangerfield's name does not come up. We have
15 just gone through them. And nothing is said to
16 Dangerfield, not copied, no evidence that I can
17 point to that he knew about this, unless you
18 know of some evidence that we don't have? And I
19 take it you don't?

20 A That's correct.

21 Q Right. That's why I suggested to you that it is
22 plausible, when Mr. Dangerfield says that he was
23 instructed that he would not be involved in
24 these negotiations and meetings concerning
25 witness protection, that's exactly what

1 happened. Correct?

2 A Yes.

3 Q And again, you know what, I have a note to take

4 you to it, but I don't think that I'm going to

5 bother. You remember again you were taken to

6 Kovnats' dockets and there was a second meeting,

7 and it referred to Whitley and Miller. If you

8 want to refer to it, Mr. Commissioner, it is in

9 exhibit 15A, tab 2, those are Kovnats' dockets.

10 And there was a second meeting and, again,

11 Dangerfield is not mentioned. Is that right?

12 A That's right.

13 Q If you could look at tab 13 -- exhibit 15A,

14 pardon me -- option 1 and option 2.

15 A Is that the --

16 Q That's Kovnats' exhibit 15A.

17 A Tab again?

18 Q 13.

19 A 13A?

20 Q 13 -- the exhibit is 15A, tab 13.

21 A Yes.

22 Q We have got option 1 and option 2. Option 2

23 being a lump sum, which I've referred to in

24 discussions with my colleagues as sort of the

25 self-administered witness protection program;

1 right?

2 A Yes.

3 Q And can you point to any evidence, sir, that
4 would indicate that there were any discussions
5 with Mr. Dangerfield about these options?

6 A I can't, sir.

7 Q No. After Mr. Code took you through these
8 exhibits, he then took you to tab 24, back to
9 your documents, volume 1, exhibit 30A, tab 24.
10 We have an ultimatum here, the one I referred to
11 earlier, the ultimatum that Kovnats was giving
12 to Miller. And I recall Mr. Code suggesting to
13 you that these materials raised disclosure
14 issues, namely a lump sum option, as my notes
15 have it, and a demand for immunity -- not that
16 there was any agreement in place with respect to
17 immunity, not that there was any agreement in
18 place with respect to a lump sum payment, but
19 just the fact of the demand for both was
20 discloseable. You agreed with that?

21 A Yes.

22 Q And I wanted to go over this with you, and it is
23 more thinking aloud than anything else. I'm
24 just not sure that in a pre-Stinchcombe period
25 of time that they are discloseable, but let's

1 assume for a moment that the demand itself was
2 discloseable, the demand for immunity. Now, as
3 defence counsel, I get information that the
4 witness has made a demand for immunity, didn't
5 get it, or he has made a demand for
6 compensation, didn't get it, am I going to put
7 that to a witness?

8 A I think --

9 Q Why? Here the witness didn't get what he wanted
10 but he is still here testifying, that's liable
11 to strengthen his evidence, in my respectful
12 suggestion to you. I mean, it is something that
13 I thought about this morning. Whether it is
14 discloseable or not is one issue, but even if
15 you disclose it, it seems to me rather dicey to
16 use it. But that I suppose may be subject to
17 discussion between various defence counsel. Why
18 do you say that it would be used?

19 THE COMMISSIONER: Mr. Tapper, is this -- Mr.
20 Prober.

21 MR. TAPPER: I'm waiting for --

22 MR. PROBER: Oh, I am sorry, I just asked him --

23 MR. TAPPER: If he would restrict this to
24 questions.

25 MR. PROBER: Fair enough.

1 BY MR. PROBER:

2 Q Mr, Whitley thought that it would be useful, and
3 it might be put to a witness, and I'm just
4 asking him why he thought that.

5 A No, I don't agree that it is or isn't useful.
6 The point I was trying to make, if I wasn't
7 making it clearly yesterday, that's the choice
8 for defence counsel to make. If we remove that
9 choice for them, they never have it.

10 Q Okay. Fair enough. You are right, it is a
11 choice that defence counsel has to make, and you
12 don't pretend to comment, or don't purport to
13 comment on whether that choice should be made or
14 not.

15 A That would be up to the strategy of counsel.

16 Q Okay. Can you point us to any evidence that
17 Mr. Dangerfield was advised of these demands for
18 immunity and compensation?

19 A There is no possible way --

20 Q No?

21 A -- I could answer that question.

22 Q You haven't seen anything in the documents that
23 I have taken you through, have you?

24 A I have not been referred to anything of that
25 nature.

1 Q No. In fact, again, if you would turn to tab
2 59, please, in your book of documents, which
3 would be the third --
4 MR. WOLSON: Which tab?
5 MR. PROBER: Third volume, tab 59.
6 MR. WOLSON: Thank you, sir.
7 MR. PROBER: I like that appellation, by the
8 way, you can keep that up.
9 BY MR. PROBER:
10 Q The document, again, just to highlight the
11 second, third page in,
12 "Witness protection, B. Miller and S.
13 Whitley only."
14 And then the previous page, the previous page,
15 "Strictly confidential. Strictly
16 confidential. Public prosecutions
17 directors only."
18 Well, Mr. Dangerfield was not a director, right?
19 A That's correct.
20 Q Is there anything you can tell us, any evidence
21 you can point to that Dangerfield actually ever
22 accessed that file at any time?
23 A I can't help you with that.
24 Q How was Dangerfield to get all of this
25 information? By osmosis? I mean, we have seen

1 all of the memos, we have seen the meetings
2 where he is not involved at all. We have a file
3 that doesn't have his name on it. How is he to
4 get that information? I take it you would
5 expect that perhaps, and you said this
6 yesterday, you would expect two senior
7 prosecutors to keep each other informed; right?

8 A Yes.

9 Q And I made a note of that, and I wondered
10 whether you were you talking about yourself and
11 George Dangerfield, or yourself -- or Bruce
12 Miller and George Dangerfield?

13 A I was speaking of Bruce and George specifically.

14 Q Okay. Would there have been anything preventing
15 you from advising George Dangerfield? You were
16 away a lot, I know that, as assistant --

17 A If I was privy to a lot of what was going on,
18 there wouldn't have been any obstacle to me
19 doing that. This was more in the line of
20 operations. I would have expected --

21 Q Right. Okay.

22 MR. TAPPER: The witness was cut off.

23 BY MR. PROBER:

24 Q He would have expected --

25 A That the director would have kept the lead

1 prosecutor informed as to developments on this
2 file.

3 Q And you don't know what meetings or discussions,
4 obviously, they had about it --

5 A No.

6 Q -- if any.

7 Now, why would there be any negotiations at
8 all? This is a thought that occurred to me as
9 well. Somebody wants witness protection, they
10 ask for witness protection. Your department is
11 trying to get them into the national RCMP
12 Witness Protection Program. Why would there be
13 any negotiations about that? I mean, there is
14 issues of a new identity, there is issues of
15 relocation, obviously, there is issues of
16 expenses paid on behalf of, not to, but on
17 behalf of the particular individual who is going
18 into the program. Would it be normal to have
19 lengthy negotiations about that, and lump sum
20 payments, and payments for motorcycles and sale
21 of houses and that sort of thing?

22 A No, it wouldn't be usual. But a person's
23 estimation of their existing lifestyle -- and it
24 is a reasonable demand it make, to be relocated
25 in a manner that's reasonably consistent with

1 what they enjoyed prior to their engagement with
2 the justice system -- sometimes a person's
3 estimation of that lifestyle is inflated. If
4 counsel enters the picture, more inflated still,
5 I would suggest.

6 Q Right. And if George Dangerfield did not get
7 some information, I don't like to call it
8 significant because we are talking only about a
9 demand, that wasn't demands plural, that were
10 not met. If he was not advised of those
11 demands, do you have any explanation as to why?

12 A No.

13 Q You said that these are good decent men, I take
14 it you were referring to Dangerfield and Bruce
15 Miller; correct?

16 A That's right.

17 Q And you said you don't know what happened in
18 this case; correct?

19 A That's right.

20 Q Would you know whether the prosecution, a lot of
21 the information that the police had was withheld
22 from the prosecutors, or would you not know?
23 And it came up this morning when Mr. Lockyer
24 suggested to you that the Crown would know. And
25 in fact, Mr. Code rose to correct Mr. Lockyer.

1 I agreed and I believe you agreed to a certain
2 extent?

3 A Sorry, I misapprehended Mr. Lockyer's question
4 about the Crown knowing, I thought he was
5 referring to the original Quinney letter.

6 Q Oh, right. Okay?

7 A But if the police were to not share information
8 with the prosecution, obviously, we are not in a
9 position to know, to do anything about it.

10 Q Do you know, do you have any personal knowledge
11 of the situation in this case as to whether the
12 police did or didn't share?

13 A No.

14 Q I have very few questions left. And they relate
15 to the post-trial period. If you want to
16 look -- you don't have to -- at tab 61, that's
17 the Quinney letter. And you very fairly and
18 very candidly said yesterday that any one of the
19 three of you, you, Miller, or Dangerfield, could
20 have disclosed this?

21 A Yes.

22 Q Correct? Despite the fact that Mr. Code kept
23 trying to bring you back to Mr. Dangerfield and
24 questions like, who had the primary
25 responsibility, what about personalities, and

1 you quickly rejected the fact that personalities
2 have nothing to do with that, you agreed you
3 wouldn't stand on niceties. And it is still
4 your view, I take it, today, that any of the
5 three of you could have made that disclosure?

6 A That's right.

7 Q Would you agree with my suggestion that if
8 Brodsky, Mr. Brodsky, already knew about the
9 matters in the Quinney letter, he already knew
10 about the Swift Current arson because it was his
11 client, Driskell, made a statement, you might
12 recall that part of the letter, with the
13 concurrence of Mr. Brodsky. And if Brodsky knew
14 about the demands that were being made -- we
15 know, you may not know, that he had a meeting
16 with Kovnats to discuss that issue with respect
17 to Zanidean -- if Mr. Brodsky knew about the
18 recantation, because he may have had one himself
19 from Zanidean, if he knew about all of that,
20 would that not alleviate the concern and the
21 urgency of the matters raised in the Quinney
22 letter?

23 A It may very well have.

24 Q And finally, if you look at exhibit 34, please.
25 It is a single sheet of paper, it is a memo

1 dated March 19, 1993 to Mr. Dangerfield from
2 Mr. Miller?

3 A I have it.

4 Q Clear -- well, we know it is Mr. Dangerfield's
5 writing -- he was in favour of disclosing the
6 material, whether he believed Brodsky knew it or
7 not, he was in favour of disclosing the material
8 to Mr. Brodsky; correct?

9 A Yes.

10 Q Consistent with his open, fair and objective
11 role as a prosecutor?

12 A I completely agree with that.

13 MR. PROBER: Thank you. Those are my questions.

14 THE COMMISSIONER: Thank you, Mr. Prober.

15 MR. PROBER: Thank you, Mr. Commissioner.

16 MR. WOLSON: That is a sure way to keep my
17 questioning down, my friend was taking all of my
18 materials.

19 MR. PROBER: I was trying to do us all a favour,
20 Mr. Commissioner.

21 MR. WOLSON: And I see the Commissioner favours
22 that.

23 BY MR. WOLSON:

24 Q Good morning, Mr. Whitley. You and I go back a
25 long way, we have known each other for many

1 years, and I have some questions for you. I act
2 for members of the Winnipeg Police Association,
3 and if you will then consider my questions from
4 that respect.

5 First of all, Witness Protection Program,
6 those cases in 1990 and '91, we were told from
7 the police that they hadn't dealt with one
8 before at that time, the police officers
9 involved. From the prosecution's perspective,
10 they weren't the norm either at that time, were
11 they?

12 A That's right.

13 Q There were no set policies in place, and I'm not
14 critical of that, but there were no set policies
15 in place to deal with witness protection
16 matters?

17 A That's absolutely true. It is many times the
18 case that crisis drives policy development.

19 Q And so we have, in effect, those involved were
20 in unchartered waters to start with, because it
21 wasn't an issue of precedent, there was none in
22 terms of policy, that's true?

23 A Yes.

24 Q And along with that there had been changing
25 disclosure policies which, as you indicated

1 yesterday, had been the subject of debate and
2 there was some resistance to these new
3 disclosure policies, in around 90/91?

4 A I want to stress, I need to be fair to the
5 prosecutors who did express resistance, it was
6 resistance based on what they considered to be
7 rational basis.

8 Q I'm not questioning the resistance, but we are
9 in a situation, one, of witness protection;
10 secondly, of new disclosure policies, and it was
11 all at the same time, around 90/91?

12 A That's right.

13 Q Now, you were asked some questions today, and
14 Mr. Prober referred you to an interview with
15 Mr. Finlayson, and discussed with you that he
16 had raised the issue of a wall between
17 Dangerfield and those dealing with witness
18 protection matters?

19 A Yes.

20 Q But that wall would not in any way take from the
21 Crown's responsibility to disclose information
22 they had that was relevant to the case?

23 A That's right.

24 Q Certainly, they wouldn't disclose matters of
25 location, where a witness was going to be

1 relocated. That's something obviously that
2 wasn't discloseable and was not of relevance to
3 Mr. Dangerfield, being the trial counsel?

4 A Correct.

5 Q And as you said, a plan to keep Mr. Dangerfield
6 in the dark would do violence to common sense,
7 in the sense of keeping him in the dark of
8 discloseable matters?

9 A Yes.

10 Q The fact that Zanidean, through his counsel,
11 asked the Crown for some kind of accommodation
12 regarding outstanding investigations is clearly
13 a discloseable fact and demonstrably in the
14 hands of the Crown?

15 A Yes.

16 Q You don't have to go there, but for the record,
17 and you have been there before, at tab 11 there
18 is a December 14th letter from Kovnats to Bruce
19 Miller where at paragraph 8 he says that as a
20 result of new identity, any other matters the
21 Crown is aware of, any investigations or charges
22 in this or other provinces should not be
23 proceeded with. That's a request for
24 accommodation?

25 A Yes.

- 1 Q And that is now in the hands of the Crown and
2 absolutely discloseable?
- 3 A Yes.
- 4 Q Even if you look at tab 24, and you have been
5 there before --
- 6 A Do you wish me to go to the exhibit?
- 7 Q You can. You have been referred to it before,
8 it is the more or less what we have referred to
9 as the ultimatum given by Kovnats to Miller,
10 just, on the 29th of May, a short, just a few
11 days before the trial was to start.
- 12 A Yes.
- 13 Q And he specifically asks for an accommodation
14 regarding the Swift Current affair?
- 15 A Yes.
- 16 Q That is, on the eve of the trial, clearly and
17 absolutely discloseable?
- 18 A Yes.
- 19 Q The fact that -- you don't have to go there, but
20 back to tab 11, the shopping list of Kovnats
21 where he wants the Crown to buy the house of the
22 witness and pay the witness money for that --
23 that is a discloseable fact?
- 24 A Absolutely.
- 25 Q The fact that he wants legal fees paid for, that

1 is a discloseable fact?

2 A Yes.

3 Q The fact that he wants property that he owns, I
4 think a car and a motorcycle, he wants those
5 purchased, those are discloseable facts?

6 A Yes, they are.

7 Q Not whether or not the department is going to
8 accommodate him, but the fact that he is asking?

9 A Yes.

10 Q When I say he, he through his counsel?

11 A Yes.

12 Q And the last point in there, before I get to the
13 outstanding charges, there was a -- and you've
14 been apprised of it this morning if you haven't
15 seen it already -- there was a negotiation
16 between Mr. Miller and Mr. Kovnats for a lump
17 sum to equal relocation, Kovnats asking for
18 \$30,000, and eventually Mr. Miller settling for
19 20,000, a critical discloseable fact?

20 A Yes.

21 Q And the request for \$30,000 by Kovnats is at tab
22 50, you don't have to go there, but it is a
23 request that he would settle for \$30,000. June
24 the 4th, that's the date of the letter, that's
25 while the trial is ongoing. The trial started I

1 believe on the 3rd. The trial started on the
2 3rd, he is asking for \$30,000 while the trial is
3 proceeding. That is a discloseable fact?

4 A Yes.

5 Q And that is, you would agree, clearly the Crown
6 knows of this?

7 A Yes.

8 Q The word immunity has been used by a number of
9 different people in this case. I would be
10 correct, and I ask for your opinion on this,
11 that immunity means, true immunity is something
12 that's a dispensation from Justice, the Justice
13 Department?

14 A Dispensation from prosecution, yes.

15 Q Yes, but it comes from the Justice Department?

16 A Yes, it does.

17 Q The police can't give immunity. Immunity has to
18 come from the higher source of the Justice
19 Department, prosecutions?

20 A As a matter of law, I think that's right.

21 Q Yes. If Swift Current had an allegation of
22 arson that they decided they weren't going to
23 proceed with, that in effect is not immunity per
24 se, in the legal sense, is it?

25 A No.

1 Q That is, if they decide not to pursue an
2 allegation and lay a charge, because none had
3 been laid we were told, that is not true
4 Immunity?

5 A No. But the perception --

6 Q I understand.

7 A -- might be different.

8 Q It is a perception, but not true immunity?

9 A That's right, yes.

10 Q If Swift Current, through the RCM Police, had
11 decided that there was an allegation of arson by
12 Zanidean, that he was either a principal or
13 party to the arson, but decided to do nothing
14 about it, and that came to the attention of
15 Justice, that is a discloseable fact?

16 A Yes.

17 Q And it would be important for the Crown to know?

18 A Well, absolutely, as I understand the facts of
19 this case, it is alleged he was involved in that
20 with the accused in the case.

21 Q If you turn to tab 44, and there are four pages
22 in tab 44, that's in volume 2 of the materials
23 with your name on the front?

24 A Yes.

25 Q If you turn to the third page which has -- I

1 think there are five pages -- but has the number
2 338 in the right-hand corner.

3 A I have it.

4 Q This is from a pre-trial with Mr. Dangerfield
5 and Mr. Brodsky before Mr. Justice Morse,
6 Dangerfield and Lawlor and Brodsky before
7 Justice Morse.

8 A Yes.

9 Q Second paragraph,
10 "The Crown makes the point...",
11 and it is the date of the pre-trial, as you will
12 see from the first paragraph, was the 22nd of
13 May. You see that?

14 A I see it.

15 Q "The Crown makes the point that the RCMP
16 in Swift Current were notified of the
17 involvement of Zanidean and it is up to
18 them to pursue or not pursue the
19 investigation."

20 You see that?

21 A I'm following you as you speak.

22 Q And I tell you that there is evidence that the
23 police, Winnipeg Police Service notified the
24 Swift Current RCMP. So here is a disclosure
25 made by the parties to the murder allegation in

1 a pre-trial before Justice Morse, according to
2 the memo of Greg Brodsky. You see that?

3 A I see it.

4 Q And if you go back to, there is another memo,
5 and it is the first page of the tab.

6 A Yes.

7 Q And this talks of a pre-trial again, this is a
8 date of May 23rd, but I think there was only one
9 pre-trial, was there not? All right, so it is a
10 continuation of an earlier pre-trial, but the
11 date of the 23rd. If you look at the third
12 paragraph,

13 "The RCMP were advised according to
14 Dangerfield and Lawlor (by Lawlor) in
15 Dangerfield's presence in the office of Mr.
16 Justice Morse that Zanidean probably set
17 the fire. The RCMP chose to do nothing
18 about it."

19 Do you see that?

20 A I'm following.

21 Q So there is no question that on the date of the
22 pre-trial, Mr. Dangerfield knew about the
23 investigation in Swift Current. There is no
24 doubt about that?

25 A It appears to be the case.

1 Q He would either have had to have found out from
2 the police directly, or from Mr. Miller, who was
3 advised by the police?

4 A Yes.

5 Q Now, the question that I have for you, knowing
6 that much, knowing the fact that there is an
7 investigation in Swift Current, that it is
8 regarding an arson, that the RCM Police have
9 chosen to do nothing about it, would you not
10 think, just a few weeks prior to the trial, that
11 one would make, if you were there, if you were
12 involved, that you would make further inquiries
13 about Swift Current?

14 A That seems to be a reasonable thing to do.

15 Q Yes. To find out the whole story, if you didn't
16 know it beforehand?

17 A Yes. I would think that one would want to guard
18 against being taken by surprise if this issue
19 arises.

20 Q If when you consider the reputation of
21 Mr. Dangerfield, and his preparation and level
22 of preparation, you would think that he would
23 want to be fully informed so as not to be
24 blind-sided, as you say. That's something that
25 is rather obvious, isn't it?

1 A Well, yes.

2 Q If the police, knowing Mr. Dangerfield, again,
3 as you do, had not fully informed him and he
4 found out at least this much, you would expect
5 him to be furious with the police?

6 A Yes, yes, I would.

7 Q Now, on some sensitive issues police will write
8 supplementals, on others there will be oral
9 disclosure, and you have noted that in your
10 statement, or your interview with Mr. Code. You
11 would agree with that?

12 A That's happened, yes.

13 Q Now, for the Crown to work successfully, when
14 you have a separation like you had here, where
15 you had Mr. Miller doing negotiations with
16 Mr. Kovnats, and Mr. Dangerfield doing the
17 trial, there has to be an exchange of
18 information. For senior counsel, that's a
19 given, isn't it?

20 A Absolutely, yes.

21 Q And if you look at tab 15, while this is -- I
22 will wait until you get there, tab 15 of volume
23 1?

24 A I have it.

25 Q This is a memo from Mr. Miller to you, and I'm

1 not concerned that it is going to you in my
2 question, but it is obvious from, when you look
3 at the content of the memo, the last three
4 lines,

5 "This matter takes on a greater urgency
6 given the fact that statements of witnesses
7 have now been disclosed to the defence."

8 That connotes knowledge of Mr. Miller of what is
9 going on in Mr. Dangerfield's prosecution?

10 A Yes.

11 Q And that's the kind of exchange you would expect
12 between two senior lawyers?

13 A Yes.

14 Q And likewise, if Mr. Miller had information that
15 there were accommodations being requested by a
16 witness, or that there was immunity discussion,
17 not true immunity from Justice in Saskatchewan,
18 but a kind of perceived immunity, that's why you
19 would expect the communication to be going both
20 ways, between Miller and Dangerfield, and
21 Dangerfield and Miller?

22 A Yes.

23 Q Now, we were told from a number of different
24 sources, although there is a contest as to it,
25 that in order to get into the Witness Protection

1 Program, that if you have outstanding
2 allegations, it is a bar to getting in. Do you
3 know anything about that?

4 A My recollection on this is very weak, but I
5 don't believe that that was necessarily the
6 case, but I'm not certain about that.

7 Q Well, one way or the other, if it were a bar to
8 getting in, then an outstanding allegation
9 becomes part of witness protection per se?

10 A Yes, that's absolutely right.

11 Q If it isn't a bar, and it is known to the
12 prosecution, then it has to be -- known to one
13 senior prosecutor -- it has to be relayed to the
14 prosecutor that's handling the case?

15 A You would expect that, yes.

16 Q Yes. Now, you've been taken to tab 57, and
17 that's the June 21 fax from Miller to Kovnats
18 indicating that they have a resolution subject
19 to approval, a resolution that \$20,000 will be
20 paid for witness protection?

21 A Yes.

22 Q Now, we know here, and you have been taken
23 there, that there was an understanding between
24 Mr. Miller and Mr. Kovnats that the Crown would
25 ensure that Zanidean was protected?

1 A Yes.

2 Q If Zanidean, who was under police escort after
3 the trial, and that escort were to end and
4 something were to happen to Mr. Zanidean, and no
5 agreement in place, that would be a very, very
6 difficult thing for the Crown later to explain.
7 That would put them in a very precarious
8 position?

9 A That's fair.

10 Q Yes. If a man who had received a threat
11 already, like Zanidean had, and he were just
12 thrown out on the street without any agreement
13 and something happened to him, there would be a
14 lot of answering to do?

15 A Yes.

16 Q I want to ask you then about the Quinney
17 letters, and I understand your position that you
18 weren't aware of them at the time, and for the
19 purposes of my questions, I'm not challenging
20 you on that at all. So if you go then to book
21 3, the first letter is at tab 61.

22 A I have it.

23 Q And I'm interested in the second page, and I'm
24 interested in the second paragraph of the second
25 page. And just summarizing the second

1 paragraph, it is read that there was a threat of
2 a recantation by Zanidean. You've read that and
3 you would agree with that summary?

4 A Yes.

5 Q And this is January of 1992, so this is some
6 many, many months after the trial; right?

7 A Yes.

8 Q If one were just hearing of that for the first
9 time, there would be an alarm going off, if you
10 hadn't heard about it before?

11 A I agree.

12 Q And the things that would be done if you, for
13 instance, had received this letter, you would
14 first go to trial counsel and say, what is this
15 all about?

16 A I would.

17 Q You would, you may go to the police and say, do
18 you know something about this? You would do an
19 investigation?

20 A Something would happen, yes.

21 Q Yes. And the same if you were unaware of a
22 situation of immunity set out in paragraphs 3
23 and 4, particularly paragraph 4.

24 "With respect to the arson in this
25 province....",

1 Quinney writes,

2 "...it seems clear that Mr. Zanidean is of
3 the view that he was granted immunity from
4 prosecution."

5 You see that?

6 A I do.

7 Q Again, if one didn't know anything about that,
8 and it were to come up several months after the
9 trial -- if you had gotten this letter, for
10 instance, you certainly would have gone to trial
11 counsel, would you not?

12 A Absolutely, yes.

13 Q And you would have gone to the police and you
14 would have raised several questions?

15 A Yes.

16 Q And then if I can go to the second Quinney
17 letter, tab 69? There is some more of the same,
18 but I'm interested first -- Mr. Code points out
19 it is the third Quinney letter, but it is the
20 letter, so there is no misunderstanding, on the
21 28th of April, 1993, Quinney to Mr. Miller. Do
22 you see that? It is about the third page in at
23 tab 69. Are you with me?

24 A As always, Mr. Wolson.

25 Q Thank you. Again, I'm not asking you questions

1 about whether you received this.

2 A I understand.

3 Q I accept your evidence in that regard. But
4 there had been some conversations, some
5 questions asked of you as to the propriety of
6 telling a witness after his evidence that he was
7 not going to be proceeded against of outstanding
8 charges. And Mr. Code took you there, and other
9 counsel took you there. And you had indicated,
10 you had made some very definite remarks of how
11 wrong that would be, in your opinion?

12 A I think so, yes.

13 Q Now, if you hadn't known anything about that
14 kind of arrangement and you read about it at the
15 second page of this April '93 Quinney letter, at
16 the very first line of the second page,

17 "The Winnipeg City Police investigator
18 maintained that he did not tell
19 Zanidean..."

20 A Excuse me, I said I was with you, but I'm not.
21 I have the April 28th letter.

22 Q Tab 69.

23 A I have that.

24 Q If you look into the third page, that's the
25 start of the letter, April 28, '93?

1 A I have that.

2 Q And if you go to the second page of the
3 letter --

4 A Yes.

5 Q -- at the top,

6 "The Winnipeg City Police investigator
7 maintained that he did not tell Zanidean
8 about the immunity until after Zanidean had
9 testified."

10 So it is spelled out to Mr. Miller at that time,
11 if he hadn't known earlier, it is spelled out on
12 April 28th, 1993; right?

13 A That's what the letter suggests, yes.

14 Q It would be inconceivable, if one hadn't known
15 about that earlier, that Mr. Miller would not go
16 to Mr. Dangerfield and ask him about it; right?

17 A Right.

18 Q Would not go to the police, for two reasons;
19 one, to see whether or not it were true; and
20 secondly, to perhaps take issue with him so that
21 it wouldn't happen again. That would be without
22 question what Mr. Miller would do?

23 A Those are just reasonable things to suggest,
24 yes.

25 Q That's what you would do for sure?

1 A Yes.

2 Q But we know that just two weeks later that the
3 police were conducting their homicide review,
4 and we know that they went to Mr. Miller on the
5 5th of May, 1993, and you can see that at tab
6 71 -- 13th of May, 1993, 93/05/13. And if you
7 go then to page 81, which is four or five pages
8 in, it is one of the pages of the homicide
9 review.

10 A Page?

11 Q Page 81. In the right-hand corner it will say
12 6305?

13 A Yes.

14 Q "Miller told us he was satisfied that he
15 and his prosecuting attorneys had been
16 fully advised of all aspects of what
17 Zanidean had told the police investigators,
18 during the course of their investigation,
19 including his involvement in the arson."
20 You see that?

21 A It is there, yes.

22 Q So, A, it appears that the arson disclosures
23 were made to the Crown?

24 A Yes.

25 Q "He also stated investigators had

1 indicated they had not made any promises to
2 Zanidean regarding immunity in return for
3 his testimony."

4 A Yes.

5 Q And I can tell you that the investigators took
6 the position that they were advised by
7 Mr. Miller to tell Zanidean after he testified,
8 so as it wouldn't appear as if they were doing
9 something for him in return for his testimony,
10 to keep him in a pristine state.

11 Now, there is nowhere in the homicide
12 review report where Mr. Miller is at all
13 critical of the police?

14 A I'm sorry?

15 Q Where he is at all critical of the police or
16 their conduct.

17 A Sorry, I didn't hear --

18 Q Nowhere in the homicide review that he is
19 critical of the police, I tell you that. That
20 is not reasonable if, in fact, the police had
21 done things beyond his knowledge. He would
22 certainly let them know, would he not?

23 A Absolutely, yes, he would.

24 Q The homicide review, we have been told, was an
25 investigation conducted by the police to see

1 whether or not all disclosure was made by the
2 police to the Crown. That was the genesis of,
3 and the reason behind the homicide review. We
4 have been told that. And then if you look at
5 tab 72?

6 A I have it.

7 Q By August of 1993, this is an interview with
8 Mr. Dangerfield, and this is in 1993, August, by
9 that time we know that he is aware at least of
10 the first Quinney letter, the letter which talks
11 about immunity and talked about recantation.
12 And they are interviewing Mr. Dangerfield
13 regarding the state of the disclosure that the
14 Crown was given by the police in this case. And
15 the comments are that they are happy with the
16 information supplied by the police, they had --

17 A Are you referring to the first page?

18 Q I am. Are you with me, where it says 93/08/23?

19 A Yes, they are happy, I see it.

20 Q "...they are happy with the information
21 supplied by the police."

22 And I don't have to read it all, but they have
23 absolutely no complaints with the investigation
24 and how it was handled by the police, stressing
25 that it was a difficult investigation.

1 Now, knowing George Dangerfield as you do,
2 if he were blind-sided by the police, if he
3 found out after the fact that the police had not
4 given him critical information, there is no way
5 in the world, I take it you would agree with me,
6 that he would make a statement that he was happy
7 with them?

8 A That's right.

9 Q I just have one other question for you, and you
10 may or may not be able to help us, it is dealing
11 with exhibit 35H, one of the loose pages, or the
12 loose documents that you were given this
13 morning. At the top it says James Patrick
14 Driskell, Dale Schille number 3, it is a review
15 that Schille did, 35H?

16 A I don't have it here, but I recall it -- or
17 perhaps I do. Yes, this document?

18 Q Yes. Now, if you go to page 3 of the document,
19 what happens, let me just ask you first,
20 Mr. Whitley, from your knowledge of being -- you
21 don't have to read the document yet -- but from
22 your knowledge of being, holding the position
23 that did you with the Crown's office, what
24 happens with a homicide file? How long does it
25 remain open? How long can you find it, retrieve

1 it, and get the file?

2 A I can't answer that with any precision. But
3 theoretically, at least, the portion of the file
4 that is retained by us, as opposed to the pinks
5 which used to be returned to the police
6 department, it would be retained in our offices
7 for at least a few years after the close of the
8 appeal period. Thereafter, it would be archived
9 in accordance with the schedule of the
10 Provincial archivist and, at least in theory,
11 fully accessible until a period of think it is
12 10 or 15 years.

13 Q Now, I know in most law firms, and I don't know
14 about the Crown office, storage is a problem and
15 most law offices have their -- the lawyers who
16 deal with cases strip down the file so that you
17 have the important parts of the file left. Does
18 that happen with Justice?

19 A The file area during those years is one of our
20 serious weak points. We only had one full-time
21 file clerk and her assistant. And the two of
22 them did yeoman work in the file room, but we
23 tried year after year to get automated systems
24 put in. And it never happened as long as I was
25 there. I was never able to get the money to do

1 it.

2 Q Whether the file was stripped down or it wasn't
3 would depend on whether they could get it?

4 A That's right. Quite often everything was
5 stuffed in the file and off the desk in return
6 for the next one. Some would take out their
7 personal notes and that sort of thing and throw
8 those away.

9 Q The other question that I want to ask you, some
10 counsel when they work on a file, when the file
11 is closed, papers go missing, not intentionally,
12 but they are working, whether they work at home
13 or they work at the office, papers are all over
14 the office. Do you know whether that was -- was
15 there a policy that all papers should be put
16 back in a file?

17 A There was a general expectation that everything
18 that one worked on in a file went into the file.
19 Although there was a practice I know of some
20 people taking the handwritten notes that they
21 made of cross-examination and that sort of
22 thing, throwing them away, simply because we had
23 no space. We had a room that by the time of the
24 renovation of the Woodsworth Building was
25 already too small. So, did things go missing?

1 I'm virtually certain that that's the case.

2 Q What I'm asking you then, at tab 35, or exhibit
3 35H, page 3, Mr. Schille, in 2000 when this
4 review was conducted, sets out at the top of
5 page 3 and on the previous page a series of
6 things that were in the file that he reviewed?

7 A Yes.

8 Q But at page 3 in the middle with an asterisk
9 beside it, he notes,

10 "The police officers notes were not on the
11 file at the time of the review, otherwise
12 the file appeared to be intact and well
13 organized."

14 A Yes.

15 Q Would the police officers' notes be sent back to
16 the police?

17 A No -- I should qualify that, because it wasn't
18 until sometime later that police officers' notes
19 became paginated. So that a notebook, and there
20 was a transition period, as I recall, where a
21 notebook might be used in a couple of
22 investigations, so the police officer might
23 require --

24 Q His notes back?

25 A -- notes back. However, it would be my

1 recollection and my instinct that the notes
2 themselves would be photocopies of the actual
3 book. Those would not be returned. I would not
4 expect those to be returned.

5 Q I see. So if he says the notes weren't on the
6 file, otherwise the file appeared to be intact,
7 you wouldn't know what happened to them?

8 A I wouldn't have any idea, no.

9 MR. WOLSON: Thanks very much, sir.

10 THE WITNESS: Thank you.

11 MR. WOLSON: Thank you, Mr. Commissioner.

12 MR. OLSON: Good afternoon, Mr. Commissioner.

13 BY MR. OLSON:

14 Q Mr. Whitley, I represent the Attorney General
15 and Mr. Lawlor in these proceedings. We have
16 known each other for a number of years, sir.

17 A Many years.

18 Q Mr. Whitley, I wanted to deal with you on a few
19 of the matters that Mr. Lockyer addressed this
20 morning, because I think he has inaccurately
21 portrayed what some of the information he put to
22 you was. And for the sake of the record, I
23 would like to correct that.

24 Firstly, sir, if you can turn to 35E, that
25 is exhibit 35E and F, which were the memorandum,

1 September 15, '97, from Mann to Finlayson, and
2 then the briefing paper?

3 A I have them.

4 Q Do you recall that one of the matters that
5 Mr. Lockyer took you through was referring you
6 to, on 35F, the entry on January 16, '92, and
7 then over to the second page, the July 7, '92,
8 and the April 28, '93, and said some are
9 inaccurate or just plain wrong. Without getting
10 into a dispute as to whether they are or not,
11 you will see that each of those are, in fact,
12 extracted precisely from 35E, which was the
13 review by the first year lawyer at that time,
14 Dave Mann, if you compare the two?

15 A I will accept that.

16 Q All right. And in the last paragraph, and
17 because the inference from Mr. Lockyer, of
18 course, that he was suggesting that
19 Mr. Finlayson had not been sufficiently
20 diligent. I assume, in your capacity, you
21 delegated tasks from time to time and then
22 relied on what you were given?

23 A It is impossible to function otherwise.

24 Q Indeed. In the last paragraph in the Finlayson
25 briefing note under current issues he said, he

1 pointed you to that last paragraph.

2 "I have had our administrative file, the
3 Ministerial file and all documents relating
4 to the Driskell file reviewed...",
5 and carries on from there.

6 Compare to what Mann says at the end of
7 his, that is at the bottom of page 4 if you are
8 looking at the number in the top right-hand
9 corner,

10 " I have reviewed our administrative file
11 as well as those documents...",
12 et cetera, and it is the precise wording again?

13 A Yes.

14 Q All right. Next, sir, Mr. Lockyer also raised
15 with you 35H, that Mr. Wolson had just asked to
16 you look at, which was the Dale Schille review?

17 A Yes.

18 Q And made the statement -- why I don't know --
19 heaven knows how Schille came to that
20 conclusion -- when, as Mr. Code pointed out,
21 which I was urging Mr. Code to do, in fact,
22 there is a written explanation on the file and,
23 in fact, the explanation was that the file, the
24 administrative file dealing with witness
25 protection matters was not discovered until

1 later, within the Department of Justice. And by
2 administrative file I'm referring to the file
3 that has a tab at exhibit 30C, which is volume 3
4 of the materials before you, tab 59. You don't
5 have to turn it to unless you want, but it says
6 "S. Whitley and B. Miller only" and
7 "confidential" and that sort of thing?

8 A Yes.

9 Q That was the file that was later discovered and
10 was kept separate by I think Louise Beaudette,
11 who you knew was Mr. Miller's assistant who
12 handled those matters?

13 A Yes.

14 Q Yes, thank you.

15 THE COMMISSIONER: Now, Mr. Olson, I hate to go
16 back. The second point you made, I understand
17 the first one, the second point about the memo,
18 I'm not sure I followed that, the second point
19 you made to Mr. Whitley.

20 MR. OLSON: I was referring to the
21 administrative file.

22 THE COMMISSIONER: Yes.

23 MR. OLSON: And we see the tag on the file at
24 tab 59, I think the second or third page.

25 THE COMMISSIONER: No, the point you made just

1 before that?

2 MR. OLSON: Oh --

3 THE COMMISSIONER: That's okay, I will pick it
4 up.

5 MR. OLSON: Was it dealing with the Schille
6 matter?

7 THE COMMISSIONER: No, it is the reference to
8 35E.

9 MR. OLSON: It was the last paragraph in the
10 Finlayson memo which under conclusion he said, I
11 have had the administrative file reviewed?

12 THE COMMISSIONER: Yes, that's one.

13 MR. OLSON: That is the one. And there is a
14 paragraph there, and it replicates exactly what
15 Mann said in his memo, except Mann said, I have
16 reviewed the administrative file. So if you put
17 the two together, clearly what Finlayson is
18 doing is he has asked Mann to review it, and
19 then he has taken whatever Mann has said on all
20 those points and just built it into his and made
21 the necessary changes, to say I have had
22 somebody else do it.

23 THE COMMISSIONER: That's exactly the point.
24 Thank you.

25

1 BY MR. OLSON:

2 Q I wanted to come to your evidence to Mr. Lockyer
3 about Crown culture and that sort of thing, if I
4 may, Mr. Whitley.

5 First of all, I gather that you will agree
6 that any of us, as professionals and lawyers and
7 so on, who handle files on a regular basis,
8 many, many of those files per year, and cases
9 tend to fade as time goes by, of course, and we
10 forget what we have done and why we have done
11 it. And we all live in fear that somebody is
12 going to ask us to review a file that's 15 years
13 old and comment as to why you did something and
14 what the circumstance were at the time, because
15 it is --

16 A Welcome to my world.

17 Q -- near impossible to review, recollect rather,
18 that is why we did it and when we did it and
19 what the circumstances were?

20 A Yes.

21 Q And, of course, you have indicated a lack of
22 recollection of some of the things that clearly
23 you would have known about at the time, and
24 that's relatively normal; fair?

25 A Thank you.

1 Q And it is also relatively normal, of course, for
2 the people who were handling it on a day-to-day
3 basis, such as the front-line prosecutors, to
4 explain after the fact, 15 years after the fact,
5 why they did something. Is that fair?

6 A Fair.

7 Q Now, you also spoke about educating Crowns,
8 eliminating, or trying to address Crown culture,
9 that sort of thing. It is fair to say, is it
10 not, Mr. Whitley, that to truly address systemic
11 issues or concerns within the justice system, it
12 is not just Crown that one has to deal with, but
13 also police and the defence bar as well?

14 A There is clearly an interlocking relationship.

15 Q Right. All three have to work together, and
16 hopefully it will work or function so that there
17 is no miscarriage of justice and so on. But the
18 three do have to work together; is that fair?

19 A That's absolutely right.

20 Q And you indicated at the grassroots level, from
21 the Crown's point of view or perspective at
22 least, you would have to get the Crown
23 Attorney's engaged in something, some awareness
24 of the issues and some ability to handle those
25 issues when they arise, more than just giving

1 them the policies and directives; fair?

2 A Absolutely, there has got to be an investment in
3 resources and time.

4 Q Right. And I think you would agree with me that
5 the only way to do that, or the best way to do
6 that, that is the engagement and the awareness,
7 is to ensure that you have got both the
8 directives and policies, but also then to ensure
9 that the Crown is educated as to the approaches
10 and the tools they have available through
11 training seminars and that sort of thing?

12 A Yes.

13 Q And that's, in fact, what I think you said, you
14 have done some of that on the ethics side and
15 that's one of your pet concerns?

16 A Yes.

17 Q Right. Now, you would admit, I assume, sir,
18 that since you left Manitoba you are not current
19 as to what the state of the Crown culture is in
20 the Manitoba Department of Justice, since you
21 left?

22 A No, I couldn't really comment with any kind of
23 accuracy.

24 Q Right. What we do know is that with respect to
25 some of the matters I know you have reviewed,

1 because I asked your counsel to have you review
2 them, there has been a fair amount of activity
3 in Manitoba to address the very things that you
4 have indicated should be addressed in recent
5 years. Is that fair?

6 A Yes, that's very fair, a lot of work has been
7 done.

8 Q Yes. And specifically, sir, if I may ask you
9 first to look at the disclosure policies? I
10 know you have done so, and Mr. Wullum had copies
11 available because he understood that if anyone
12 else didn't address it, Mr. Tapper was going to
13 address it. And you may get some duplication,
14 but I --

15 MR. TAPPER: He is not only stealing my
16 questions, but my assistant.

17 MR. OLSON: Mr. Tapper --

18 THE COMMISSIONER: Maybe you can double bill for
19 this, Mr. Olson.

20 MR. OLSON: No, I already had a favour offered
21 to me, it was a Popsicle by Mr. Tapper, if I was
22 quick.

23 BY MR. OLSON:

24 Q You may get some duplication of what I had, I
25 had ensured that copies were available of

1 materials that were not in your disclosures,
2 which was the pre-1990 policy, and then the most
3 recent one which was the 2001. But counsel and
4 the Commissioner and hopefully you will have
5 available very shortly the various documents.
6 And we needn't go through them one by one,
7 Mr. Whitley, because I think we can short
8 circuit it, nobody is going to question it, I
9 don't think.

10 I understood there was a written policy in
11 the Department of Justice in Manitoba prior to
12 the '90s, and that's one of the documents which
13 is marked late 1980s. And I understand that you
14 were instrumental in reviewing that in 1990 and
15 having changes made to it, is that fair?

16 A That's right, yes.

17 Q And then there were several changes, including
18 after Stinchcombe, a '92 one, and then more
19 recently there has been a change in 2001. You
20 have had a chance to look through all of those,
21 I understand, sir?

22 A Yes.

23 Q And those disclosure policies are consistent
24 with what you understood to be appropriate
25 practice throughout that period of time?

1 A Yes.

2 Q Thank you.

3 THE COMMISSIONER: I wonder if we might enter
4 them as one exhibit.

5 MR. OLSON: Yes, I was just about to say if --
6 35, is it?

7 THE COMMISSIONER: Disclosure policies and
8 practices.

9 MR. OLSON: 36A, there will be a few others.

10 THE COMMISSIONER: Okay.

11 (EXHIBIT 36A: Disclosure policies and
12 practices)

13 BY MR. OLSON:

14 Q I won't, as I say, take you through all of them,
15 but now that you have what is being passed
16 around, if you could just identify them and
17 confirm that's what you have there, sir?

18 A Yes, I believe I had a hand in writing the one
19 that's on the top.

20 Q Right. All right, I can move on then.

21 Exhibit 23, if Madam Registrar would be
22 good enough to put that before you, sir. In
23 Manitoba we have had a direct indictment policy,
24 at least since August of '96, and updated in
25 2004. You have had a chance -- I don't know,

1 have you had a chance to see those before, sir?

2 A Yes, I've seen the '96 policy, yes.

3 Q And I assume that was shortly after you left.

4 Was there one while you were there, do you
5 recall?

6 A I think so. I still have my policy handbook
7 from the time when we put it together in those
8 years, but I didn't consult it on this issue, so
9 I can't tell you, but I think so. I'm not sure.

10 Q All right. We have been unable to find a copy
11 of the pristine one, because what happens with
12 these sometimes, as they get replaced, you throw
13 the old ones out and insert them in the binder.
14 But if you can uncover one, that would be
15 helpful.

16 A I will look.

17 Q Do you recall, was the direct indictment
18 practice in Manitoba prior to '96 something
19 similar to what we see here in the August '96
20 one?

21 A Yes, these would be the same kinds of factors
22 that would be taken into account.

23 MR. OLSON: Thank you. Next, Mr. Commissioner,
24 I asked all counsel to bring with them the
25 volume that was additional documentary

1 disclosure, that we had submitted some time ago
2 now about actions already taken in Manitoba.
3 And I don't know if all counsel did bring it,
4 but it is a fairly hefty volume, otherwise we
5 would have to reproduce it.

6 Everybody is silent, so I guess nobody
7 brought it?

8 MR. GATES: We all brought it.

9 MR. OLSON: I don't know if it is available to
10 you, Mr. Commissioner. What I may do is ask if
11 perhaps Mr. Tapper's copy could be given to the
12 witness, and I will just ask him a couple of
13 questions about these sorts of things.

14 Could we have that marked as B, 36B?

15 THE COMMISSIONER: So the disclosure policies
16 and practices will be 36A, and then this
17 additional material is 36B.

18 MR. OLSON: Yes, thank you.

19 (EXHIBIT 36B: Additional documentary
20 disclosure re actions already taken in
21 Manitoba submitted by Mr. Olson)

22 BY MR. OLSON:

23 Q And you, at my request, through your counsel at
24 least, I understand reviewed these, not perhaps
25 in-depth, but did look through the list of

1 actions already taken in Manitoba? That's just
2 inside the cover there, sir?

3 A Yes, I reviewed that.

4 Q Yes. Would it be fair to say, sir, these are
5 the types of things, very generally speaking,
6 that one should do to try and improve, or ensure
7 that you have an appropriate culture, not only
8 within the Crown but also with police agencies
9 and in the defence bar?

10 A These are excellent initiatives. In fact,
11 number 3 I recognized immediately because I
12 instituted our own review in the jurisdictions
13 that I'm responsible for, which involve Criminal
14 Code prosecutions in the north, to determine
15 whether or not there was any reliance on hair
16 comparison evidence, as was the case in --
17 THE COMMISSIONER: Keep your voice up a little
18 please?

19 THE WITNESS: Sorry, sir. How far back do you
20 want me to go?

21 THE COMMISSIONER: Just continue.

22 THE WITNESS: I think that was what I wanted to
23 say.

24 BY MR. OLSON:

25 Q If you could just turn to tab 2, I won't take

1 you through, they will speak for themselves,
2 sir, tab 2 was the FPT Heads of Prosecution
3 Committee Working Group on the Prevention of
4 Miscarriages of Justice, this is their report in
5 September '04, chaired by Mr. Finlayson from
6 Manitoba.

7 Did you participate in this, sir?

8 A No, I didn't. I have three directors of
9 prosecution, once again --

10 Q Right?

11 A -- who did participate in this. And this, of
12 course, this document was required reading for
13 all of our prosecutors.

14 Q Thank you. FTP for the record, of course, is
15 Federal, Province, Territorial?

16 A Yes, Heads of Prosecutions, yes.

17 Q And at page, bottom right-hand corner of 9, if
18 you can, sir, their summary of recommendations
19 under the heading "tunnel vision," point number
20 8,

21 "Regular training for Crowns and police in
22 the dangers and prevention of tunnel vision
23 should be implemented training for Crown
24 attorneys, should include a component
25 dealing with the role of the police, and

1 training for police should include a
2 component dealing with the role of the
3 Crown."

4 That's one of the things that you were talking
5 about in terms of improving culture?

6 A Yes.

7 Q And you were aware that Manitoba sponsored an
8 international conference on avoiding wrongful
9 convictions last year, sir?

10 A Yes, I sent several of my staff to it.

11 Q Yes. And that's at tab 5. And again, I won't
12 go through it, but the types of topics
13 discussed -- and a number of the Crowns from
14 Manitoba were there -- are the types of things
15 that one would want your Crowns to be exposed to
16 to heighten the awareness and improve the
17 culture, if there was any need for that?

18 A Yes.

19 Q And tab 6, sir, is the Prism, what is called
20 Prism, which was the system implement in
21 Manitoba for tracking and more accurately
22 determining what is disclosed on cases. That
23 again is something that is extremely worthwhile
24 to, after the fact, determine what disclosure
25 has been made and ensuring that it has been made

1 properly?

2 A Yes.

3 Q The rest of them will speak for themselves, sir.

4 But I just wanted at number 9, if you would,

5 there is an in-custody informer policy in

6 Manitoba back to 2001. That's something that is

7 worthwhile and helps in these circumstances;

8 fair enough?

9 A Absolutely, yes.

10 Q And number 10, the list of the type of legal

11 education that has occurred for Crowns since

12 '99, in Manitoba at least, up to the date this

13 was compiled at least, is the types of things

14 that you would want your Crowns participating

15 in, again, to protect against that which you

16 spoke?

17 A This is exactly the kind of thing that

18 fundamentally changes how we think about our

19 work.

20 I just have to say that I'm envious in the

21 extreme that this kind of resource is made

22 available only after the fact. And that during

23 the '80s and '90s that the idea that we could

24 send four or five Crown attorneys to a

25 conference was virtually an uphill battle. We

1 just did not have the resources to do this kind
2 of thing. This is the way of the future, this
3 is what will make the difference.

4 Q Thank you. If 27G and H can be put before you,
5 sir, exhibits 27G and H. What they are, for
6 those who are searching for them, is an article,
7 or a copy of the article of the Lawyer's Weekly
8 where the current Manitoba Attorney General is
9 interviewed as to efforts being made on
10 disclosure. And then the other one is copies of
11 the various Crown/defence conferences that have
12 been held.

13 Just 27D, I don't know if you have seen
14 that before, sir?

15 A No.

16 Q Were you aware that Manitoba had asked Judge
17 Enns, former Judge Enns, to do three reviews of
18 some of the matters and issues that arose out of
19 this case?

20 A Yes, I was part of that.

21 Q Of course you were. And if you see the third
22 column, one of the reports dealing with the
23 police information, its conclusion was that in
24 nine different areas police did not share
25 information with the Crown, including

1 information that may have affected the jury's
2 perception of the credibility of the two key
3 witnesses. That was at least his conclusion,
4 and it will be up to the Commissioner, of
5 course, to make his own conclusions on the
6 evidence before him here.

7 But in the fourth column, what I wanted to
8 draw your attention to was the creation of the
9 Joint Police/Crown Disclosure Working Group to
10 look at current issues of disclosure between the
11 various police agencies and the Crown to develop
12 solutions that might be necessary to address
13 that problem. That's a positive step, sir?

14 A That's a hugely positive step. That's the way
15 in which our respective organizations change
16 their thinking about these kinds of things. And
17 the fact that there is a joint working group is
18 an important way in which I believe that the
19 barriers are broken down, the suspicions are
20 broken down. That's a very positive move.

21 Q In the fifth column, I won't take you through
22 all of these, sir, but just one-third of the way
23 down, there is a paragraph,

24 "Macintosh has asked Crown attorneys to
25 attend a new disclosure training session

1 which will be part of a conference this
2 fall."

3 The rationale was,

4 "...because it is not good enough to have a
5 strong policy if it is not strongly
6 communicated."

7 And that's part of what you were impressing on
8 the Commissioner as well?

9 A Yes.

10 Q 27H, sir, which is the other document, hopefully
11 that's been put before you?

12 A That's the conference?

13 Q Yes, the Crown Defence Conference, these are
14 joint Crown Defence conferences that have been
15 held in 2002, 2003, and 2004, with various
16 articles or issues being addressed by various
17 speakers. Were you aware of these, sir?

18 A Of this conference?

19 Q Yes?

20 A No.

21 Q All right. This is a 2002, then it is followed
22 by a 2003 after the yellow page, but just
23 dealing with the 2002, at page 4 of that, sir,
24 the panel that day was professional courtesy,
25 that's one of the issues relating to ethics,

1 perhaps, that's one of the pet concerns that you
2 have?

3 A Yes.

4 Q And after the first yellow page, the 2003
5 conference, on the first page of that, on the
6 Thursday, September 11 at 9:50 there is the
7 "Point-Counterpoint, Mutual Disclosure, Show Me
8 Yours, I'll Show You Mine," that touches on the
9 ethical side?

10 A Yes.

11 Q And over on page 2, at 1:15 p.m. "Panel -
12 Ethics: Conflict? What conflict?" And again
13 that's part of the ethical issue that you were
14 commenting upon as well?

15 A Yes, excellent.

16 Q Thank you.

17 MR. OLSON: Thank you, sir. Those are my
18 questions.

19 THE COMMISSIONER: Thank you, Mr. Olson.

20 MR. TAPPER: I just told Mr. Prober I would be
21 two hours. I lied.

22 Mr. Commissioner, my own view of examining
23 one's own witness in these types of proceedings
24 is that one shouldn't lead. I'm going to be,
25 given time restrictions, however, I'm going to

1 lead him on what I consider to be uncontentious
2 matters.

3 THE COMMISSIONER: I have absolutely no
4 objection to you leading on whatever you wish,
5 however, as I commented before, when it comes to
6 the critical areas, it is not helpful.

7 BY MR. TAPPER:

8 Q Mr. Whitley, when you were in your last position
9 as ADM, there was a difference between that and
10 Director of Prosecutions. You had earlier been
11 Director of Prosecutions?

12 A Yes, I was.

13 Q And in the later years, the Director of
14 Prosecutions position was split into three?

15 A Yes, it was felt there was just too much work
16 for one person.

17 Q You had been a singular Director of
18 Prosecutions?

19 A Yes.

20 Q When you were ADM and there were three Directors
21 of Prosecutions, the ADM would not have been
22 responsible for what you called operations, but
23 what I will suggest are hands-on prosecutors; is
24 that a fair statement?

25 A That's right, yes.

- 1 Q As ADM, let's talk for a few moments about what
2 your duties would have been. I understand you
3 were in charge of, or at least in a significant
4 way, criminal law policy in Manitoba; is that
5 correct?
- 6 A Yes.
- 7 Q The RCMP contract?
- 8 A Yes.
- 9 Q The witness programs?
- 10 A Yes.
- 11 Q The Women's Advocacy Group?
- 12 A Yes.
- 13 Q Crime prevention?
- 14 A Yes.
- 15 Q The Law Enforcement Review Agency?
- 16 A Um-hum.
- 17 Q Firearms issues in Manitoba?
- 18 A Yes.
- 19 Q The Uniform Law Conference?
- 20 A Yes.
- 21 Q The acronym CCSO standing for, Coordinating
22 Committee of Senior Officials, National Policy
23 Work?
- 24 A Yes.
- 25 Q Your position required you to be a member, chair

- 1 or co-chair of a number of organizations?
- 2 A That's right.
- 3 Q The Winnipeg Police Service Enforcement Justice
4 Committee?
- 5 A Yes.
- 6 Q The Aboriginal Justice Working Group in response
7 to the Aboriginal Justice Inquiry?
- 8 A Yes.
- 9 Q Executive Management Committee, Department of
10 Justice?
- 11 A Yes.
- 12 Q Provincial Advisory Committee on Child Abuse?
- 13 A Yes.
- 14 Q Child Death Review Committee, otherwise known as
15 the Pediatric Death Review Committee?
- 16 A Yes.
- 17 Q Federal Provincial Territorial Committee of
18 Senior Officials?
- 19 A Yes, I think that was already referred to.
- 20 Q Elder Abuse Resource Centre Advisory Committee?
- 21 A Yes.
- 22 Q Chief Medical Examiners Inquest Review
23 Committee?
- 24 A Yes.
- 25 Q Inter-departmental Committee for Manitoba

- 1 Government's War on Drugs Initiative?
- 2 A Yes.
- 3 Q Curriculum Review Committee for the Canadian
4 Police College?
- 5 A Yes.
- 6 Q Inter-departmental Liaison Committee on
7 Children?
- 8 A Yes.
- 9 Q Federal Provincial Territorial Working Group on
10 Gender Equality in the Justice System; is that
11 correct?
- 12 A Yes, that was a particular initiative of the
13 Minister of the day.
- 14 Q Federal Provincial Territorial Working Group on
15 Multiculturalism.
- 16 A Yes.
- 17 Q You had your hands full?
- 18 A Yes.
- 19 Q One of the witnesses said, I think it was
20 Mr. Dangerfield, that you were very hard to come
21 by, very hard to get ahold of. Would that be a
22 fair description of you in that time frame?
- 23 A That's fair.
- 24 Q Did you travel much?
- 25 A Almost constantly.

1 Q In any four-week period of a month, would you be
2 away from Manitoba for a significant piece of
3 that, and if so, how much?

4 A It is my recollection that I was. I did try and
5 get the records. I even did try and check with
6 my credit card company, but they only go back
7 seven years. But it is my recollection that I
8 did travel quite a lot, not only in the country,
9 but also in the Province of Manitoba as well.

10 Q One of a series of events that was described in
11 the evidence occurred in May of 1991, and you
12 had indicated that in that time frame you had
13 attended a conference in Vancouver. Do you
14 recall giving that evidence?

15 A Yes.

16 Q It is my understanding, sir, that in May of 1991
17 there was another event which took you out of
18 the office?

19 A Yes, I was reminded by my wife that my twin boys
20 were born in May, May 9th of '91. And because
21 she had some difficulty with the size of those
22 boys, it was necessary for me to take time, once
23 the birth had taken place, to assist her. She
24 had to have a Caesarean.

25 Q We have heard some passing references to the

1 illness that you suffered in March of 1993. The
2 newspaper article that was referred to, I think,
3 I have forgot which counsel, but in any event
4 this morning, the Winnipeg Police Sun
5 newspaper -- it was Mr. Lockyer -- of Saturday,
6 March 13th. Is that day significant to you,
7 sir, and relative to the issue of your illness?

8 A It wasn't until I got the medical report, which
9 once again my wife reminded me that I had been
10 ill that particular time.

11 Q Seeing the medical report jogged your memory?

12 A Yes, absolutely. I remember the attack coming
13 on, on the Friday morning, seeking medical
14 attention, getting medication for it, and told
15 to stay in bed, take the medication and report
16 immediately on Monday morning if my condition
17 hadn't changed. It had worsened in the sense
18 that atrial fibrillation is kind of a come and
19 go thing, sometimes it is faint, sometimes it is
20 strong, and it feels like a bird fluttering in
21 your chest. So the 13th would have been a
22 Saturday or a Sunday?

23 Q Saturday.

24 A Saturday. I would have been in bed.

25 Q On the 15th you were admitted to the Grace

1 Hospital?

2 A Yes.

3 Q And what is known as a cardio conversion
4 occurred?

5 A Yes.

6 Q Under general anesthesia?

7 A That is right.

8 Q What is a cardio conversion?

9 A Essentially, they told me in layman's language
10 it is where they stop your heart and start it
11 again, to try and kick it into rhythm. And they
12 had to do that, I was told afterwards, they had
13 to do it twice to get it back to a regular
14 rhythm.

15 Q All right. Now, Mr. Code questioned you about
16 why the word "perjury" rang some bells for you,
17 and we will talk in a few minutes as well about
18 the presence of that word. But after your
19 interview with Mr. Code, did you have occasion
20 to review some documents and consider the issue,
21 and did that assist your recollection?

22 A Yes, I went back to the heap of documents that
23 you had sent me, and I reviewed the notes that
24 Mr. Quinney had made of his conversation with
25 Mr. Miller, and Mr. Finlayson's assessment.

1 Q And, Mr. Commissioner, for the record, those
2 notes come from the section 696 application for
3 Ministerial Review, volume 14, and it is
4 document number 21. I have extracted that for
5 the sake of convenience, and I'm going to give
6 the witness a copy. These are the notes that
7 you were referring to, sir?

8 A Yes.

9 Q And what was significant about this?

10 A Well, I have actually underlined, that's my
11 underlining there at the bottom of the page,
12 that Zanidean's version as apparently told on
13 Driskell's trial was probably not referring to
14 his statement.

15 Q So that caused you to consider the
16 characterization of that evidence?

17 A Yes.

18 Q And as well, Mr. Code said to you that in these
19 discussions between Quinney and Finlayson, there
20 was no reference to the word perjury. Now,
21 before I take you to that, did the word perjury
22 have to be there for you to believe perjury was
23 there?

24 A Of course not. I thought at the time that we
25 were quibbling over the use of the word

1 "perjury," it was clear that evidence was given
2 that appeared to be untruthful. In ordinary
3 parlance, that's perjury. Now, I know that
4 perjury has a legal framework around it in order
5 to be proved.

6 THE COMMISSIONER: We won't go into that. We
7 don't need to get into that.

8 BY MR. TAPPER:

9 Q As well, if you can take volume 1?

10 THE COMMISSIONER: The excerpt, by the way, will
11 be exhibit 37.

12 (EXHIBIT 37: Excerpt of notes from
13 section 696 application for Ministerial
14 Review, volume 14, document 21)

15 BY MR. TAPPER:

16 Q Volume 1, turn to tab 5? You will see
17 Mr. Finlayson's statement, and that was a
18 document that you had reviewed as well?

19 A Yes.

20 Q And if you turn in that statement to page 12,
21 you will see under parenthetical number 4,
22 Finlayson's May 4, 1995 telephone conversation
23 with Richard Quinney. Do you see that, sir?

24 A I do.

25 Q And then you turn to page 5, Finlayson's

1 May 1995 letter to Duncan. Do you see that,
2 sir?

3 A Yes.

4 Q The second paragraph, do you see that, sir,
5 "Finlayson's assumption..."

6 A Yes.

7 Q "...at the time was that the information
8
9 from Quinney had been disclosed to Brodsky
10 years earlier. By this time he thinks he
11 had probably seen the April 13..."

12 THE COMMISSIONER: Not too fast.

13 BY MR. TAPPER:

14 Q Sorry,

15 "...he had probably seen the April 13, 1993
16 memo from Miller to Whitley referring to a
17 draft disclosure letter to Brodsky and
18 assumed that this letter had in fact been
19 sent. There was also an indication in the
20 file that the Winnipeg Police had
21 investigated the perjury allegation."

22 Is that something that you considered, sir?

23 A Yes.

24 Q So when Mr. Code suggested, with great flourish,
25 the word had not surfaced, in fact, that's not

1 so?

2 MR. CODE: I think I was referring to tab 61,
3 where I said the word perjury was not used.

4 MR. TAPPER: With all due respect, sir, the
5 record will speak for itself. You said the word
6 perjury did not show up anywhere, and there we
7 have it.

8 MR. CODE: That's completely nonsensical. The
9 word perjury is found all over this --

10 THE COMMISSIONER: I don't think that we need to
11 get into it.

12 BY MR. TAPPER:

13 Q You have given evidence about your
14 administration of the department as ADM and your
15 interest in ethical standards?

16 A Yes.

17 Q Without naming names, sir, did it ever come to
18 pass that ethical standards, to your knowledge,
19 were violated?

20 A Yes.

21 Q And did you deal with that in any way?

22 A Yes.

23 Q Did you have cause to discipline prosecutors?

24 A I did.

25 Q Did you have cause to suspend prosecutors?

1 A I did.

2 Q One final area, Mr. Whitley, if you could take
3 volume 3, please?

4 A I have it.

5 Q And I don't think I'm in the right volume. If I
6 could just have a moment?

7 THE COMMISSIONER: Certainly.

8 MR. TAPPER: It turns out my notes are a little
9 dyslexic. I put the numbers down backwards.
10 Tab 66?

11 THE WITNESS: If that number was backwards,
12 wouldn't it be still 66?

13 MR. TAPPER: Well, I had only written down one.
14 But that's a good observation. Reminds me of a
15 bad joke, but I will save that for another day.
16 BY MR. TAPPER:

17 Q You will recall Mr. Code asking you about this
18 note of Mr. Dangerfield's?

19 A Yes.

20 Q And you will recall your evidence that it was
21 unusual for, you called it a line prosecutor,
22 even if Mr. Dangerfield was a seriously senior
23 prosecutor, to be doing a briefing note directly
24 to the Deputy?

25 A That was unusual, yes.

1 Q And Mr. Code suggested to you, mockingly I
2 suggest, that you couldn't have been that
3 forgetful, you had to have been involved in this
4 note. Do you remember that?

5 A Well, I'm not entirely sure it was mocking, but
6 I think there was an inference that --

7 MR. CODE: I made no such suggestion.

8 MR. TAPPER: With all due respect, the reason
9 I'm asking this question is because you made
10 this suggestion.

11 BY MR. TAPPER:

12 Q If you look at the date of the note, sir, it is
13 March 16?

14 A Yes.

15 Q Where were you on the 16th of March?

16 A I would have been at home.

17 Q The day after your cardio conversion?

18 A Yes.

19 MR. TAPPER: Those are all of the questions that
20 I have, sir. Thank you.

21 THE COMMISSIONER: Thank you, Mr. Tapper.

22 MR. CODE: I'm going to have to get transcripts
23 from here on in with Mr. Tapper. I have one
24 matter to re-examine you on, Mr. Whitley.

25

1 BY MR. CODE:

2 Q In Mr. Abra's cross-examination he put to you
3 the whole sequence of events that happened in
4 the spring of 1993, beginning in March and
5 coming through to the Hall and Ewatski review in
6 the summer, and the various media coverage, and
7 Mr. Lockyer put it to you this morning, and you
8 confirmed a number of times that you had no
9 recollection of these matters. And in that
10 context, the matter of your illness got raised
11 for the first time, and your counsel,
12 Mr. Tapper, just reviewed it with you again,
13 this question of your hospitalization for a
14 heart matter. So I want to clarify the issue of
15 your medical condition at the time.

16 If you could have volume 1 of your
17 materials available to you, Mr. Whitley, please?

18 A I have it.

19 Q Tab 4, is the supplementary statement you
20 provided to us; is that correct?

21 A Yes, it is.

22 Q And it has three points that it covers, and the
23 first point is titled "my hospitalization," is
24 that correct?

25 A Yes.

1 Q And the hospitalization, which you characterize
2 accurately as a brief hospitalization, was on
3 March 15th; is that correct?

4 A Yes, it was.

5 Q And the question of whether it resulted in any
6 time off work, you proceed to explain that your
7 stepdaughter, I believe it is --

8 A Yes.

9 Q -- has a recollection that you were off work for
10 what she describes as approximately three weeks;
11 is that correct?

12 A Yes.

13 Q You yourself don't have a recollection of taking
14 time off work, or if so, how long you were off
15 work; is that correct?

16 A No, I can't be helpful with that, I don't know
17 that.

18 Q And you very fairly told us that in our
19 interview at tab 3, page 13, is that you simply
20 can't recall whether you took any time off work?

21 A I do recall the incident once it was brought to
22 my attention, but I can't place that within any
23 kind of time frame.

24 Q You recall going to the hospital?

25 A No, the incident that we are talking about with

1 my sister-in-law, it is a bit of a family joke,
2 I remember that.

3 Q I'm not asking you about that. You recall going
4 to the hospital, is that correct?

5 A Yes.

6 Q And in your interview with us at tab 3, page 13,
7 you advised us that you couldn't recall whether
8 it resulted in you taking any time off work; is
9 that correct?

10 A That's right.

11 Q So let's accept your stepdaughter's
12 recollection, passed on to you, and which you in
13 turn passed on to us, that you were off work for
14 approximately three weeks after the March 15th
15 hospitalization. That would put you back at
16 work on April 5th; is that correct?

17 A I will take that, yes.

18 Q If it was two weeks off, you would be back on
19 March 29th, if it was three weeks off you would
20 be back on April 5th; is that correct?

21 A That would follow, yes.

22 Q Miller's memo to you at tab 67 is dated
23 April 13th; is that correct?

24 A Yes.

25 Q So in other words, it would have been sent, if

1 it was sent, eight days after your return to
2 work?

3 A That would be fair, yes.

4 Q And we see from your tab 68 letter to Janie
5 Duncan on April 20th, that within a week of
6 Miller sending you that memo, you are dealing
7 with your correspondence at your desk; is that
8 correct?

9 A Yes.

10 Q So assuming that you were off work for some
11 period of time in March, we can conclude that by
12 the time matters developed in April you were
13 back at work?

14 A Yes.

15 MR. CODE: Thank you very much.

16 THE COMMISSIONER: Well, I thank and commend
17 everyone that we finished one minute early. I
18 don't know if there are any comments or any
19 announcements that --

20 MR. CODE: If I could just briefly deal with the
21 schedule issue, Mr. Commissioner. I passed out
22 the schedule to my colleagues on the recess. If
23 anyone didn't get a copy, there are a number of
24 spare copies here. I thought it would be
25 helpful if we wrote out the schedule for our

1 next week on September 18th, because it is a
2 little bit complicated. And could I note three
3 points, just so that everyone is clear on it?

4 Two days during that week, the Monday and
5 the Thursday, are given over to systemic issues,
6 at least large parts of the day are given over
7 to the systemic panels. Accordingly, we would
8 like to start those days at 9:00 a.m. in the
9 hope that we can complete the systemic panel by
10 12:30 and have a lunch recess at that point. So
11 you will note that the start time on Monday and
12 Thursday is 9:00 a.m.

13 Could I also ask my colleagues if it is
14 possible for them to be flexible about the lunch
15 recess, if the panel is going well and there is
16 an intense debate of some kind going on, and we
17 need a few extra minutes, it would be helpful to
18 be able to carry on a little bit into the lunch
19 recess and delay the afternoon session. But I
20 think we are going to promise our panelists that
21 they will be out of here by 1:00 o'clock at the
22 latest, as many of them will have flights to
23 catch that afternoon. We will then -- so that's
24 the first point, is the two systemic days,
25 Monday and Thursday, have an early start time

1 and we will finish the afternoon at 4:30.

2 The second point is that on the evidence
3 days, if I can call them that, Tuesday,
4 Wednesday and Friday, we will revert to our
5 normal calendar of a 9:30 start and the usual
6 lunch recess at 12:45, and the termination at
7 4:45.

8 The third point is that the order of
9 witnesses in this week is important because we
10 have to complete Christianson's evidence prior
11 to the systemic panel on Thursday. And we would
12 like to complete his evidence early in the week,
13 so that hopefully by the Thursday panel we have
14 a transcript of his evidence available, should
15 the panelists on the Thursday wish to discuss
16 Mr. Christianson's evidence. And that's why he
17 is scheduled in as the first witness. Mr. Dawe
18 will conduct the examination, and he will be
19 quite brief in chief. So my friends should
20 anticipate commencing the cross-examination of
21 Mr. Christianson on the Monday afternoon, and
22 complete it on the Tuesday morning with Chief
23 Ewatski on standby. My recollection is that I
24 asked Chief Ewatski if he would be available on
25 the Tuesday and Wednesday, and if he could keep

1 his calendar flexible. And Ms. Carswell is
2 going to check with him again in that regard.
3 My recollection is that he said that that
4 wouldn't be a problem, but Ms. Carswell is going
5 to confirm that with him.

6 Then finally, Lawlor is to follow, and if
7 he could be on stand by on the Wednesday, I
8 checked with Mr. Olson, and Mr. Olson is very
9 keen to get Mr. Lawlor -- his evidence in this
10 week, because I know that Mr. Olson has problems
11 with his calendar in the following week. So we
12 would very much like to get Mr. Lawlor started
13 as soon as Ewatski finishes, likely on the
14 Wednesday. And I'm quite confident we will
15 finish him. I will not be as long in chief with
16 him as I was with Mr. Dangerfield.

17 So that's the schedule for that week, and I
18 appreciate all of the help from my colleagues in
19 making that work.

20 THE COMMISSIONER: As I understand it,
21 Mr. Lockyer either has or will make an
22 application to have additional witnesses called.

23 MR. LIBMAN: Yes, Mr. Commissioner, I can make
24 that application now or we can deal with it
25 another time. I know -- I leave it in the hands

1 of the Commission, I'm prepared to go ahead. We
2 have an application for you to --
3 THE COMMISSIONER: Perhaps, if you give me the
4 outline of what, of who it is?
5 MR. LIBMAN: First of all, Mr. Commissioner, you
6 received a book of materials yesterday.
7 THE COMMISSIONER: I did.
8 MR. LIBMAN: It is not marked as an exhibit.
9 And I can tell you Mr. Olson also was given a
10 copy of the book of documents. It is our
11 position that this Commission should hear from
12 Robin Finlayson, he is at tab 5 of the
13 Commission Counsel's book, so you know who he
14 is. As well as Dale Schille, who was and
15 currently is a Crown Attorney, and you had his
16 review put to this last witness by Mr. Lockyer.
17 So he was the point man for Manitoba Justice
18 dealing with the disclosure when AIDWYC became
19 involved in 2000, up to the stay of proceedings
20 being entered against Mr. Driskell in 2005. He
21 put together the book of materials, which is
22 documents, our application, response to the
23 investigative brief, to show you the type of
24 difficulties we say need to be addressed by this
25 Commission in getting post-conviction

1 disclosure.

2 THE COMMISSIONER: All right. If I -- I can
3 tell you that I had an opportunity only to
4 glance at the material that I was provided
5 yesterday, and I will just ask you this
6 question. If I were to accede to your request,
7 but decided it would be one of those two, which
8 would be your preference?

9 MR. LIBMAN: Dale Schille, Mr. Commissioner, and
10 for the reason that he was the person -- and
11 just as my learned colleague Mr. Olson said,
12 people in the positions of Deputy Attorney
13 General or Deputy, Mr. Finlayson, it wouldn't be
14 unusual for him to delegate the
15 responsibilities. And as you can see from the
16 letter, he did do a lot of delegating.

17 Now, we had, AIDWYC had meetings with
18 Mr. Finlayson, but a lot of our contact in
19 trying to get post-conviction disclosure was
20 Mr. Schille. So we do have Mr. Finlayson's
21 statement to the Commissioner, but we haven't
22 heard from Mr. Schille.

23 THE COMMISSIONER: All right. Counsel, the
24 inquiry reporter has had a long morning, as --

25 MR. LIBMAN: My submission is based on the fact

1 that you had an opportunity to review the
2 materials, sir, I was going to be very brief.

3 And if you have only glanced at them --

4 THE COMMISSIONER: I have only glanced at them.

5 I just don't know. Mr. Code, can you help as to
6 when I should do this or how I should do this?

7 I do need to hear from other counsel.

8 MR. CODE: As we were running out of time, as
9 the morning progressed, my colleague Mr. Libman
10 came over at one point and asked whether it
11 might be advisable to try and do this in
12 writing, and I'm more than pleased, if he wanted
13 to submit, put his submissions forward in
14 writing, and we could respond in writing. I
15 know Mr. Olson will want to respond as well. So
16 I'm content that we do it in writing.

17 Obviously, I would like this to be done sooner
18 rather than later, so that if we do have to
19 schedule a witness, we can try and fit into the
20 schedule. So I'm content to do it in writing if
21 Mr. Libman is.

22 MR. LIBMAN: Yes. I'm sure Mr. Lockyer would be
23 happy to put his position in writing and put it
24 to you, sir, and then carbon the parties.

25 THE COMMISSIONER: All right. Mr. Olson?

1 MR. OLSON: Thank you, Mr. Commissioner. I
2 won't take time, I do have submissions to make
3 on it, but I won't take up your time today. But
4 that is fine, if it is going to be in writing, I
5 would respond -- I don't know if the order would
6 be myself before Mr. Code, or Mr. Code before,
7 but we can work that out. But I am having my
8 son pass around some documents. Why they were
9 excluded from my learned friend's materials that
10 he wanted you to look at, I don't know, because
11 they are in the same sequence and give some of
12 the very explanations that they say they didn't
13 get.

14 So those are additional documents that they
15 have not put into the materials, and they should
16 be twinned with the book of materials for
17 Mr. Driskell's counsel's submission to the
18 Commission, because you will see chronologically
19 they fit in with some of the ones that my
20 learned friend has put before you.
21 Unfortunately, as I say, he hasn't put the
22 responses in, in many cases.

23 MR. PROBER: Mr. Commissioner, I didn't want to
24 remain silent and have you take that as my
25 not --

1 THE COMMISSIONER: I wouldn't take that as
2 acquiescence from anyone.

3 MR. PROBER: Because I may have an application
4 to call certain witnesses, one of them being
5 Finlayson, Mr. Finlayson, Judge Finlayson,
6 pardon me, Judge Finlayson as he now is, and
7 others. But it is my respectful submission, two
8 points that I would ask the Commission to
9 consider and that is, it seems to me we should
10 hear all of the evidence, for example, finish
11 hearing Chief Ewatski before either I or anyone
12 else makes an application to have Inspector Hall
13 called, for example. And that we finish hearing
14 Mr. Lawlor before we make application for any
15 other Crown official to be called. And again,
16 generally, it would be my respectful submission
17 that if the Commission is going to make findings
18 on any of these interview summaries, whether it
19 is Garber's, Chief Judge Wyant's, or any of
20 them, then it should be that these witnesses be
21 called. For example, we have Gumieny's
22 interview summary, which was not tendered for
23 the truth of its contents, I think marked as
24 exhibit 4 or something around that number. So I
25 just say that, I'm not sure when you want these

1 applications made. I'm happy to discuss the
2 matter with Mr. Code in the break that we have
3 now, but it seems to me the evidence should be
4 finished before we are required to make that
5 sort of application. That's the only comments
6 that I have to make. Thank you.

7 THE COMMISSIONER: Any other comments at this
8 time? Well, let me just make a couple of
9 comments. I have now received the application
10 from Mr. Lockyer, and I always am reluctant to
11 ask counsel to make written argument or
12 submissions. However, I am a little concerned
13 about leaving this until our next gathering,
14 which is on September 18th, so it is a month
15 away. I would like to be able to consider the
16 issue prior to that.

17 There is much to be said in support of
18 Mr. Prober's comment. However, it is to be
19 remembered that the Order-In-Council clearly
20 provides that I may gather evidence, the inquiry
21 may gather evidence by interview. It is
22 unequivocal in that regard. So I don't think I
23 agree with the submission that simply because
24 the person's evidence is going to be considered,
25 and has been taken and a statement prepared,

1 that I have to call that person. And quite
2 frankly, unless I feel there is something that
3 is essential, that requires viva voce evidence,
4 I would not be inclined to call the person. So
5 I just make that as a general comment.

6 So I think I would like to, in the
7 intervening month, perhaps in the next week or
8 two, receive any submissions from counsel who
9 wish to request that I call other witnesses.
10 And if you would put the reasons in writing,
11 they can be very succinct, I don't want long
12 submissions, and circulate them to other
13 counsel. And that having been done, I think if
14 other counsel then had a week to respond, I
15 would certainly give consideration to those
16 requests for additional witnesses.

17 If I leave the whole matter until
18 September 18th or after, it is then going to
19 require a significant change in our schedule.
20 And I don't know what position that will put all
21 of you and myself in, if we have to add days or
22 a week to our sitting time. So, I don't know if
23 that is helpful or not, but those are just my
24 very general thoughts on the topic.

25 All right. I think then we will adjourn

1 then until September 18th. And I just want to
2 thank counsel for the last five weeks, your
3 assistance has been quite outstanding. And I
4 also want to thank the staff of the Commission
5 office, lead by Mr. Giasson, for the tremendous
6 work and effort that they have put into the
7 organization of the sittings to make them go so
8 smoothly. Thank you all.

9 THE CLERK: All rise. This Commission of
10 Inquiry is now adjourned.

11 (Proceedings adjourned at 1:45 p.m.)

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COURT REPORTER'S CERTIFICATE

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.

Cecelia Reid
COURT REPORTER

Lisa Reid
COURT REPORTER

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