

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

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The Honourable Patrick LeSage, Q.C. Commissioner

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

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Tuesday, August 8, 2006

Volume 13

INQUIRY PROCEEDINGS

## COMMISSION STAFF:

Mr. Michael Code	Commission Counsel
Mr. Jonathan Dawe	Associate Commission Counsel
R.L. (Bob) Giasson	Chief Administrative Officer
Wendy Bergmann	Administrative Assistant
Kathy Karamchand	Administrative Assistant
Nancy Pelletier	Administrative Staff
David Bruni	Legal support staff

## APPEARANCES

Mr. Alan M. Libman and	
Mr. James Lockyer	For Mr. James Driskell
Mr. E.W. Olson, Q.C.	For Province of Manitoba
Mr. Jay Prober	For George Dangerfield
Mr. D. Abra, Q.C.	For The Estate of Bruce Miller
Mr. R. Tapper, Q.C.	For Mr. Stuart Whitley
Mr. D. Gates, Q.C.	For the RCMP
Ms. K. Carswell	For the Winnipeg Police Services and certain members
Mr. R. Wolson, Q.C.	For the Winnipeg Police Association and certain members
Mr. J. Kennedy, Q.C.	For the Association in Defence of the Wrongly Convicted

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1 Tuesday, August 8, 2006

2 Upon commencing at 9:00 a.m.

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

5 MR. WOLSON: Good morning, Mr. Commissioner.

6 THE COMMISSIONER: Good morning, Mr. Wolson.

7 MR. WOLSON: Mr. Kovnats, good morning.

8 THE WITNESS: Good morning.

9 BY MR. WOLSON:

10 Q Mr. Kovnats, you told the inquiry last week that  
11 your memory was governed by your memos which  
12 were made closer to the events in question, at  
13 least your June 2nd memo was made on June 2nd,  
14 but dating back several months?

15 A That's correct.

16 Q And your memos speak for themselves as  
17 indicative of your memory at the time?

18 A That's correct.

19 Q You made the memo of June 2 from the advice you  
20 were given, or in accordance with the advice you  
21 were given by Mr. Brodsky when you met with him?

22 A As a result of the advice.

23 Q And if I could take you to tab 33, if you go  
24 into the third page of tab 33, it is a June 10th  
25 date, a memo from Mr. Brodsky's file. Are you

1 with me there?

2 A Yes, I am.

3 Q And if you go to the bottom of the page, he  
4 indicates to you, just reading last three lines,  
5 "...what he should do for his own  
6 protection...",

7 so he is talking about advice he gave you,

8 "...for his own protection from wherever it  
9 came, to make a record of all incidents and  
10 the people involved because if he left it  
11 too long things would get blurry in his  
12 mind."

13 That's the advice that Brodsky gave you?

14 A Basically, yes.

15 Q And in order to keep things from getting too  
16 blurry, you then sat down on the 2nd of June,  
17 June '91 that is, and recorded everything that  
18 you could recall at that time that you thought  
19 was relevant to the matters at issue?

20 A I did my best. I don't know that I put  
21 everything down, but I put as much down as I  
22 could.

23 Q And you put down what you thought were the  
24 salient features?

25 A That's correct.

1 Q While the memo of June 2, which is at tab 3, is  
2 about five pages in length, many of the later  
3 entries on that memo were more current because  
4 they were events that occurred in the last few  
5 weeks before you prepared this memo?

6 A That's correct. And this memo, I started on  
7 Sunday night and I think I finished on Monday  
8 morning. I think I have testified to that in  
9 the past.

10 Q But when you were dealing with the initial, your  
11 initial discussions with Mr. Driskell and your  
12 initial November meeting with the police, by  
13 that time it was already about six months stale?

14 A I believe I met with Mr. Zanidean, not  
15 Mr. Driskell.

16 Q Pardon me, Mr. Zanidean, you met with him in  
17 November of 1990?

18 A Yes.

19 Q So by the time you made this memo, you were  
20 about, it was about six months earlier,  
21 approximately?

22 A That's correct.

23 Q And you noted that he told you, in the third  
24 paragraph,

25 "The police had promised him immunity from

1 prosecution for anything he had said."

2 A That's correct.

3 Q That's what he told you?

4 A That's right.

5 Q And then you had this meeting with the police,  
6 and you noted, about three or four lines in  
7 paragraph 3 and then a paragraph in paragraph 4  
8 of the memo; you see that?

9 A Yes, I see that.

10 Q And when you met with Sergeants Anderson and  
11 Paul in paragraph 3, the note that you made was  
12 they first denied -- well, let me go back.

13 "When we discussed this...",  
14 this was the immunity issue, are you with me on  
15 the fourth line in on the third paragraph?

16 A Yes, I am with you.

17 Q When we discussed this issue, or this being the  
18 immunity situation with Detectives Anderson and  
19 Paul,

20 "...they had at first denied it and then  
21 they said Ray had misunderstood what they  
22 had said, they had only offered him  
23 immunity with respect to Manitoba issues."  
24 And that's what you have recorded when it was  
25 much fresher in your mind; true?



1 A That's correct, that's what I recorded.

2 Q And then in the next paragraph you record the  
3 fact, and I will just summarize it, that they  
4 had offered him the Witness Protection Program  
5 and they had told you about it in that  
6 paragraph?

7 A That's correct.

8 Q And you were recording, as best you could  
9 recall, the truth of the incidents at that time,  
10 that was your best memory at that time?

11 A Is what I put on the paper, is what I dictated  
12 actually.

13 Q And you dictated that some 16 years ago?

14 A Yes.

15 Q And at the end of the memo, on page 5, this  
16 would be the conclusion of your dictation, you  
17 indicated at page 5, last paragraph,

18 "This memo contains the basis of what has  
19 been going on and I'm going to ask my  
20 client to sign it because he knows  
21 everything contained herein is true."

22 A That's right.

23 Q So you wanted him to sign that memo for its  
24 truth and accuracy, that's what you have noted  
25 there?

1 A That's exactly correct, yes.

2 Q You believed it to be true and you wanted him to  
3 sign it so that you would have a record of it?

4 A That's correct, sure.

5 Q That's what you wanted?

6 A I wanted him to sign a memo. This was a first  
7 draft. I never did do a better memo.

8 Q You wanted him to sign it for its truth and  
9 accuracy, so you would then have a record, not  
10 of just your recollection but of his as well?

11 A Yes.

12 Q Now, you told us last week that you believed  
13 Mr. Zanidean was honest?

14 A I don't know that that's the phrase I used. I  
15 don't think that I would like to comment on my  
16 client's honesty or dishonesty.

17 Q Did you believe what he told you?

18 A Yes.

19 Q Because I want to review with you exhibit 17; do  
20 you have that in front of you? This is a  
21 transcript -- it won't be in the materials,  
22 Mr. Kovnats, it is a loose document that I filed  
23 last week. This was part of the  
24 cross-examination of Ray Zanidean by  
25 Mr. Brodsky. Are you at page 97?

1 A Yes, I am.

2 Q Exhibit 17?

3 A I don't know what exhibit, it just says  
4 "witness, '97."

5 Q It is exhibit 17, for the record.

6 A Thank you.

7 Q And if you just look at line 10, Mr. Brodsky  
8 asked this question, and I will review with you  
9 the series of questions that he asked.

10 "Q You just forgot to tell them about  
11 Swift Current?"

12 And I'm picking this up in the middle. This is  
13 Mr. Brodsky's cross-examination of Zanidean and  
14 the fact that he hadn't mentioned Swift Current  
15 in his statements, and this is what Mr. Brodsky  
16 asked.

17 "Q You just forgot to tell them about  
18 Swift Current?"

19 A Maybe I never forgot.

20 Q How did it get out?

21 A I was still scared about that, so I  
22 didn't, didn't really want to talk about  
23 that.

24 Q But they knew about it, they had the  
25 tape?

1 A Yes, they knew about it, but I didn't  
2 want to keep bringing it up.

3 Q Why?

4 A Because I was scared about it.

5 Q Who were you scared from, who was  
6 scaring you?

7 A The police were.

8 Q What did they tell you?

9 A They told me that whatever I told them  
10 about that, they'd have to give to the  
11 Swift Current RCMP."

12 Page 98,

13 "Q And that's what you were protecting  
14 yourself from?

15 A When?

16 Q When you made the statements?

17 A No, I wasn't protecting myself from  
18 that, because they already told me that I  
19 had no protection from that. I will tell  
20 you what they told me, because you keep  
21 coming back to this.

22 Q Sure, I keep going back to it.

23 A What they told me was, 'what you told  
24 us about the Swift Current incidents, we  
25 have to phone the Swift Current RCMP about

1           it and tell them what you told us.'

2           Q     Right.

3           A     That's what was, what happened about  
4           that?

5           Q     That's to your advantage, isn't it?

6           A     No, it isn't.  Because now the Swift  
7           Current Police know about it, they know  
8           where I am, it's a matter of -- what I'm  
9           thinking, it's a matter of them gathering  
10          the evidence now because I think they need  
11          more than what I told the police, then they  
12          come and arrest me."

13          Mr. Brodsky then says,

14                 "Mr. Zanidean, would I not be fair in  
15                 suggesting to you that you could not have a  
16                 better advocate for your cause, that is, to  
17                 keep you out of jail, than the Winnipeg  
18                 Police; that you wanted the Winnipeg Police  
19                 to help you out with the RCMP police in  
20                 Swift Current?

21          A     I wanted them to but they said they  
22          couldn't.

23          Q     And that's the reason you implicated  
24          Jim?

25          A     No, I told you why.  I phoned Crime

1                   Stoppers already."

2                   So that's what your client told the court when  
3                   is was under oath, that he asked the police to  
4                   help him and the police said they couldn't.  
5                   Were you aware of that before today?

6       A       I became aware of his testimony in May of this  
7                   year, I think it was mid May, I can look up my  
8                   calendar.

9       Q       And when he testified, you, of course, knew he  
10                  was under oath, as compared to when he saw you  
11                  when he wasn't? You would agree with that  
12                  statement?

13      A       Yes.

14      Q       You had told him to tell the truth when he  
15                  testified, that was the advice you gave him?

16      A       Yes.

17      Q       And you expected that he would?

18      A       Yes.

19      Q       Now, I want to go to your June 3rd, 1991 memo,  
20                  which is at tab 34. And this was a  
21                  contemporaneous memo?

22      A       Within a few hours after, yeah, shortly after  
23                  the meeting.

24      Q       And the memo is an indication, he says to you in  
25                  the first paragraph,

1 "During of course of our meeting,  
2 Mr. Zanidean advised me for the very first  
3 time that a statement that he had given to  
4 the police was not all in his own words but  
5 the police had altered it."

6 Do you see that?

7 A I see that.

8 Q Now you had been dealing with Mr. Zanidean by  
9 that time for about seven months?

10 A Approximately.

11 Q And you had met him a number of occasions?

12 A Yes.

13 Q You had talked to him on the phone on other  
14 occasions?

15 A Yes.

16 Q But this is the very first time that he raised  
17 this issue with you?

18 A Yes, sir.

19 Q And it was dealing with statements that he had  
20 made to the police?

21 A Yes.

22 Q He had made those statements, you know now  
23 today, in October and November of 1990?

24 A That's correct.

25 Q Now, when he made these statements, you would

1 agree with me that he hadn't been very happy  
2 with how the negotiations were going at that  
3 time, to say --

4 A Which statements are you referring to, the  
5 official police statements or the statements to  
6 me?

7 Q I'm talking about when he made the statements to  
8 you in June of 1991, in early June, you had been  
9 having all kinds of difficulties that you have  
10 related to this inquiry last week at that time?

11 A Yes.

12 Q And obviously your client wasn't very happy and  
13 had indicated that to you on a number of  
14 occasions?

15 A That's correct.

16 Q With the state of the negotiations?

17 A That's correct.

18 Q You had, at tab 35, issued your June 4th letter?

19 A That was after my meeting on June 3rd.

20 Q Yes?

21 A Okay, sorry.

22 Q Just to indicate the fact that things weren't  
23 going well, you had formally put into writing  
24 your June 4th letter --

25 A That's correct.



1 Q -- with a series of demands and requests that  
2 you wished to be honoured. You would agree with  
3 that statement, Mr. Kovnats?

4 A I'm just reviewing my letter to make sure I do  
5 it properly here.

6 Q Your letter is a series of requests and demands,  
7 is it not?

8 A Yes, that's correct.

9 Q You had his statement to you, Zanidean's  
10 statement to you, that the police had altered  
11 his statement, had come shortly after the fact  
12 that he had been arrested in Cochrane, Alberta  
13 and brought back to Manitoba?

14 A He had been arrested in Alberta, I don't know  
15 where.

16 Q I tell you it was Cochrane, but that's  
17 irrelevant for the purpose of this question. He  
18 had been brought back in custody by the police?

19 A Yes, that was about a week earlier.

20 Q You had had this blow-up at the Safety Building  
21 by that time?

22 A Yes.

23 Q He was aware of that, because you said last week  
24 he had seen it?

25 A Yes.

1 Q You had, by that time, in your earlier memo of  
2 June 2, indicated that he wanted to go to the  
3 media and blow this thing out of the water?

4 A That's what he told me.

5 Q He was now in police custody 24 hours a day?

6 A I don't know what wording, when you say police  
7 custody, he was with the police in the hotel, he  
8 wasn't in jail.

9 Q He was on 24 hours a day supervision, which was  
10 different than he had been when he went to  
11 Alberta?

12 A That's correct.

13 Q And with that backdrop, you indicate for the  
14 first time in your memo of the 3rd of June, with  
15 all of that happening, Zanidean said to you for  
16 the very first time that the police had altered  
17 his statement?

18 A That's correct.

19 Q You had also issued an ultimatum to Bruce Miller  
20 on the 29th of May that we see in the materials?

21 A Would you refer me to the tab, because I don't  
22 know which tab it is in, not right at this  
23 moment, I would have to look it up.

24 Q Tab 31. Are you with me on tab 31?

25 A I am.

1 Q This was a note from Sergeant Orr, 91/05/29, so  
2 the 29th of June, just about a week prior to, or  
3 not even a week prior to this complaint coming  
4 from Zanidean, you had -- at least Sergeant Orr  
5 indicates,

6 "Call received from Mr. Bruce Miller who  
7 received a letter from Mr. Kovnats setting  
8 out three demands."

9 Are you with me at tab 31?

10 A Yes, I'm looking for the letter referred to in  
11 here. This is someone else's note.

12 Q I understand that. But this was an ultimatum,  
13 according to Mr. Miller, who indicates he would  
14 take steps to ensure his client's protection.  
15 Mr. Miller was given a day to respond; do you  
16 see that?

17 A I see that writing.

18 Q So all of these things, there was a flurry of  
19 activity in the week or so leading up to  
20 Zanidean complaining about the police in this  
21 June 3rd memo?

22 A It was a week of activity prior to him  
23 complaining about the police.

24 Q Yes. Again, the complaint would be based on his  
25 truthfulness? That is you had to rely on

1           whether or not he was telling you the truth --

2    A       Yes.

3    Q       -- obviously? Now, I may have misunderstood

4           your evidence last week, if you go to tab 35,

5           please? This is your June 4th letter to

6           Mr. Miller, and this letter came following the

7           incident at the Safety Building where you had

8           had a problem with Mr. Dangerfield; true?

9    A       Yes, it is subsequent to that.

10   Q       If you look at point number 11 on the second

11          page, did I understand you last week, and

12          correct me if I'm wrong, that Mr. Zanidean was

13          complaining about the Crown putting words in his

14          mouth? Was that an issue that prompted point

15          number 11?

16   A       I don't know if it was the Crown or the police,

17          but he was complaining that people were putting

18          words in his mouth, and I wanted to be present.

19          He and I both wanted me to be present at all

20          interviews.

21   Q       Do you know whether or not he had met with

22          Mr. Dangerfield by that time?

23   A       I cannot say for sure, no.

24   Q       What did he tell you?

25   A       I don't have it written down, I apologize, and I

1 don't know. I mean, there was such a flurry of  
2 activity in that week, and I don't think -- he  
3 did on a number of occasions tell me that he met  
4 with, as he put it, Miller, or Bruce.

5 Q I'm not interested in Miller, I'm interested in  
6 the trial counsel; had he met with  
7 Mr. Dangerfield?

8 A I can't say for sure. I was left with the  
9 impression that he had, but I can't say that he  
10 said it for sure.

11 Q Your impression was that he had?

12 A My impression was that he had, again, going from  
13 a 16 year memory.

14 Q So if it is not in your memos, it would be  
15 difficult to recall today?

16 A I wouldn't recall it today, I can't say for  
17 sure.

18 Q The statement that I just suggested to you, that  
19 if it is not in one of your memos, it would be  
20 difficult for you to recall or you can't recall  
21 today?

22 A No, I don't agree with that statement. There  
23 are certain things that happened -- that  
24 particular item, yes -- but, in general, not  
25 necessarily. There are certain things that

- 1 stand out in my mind that I will never forget.
- 2 Q One of those things was the incident at the  
3 Safety Building?
- 4 A That's right. That's something I thought would  
5 never ever happen.
- 6 Q All right. Tab 36, this is your June 6th memo.
- 7 A Yes.
- 8 Q And this too was a contemporaneous memo?
- 9 A Yes.
- 10 Q You put at the bottom of that memo, last  
11 paragraph,  
12 "I'm making this memo to the file so that I  
13 may keep a record of exactly what  
14 happened."
- 15 A That's correct.
- 16 Q And this memo talks in part about the incident  
17 at the restaurant, Schmecker's Restaurant, where  
18 you had an incident with Al Paul?
- 19 A Yes.
- 20 Q Last week you told the inquiry that Mr. Paul  
21 leaned on your car, that he stood in front of  
22 your vehicle and banged on the windshield. You  
23 told him those three things when he asked you?
- 24 A Yes.
- 25 Q Your memo, it is a fairly short memo, but as you

1 indicated, it is exactly what happened, this  
2 memo?

3 A Yes.

4 Q Let me take you to the third paragraph on top.

5 "We then reviewed the police statement and  
6 they showed me where they had made  
7 alterations, that the police had  
8 misunderstood or changed their statements  
9 as the case may be."

10 Now, their statements refer to who, Zanidean and  
11 Fehr?

12 A Yes, they were together, and she was doing the  
13 handwriting sometimes and he was sometimes.

14 Q When you say to "their statements as the case  
15 may be," were you of the opinion at the time  
16 that Susan Fehr had made a statement to the  
17 police?

18 A I don't recall.

19 Q Because you write "their statements"?

20 A I know that. I don't recall.

21 Q Was Susan Fehr complaining about the police  
22 altering her statement?

23 A No.

24 Q So we are just talking then about Zanidean?

25 A Yes, that's who was complaining.

1 Q Now, we had heard that the statements were  
2 taken, the police have testified, were recorded  
3 verbatim by the police, were then provided to  
4 Mr. Zanidean to read, make any changes that he  
5 wanted to make, and then he would sign it. Did  
6 your client tell you otherwise?

7 A No.

8 Q Were the statements changed some time later,  
9 after they had been signed by Zanidean?

10 A I have no idea.

11 Q Did you ask him whether or not the changes that  
12 were made were made after he had read it and  
13 signed it?

14 A No. On that date, I believe you have further  
15 documents, they gave me a bunch of statements  
16 that appear to be the City of Winnipeg Police  
17 statements.

18 Q What I want to know is whether the statements  
19 were changed after they had signed them, that is  
20 after Mr. Zanidean had signed the statements?

21 A I have no idea. I can only tell you the notes,  
22 I remember the discussion to a certain degree on  
23 this.

24 Q So you never asked that question?

25 A Okay, sorry.



1 Q You never asked that question of Mr. Zanidean?

2 A No. No, I did not.

3 Q And then, go to the sixth paragraph on the page,  
4 halfway down the page, you then discuss the  
5 incident that happened at the restaurant with  
6 you and Al Paul?

7 A Yes.

8 Q Of course, you indicated at the last paragraph,  
9 you were writing exactly as it occurred and it  
10 was fresh in your mind at that time?

11 A Yes.

12 Q Obviously. You said,  
13 "I went out to the car with Ray. We  
14 finished going over his statement. I was  
15 driving away when I was stopped by the City  
16 of Winnipeg Police."

17 A That's right.

18 Q So you were actually in the process of driving  
19 away?

20 A Yes.

21 Q You are with Ray?

22 A I don't recall. I don't think so, but I don't  
23 recall.

24 Q Well, if you were with Ray and he was under a  
25 material witness warrant, you would appreciate

1           that you couldn't take him away.  You would  
2           understand that today?

3    A       Yes, I certainly would.

4    Q       So if you were driving with Ray, you would  
5           expect the police would stop you?  That would  
6           make sense to you today?

7    A       Yes, that's correct.

8    Q       And you don't remember whether you were with him  
9           or not, according to your memo, it doesn't say.

10   A       My memo doesn't say.  I don't want -- obviously,  
11           this is important to your client, I don't want  
12           to say for sure, I don't think he was in the car  
13           any more, but he could have been.  I had  
14           statements -- the biggest fight I had with  
15           Mr. Paul was over the pieces of paper.

16   Q       I want to get to the memo that you wrote at the  
17           time.  Would I be correct in stating,  
18           Mr. Kovnats, that if it is not in a memo, this  
19           memo or earlier memos, you can't be 100 per cent  
20           sure today?  Would that be a fair statement?

21   A       That is correct.

22   Q       Next paragraph,

23           "Mr. Paul demanded the statement back that  
24           my client had made solicitor/client notes  
25           on.  I told him I would not give it to him.

1 I tried to reach Mr. Miller by telephone  
2 and was unable to do so. I asked for  
3 Mr. Whitley, was unable to get him and I  
4 got Graeme Garson..."

5 And Mr. Garson couldn't help you, that's what  
6 your memo says basically; is that correct?

7 A Mr. Garson said he couldn't help. There is a  
8 big difference.

9 Q All I'm suggesting to you is what you have noted  
10 here.

11 A Yes.

12 Q Have I summarized it accurately?

13 A He said he could not help.

14 Q In the second last paragraph,

15 "I told him I felt he should but in any  
16 event, I let him go, Paul and I argued  
17 about it, we called the inspector and the  
18 inspector said I was entitled to keep the  
19 papers. I took the papers and drove off."

20 That's what you noted?

21 A Yes.

22 Q There is nothing in this memo about Mr. Paul  
23 leaning on your car, standing in front of your  
24 vehicle or banging on the windshield, there is  
25 nothing in your memo about that?

1 A There is nothing in my memo.

2 Q That memo was made on the day of the incident  
3 some hours afterwards?

4 A That's correct.

5 MR. WOLSON: Thank you, Mr. Kovnats.

6 THE COMMISSIONER: Thank you, Mr. Wolson.

7 MR. CODE: Mr. Commissioner, what I propose to  
8 do now, rather than turning to my  
9 re-examination, I have a few questions in  
10 re-examination, but I think it would be  
11 appropriate, in light of additional documents  
12 that Mr. Kovnats and his assistant discovered on  
13 Thursday afternoon, after leaving the hearing,  
14 that I seek leave to re-open my examination and  
15 go through those documents with Mr. Kovnats, and  
16 have him identify them and deal with anything  
17 that's unclear on the face of the documents.  
18 And then invite my colleagues, if they wish to  
19 cross-examine or re-open their cross-examination  
20 on the new documents. I think I can be quite  
21 brief, if you will permit that?

22 THE COMMISSIONER: And these documents, perhaps  
23 you could just put on the record when they came?

24 MR. CODE: Perhaps I could ask that they be  
25 formally marked as an exhibits.

1 THE COMMISSIONER: Exhibit 18, I believe.

2 MR. CODE: If they could be exhibit 18?

3 THE COMMISSIONER: These are additional  
4 documents from Mr. Kovnats' files.

5 THE CLERK: Exhibit 18.

6 (EXHIBIT 18: Additional documents from Mr.  
7 Kovnats' files)

8 BY MR. CODE:

9 Q Do you have a copy handy, Mr. Kovnats, of that  
10 additional book of documents?

11 A Yes, I do.

12 Q And I believe you have the originals still in  
13 your possession should there be any problems  
14 with legibility.

15 A I do.

16 Q I will take you through them in the order that  
17 we find them in the book, rather than in  
18 chronological order, and ask you to identify  
19 them.

20 You see the first document, it is headed up  
21 "from the desk of David Kovnats" dated  
22 January 10, 1990?

23 A I do.

24 Q Could you tell us what that document is?

25 A I couldn't get Bruce on the phone, he was not

1           answering my calls, so I sent him a memo to call  
2           me. And I sent it by fax. And if you turn the  
3           page, before that is a copy of the fax little  
4           tab thing that comes off the machine. In those  
5           days that's what we had. Don't forget, fax  
6           machines have changed since then, but in those  
7           days we used to get a thing that said the fax  
8           went through or it didn't.

9       Q       And this is the fax to Mr. Miller, and the  
10           confirmation slip shows that the transmission  
11           was okay?

12      A       Yes.

13      Q       And you are simply trying to get him to call  
14           you?

15      A       That's right.

16      Q       The second document, over the page, is a  
17           handwritten note of yours, is it?

18           THE COMMISSIONER: Mr. Code, I wonder if you  
19           would set the scene, for the record, as to where  
20           these documents came from?

21           MR. CODE: Fair enough, Mr. Commissioner.

22           BY MR. CODE:

23      Q       The covering letter that is attached to the  
24           exhibit, could you take a look at that,  
25           Mr. Kovnats? At the front of the exhibit is a

1 letter that I wrote on Thursday afternoon after  
2 receiving them, and it sets out how I came into  
3 possession of them.

4 A I'm at a loss, I don't have a copy. Basically,  
5 I can tell you, if you want to know,  
6 Mr. Commissioner.

7 MR. CODE: So the covering letter, I'm sorry, is  
8 on the disclosure copy that all counsel have,  
9 but not in the court copy it appears. Perhaps,  
10 Mr. Kovnats, you could simply tell us what  
11 happened on Thursday afternoon, how these  
12 documents came to light?

13 THE WITNESS: I left here, went and grabbed  
14 lunch, got back to the office. My secretary  
15 said, I have seen some notes. And I said, you  
16 couldn't, I have gone through the file from stem  
17 to stern, there were no notes. She said, David,  
18 I have seen them. So I was concerned, I  
19 couldn't figure out where they were.

20 BY MR. CODE:

21 Q Your secretary was here at the hearing?

22 A Yes, my secretary came down to the hearing and  
23 both her children came down, to be at the  
24 hearing, they had to get documents signed in the  
25 morning, so they came down and they stayed for a

1 while. She said she had seen notes somewhere.  
2 And she wasn't with me back in 1991. So we were  
3 sitting there, scratching our head, saying where  
4 could these things be and where could you have  
5 seen the note? So I went through the file  
6 again, couldn't find it, and said bring me the  
7 house purchase file, because I had the house  
8 purchase file for Zanidean. And I opened the  
9 front and it wasn't there. So I went through  
10 that file from beginning to end, and found at  
11 the back of the file -- like my files are kept  
12 chronological order starting at the bottom, the  
13 oldest at the bottom, the newest at the top, and  
14 I found a raft of papers, which included a copy  
15 of the quit claim deed for the house sale, that  
16 had been shoved in there. There were some  
17 handwritten notes from my client which are in  
18 this book, and some foolscap notes.

19 So I immediately phoned you and said, look,  
20 I found this stuff. It is a little embarrassing  
21 that I hadn't looked back there before. I had  
22 opened the file originally and just looked at  
23 the top, never looked at the very bottom of it.  
24 And I said they were there. And I said, can I  
25 fax them to you? And you said, no, I want you



1 to bring them to me. So I left my office, I  
2 phoned -- never mind the other things I did.  
3 And I came down to your office immediately and  
4 brought you those papers. Your staff then  
5 photocopied them, gave the originals back to me  
6 and I then departed.

7 Q Turning back then to the documents themselves,  
8 we have reviewed the first one and I'm at the  
9 second one now, which is a handwritten note  
10 dated March 18, 1991. Whose handwriting is that  
11 on the note?

12 A That's my handwriting.

13 Q And what is the note referable to?

14 A It is what -- some of the issues that we were  
15 trying to get accomplished with the Crown. I  
16 can't tell you any more than that. That's just  
17 what I found in the file, and I didn't -- I  
18 don't know what else it is.

19 Q The subject matter of them is recognizable as  
20 the matters that you were dealing with. My  
21 question is, is this a result of a meeting with  
22 your client or a result of a meeting with  
23 somebody else?

24 A I can't tell you.

25 Q Over the page, the third document appears to be

1 in a different handwriting. Whose handwriting  
2 is this?

3 A I believe it is Susan Fehr, except for the  
4 bottom, where I would have identified it for the  
5 Zanidean file. That's in printing from me.

6 Q This is a document that's Zanidean's wife, Susan  
7 Fehr, produced to you, and then the subject  
8 matter of it?

9 A I assume it is Susan's handwriting, it was given  
10 to me by them at the time.

11 Q And the subject matter, Mr. Kovnats?

12 A This was, they were after some expenses, and  
13 they wanted driver's licence, everything that  
14 they wanted. This was a list of their wants.  
15 And this was the latter part of June.

16 Q We can place the time frame of the document,  
17 although it is not dated, as being post-trial --

18 A Yes.

19 Q -- it appears, because they are asking for  
20 expenses up to June 19th. Is that correct?

21 A That's right.

22 Q And over the page, the fourth document, again a  
23 handwritten note, whose handwriting is this?

24 A I would imagine Susan's or Ray's. This was  
25 given to me by them. They were together, so at

1 the time they just handed me the paper.

2 Q And again the subject matter here?

3 A Is what they wanted for the witness -- well, as  
4 a matter of fact, it must be Susan's, because my  
5 insurance afterwards, it was her, she had the  
6 Con Fed Insurance, the disability that was part  
7 of the discussion, so it must be Susan's.

8 Q And Ray is referred to in the third person?

9 A Yes.

10 Q So it would appear to be his wife. Again, it is  
11 a list of the kinds of requests that they were  
12 making through you to the Crown?

13 A Yes.

14 Q The fifth document, another handwritten note  
15 appears to be in the same writing?

16 A Except for the part where it says Calgary -- I  
17 have to get -- my photocopy isn't as clear as I  
18 would like.

19 Q The writing in the top right-hand corner about  
20 Calgary --

21 A That's my handwriting.

22 Q -- that's your writing?

23 A Yes, sir.

24 Q And the requests, again, these ones appear to be  
25 referable to that time frame in Calgary?

- 1 A Yes, that's correct.
- 2 Q And they match a memo of Mr. Miller's that we  
3 saw when we went through the documents in  
4 exhibit 15; is that correct?
- 5 A Yes.
- 6 Q They deal with the reimbursement issue,  
7 essentially?
- 8 A Yes.
- 9 Q The next document is headed up to "to whom it  
10 may concern"?
- 11 A Yes.
- 12 Q Signed by both your client and his wife, is that  
13 correct?
- 14 A That's correct.
- 15 Q And the purpose of this document?
- 16 A I can't handle trust funds without a written  
17 instruction, so I had asked for written  
18 instruction of what to do with the money that  
19 belonged to them.
- 20 Q Any money that came into you, this was simply to  
21 authorize you to put it into their bank account?
- 22 A That's right.
- 23 Q The PS, whose writing is the PS? It refers to  
24 any cash from the City of Winnipeg Police?
- 25 A I don't know whether that's Ray or Susan's.

- 1 Q And were there --
- 2 A It is not mine anyways.
- 3 Q And the reference to any cash from the City of  
4 Winnipeg Police, we don't see any, in the  
5 records that we have we don't see any monies  
6 coming from the Winnipeg Police, with the  
7 possible exception of the Crime Stoppers money  
8 which is related to the police. But what is the  
9 explanation for any reference to cash from the  
10 Winnipeg Police?
- 11 A Again, I am going from 16 year recollection, but  
12 we originally thought the money was coming from  
13 the police, that the witness protection was  
14 coming from the police, everything was coming,  
15 even though the Crown was negotiating. Then we  
16 had a meeting with Mr. Whitley. My clients were  
17 under the impression that the money was coming  
18 from the police. The police and the Crown to  
19 them were sort of one as a whole.
- 20 Q All right. So this reflects your clients'  
21 misunderstanding about the source of the monies?
- 22 A That's correct.
- 23 Q The next document dated August 6, 1991?
- 24 A Yes.
- 25 Q After the trial, well after the trial, whose

1 writing is this?

2 A Probably Susan's.

3 Q And it essentially concerns her long term  
4 disability; is that correct?

5 A That's correct.

6 Q All right. Now, this last group of documents  
7 are on a particular kind of paper that had holes  
8 in the top of it, as I recall?

9 A Yes.

10 Q Can you tell us who authored this last group of  
11 documents, whose writing is this, and what was  
12 this paper with the holes at the top?

13 A When you say that, are you referring to the  
14 handwritten documents?

15 Q Yes?

16 A Because there is also a letter at the back as  
17 well.

18 Q Yes, the handwritten documents?

19 A The handwritten documents were authored by  
20 myself.

21 Q And they are all on the same kind of paper in  
22 the originals? You can't see it in the  
23 photocopy but --

24 A Well, the same kind, but not necessarily from  
25 the same --

1 Q My recollection is the originals all had holes  
2 punched in the top; is that correct?

3 A Yes.

4 Q As if affixed to a brad on the file?

5 A Yes, but I don't know if these were -- yes,  
6 these must have been punched by us, because the  
7 ones that we buy with the two hole punches are  
8 bigger holes, so these are our own hole punch  
9 ones.

10 Q Where did these documents come from, tell us how  
11 they got generated and put on the file?

12 A Well, the first set of documents came, I think,  
13 the same day as I originally met with Ray and  
14 the police. I think that after we met with the  
15 police, I made these notes.

16 Q And that meeting with the police is the  
17 November 13th meeting?

18 A Yes.

19 Q All right.

20 A I sat down -- after the police left, I think I  
21 interviewed Ray to get more details because he  
22 had given me some sketchy stuff. He told me  
23 everything that he had said to the police, and  
24 that's why -- there is a reference to "burn  
25 house in Saskatchewan, sister's," and then he

1 told me --

2 Q So in the first page about three quarters of the  
3 way down, he tells you that he burned the house  
4 in Saskatchewan at his sister's?

5 A Yes.

6 Q So this is all information coming from your  
7 meeting with your client?

8 A Yes, subsequent to the meeting with the police.

9 Q And then over the page, there is a number 2 in  
10 the top right-hand corner?

11 A Yes.

12 Q Who is the -- and then there is a line in the  
13 middle of the page, dealing with above the  
14 line -- who is the information coming from --  
15 above the line?

16 A Above the line, that was all from my client.  
17 Below the line, I made some notes of what was  
18 said at the meeting with the police.

19 Q All right. So dealing with above the line, from  
20 your client, the reference to "offered immunity  
21 on everything, told not to get lawyer"?

22 A Yes.

23 Q I take it that's what your client is telling  
24 you?

25 A That's what he told me after the meeting with



1 the police, yes.

2 Q And below the line, the reference is to Gregg  
3 Lawlor, Anderson promised protection only, and  
4 Swift Current has been informed. As I  
5 understand you, that's your note of the  
6 discussion with the police?

7 A Yes. I am sorry my notes aren't more complete  
8 because I remember more than that, but that's  
9 pretty close.

10 Q And then over the page we have, the third page  
11 of this group of documents or notes, we have a  
12 December 12th, 1990 note. Could you identify  
13 that for us, please?

14 A That was a note that I made -- I went, my memory  
15 is that I went to a meeting with Bruce Miller.  
16 We were discussing all of the points. I didn't  
17 detail all of them in there, but we had a  
18 meeting, I discussed everything with him. And  
19 the reason I believe it was a meeting, it could  
20 have been a phone call, but the reason I believe  
21 it is a meeting is because I have his address  
22 instead of his phone number at the bottom of the  
23 thing. So if I would have gone to a meeting,  
24 that would be my habit. And then I made a note,  
25 and that would be memorialized in my

1 December 14th letter.

2 Q All right. And the bullet points noted, the  
3 sixth bullet point is the one I'm interested in,  
4 what does that say? Could you read the writing  
5 for us?

6 A "The Saskatchewan thing."

7 Q And these bullet points, as you say, become the  
8 basis for your December 14th letter --

9 A Yes.

10 Q -- to Mr. Miller?

11 A Yes.

12 Q If you look at your dockets back in exhibit 15A  
13 of tab 2?

14 A I have to move back and forth here, I have a few  
15 pieces of paper.

16 Q Tab 2 of exhibit 15A, you have a docket for  
17 December 12th, you see?

18 A Yes.

19 Q And what is that docket for? It says a one hour  
20 meeting?

21 A That would have been my time going to the  
22 meeting with Mr. Miller.

23 Q All right. And then the last two pages of these  
24 notes, can you tell us as to what the last two  
25 pages refer to?

1 A These were notes just on paper that I had  
2 written, things that Ray had told me about and  
3 Susan had told me about, that's the first page,  
4 and the same thing on the second page, some of  
5 the things they wanted. And at the bottom of  
6 the second page were notes that Bruce had given  
7 me, and I think it was on the phone, those were  
8 things in Manitoba that Bruce had told me about  
9 Ray.

10 Q This is in the bottom line beside the word  
11 "tips"?

12 A Yes.

13 Q We have a number of criminal offences, auto  
14 theft, break and enter, assault with a deadly  
15 weapon?

16 A Yes.

17 Q And driving?

18 A Yes.

19 Q What is your recollection as to what refers to?

20 A I can't swear 100 per cent to it, obviously, but  
21 my recollection is those are the things that  
22 Bruce and I had discussed about the things in  
23 Manitoba that could be brought up against Ray.  
24 I can't say for sure.

25 Q That he had some possible jeopardy in Manitoba

1 in relation to these kinds of charges?

2 A Yes. That's not dated, that's just another  
3 piece of paper. I just gave you whatever I  
4 found.

5 Q All right. So you are not sure about that?

6 A No, that's why I'm being clear here.

7 Q And then finally we have an August 8th letter  
8 relating to the real estate matter that was not  
9 part of our original tab 27 --

10 A That's right.

11 Q -- that you've produced for us, simply showing  
12 the ongoing discussions about finalizing the  
13 real estate deal; is that correct?

14 A That's correct.

15 MR. CODE: Those are my questions in the  
16 re-opened examination, if I can call it that,  
17 Mr. Commissioner. And before my re-examination,  
18 if I could invite any of my colleagues who want  
19 to cross-examine on the new documents to do that  
20 now.

21 THE COMMISSIONER: Okay.

22 MR. LOCKYER: I have no further questions,  
23 Mr. Commissioner.

24 THE COMMISSIONER: Thank you, Mr. Lockyer.

25

1 BY MR. ABRA:

2 Q Mr. Kovnats, I would like you to go to the pages  
3 in your handwriting, numbered 1 and 2? Page 1,  
4 I assume, are notes that you made of your  
5 meeting with Mr. Zanidean?

6 A Yes, it was -- my best recollection and what  
7 would make sense is these are the notes that I  
8 made after we had met with the police and Ray  
9 the first day.

10 Q Where did that meeting take place?

11 A My office in my boardroom.

12 Q Okay. And it was just Mr. Zanidean, and was  
13 Susan Fehr with him?

14 A I can't remember, I told you that before, I  
15 can't recall. I don't think she was, but I  
16 can't say for sure.

17 Q And these are the notes that you made of that  
18 meeting?

19 A My notes of -- not of the meetings, of things  
20 that I was told, I didn't make minutes of the  
21 meeting.

22 Q What I meant by notes of the meeting is that  
23 this is what Mr. Zanidean told you in that  
24 meeting?

25 A There were two meetings, in effect. There was a

1 meeting with the police, and then I had a  
2 continued meeting with my client. So when you  
3 say that meeting, my recollection is that this  
4 was more -- I started this memo, and I may have  
5 even written some of this stuff when Ray was  
6 talking to me after the police left.

7 Q Well, Mr. Kovnats, page 1 shows at the top, Ray  
8 Zanidean?

9 A Yes.

10 Q I'm assuming from that that you were meeting  
11 with Mr. Zanidean?

12 A That's right.

13 Q There is no mention of the police?

14 A That's correct.

15 Q Well, are you saying the police were there and  
16 you didn't record it?

17 A What I'm saying is that I met first with the  
18 police and Ray, I didn't meet with Ray before I  
19 met with the police. Everyone came together.  
20 Then the police left -- I will answer my own  
21 way -- then the police left and I said, Ray, you  
22 better fill me in or words to that effect, I  
23 don't know the exact wording that I used, and I  
24 made notes of what he told me.

25 Q Did you not make any notes of the initial

1 meeting with the police?

2 A I don't know. As I said to you yesterday, I  
3 don't always keep my notes afterwards.  
4 Sometimes I do, sometimes I don't make notes. I  
5 regret the fact that I don't have them today,  
6 but this is all I found. So this is what I  
7 brought. I immediately, when my secretary said  
8 she saw some notes, I immediately searched  
9 everywhere, found the notes. In less than an  
10 hour of leaving downtown I was on my way back  
11 downtown with what I found. This is what I  
12 found.

13 Q So your recollection is, some 15 years later,  
14 that you met with the police before you met with  
15 Mr. Zanidean, but you have no note of any of  
16 that meeting with the police?

17 A You know, no, I do not have a note of the  
18 meeting with the police.

19 Q But did you meet with the police before you met  
20 with Mr. Zanidean?

21 A No, I met with Mr. Zanidean and the police --  
22 the first meeting that I had --

23 Q What did you discuss?

24 A Can I finish my answer and then I will answer  
25 the next question? And I don't want to be

1           adversarial, I'm here to give evidence.

2                   My first meeting was, the first thing that  
3 happened was Ray came in with the police.

4           Everyone came at the same time. I don't know  
5 whether they came in the door together. I met  
6 them in the boardroom at the same time.

7                   We discussed in this meeting that Ray would  
8 be testifying in the Driskell case. I don't  
9 know that we used the word Driskell case, that  
10 he would be testifying. They wanted him as a  
11 witness, that he had given them some statements,  
12 they promised him witness protection. They  
13 first denied they had, and then they said, no,  
14 we only promised protection in Manitoba. And he  
15 said no, they promised me protection in  
16 Saskatchewan and without that there is nothing.  
17 I'm paraphrasing, I don't want to have my words  
18 taken word for word. Then we discussed that.  
19 Then they said he would be protected. Then they  
20 told me the witness protection would be dealt  
21 with, with Mr. Lawlor, with the Crown Attorney.  
22 And they told me that they would be in touch  
23 with Swift Current, because that Saskatchewan  
24 thing was discussed. I don't believe when I  
25 first met with the police and Ray that I knew



1           what the Saskatchewan issue was. I believe that  
2           at that time all I knew about was there was a  
3           Saskatchewan issue. I think afterwards when I  
4           needed more detail from Ray, then I had this  
5           memo.

6        Q     Well, Mr. Kovnats, what you have just told us  
7           that you discussed with the police and  
8           Mr. Zanidean appears, would seem to be reflected  
9           at the bottom of page 2 of the memo, not page 1?

10       A     That's right.

11       Q     So you are saying -- did you make, did you  
12           record those notes relating to -- that begin  
13           with Gregg Lawlor, and then Anderson promises  
14           protection only, and Swift Current and so on,  
15           did you make those in the first meeting with the  
16           police?

17       A     No. After the police left, I sat down and I  
18           interviewed Ray, I made notes. Then I made some  
19           notes of what went on in the meeting with the  
20           police. All right. And that's what I did at  
21           the end of the day, that's why I drew the line  
22           across, as best as I can remember. So I  
23           honestly don't know whether I made notes during  
24           my time of the meeting with the police. I quite  
25           often go to a meeting and sit down, and then I

1 leave the meeting and I make notes. And then if  
2 I put it in a letter, I throw the notes away.

3 I am sorry, I don't have the notes. We  
4 went through my filing system, I spent 10 hours,  
5 and I don't know how many man hours, I think it  
6 was 2 or 3 weeks of two people working eight  
7 hours a day, five days a week, to try to find an  
8 old file from 16 years ago. Our normal practice  
9 is to get rid of files after 10 years because we  
10 have a huge storage issue.

11 We had these files, we found what we found.  
12 If you would have asked me six months later or a  
13 year later, I would have been able to put my  
14 hands on this stuff very, very quickly.

15 Q So what you are telling me is that the notes  
16 that begin with the entry of Gregg Lawlor, and  
17 then "Anderson promised protection only," in  
18 fact was said to you by the police before you  
19 met with Mr. Zanidean, but you recorded it  
20 after?

21 A No. They were said when I met with Mr. Zanidean  
22 and the police, and then I did my interview with  
23 Mr. Zanidean. And then at the end of the day,  
24 before I put my file away, I made -- I drew a  
25 line across and made some notes of the meeting

1           that I had with the police.

2    Q       That's what I asked you.

3    A       I don't know what you asked me.

4    Q       What I asked you, Mr. Kovnats, is very simple.

5           The entry that you made, that's on page 2, which  
6           you, I assume numbered page 2?

7    A       I numbered them both.

8    Q       Where it begins "Gregg Lawlor" and then goes on

9           to say "Anderson promises protection only,"

10          those are notes of the meeting that you had with  
11          the police before you met with Mr. Zanidean, but  
12          you made them after. Am I correct or am I not?

13   A       I don't know how to answer that question. I  
14          didn't have a separate meeting with the police.  
15          My meeting was with the police and Mr. Zanidean.

16   Q       I understand that, Mr. Kovnats. What I'm asking  
17          you is that the notes you made of the meeting  
18          with the police and Mr. Zanidean, were they made  
19          contemporaneously, or were they made after you  
20          had then met with Mr. Zanidean?

21   A       They were made after I met with Mr. Zanidean.

22          It was one continuous meeting. They left and I  
23          continued meeting with Ray. It was one meeting,  
24          sir.

25   Q       Okay. I thought you had told us the other day

1           that Zanidean had told you initially that the  
2           police had offered immunity, including the Swift  
3           Current charges?

4    A       That's right.

5    Q       And then when you met with Anderson he said, no,  
6           we didn't promise any such thing, we just said  
7           we would give him protection?

8    A       Yes.

9    Q       Did you meet with the police twice that day?

10   A       No. And what I said to you the other day, and I  
11           want to be very clear so that there is no  
12           misunderstanding between us, is that when we met  
13           with the police, the immunity was discussed, it  
14           was promised. We discussed the fact that he  
15           would have a job just like he had here. They  
16           made all sorts of promises of what the witness  
17           protection would have, including the immunity.  
18           And then they said I have to finalize matters  
19           with the Crown, and the person they told me to  
20           contact was Mr. Lawlor. That's what happened,  
21           unequivocal. I can't remember the exact words  
22           but I remember the gist of it, sir. It was a  
23           very important event.

24   Q       So you are saying that the police promised  
25           immunity?

1 A Yes.

2 Q Were you present when they promised immunity?

3 A The wording of that -- in the course of my  
4 meeting with the police, my client said that  
5 they had promised immunity. They first denied  
6 it, they said, no, we didn't promise that. And  
7 my client got all upset. And my client said,  
8 David, we have got to talk, and we had some  
9 private discussions when they were right there.  
10 And then he said, they sure did. I'm going to  
11 use polite language. And they said, well, we  
12 didn't promise immunity for the Saskatchewan  
13 thing. At that point I don't believe I knew  
14 what it was, because in my mind I don't think I  
15 did. And then he said that -- he said without  
16 that, I'm not meeting with these guys any more.  
17 And I said to them, that's a deal breaker. My  
18 understanding, my recollection is, and I don't  
19 know the words that were used, so I don't want  
20 to say they said, yes, you have immunity, but we  
21 left with the impression at that point that we  
22 had immunity for Saskatchewan as well. The  
23 details of the program were to be worked out  
24 between myself and Mr. Lawlor. That is my  
25 recollection.

1 Q I am sorry, sir, I don't want to take too much  
2 of the Commissioner's time but I'm having  
3 difficulty working out what was discussed when.  
4 What I understood you to say was you met with  
5 the police and Mr. Zanidean initially?

6 A That's correct.

7 Q And that Mr. Zanidean gave you some information?

8 A That's correct.

9 Q Now, is that the meeting at which he told you  
10 that the police had promised him immunity, and  
11 they said, no, we didn't, we just offered you  
12 protection?

13 A That was their first response.

14 Q All right. And yet you have entered that at the  
15 bottom of page 2?

16 A Yes.

17 Q After that meeting is done?

18 A That's correct.

19 Q How did that come about?

20 A Because I made a note that they had tried to  
21 renege on what they had originally said, in my  
22 client's opinion. They then changed their  
23 position in front of me and said, they  
24 voluntarily changed their position, because it  
25 was very quick -- and I'm going from memory to a

1 great extent, but I also have my notes that were  
2 made six months later. And I'm sure if I knew I  
3 was going to be cross-examined like this, I  
4 would have been in much more detail. But having  
5 said that, sir, I remember very clearly, they  
6 said no, no, no, we couldn't give him immunity  
7 in Saskatchewan, we could only give him immunity  
8 in Manitoba, and he has got that.

9 And then my client and I spoke, we didn't  
10 go in a separate room but we were sitting on one  
11 side of the table, they were sitting on the  
12 other side of the table. And he and I spoke,  
13 and our position to them was, if they didn't  
14 give him immunity everywhere, there was no point  
15 in continuing our discussions. They said don't  
16 worry about it, everything will be fine. I  
17 don't know the exact words they used. I was  
18 left with the impression that he had immunity  
19 everywhere, and that I was to work out the  
20 details.

21 We went through the Witness Protection  
22 Program, and the picture they painted was a lot  
23 different than later came out, they painted a  
24 picture of what the protection program would be,  
25 and my client and I were to negotiate the final

1 details of this with Gregg Lawlor.

2 Q I see. So what you are telling us is that the  
3 police, in fact, changed their mind in midstream  
4 and agreed that they were going to give immunity  
5 to Mr. Zanidean?

6 A They did that immediately with respect to the  
7 Manitoba issues, and my impression was, and I  
8 don't know the words that were used, so I don't  
9 want to put words in someone's mouth 15 or 16  
10 years later, but my impression was they were  
11 giving him immunity for Saskatchewan as well,  
12 otherwise we wouldn't have continued to talk.

13 Q Yet the only thing that you recorded was  
14 Anderson's comment "promise protection only"?

15 A I recorded that, yes, sir.

16 Q And you didn't record anything about what you  
17 infer to be a change in the police's position  
18 that they would get you immunity for Swift  
19 Current as well?

20 A No, I did not.

21 Q And yet that was probably the most important  
22 part of the meeting, from what you are telling  
23 us?

24 A My note wasn't made so that I would be able to  
25 sit 15 years later in cross-examination. I know



1           what I need to remember and why I need to  
2           remember it. And whether you like my note or  
3           not, that's my note. That's my recollection,  
4           and there it is.

5       Q     Mr. Kovnats, if you made a note of what you had  
6           to remember, what you wrote was, Anderson said  
7           there would only be protection. He didn't say  
8           anything about immunity --

9       A     No.

10      Q     -- according to the notes that you made?

11      A     I am sorry, the note was made for my reference.

12      Q     Yes?

13      A     Not to say, here is everything that happened in  
14           the meeting. When I tried to remember  
15           everything a few months later and put it down, I  
16           was very clear what went on in the meeting. So  
17           I want you to understand something --

18      Q     Six months later?

19      A     It may be six months later or six years later,  
20           this was an event in my life that was different  
21           than the rest of my practice, so I have a pretty  
22           good recollection about it.

23      Q     And --

24      A     And I'm going to continue.

25      Q     Go ahead.

1 A When I make a note to file to me, it is for my  
2 purposes. It may not have the same import for  
3 other people. If I had known this was going to  
4 happen, believe me, I would have sat down and  
5 made a lot more detailed notes. Because I know  
6 Mr. Anderson's family is going to read the  
7 newspaper, I made that because that told me  
8 something about Mr. Anderson.

9 Q When you make the note, Mr. Kovnats, I just want  
10 to be perfectly clear on this, when you make the  
11 note it is for your own benefit?

12 A That's correct.

13 Q In order to protect yourself and record what you  
14 were told for your own benefit?

15 A No, not for my own benefit, for my recollection.

16 Q Yes?

17 A Of something that's important to me.

18 Q And yet what you didn't record was what you are  
19 now telling us was the most important part of  
20 that meeting with Anderson, where he said you  
21 had immunity, or inferred that you had immunity  
22 for Swift Current.

23 A I did not record that in that note.

24 Q No. Going over to the next page?

25 A Which page are you referring to?

1 Q It has got the heading December 12, 1990?

2 A Yes.

3 Q Now, you don't have anything written about  
4 meeting with Bruce Miller or telephone  
5 conversations with Bruce Miller, all you have is  
6 a list of items; do you agree?

7 A That's what it says.

8 Q And although your time docket says you had a  
9 meeting on December 12th, it doesn't indicate  
10 with whom you met?

11 A That's correct.

12 Q But the December 12th note has a number of items  
13 listed, house purchased from him, legal fees in  
14 and out, new identity, fees paid, moving costs,  
15 Susan --

16 A Taken care of or something.

17 Q -- taken care of, Saskatchewan thing, new job.  
18 Have I listed everything?

19 A You have listed what is on the paper.

20 Q Yes?

21 A Those were notes to me.

22 Q Yes. Nowhere in that list, whether you  
23 discussed it with Miller on the telephone or in  
24 a meeting, or whether you just prepared it for  
25 the purposes of your letter to Miller, nowhere

1 is there mention of immunity, is there?

2 A The "Sask thing" is the immunity.

3 Q Then why doesn't it say immunity?

4 A It doesn't say the word immunity, it is a note  
5 to me.

6 Q And when you later wrote to Mr. Miller, you were  
7 told to write to him personally at the address  
8 that's shown on there; right?

9 A Yes.

10 Q So, these are the notes you made of your meeting  
11 or your telephone conversation with Mr. Miller,  
12 you think?

13 A That's my best recollection, sir.

14 Q There is no mention of immunity anywhere?

15 A There is mention of the Saskatchewan thing,  
16 which incorporates the immunity, in my mind.

17 Q You haven't written immunity, have you?

18 A I have not written the word immunity. Mr. Abra,  
19 please, let me answer one question at a time.

20 THE COMMISSIONER: Mr. Kovnats, could I ask you  
21 to just try and answer the question. I know --

22 THE WITNESS: I apologize.

23 THE COMMISSIONER: Go ahead, Mr. Abra.

24 BY MR. ABRA:

25 Q There is no reference in your note to immunity,

1 and I suggest to you that, in fact, Mr. Miller  
2 told you that he was not prepared to give you  
3 any immunity?

4 A I would tell you that is completely false.

5 Q Well, you haven't written it.

6 A Whether I wrote it or not, I'm telling you that  
7 Mr. Miller told me that we would have immunity.

8 Q And I suggest to you Mr. Miller told you, okay,  
9 this is what you are asking for, write to me and  
10 I will let you know what our position is?

11 A No, I'm telling you that's not the case.

12 Q So when you wrote the subsequent letter, as I  
13 had said to you the other day, and Mr. Olson  
14 said to you, the letter of December 14th,  
15 nowhere in it did you say, this is to confirm  
16 our agreement from December the 12th?

17 A No, I did not put that in the letter.

18 Q And nowhere in your notes do you have anything  
19 about immunity?

20 A I, by having the word "Saskatchewan thing" have  
21 that in my notes, sir, not the word immunity,  
22 but I have the concept in my note.

23 Q I see. And did you show the notes to  
24 Mr. Miller?

25 A No.

1 Q I didn't think so. Thank you, Mr. Kovnats.

2 MR. PROBER: I have no further questions,

3 Mr. Commissioner.

4 THE COMMISSIONER: Thank you, Mr. Prober.

5 MR. GATES: I have no questions.

6 THE COMMISSIONER: Thank you, Mr. Gates.

7 MR. OLSON: I have no questions,

8 Mr. Commissioner.

9 THE COMMISSIONER: Thank you, Mr. Olson.

10 MR. KENNEDY: I have no questions.

11 THE COMMISSIONER: Thank you, Mr. Kennedy.

12 MS. CARSELL: No questions.

13 THE COMMISSIONER: Thank you, Ms. Carswell.

14 MR. WOLSON: I have questions.

15 BY MR. WOLSON:

16 Q Mr. Kovnats, what I would like you to do,

17 please, is to take tab 3, which is your memo of

18 the 2nd of June, and open that up. And if you

19 would as well, please, have the new material --

20 is that exhibit 18 -- have exhibit 18 as well.

21 And turn, if you would, please, Mr. Kovnats, to

22 page 1 of your handwritten notes, of exhibit 18,

23 and to also keep open, so you have both

24 materials, the tab 3. Would you do that for me?

25 A I have done it.

- 1 Q Okay. So, just to understand the scenario, the  
2 handwritten notes which are exhibit 18, and the  
3 book of exhibit 18, those were made when matters  
4 were most fresh in your mind?
- 5 A That's correct.
- 6 Q They were made in November when you had this  
7 meeting with Mr. Zanidean and the police?
- 8 A Yes.
- 9 Q And with Mr. Zanidean alone?
- 10 A That's correct.
- 11 Q And you would have made notes of the important  
12 aspects of both meetings, the one with the  
13 police and with Mr. Zanidean, when matters were  
14 current. There is no doubt about that, is  
15 there?
- 16 A Well, they were limited notes, they weren't  
17 detailed notes.
- 18 Q But they were current because they were made --
- 19 A They were current, no question.
- 20 Q They were made within an hour or two of your  
21 meeting with the police?
- 22 A That's correct.
- 23 Q Whereas your memo, tab 3, was made about seven  
24 months after the fact?
- 25 A That's correct.

1 Q Okay. And together those two form a very good  
2 aid for you to recollect what happened?

3 A Until Thursday last, I was only relying on the  
4 memo.

5 Q But they are now today your best aid, are they  
6 not?

7 A As an aid, yes.

8 Q Yes. Now, if you look at the handwritten page  
9 1, tab 18?

10 A I'm going to tab 18?

11 Q No, sorry, exhibit 18. I only want you to  
12 concentrate on these two documents?

13 A You said tab 18.

14 Q Sorry, then I misspoke, exhibit 18, page 1?

15 A Yes.

16 THE COMMISSIONER: I think, for the record, we  
17 should note that it is the page that has 1  
18 circled on it, I think it is about the eighth  
19 page in on exhibit 18.

20 BY MR. WOLSON:

21 Q It is the handwritten note, your handwritten  
22 note?

23 A Yes.

24 Q Just so we have it, it says Zanidean on the left  
25 side, Ray Zanidean, and 669-3995 on the right



1 side at the top?

2 A That's correct.

3 Q And the first, that page is really, you are  
4 taking down information that Ray Zanidean gave  
5 you.

6 A In the main, yes.

7 Q And basically he is telling you what he knows  
8 about the Perry Harder murder, in a nutshell,  
9 you have written that down?

10 A Yes.

11 Q He tells you right there that he burned a house  
12 in Saskatchewan, it was his sister's?

13 A Yes.

14 Q So you knew that from the meeting?

15 A From the second part of the meeting, yes.

16 Q And you also noted where the body was found?

17 A Yes.

18 Q And you are turning over the page now to the  
19 circle 2, and he is telling you that he met, he  
20 was hooked up with Detectives Anderson and Paul?

21 A Yes.

22 Q And that he gave statements to them?

23 A Yes.

24 Q And that they had offered him immunity on  
25 everything, and he was told not to get a lawyer?

1 A That's what he told me.

2 Q He gave statements, he wore a tape recorder?

3 A Yes.

4 Q And that all -- if you now look at the memo of  
5 June 2, at tab 3, which you have open before  
6 you?

7 A Yes.

8 Q And you look at the third paragraph, you have,  
9 Zanidean indicated to me, he admitted to  
10 committing arson in the Province of  
11 Saskatchewan?

12 A Yes.

13 Q Now when you look at your note, you appear to  
14 know that?

15 A Yes.

16 Q And you put that in your memo?

17 A That's correct.

18 Q "Police had promised him immunity from  
19 prosecution for everything he had said."  
20 That's consistent with page 2 where you have,  
21 "Offered immunity on everything, told not  
22 to get a lawyer."

23 A That's right.

24 Q Now, you then have a line, if you go back to  
25 page 2 of exhibit 18, the circled page 2, the

1 Commissioner is right, it is not the second  
2 page, but the circled 2?

3 A Yes.

4 Q You have Gregg Lawlor. So that's something I'm  
5 assuming the police told you, they gave you the  
6 name of Lawlor who is dealing with the matter,  
7 and that's consistent with what the police have  
8 told us?

9 A Yes.

10 Q And so then you are writing down what the police  
11 told you?

12 A Right.

13 Q "Anderson - promise - protection only."

14 A Yes.

15 Q That refers to the Witness Protection Program;  
16 right?

17 A That's correct.

18 Q And when you look at your memo, tab 3, are you  
19 with me there?

20 A Yes.

21 Q You have,

22 "After the police promised him  
23 immunity...",

24 this is what your client tells you,

25 "When we first discussed with Anderson and

1 Paul, they first denied it and said Ray  
2 misunderstood and they had offered him  
3 immunity with respect to Manitoba issues."

4 A That's correct.

5 Q There is nothing in that memo about Saskatchewan  
6 at all? It is not there, is it?

7 A It is, in the next paragraph.

8 Q It is not in the paragraph I just read to you?

9 A No.

10 Q Next paragraph,

11 "Messrs. Anderson and Paul confirmed in the  
12 presence of Ray that they had offered him  
13 the Witness Protection Program and that he  
14 would be relocated in the same position  
15 elsewhere as when he was in Winnipeg. This  
16 included that he would be able to have a  
17 home, a job and everything else. At that  
18 time Susan and Ray were not married."

19 That is what you have written in your memo at  
20 tab 3; true?

21 A That's correct.

22 Q That was seven months after the fact, but  
23 nonetheless when it was much more current than  
24 it is today?

25 A Yes.

1 Q Which is consistent, I would suggest to you, to  
2 what you have under the name Gregg Lawlor, at  
3 page circled 2. Anderson -- Anderson is Tom  
4 Anderson; right?

5 A That's correct.

6 Q Promises what he promising to your client in  
7 your presence?

8 A Yes.

9 Q Protection only, you put in the word "only,"  
10 that's what you put in?

11 A Yes.

12 Q And the matter was most fresh in your mind back  
13 in November of 1990, true?

14 A That's correct.

15 Q And that's why I suggest to you, when you said  
16 the other day that you can't be 100 per cent  
17 sure that Anderson or Paul promised immunity,  
18 you made that statement the other day, because  
19 it is not in your memo of June 2, tab 3; right?

20 A That's correct.

21 Q And we can see today it is not in your memo  
22 handwritten on the date of the actual meeting  
23 with the police?

24 A That's correct.

25 Q And that's your evidence today?

1 A That's my evidence today.

2 MR. WOLSON: Thank you, sir.

3 MR. CODE: If that concludes the  
4 cross-examination on the re-opening --

5 THE COMMISSIONER: I believe it does.

6 BY MR. CODE:

7 Q I just have a couple of questions in  
8 re-examination, Mr. Kovnats.

9 If I could go back to the order in which my  
10 colleagues cross-examined you, a number of them,  
11 and my note is beside Mr. Olson's  
12 cross-examination in particular, but a number of  
13 them cross-examined you about tab 39, which is  
14 the retainer letter that you received on  
15 June 12th, and pointed out the fact that it  
16 arrives a day after Zanidean, or it is sent a  
17 day after Zanidean testifies, and includes  
18 authorization to attend the trial and be present  
19 for his testimony. Do you recall that area of  
20 cross-examination about tab 39?

21 A Believe it not, I recall the events of 15 years  
22 ago better than last week. The pressure is a  
23 little different.

24 Q I just want to ask a couple of questions about  
25 that issue of the tab 39 retainer letter

1 arriving the day after the testimony. If you go  
2 back to tab 14, which I don't believe my  
3 colleagues took you to, in volume 1, do you have  
4 tab 14 in volume 1?

5 A I do.

6 Q You see that Mr. Miller issued instructions to  
7 the Assistant Deputy Minister to issue the  
8 retainer letter to you on March 22nd, 1991?

9 A I see that.

10 Q And it is described as a retainer to act on our  
11 behalf in negotiations with a key witness. And  
12 it says,

13 "Please, retain at the usual rate."

14 Did you ever receive an explanation for why it  
15 took some two and a half months to issue that  
16 retainer letter to you after Mr. Miller gave  
17 instructions that it be issued?

18 A No. In fact, I would like to refer you to my  
19 further documents for disclosure, to a letter  
20 that I wrote on June 21st, thereabouts, 17th, I  
21 can't remember, just give me a minute.

22 Q This is not a document that was in the exhibit  
23 books but it was in the further disclosure?

24 A Further disclosure to counsel.

25 Q Did that letter seek an explanation for the

1 delay in the retainer?

2 A I don't know if it sought an explanation, but  
3 certainly complained about it. It is a letter  
4 addressed to Bruce Miller dated June 17th.

5 Q So after you receive the June 12th retainer  
6 letter, you write a June 17th letter in  
7 response?

8 A First I have a phone call with Bruce, all right.  
9 And I had spoken to him in some detail. Then I  
10 confirmed, I finally got to the point with Bruce  
11 where I felt I had to confirm something in  
12 writing, I confirmed in writing so there would  
13 be a record. He never responded to that, and  
14 the result is the government never did honour,  
15 even this confirmed discussion six months later,  
16 they weren't honouring it.

17 Q My question very simply, Mr. Kovnats, is as a  
18 result of your June 17th letter, did you ever  
19 receive an explanation for the delay in  
20 forwarding the retainer letter to you?

21 A No.

22 Q And perhaps, Mr. Commissioner, that June 17th  
23 letter is disclosed to my colleagues, but I will  
24 have copies made and have it marked as an  
25 exhibit, since it has now been referred to, it



1 should be probably be entered as an exhibit. If  
2 we could save exhibit 19 for that, before we get  
3 to Mr. Brodsky.

4 (EXHIBIT 19: Letter of June 17 addressed  
5 to Bruce Miller)

6 BY MR. CODE:

7 Q The next question I had, again, a number of my  
8 colleagues questioned you about this, and my  
9 note is simply beside Mr. Olson's as the first  
10 counsel who raised the issue. And that is the  
11 whole question of the perception you developed  
12 at some point that your client was dealing  
13 directly with the other parties, as opposed to  
14 having the negotiations conducted through  
15 yourself. Do you recall the cross-examination  
16 in that area?

17 A A little bit, yes.

18 Q About your concerns in that regard?

19 A Yes.

20 Q And if I could refer you to a document that I  
21 don't think you were taken to when you were  
22 questioned in that area, about your concerns,  
23 and that's at tab 49, where you appear to have  
24 eventually taken some steps to deal directly  
25 with this problem. Is that correct?

- 1 A That's not the first one, but that is one of  
2 them, yes.
- 3 Q And the document at tab 49, what was the purpose  
4 of this document? It is a direction from your  
5 client.
- 6 A I wanted a written direction from my client,  
7 because my written directions to the Crown were  
8 being ignored, and they were still dealing  
9 directly with my client, contrary to my wishes.  
10 And the only way I would continue to represent a  
11 client was, I wanted them to know that my client  
12 had given me written instructions and they  
13 should only deal through me. I think I gave  
14 them that instruction also prior to that, not  
15 from my client, from myself, in writing. I  
16 think I reduced it to writing in June before he  
17 testified, which again was breached.
- 18 Q I don't believe we have any documents to that  
19 effect.
- 20 A Would you look at -- I wrote a letter on  
21 June 4th.
- 22 Q We have your June 4th letter.
- 23 A I have to find it. And I'm going from memory  
24 now.
- 25 Q Your June 4th letter does ask that you be

1 present at all meetings, yes, that is true. You  
2 are quite right.

3 A I thought I had.

4 Q Excuse me, it is tab 45, Mr. Kovnats, and it is  
5 item 11.

6 A I specifically mentioned it.

7 Q You are quite right.

8 A I know I verbally told them, but I think I did  
9 reduce it to writing.

10 Q One final matter, Mr. Kovnats, and this was  
11 particularly stressed during Mr. Abra's  
12 cross-examination, and it concerned your  
13 December 14th letter that you recall is back in  
14 volume 1, at tab 7. And Mr. Abra put to you the  
15 proposition as to whether that letter accurately  
16 set out the matters previously discussed with  
17 Mr. Miller, in addition to challenging you in a  
18 number of other areas. But the only aspect of  
19 his cross-examination that I want to deal with  
20 is the question of whether your December 14th  
21 letter accurately set out the matters that had  
22 been discussed?

23 A Except for the two items I mentioned in -- I  
24 don't know whether it was cross or in my direct  
25 testimony -- except the two items that I

1 mentioned before about the alarm systems, yes.

2 Q And the only question that I had in  
3 re-examination is, when Mr. Miller responded to  
4 that letter, which we know he did, did he ever  
5 challenge the accuracy of your listing?

6 A Never.

7 MR. CODE: Those are all of my questions in  
8 re-examination. Thank you very much.

9 THE WITNESS: Mr. Commissioner, I have a few  
10 things that I want to say, and I want to be able  
11 to tell the whole truth, and I want to put  
12 things in context, because I don't want you  
13 leaving with any misunderstandings or  
14 misimpressions. I'm going to tell you, and it  
15 is going to take maybe five minutes, but I have  
16 taken a few days of my life for this Commission,  
17 and they can take five minutes to hear from me,  
18 frankly.

19 THE COMMISSIONER: It is a bit unusual --

20 THE WITNESS: I want to make sure you  
21 understand.

22 THE COMMISSIONER: -- to have a postscript, but  
23 you go ahead.

24 MR. CODE: I thought, Mr. Kovnats, you simply  
25 wanted to thank the Commission?

1 THE WITNESS: No, I also want to indicate about  
2 how we practice in Manitoba on some issues.

3 THE COMMISSIONER: I don't know how people  
4 practice in Ontario, so it wouldn't be in contra  
5 distinction.

6 THE WITNESS: Well, I just want to give you a  
7 little bit of an example here. Because by the  
8 very questions that have been asked of me, it  
9 creates an impression that I don't think is  
10 correct. So I want you to bear with me for five  
11 minutes.

12 When I first started the practice of law, I  
13 had two things happen in a very short period as  
14 a student. I was dealing with counsel  
15 out-of-province and I said we will do everything  
16 on trust conditions, and he said we trust  
17 nobody. And then I got a letter in Manitoba, we  
18 do a lot of things on trust conditions, and a  
19 letter came from a senior practitioner who said,  
20 I send you these documents on a real estate file  
21 on the usual trust conditions. So I phoned him  
22 up and I said, usual, yours or mine, whose usual  
23 trust conditions? And he said, David, are yours  
24 reasonable? And I said, yes, I'm the epitome of  
25 the reasonable man. And he said, fine, we will

1 use yours. And that's the attitude in which I  
2 practiced then, and I continue to practice that  
3 way.

4 And that example of senior practitioner was  
5 addressed to the bar, the call to the bar  
6 ceremony by a judge of the Queen's Bench who  
7 said how our profession is a honourable one and  
8 we should be able to practice without having to  
9 make all of these letters and everything, that  
10 this is something that unfortunately has become  
11 a more recent practice, but in years gone by we  
12 didn't have to do it.

13 In late 1984, early 1985, I had the great  
14 pleasure of practicing with a gentleman called  
15 Clive Tallon. And we were dealing with a very  
16 controversial issue with someone who was not a  
17 member of our profession, and I said -- we had  
18 lunch and I told Clive what had happened. And  
19 he said, David, you had better write him a  
20 letter. And I said, I don't need to, I have  
21 been dealing with this man for years. He said,  
22 David, he is not a lawyer, he is not bound by  
23 the same rules as us, write a letter, which I  
24 did. The attitude was you don't write letters  
25 for everything in our profession.

1 I have dealt with people, and most of the  
2 counsel here whom I know, and including Mr. Abra  
3 who was challenging me, if Mr. Abra asked me to  
4 take his word on something, I wouldn't write him  
5 a letter confirming it right away. Today,  
6 perhaps I will, for the future, perhaps I will,  
7 but until today, I wouldn't write those kinds of  
8 letters. And I think it left me in a very  
9 difficult position when I'm being asked the  
10 question as if it has to be done.

11 Last Thursday afternoon, while I was  
12 driving between my office and bringing these  
13 papers back to Mr. Code, and I had a real estate  
14 transaction which I couldn't close because I was  
15 dealing with this issue, and another lawyer gave  
16 keys to possession, keys and possession to the  
17 property, based on my word on the phone, because  
18 we practice in an honourable profession in this  
19 province. So don't be surprised that I didn't  
20 memo everything and I didn't write letters on  
21 everything.

22 I wanted that just so you understand the  
23 context in which I practice. The litigation  
24 people, perhaps it is different, but in my  
25 context, I don't memo everything.

1 I also want to do two things now, I want to  
2 apologize to you when I lost my equanimity,  
3 because I shouldn't do that, and as a lawyer  
4 especially I have a duty that is greater than  
5 others, and I apologize for having lost my  
6 equanimity in cross-examination. I have no ax  
7 to grind here. I'm not in the hot seat, so to  
8 speak, other than being cross-examined, and I  
9 shouldn't have done that. I'm just trying to  
10 give you the information to the best of my  
11 ability.

12 And lastly, I want to thank you, the other  
13 day when you said, I would have done the same  
14 thing, when I couldn't respond to people. You  
15 have no idea how hard it has been over the years  
16 to sit under a set of rules where perhaps my  
17 personal wishes were different, but I had to do  
18 what I believe was the right thing. And to hear  
19 you say, yes, I would have done the same thing,  
20 meant a lot to me. That's all I have to say.

21 THE COMMISSIONER: Thank you, Mr. Kovnats. And  
22 I want to make it very, very clear, that  
23 although the examinations and cross-examinations  
24 were certainly not a tea party, and I appreciate  
25 your patience and endurance, that all of the



1 counsel, in their questions, conducted  
2 themselves in the highest fashion and the  
3 highest standards.

4 THE WITNESS: Okay.

5 THE COMMISSIONER: Thank you, Mr. Kovnats.

6 MR. CODE: Mr. Commissioner, we are now ready  
7 for the second witness in this block of  
8 witnesses, and Mr. Dawe is going to call that  
9 witness.

10 THE COMMISSIONER: We would normally have a  
11 break somewhere within the next ten minutes, so  
12 I leave in your hands as to whether we start  
13 now.

14 MR. CODE: I would think it would be sensible to  
15 take the recess now. It would allow Mr. Kovnats  
16 to pack up and have Mr. Brodsky come into the  
17 room, so it would be a sensible time to take a  
18 recess now.

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

21 (Proceedings recessed at 10:36 a.m. and  
22 reconvened at 10:53 a.m.)

23 THE CLERK: All rise, this Commission of Inquiry  
24 is now open. Please be seated.

25

1 GERALD GREGORY BRODSKY, having first been duly  
2 affirmed, testified as follows:

3

4 MR. DAWE: The first order of business, as we  
5 have been doing, I propose that we file the  
6 three volumes of documents. It is going to be  
7 exhibit 20, A, B and C, in that order.

8 (EXHIBIT 20A: Volume 1 of documents for  
9 examination of Mr. Brodsky)

10 (EXHIBIT 20B: Volume 2 of documents for  
11 examination of Mr. Brodsky)

12 (EXHIBIT 20C: Volume 3 of documents for  
13 examination of Mr. Brodsky)

14 BY MR. DAWE

15 Q As we have been doing, you will note  
16 Mr. Brodsky, at tab 1 of the first volume, there  
17 is a copy of the summary that we prepared of the  
18 interview that we conducted with you on  
19 May 23rd.

20 A Yes, I see that.

21 Q Our practice has been not to canvass all of the  
22 issues that are discussed in the interview  
23 summaries and simply to file the documents, but  
24 with that in mind, I will just ask you, have you  
25 had a chance to review the summary?

1 A I have.

2 Q And are you content with its general accuracy?

3 A I am.

4 Q There is one minor error that we discussed last  
5 week that you've identified. If you turn to  
6 page 3, there is reference just under heading 2,  
7 there is reference to the Sophonow case. It  
8 says,

9 "Likewise in Sophonow, Thomas Cheng had  
10 charges that were made to disappear and  
11 this was disclosed to Brodsky."

12 A Yes.

13 Q I take it that's not actually accurate. In  
14 fact, Mr. Cheng was the gentleman who had  
15 charges that were made to disappear and they  
16 were not disclosed to you?

17 A But they were, by the time of the third trial  
18 the charges had disappeared.

19 Q But was that disclosed to you, because that was  
20 one of the issues of the inquiry, as I recall?

21 A He wasn't around, he had gone to China. I knew  
22 he couldn't have gone to China if the charges  
23 were still there.

24 THE COMMISSIONER: His evidence was read in on  
25 the 3rd.

1 THE WITNESS: There was an application to have  
2 his evidence read in.

3 BY MR. DAWE:

4 Q My understanding, and correct me if I'm wrong,  
5 is what you had actually meant to refer to was  
6 the other fellow in the case, McQuade, and he  
7 was the guy who had a resolution that was  
8 disclosed to you?

9 A Yes.

10 Q Apart from that minor point, the summary is  
11 generally accurate?

12 A Yes.

13 Q The other point that I would like to address at  
14 the outset, by way of bookkeeping, concerns your  
15 file. If you turn to volume 2, the second large  
16 volume, tab 55?

17 A I have it.

18 Q You will see there is a handwritten direction  
19 from Jim Driskell, it is not actually addressed  
20 to anybody, but it directs "you," whoever that  
21 might be, to release the contents of my file to  
22 his new lawyers, including Mr. Libman. I take  
23 it, although it is not addressed, do you take  
24 that as being a direction to you?

25 A I do, and my office.

1 Q I would just like to ask you, the file that you  
2 subsequently -- I take it you did subsequently  
3 turn your file over to Mr. Libman?

4 A I did.

5 Q And to the best of your knowledge, was the file  
6 that you turned over the complete file?

7 A It was.

8 Q Now, Mr. Libman in turn has turned over the file  
9 to the Commission, and Commission staff has gone  
10 through it and prepared an index of the  
11 disclosure documents that were in the file. I  
12 propose to file that as the last exhibit,  
13 exhibit 20D. It is not bound, it is the stapled  
14 together sheet of pages. This list has been  
15 disclosed to the parties some time ago.

16 (EXHIBIT 20D: Mr. Brodsky's file re Mr.  
17 Driskell)

18 BY MR. DAWE

19 Q The third and final preliminary point that I  
20 would like to deal with relates to your very  
21 extensive file memos that we see in the book of  
22 documents. This point is addressed in the  
23 statement, but would it be fair to say that your  
24 practice was to dictate these memos and they  
25 would be typed up some time later?

1 A Yes, my practice was to make a note on a  
2 dictaphone. When the tape was full or nearly  
3 full, I would turn it over to my secretary and  
4 she would type it up.

5 Q Mr. Brodsky, could I just ask you to rotate the  
6 microphone a little bit closer towards you?

7 A Okay.

8 Q As I read these memos, the date that appears on  
9 the memo appears to be the date that they were  
10 typed?

11 A That's correct.

12 Q So to determine the date that the memo was  
13 actually dictated, it would be fair to say that  
14 you would have to generally look to contents of  
15 the memo and figure it out from there?

16 A I try to put in the memo the day I'm dictating,  
17 because the day at the top of the memo is the  
18 day that it is typed by my secretary, as opposed  
19 to the day of the occurrence.

20 Q Okay. Thanks very much. We discussed a number  
21 of issues in the interview, and they are set out  
22 in the statement. But the issue that I will be  
23 focusing on today in my questions is the issue  
24 of disclosure. And before we get into the  
25 specifics of what you asked for and what you got

1 in Mr. Driskell's case, I would just like to go  
2 over with you very briefly your recollection of  
3 what practices were like in Manitoba with  
4 respect to disclosure during the pre-Stinchcombe  
5 era.

6 And I can indicate that this is set out in  
7 your summary at pages 2 to 3. But if I could  
8 just sum up what I understand your recollection  
9 is, and you can correct me if I'm wrong, by the  
10 time of Mr. Driskell's trial, in what one might  
11 call the late pre-Stinchcombe era, because  
12 Stinchcombe was decided later that year, as I  
13 understand it, the policy was for defence to get  
14 all relevant information in the Crown or police  
15 possession; is that fair?

16 A Right.

17 Q But at the same time, the defence did not  
18 routinely get copies of police notes; is that  
19 correct?

20 A That's fair.

21 Q So the expectation, as I understand it, was that  
22 anything that was relevant in the police notes  
23 was supposed to make its way into a  
24 supplementary report?

25 A And that's called a narrative.

1 Q And the reports are what would be given to you,  
2 or the content of the report in some fashion?

3 A Yes.

4 Q And thirdly and finally, it would be fair to  
5 say, would it not, that the policy about  
6 providing full disclosure was observed  
7 particularly rigorously in direct indictment  
8 cases?

9 A I assume -- that's what I thought.

10 Q That was your understanding of what the policy  
11 was, whether that was true in every case?

12 A That was the policy. That's what the Crown told  
13 the Attorney General, that full disclosure had  
14 been made.

15 Q So I will turn now to the specific issue of  
16 disclosure in Mr. Driskell's case. Before I get  
17 into some of the specific issues I want to focus  
18 on, I will just set out an overview of the  
19 chronology of the disclosure requests, if I can  
20 just take you through some of the documents that  
21 sort of tell the tale, as it were. Again, I  
22 just note for the record this is discussed in  
23 the interview summary at pages 4 to 6.

24 So, as I understand it, you were first  
25 brought into the case in mid December 1990 by



1 Ian Garber?

2 A That's correct.

3 Q And I will just indicate for the record this  
4 document is at tab 2 relating to that.

5 The Crown then prefers a direct indictment.  
6 As I understand it, although the direct  
7 indictment is actually preferred on November 9,  
8 the defence doesn't learn about this until late  
9 December, at some point, 1990?

10 A That's correct. I don't know why, but that's  
11 correct.

12 Q Over the next few months, over December and  
13 January, the Crown sends Mr. Garber a variety of  
14 different police reports and forensic reports.  
15 And there is a body of correspondence at tab 4,  
16 which I don't need to take you to in detail, but  
17 I take it you have reviewed that at some point  
18 in the last --

19 A Yes, you asked me and I did.

20 Q I just note parenthetically, was it consistent  
21 with your recollection of the ordinary  
22 disclosure practices at the time, that the kinds  
23 of material that are being provided in the tab 4  
24 correspondence was the kind of material that  
25 would be provided automatically, generally?

1 A Yes.

2 Q And then at tab 5, you write a disclosure letter  
3 on January 29, 1991?

4 A Tab 5?

5 Q Do you have that, or do I have the wrong tab?

6 A I have a memo of January 29, 1991 as being tab  
7 5.

8 Q Yes, if you follow, turn a few pages over, the  
9 last document, a number of these tabs have  
10 multiple documents at the tab?

11 A Yes, I see it, January 29, the letter to Gregg  
12 Lawlor.

13 Q You recall that letter?

14 A Yes.

15 Q And then the next significant event on  
16 February 4th, '91, the Crown then brings this  
17 motion for a expedited trial, and they are  
18 seeking to have the trial set for early April.  
19 The motion is at tab 6?

20 A I see that, signed by the solicitor for Her  
21 Majesty the Queen, Bruce H. Miller, yes.

22 Q That is right. And would it be fair to say that  
23 one of the main arguments that the Crown makes  
24 in support of this motion is that the defence  
25 wouldn't be prejudiced by an early trial because

1 full disclosure had been already made?

2 A I think they say that a number of times in the  
3 affidavit that was appended to that motion.

4 Q That is correct, in paragraph 29 in particular?

5 A Yes.

6 "Early and full disclosure has been made of  
7 the particulars of the case for the  
8 prosecution and the defence will not be  
9 hampered or prejudiced in their preparation  
10 for trial."

11 That's what it says.

12 Q And it would also be fair to say, I imagine,  
13 that you didn't entirely agree with this  
14 assertion that full disclosure had been made?

15 A I absolutely did not.

16 Q In fact, that's one of the main arguments that  
17 you made when the motion was argued on  
18 February 6, that you would in fact be prejudiced  
19 by having a trial in April because you didn't  
20 have full disclosure?

21 A That's correct.

22 THE COMMISSIONER: Just as a matter of  
23 curiosity, I'm not familiar with this sort of  
24 notice of motion, is that normal with all trials  
25 or just in "expedited trials"?

1 THE WITNESS: Mr. Commissioner, this is unusual.  
2 It happened in this case. This is not a motion  
3 for a direct indictment, this was a motion for  
4 the setting of an early trial date. I had  
5 indicated that I already was engaged in another  
6 case, and I said that I didn't have disclosure  
7 and couldn't be ready. And in order to resolve  
8 the matter, the Crown moved the court to set the  
9 early date.

10 THE COMMISSIONER: All right. Is that common?

11 THE WITNESS: No.

12 THE COMMISSIONER: Okay.

13 BY MR. DAWE

14 Q Just to follow along with the chronology, the  
15 transcript of the February 6 proceeding is set  
16 out at tab 8?

17 A I can say -- I have been often told I talk too  
18 much -- but what usually happens is we have  
19 something called assignment court.

20 THE COMMISSIONER: That's what I was going to  
21 say, in Ontario we do it more indirectly, we  
22 just tell them to come to assignment court.

23 THE WITNESS: Yes, that's the usual practice.  
24 This is unusual.

25

1 BY MR. DAWE:

2 Q So it would be fair to say that the upshot of  
3 the February 6 appearance is that the matter is  
4 put over, the motion is put over so that you can  
5 meet with the Crown and try and resolve these  
6 outstanding disclosure issues that you have  
7 raised?

8 A Yes.

9 Q And you do in fact meet with Mr. Lawlor, as I  
10 understand from your file memo at tab 9. And  
11 then the next day, February 7, you write what I  
12 would characterize as your first major  
13 disclosure letter. There is an earlier letter  
14 of January 29, but this is the first big one?

15 A Tab 9?

16 Q Yes, it begins with this memo about the meeting  
17 with Mr. Lawlor, you see, page 150?

18 A Yes.

19 Q Then if you turn the page, there is your  
20 February 7th letter set out?

21 A Yes.

22 Q And you will see it has some 48 specific points  
23 raised?

24 A Yes. February 6, the day before, as you see in  
25 that memo, I started to tell him the things that

1 I didn't have, and it got to be long task. And  
2 he asked me to put it in writing, so I did.

3 Q All right. And the next day, you write the  
4 letter on February 7, the next day, if you turn  
5 the tab, February 8, Mr. Dangerfield sends a  
6 reply?

7 A Yes, I see that.

8 Q And I will take you to some of the specific  
9 points in this later, but for right now I just  
10 want to get an overview of the sequence in which  
11 these letters were all written.

12 What ultimately happens, as I understand  
13 it, this letter -- I should preface this by  
14 saying the letter responds to, it would be fair  
15 to say, some but not all of the requests that  
16 you have set out?

17 A Yes.

18 Q And what ultimately happens, when the expedited  
19 trial motion comes back on and continues, the  
20 trial ends up being set down in June rather than  
21 April which is what the Crown had been asking  
22 for?

23 A Yes, that's correct.

24 Q And if you turn the tab to tab 12?

25 A Yes, I see that.

1 Q There is a number of, tab 12 has a number of  
2 disclosure letters that come in over the next  
3 month or so. But would it be fair to say these  
4 don't address many of the outstanding issues  
5 that you had raised in your February 7 letter?

6 A Yes.

7 Q And you will see at tab 14 --

8 A Yes.

9 Q -- there is a letter on April 10th that you  
10 write, where you write to the Crown requesting a  
11 response on the questions that weren't answered  
12 in the February 8th letter from Mr. Dangerfield?

13 A I was anxious to receive everything as quickly  
14 as I could, and that's why a lot of these were  
15 hand delivered as opposed to mailed. And that's  
16 why I say that time is fast approaching, can I  
17 have disclosure, please?

18 Q Right. And as I read these documents, this  
19 letter doesn't trigger a response, and so what  
20 happens then is you write what I would  
21 characterize as your second major disclosure  
22 letter, this is the April 25th letter that is at  
23 tab 16?

24 A Yes.

25 Q You see, if you keep going through the tabs

1 sequentially, the April 26th letter seems to  
2 result in a flurry of activity on the Crown's  
3 side. As you see at tab 17 --  
4 A The April 25 letter?  
5 Q April 25th.  
6 A Yes.  
7 Q The next day, April 26th, if you look at tab 17?  
8 A Yes.  
9 Q Lawlor sends a fax to the police asking for help  
10 with paragraphs, and these are all references to  
11 paragraphs in your letter?  
12 A Well, I see that. I assume he sent it.  
13 Q Yes, I knew you wouldn't have any independent  
14 knowledge of this. That's what it appears to be  
15 on its face, though, is that fair?  
16 A Yes.  
17 Q And if you turn to the next tab, on April 26th,  
18 again, these are all events of April 26th?  
19 A Right.  
20 Q There is a letter to you from Mr. Lawlor where  
21 he is responding to a number of paragraphs in  
22 your February 7th letter?  
23 A Right.  
24 Q You see with respect to paragraph 16 of your  
25 letter of February 7th?



1 A Yes.

2 Q And if you turn the tab to tab 19?

3 A Yes.

4 Q He writes you a second letter on the same day,  
5 and in this letter he is responding to some of  
6 the points in your April 25th letter?

7 A Right. He responds to some and says the  
8 remainder will be passed on to the Winnipeg  
9 Police Department.

10 Q That's right. And then if you turn one more  
11 tab, tab 20, it is a few days later, April 29,  
12 1991, it is another letter from Mr. Lawlor where  
13 he is responding to some more of the points in  
14 your April 25th letter?

15 A Yes.

16 Q And there is a fairly minor letter on May 3rd,  
17 at tab 21. But the next significant event, as I  
18 understand it, is that there is a pre-trial  
19 scheduled for May 10th to be held before the  
20 trial judge, Mr. Justice Morse?

21 A Correct.

22 Q And at the pre-trial, or shortly before the  
23 pre-trial, I'm not sure which, you deliver to  
24 the Crown and to the trial judge a lengthy list  
25 of questions. And that's the list that's set

1 out at tab 23, starting after the first page?

2 A Yes.

3 Q Page 287?

4 A Yes. It says that the meeting was to be held at  
5 1:00 o'clock, and I wanted the questions that I  
6 was going to put to the Crown given to  
7 Mr. Justice Morse in advance of that meeting, in  
8 the morning.

9 Q Right. And it is this list of questions that I  
10 would characterize as your third major  
11 disclosure request, it is not in the form of a  
12 letter, but it is in the form of -- it is  
13 essentially the same thing; is that fair?

14 A Yes.

15 Q So that sort of sets out the chronology --

16 A It is more than just the questions. You will  
17 see that the earlier requests were also  
18 contained in a document called index at page  
19 287.

20 Q Um-hum. Right. As I understand it, we don't  
21 have the entire, all of the materials in that  
22 order in this document, but as I understand it,  
23 what was actually filed was a booklet that  
24 contained a list of questions?

25 A Right.

1 Q And then appended to it is the history of the  
2 correspondence?

3 A Right, to bring Mr. Justice Morse up to speed.

4 Q Right. Having gone over sort of the overview of  
5 how these disclosure matters were raised in this  
6 case, I would like just to now turn to a closer  
7 examination of six specific disclosure issues.

8 A Yes.

9 Q I will be taking you through the documents, and  
10 we will look in some detail at what it was you  
11 asked for, what you got, and what we now know to  
12 be the true state of affairs.

13 A All right.

14 Q The first three issues, it is useful to deal  
15 with them together because they relate  
16 specifically to the Swift Current arson.

17 And by way of background, if I could just  
18 take you back to your interview summary at page  
19 4? If you are working off -- the copy of the  
20 interview summary that we sent you initially is  
21 on different size paper and the paginations are  
22 different.

23 A I have it. I will put that away.

24 Q If you notice, midway down the first paragraph,  
25 we asked you a question about some handwritten

1 notes that contained a reference to the arson  
2 dated January 27th. And you told us that you  
3 couldn't recall at that point whether or not  
4 this reference was information that you had  
5 received from Mr. Driskell, or whether it was  
6 something that you read about in the Crown  
7 brief?

8 A Right.

9 Q I would like to take to you tab 5, if I may?

10 A In volume 1?

11 Q In volume 1.

12 A Yes.

13 Q At page 74, it is the second page into the tab.

14 A Yes, I have it.

15 Q If you look down at the bottom of the page, the  
16 comment says,

17 "Driskell was paid \$900 by Zanidean to  
18 drive him (Zanidean) to Saskatchewan. He  
19 didn't want anyone to know he was going to  
20 torch his sister's house. We need  
21 information as to whether this in fact  
22 happened or not and the circumstances  
23 surrounding that house."

24 A Yes.

25 Q And if you turn to the next page, the second

1 last paragraph, it leads off with a note,  
2 "We have to look into the house that was to  
3 be torched in Saskatchewan."

4 A Yes, second last paragraph, yes.

5 Q My question is, does this memory -- does this  
6 memo help to refresh your memory as to whether  
7 or not the information that you received at this  
8 time was something that came from Mr. Garber,  
9 from Mr. Driskell through Mr. Garber, or whether  
10 it was something that you read about in the  
11 Crown disclosure?

12 A Yes.

13 Q How does it refresh your memory?

14 A It is clear here that I received the information  
15 from Mr. Driskell through Mr. Garber, and I knew  
16 about it at the time of the writing of the memo,  
17 Mr. Garber told me about it.

18 Q In fact, do you recall how was it -- what is  
19 your recollection now as to the references that  
20 were in the disclosure material about the Swift  
21 Current arson?

22 A In the disclosure material, that there was a  
23 fire in Swift Current, or fires, fire in Swift  
24 Current involving Mr. Zanidean's sister's house,  
25 and that Mr. Zanidean needed a driver to go

1 along with him, and took Mr. Driskell at a fee  
2 of \$1,000, for which he was paid \$900.

3 Q If I can take you to -- the one thing that  
4 appears in the disclosure materials that I have  
5 been able to identify is at volume 3, this  
6 little volume --

7 A I have it.

8 Q Look at tab 56?

9 A Yes.

10 Q There is a transcript from the body pack tape  
11 that was recorded by Zanidean in a meeting with  
12 Driskell --

13 A Yes.

14 Q -- on October 13th. If you look at the first  
15 page in that tab, it is page 12?

16 A Yes.

17 Q Driskell says --

18 "I just hope they don't make no connection  
19 between me, you, and Barry's car.  
20 Zanidean: Oh, right.  
21 Driskell: What was seen in Swift  
22 Current --  
23 Zanidean: Was a blue car.  
24 Driskell: But --  
25 Zanidean: Shit, that's all we need."

1           They go on for a while.  If you turn two more  
2           pages to page 14, Zanidean says, middle of the  
3           page,

4                 "They can't link us to the house in Swift  
5                 Current, they couldn't.

6           Driskell:  No.

7           Zanidean:  They wouldn't suspect you of  
8           something like that.

9           Driskell:  Mind you, I got to check my  
10           criminal record, I don't know if as a kid I  
11           had any arson charges."

12   A       Yes, I see that.

13   Q       So, if I suggested to you that that's the  
14           principal piece of information that was in the  
15           disclosure about the Swift Current arson, would  
16           that be fair?

17   A       Yes, it would be.

18   Q       Thank you.  And last point on this is that if  
19           you turn back to volume 1, tab 12?

20   A       I have it.

21   Q       Turn towards the end, a few pages in, page 213?

22   A       Yes, I have it.

23   Q       It is a memo to file, it is not signed, there is  
24           no name on it, but I take it that it would be  
25           fair to say this is a memo to file from you?

1 A Yes. The GGB at the bottom left, that is me,  
2 and VH was my secretary.

3 Q And it came out of your file.

4 A Yes.

5 Q And it indicates on February 17th, Detectives  
6 Marshall and Oliver drop off the body pack  
7 transcripts?

8 A Yes.

9 Q Am I correct in inferring that that's the first  
10 time that you saw them?

11 A Yes.

12 Q So that confirms, it would be fair to say, that  
13 your recollection about the information that you  
14 talk about in the January memo is information  
15 from Driskell and not information from the body  
16 pack?

17 A Probably, right, yes.

18 Q And we see a number of references in your file  
19 documents too. The significance that the Swift  
20 Current arson had to Driskell's defence, as you  
21 envisioned it, and if I can take you to tab 13?

22 A In volume 1?

23 Q In volume 1?

24 A Yes.

25 Q It is a memo to file from you, it is dated



1 March 1st, but it deals with a February 19th  
2 meeting with Mr. Driskell?  
3 A Yes.  
4 Q The second paragraph says,  
5 "Driskell is concerned about the items of  
6 an inculpatory nature that Zanidean talks  
7 about."  
8 I have interpreted that, correct me if I'm  
9 wrong, it was talks about on the body pack  
10 tapes?  
11 A Yes.  
12 Q "...and whether he is being prosecuted for  
13 them."  
14 He being Zanidean, I assume?  
15 A Yes.  
16 Q "Whether or not the deal with Zanidean is  
17 to forbear prosecution in return for his  
18 inculpatory him..."  
19 And the second "him" would be Driskell?  
20 A That's correct.  
21 Q "...for instance, the fire in  
22 Saskatoon."  
23 A For instance, really, probably I should have  
24 been more accurate and said for the fire in  
25 Saskatoon.

- 1 Q As I recall, there were a number of other --
- 2 fair to say that Zanidean admits to some other
- 3 criminal acts on the body pack as well, doesn't
- 4 he?
- 5 A Yes, he does, and did he in court.
- 6 Q But the Swift Current fire is the one that was
- 7 of particular importance to you, and it would be
- 8 fair to say because that's the one that Driskell
- 9 was potentially a witness on?
- 10 A Right.
- 11 Q And turn the next page over on the tab, there is
- 12 a report of Brian Savage to you dated
- 13 April 10th?
- 14 A Yes, Brian Savage was the investigator that I
- 15 had retained.
- 16 Q He was an ex-RCMP officer, is that correct?
- 17 A Yes. He was in charge of Internal Affairs, he
- 18 was a Staff Sergeant at the time that he retired
- 19 from the force, left the force.
- 20 Q If you turn the page and look at page 239, this
- 21 is some notes that Mr. Savage made of an
- 22 interview that he conducted with Mr. Driskell?
- 23 A I see that.
- 24 Q And it is fair to say that the second paragraph
- 25 deals with the discussion of the Swift Current

1 arson?

2 A Yes, it does.

3 Q And if you turn a few more pages to page 229?

4 A 229?

5 Q 229, it is two pages further into the same tab?

6 A Yes.

7 Q Mr. Savage gives a list of information he thinks

8 should be obtained from the Crown?

9 A Yes.

10 Q Several of these points, it would be fair to

11 say -- or would it be fair to say -- relate to

12 the Swift Current arson, specifically points 8

13 and point 9?

14 A That's correct.

15 Q Sorry, point 9, 8 is something different.

16 A I didn't know about 8.

17 Q Point 8 is something else.

18 All right. I don't want to belabour this

19 point, but the last document that I will take

20 you to then is tab 22?

21 A Yes.

22 Q It is another member to file memo about the

23 Swift Current arson?

24 A Right.

25 Q And you say,

1 "If the police come to see Driskell on  
2 Swift Current, we will have to determine  
3 what response, if any, he should make.  
4 Should the trade-off for testifying against  
5 Driskell on the murder be the refusal of  
6 the police to prosecute Zanidean on the  
7 Swift Current fire?  
8 Will the police response be that they  
9 couldn't prosecute Zanidean on the Swift  
10 Current fire because they had no evidence  
11 against him so there couldn't have been a  
12 trade-off."

13 A This is meandering, I am just thinking out loud  
14 into a tape recorder.

15 Q Right. But if I'm understanding this correctly,  
16 would it be fair to say that the thoughts that  
17 are going through your mind here is this concern  
18 that Zanidean might have been seeking, whether  
19 to call it immunity or simply non-prosecution on  
20 the Swift Current fire in exchange for his  
21 evidence against Mr. Driskell?

22 A Absolutely. I could have put it more shortly as  
23 you have, and I probably should have.

24 Q And the other aspect of that, which I take from  
25 the memo, is that you are concerned that the

1 police might plausibly say at this point that  
2 there was no evidence against Mr. Zanidean and  
3 that was why he wasn't being prosecuted?

4 A Yes.

5 Q So the idea, that you will see brought to  
6 fruition later on, is that you can give them  
7 some evidence in a form of a statement from  
8 Mr. Driskell.

9 A Yes.

10 Q I have said I will only take you to one more  
11 document, I changed that, I will take you to one  
12 more after that. If you turn to tab 28, in the  
13 second book, volume 2?

14 A I have that.

15 Q There are two memos in here, they are about the  
16 same event. The first one is a memo to you from  
17 your junior, Leonard Tailleux?

18 A Yes.

19 Q And the second one that I will take you to is  
20 page 342.

21 A I have that.

22 Q I won't read the whole thing out to you, but the  
23 first paragraph, in essence, you are encouraging  
24 Mr. Driskell to give a statement to the RCMP in  
25 order to get Zanidean charged with the Swift

1 Current fire?

2 A I wasn't encouraging him, I was telling him it  
3 is a good idea. It wasn't that he was  
4 reluctant.

5 Q Okay. You are giving him advice that it was in  
6 his interest to do that?

7 A Yes.

8 Q And you go on to say,

9 "Driskell when he testifies can also  
10 testify...",

11 and it tails off. I take it that was something  
12 that your secretary couldn't make out, the  
13 ellipsis, the dots?

14 A You are referring to my secretary, I may have  
15 stopped talking.

16 Q Okay.

17 "Driskell would say that Zanidean was in  
18 the arson business and was taking contracts  
19 from his brother in Edmonton. This was a  
20 perfect opportunity for Driskell, who was a  
21 witness, being put away."

22 A Yes.

23 Q It would be fair to say, and we will certainly  
24 see this in your cross-examination of Zanidean,  
25 but it would be fair to say that your theory was

1 this was Zanidean's motive for coming forward?

2 A Zanidean wanted to protect himself from that  
3 prosecution.

4 Q And the way he was going to protect himself is  
5 by getting Driskell charged with the murder?

6 A Discrediting Mr. Driskell, and getting him  
7 charged with murder is a good way of  
8 discrediting a witness.

9 Q To sum up what comes out of these documents,  
10 would it be fair to say that based on the  
11 documents the Swift Current arson was a subject  
12 of interest to you for three related reasons.  
13 Firstly, you suspected that Zanidean may have  
14 asked for and possibly received, for all you  
15 knew, immunity on the Swift Current arson in  
16 exchange for his testimony against Driskell. Is  
17 that fair?

18 A Yes.

19 Q So put another way, there is a relationship that  
20 you saw between the Swift Current arson and the  
21 issue of Zanidean's motive?

22 A Absolutely.

23 Q And motive was the critical issue for you, is  
24 that fair?

25 A Yes, yes.

1 Q And second point is Zanidean's involvement in  
2 the fire was, in and of itself, a discreditable  
3 act; would that be fair to say?

4 A Yes. Yes.

5 Q So it was important, it is something, would you  
6 agree, that you would use to attack his  
7 credibility when he testified?

8 A Yes.

9 Q And the third point, although this isn't  
10 directly referred to in the documents that I  
11 took you to, would you agree that it was your  
12 intention to cross-examine Zanidean about the  
13 Swift Current arson when he testified. Is that  
14 fair?

15 A Absolutely, and whatever theory he proposed to  
16 give, whether it was profit motive, whether he  
17 wanted to get back at his sister and wait, I  
18 think he said at the trial, until she had no  
19 insurance, to get even with her for some  
20 perceived wrong or whatever the reason was, I  
21 intended to deal with the Swift Current fire.

22 Q Right. So the Swift Current fire was going to  
23 come up as an issue at the trial because were  
24 you going to raise it at cross-examination?

25 A Yes.



1 Q And would it be fair to say that any information  
2 about the circumstances of the fire that came  
3 out of police files would have some potential  
4 use to you in the cross-examination, depending  
5 on what Zanidean said?

6 A My questions are more potent if they are backed  
7 by police investigation and police notes, than  
8 if they are just out of the air and my  
9 imagination.

10 Q Or if they are backed up by something that your  
11 client has told you only?

12 A Yes, yes.

13 Q Thanks. And now I would like to take you to the  
14 first of these six issues that I talked about,  
15 and the first three issues are the ones that  
16 deal specifically with the Swift Current arson.  
17 And the first one is the issue of disclosure of  
18 Zanidean's statements.

19 A Yes.

20 Q And if I take you, first of all, to tab 9 in  
21 volume 1.

22 A Yes, I have it.

23 Q And this is your February 7th letter, what I  
24 have been characterizing as the first major  
25 disclosure letter?

1 A Yes.

2 Q If you look at page 152?

3 A Yes, I see it.

4 Q Paragraph 16?

5 A Paragraph 6?

6 Q 16 at the bottom of the page, you write,

7 "We have eight or nine statements from

8 Zanidean, are there more that we do not

9 have? I would like a record of all of his

10 contacts with the police, whether by way of

11 formal statement or written notification in

12 a police officer's notebook."

13 Have I read that correctly?

14 A You read that correctly and that goes along with

15 paragraph 6. Yes, you read it correctly.

16 Q I will return to paragraph 6, it is a slightly

17 different issue and I will return to that later.

18 Then if you turn to the next tab,

19 Mr. Dangerfield's response on February 8th?

20 A Next tab, yes.

21 Q Page 159?

22 A Yes.

23 Q Paragraph 16, he has numbered his paragraphs to

24 match yours. He says,

25 "With respect to your paragraph 16, you

1           have all of the statements taken from  
2           Zanidean. Beyond them there is no further  
3           record of contacts with the police except  
4           with respect to caring...",  
5           and somebody had written in "for," it probably  
6           should be caring for him pending trial. I think  
7           the "for" is in wrong place?

8    A       I think the "for" should be after.

9    Q       I think that is right.

10   A       That's how I got it.

11   Q       That is how I got it too.

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

16   A       Yes, I see that.

17   Q       So if I can -- it would be fair to characterize  
18           this as Mr. Dangerfield saying that as far as he  
19           knows, there isn't anything else, but to be  
20           absolutely sure, he will get you anything if  
21           there is anything?

22   A       And he will speak to the police, not just search  
23           his own file, but he will talk to the police  
24           about it.

25   Q       Right. And then the issue gets raised again at

1 the pre-trial, if you turn to tab 23, this list  
2 of questions?

3 A Yes.

4 Q If you turn to page 291, the fourth page in?

5 A Yes.

6 Q Paragraph 19 says,  
7 "Letter from Greg Brodsky dated  
8 February 7th, 1991 to Gregg Lawlor,  
9 paragraph 16, and response by J.G.B.  
10 Dangerfield, dated February 8, 1991."  
11 Paragraph 16, these are references to letters  
12 that we just looked at?

13 A Yes.

14 Q "Has all of the Zanidean material now been  
15 provided?"

16 A Yes.

17 Q And there is a handwritten note beside there  
18 saying "all provided." Now is that your note  
19 or --

20 A That's my handwriting. When I read the question  
21 to the learned judge, that's the response that  
22 Mr. Dangerfield made and I wrote it.

23 Q Okay. And then you also prepared a memo to file  
24 about the pre-trial?

25 THE COMMISSIONER: Mr. Dawe, I have to just go

1 back. On tab 23, page 291, what paragraph, what  
2 numerated paragraph?

3 MR. DAWE: Paragraph 19, it is the one that  
4 refers to paragraph 16 of the February 7 letter,  
5 so the bottom of page 291 carries on to page  
6 292.

7 THE COMMISSIONER: Bear with me for a moment.

8 MR. DAWE: Go to volume 2 now?

9 THE WITNESS: I would like to wait for the  
10 Commissioner's pen to stop writing.

11 THE COMMISSIONER: Thank you. I need an  
12 assistant.

13 THE WITNESS: I'm in the market.

14 BY MR. DAWE

15 Q Go now to volume 2?

16 A Yes.

17 Q The other large volume, tab 29?

18 A Yes.

19 Q So at tab 29, if you turn four pages in, page  
20 339?

21 A Yes.

22 Q At the bottom of the page, the third line up  
23 from the bottom, it says,

24 "With respect to question 19...",

25 and question 19 is the question 19 from the

1 May 10th notes referring back to question 16  
2 from the February 7th letter, confusingly  
3 enough,

4 "...all statements and material has been  
5 provided according to Dangerfield and  
6 Lawlor."

7 A Yes, that was further to that paragraph right  
8 above, yes.

9 Q Right. So, in other words, it would be fair to  
10 say that coming out of the pre-trial, what you  
11 have been told was that you had all of  
12 Zanidean's utterances recorded anywhere in any  
13 form?

14 A Yes. Well, that paragraph I just referred to,  
15 just above what you did, was to the effect that  
16 they had nothing on Swift Current, the Swift  
17 Current fire or anything else. And because it  
18 wasn't their jurisdiction, Swift Current and  
19 Saskatchewan would do whatever Swift Current and  
20 Saskatchewan would do, they weren't taking  
21 direction from Winnipeg.

22 Q That's a somewhat different point and we will  
23 get into that a little later as well. But as I  
24 understand your request at this point, it wasn't  
25 restricted to Swift Current, at this point you

1           were simply requesting everything that Zanidean  
2           had said to the police that was written down  
3           anywhere, whether it was in a statement or in a  
4           notebook; is that fair?

5    A       Yes, you are right.

6    Q       So, if I can now take you to tab 35?

7    A       Yes.

8    Q       The first document at tab 35 is an extract from  
9           the notebook of Sergeant Al Paul?

10   A       I take your word for that.

11   Q       You may do so. And the first page, you will  
12           note that there is, midway down the page there  
13           is a date, 9/10/10, so October 10, 1990?

14   A       I see that.

15   Q       So if you turn over the page, and I should just  
16           indicate that this is, and you can take my word  
17           for it as well, this is the second day that  
18           Zanidean has met with the police. He first  
19           calls them on October 9th, and he goes in for a  
20           second meeting on October 10th?

21   A       I accept that.

22   Q       The second page in, the middle of the page, you  
23           see there is initials T.A. in the margins?

24   A       Yes, I see that.

25   Q       The notes then read,

1 "Ray then states that there could be a  
2 problem with his credibility in court."

3 A Yes.

4 Q "I ask him why."

5 And he answered,

6 "Well, Jim and I got involved in something  
7 this summer in Saskatchewan."

8 Question,

9 "What were you involved in?"

10 Answer,

11 "We blew up a house in Swift Current, a  
12 relative's place."

13 Question,

14 "Was anyone hurt or killed?"

15 Answer,

16 "No, the house was empty, we made sure  
17 of...",

18 and it seems to be cut off, it probably says,

19 "We made sure of that."

20 A I don't know, I never saw that.

21 Q And if you turn the page, I won't read it out to  
22 you, but essentially Paul is saying that he will  
23 make inquiries of Saskatchewan?

24 A Right.

25 Q Now, if you keep turning over to the next page,



1           there is a typewritten -- it is in the same tab,  
2           tab 35?

3    A       Yes.

4    Q       There is a supplementary report?

5    A       Yes.

6    Q       And you will note at the top of the page, it  
7           says "Wednesday, 90/10/10." So it is a report  
8           of the same conversation with Zanidean that's  
9           recorded in the notes that I just took you to?

10   A       Yes, it appears to be.

11   Q       And the second paragraph ends by saying,  
12           "Driskell said he would try to get somebody  
13           to help him presumably to follow Perry  
14           Harder in an effort to try to locate his  
15           residence...

16           THE COMMISSIONER: Mr. Dawe, Like most of us,  
17           you speak pretty quickly when you read.

18           BY MR. DAWE

19   Q       Anyway, rather than read it out, perhaps I can  
20           just ask you this. You have read this; is there  
21           any reference to the Swift Current arson in this  
22           report?

23   A       If you don't mind, I would just like -- I don't  
24           think there is, I don't recollect there was, and  
25           I'm reading it now, and there is not.

1 Q So there is no mention of the fact that Zanidean  
2 had told the police about his involvement in the  
3 Swift Current arson or that he had expressed  
4 this concern that it might affect his  
5 credibility at trial?

6 A It doesn't correspond to the notebook, if that's  
7 what you are getting at.

8 Q That's right. The next document I would like to  
9 take you, if you turn over to the next tab, tab  
10 36?

11 A Yes.

12 Q Again, I can advise you this is an extract from  
13 the notebooks of Sergeant Paul's partner,  
14 Sergeant Anderson?

15 A I take your word for that.

16 Q By way of background, the note here is dated  
17 October 29, 1990.

18 A Yes.

19 Q Just to give you the background, we know from  
20 some other reports that Zanidean, on this  
21 occasion, he has been going out in the field as  
22 a police agent wearing a body pack recorder, and  
23 on this day he has gone out for a meeting with  
24 James Driskell's brother, Ron.

25 A Yes.

1 Q And the first three pages of the notes, which I  
2 won't read, you can take my word for this, they  
3 deal with, essentially it is a debriefing of his  
4 conversation that he has just had with Ron  
5 Driskell that he has just come back from.

6 A Yes, right.

7 Q If you turn to the fourth page?

8 A The one that starts,  
9 "Me, Ray, you told us..."?

10 Q Yes. The writing is a little difficult to read,  
11 but if I can make it out, it says,  
12 "Ray, you told us before about...",  
13 and this is where I'm having some difficulty?

14 A "Ray you told us before about that house  
15 in Swift Current and..."

16 Q "...house in Swift Current..."  
17 you are absolutely right,  
18 "...and we told you about your right to a  
19 lawyer and that you don't have to..."

20 A "...talk about it..."

21 Q "...to us if you don't want.  
22 Ray: Yeah, I know.  
23 Well, Ray, I'm wondering what was behind  
24 that Swift Current business, you said it  
25 involved a relative?"

1 A Right.

2 Q "Yes, it was my sister's house. She  
3 caused me some problems. It was revenge.  
4 I knew she was living in Edmonton at the  
5 time and the house was empty. I think that  
6 she had no insurance and she would lose  
7 money."

8 A "I thought she had no insurance..."

9 Q "I thought she had no insurance and  
10 she would lose money."

11 A Right.

12 Q And the next question,  
13 "Well, didn't she..."

14 A "She says she has insurance..."

15 Whatever, it is not my handwriting so --

16 Q It carries on. I won't read the rest of it out,  
17 it has been read out before on the record.

18 A Yes.

19 Q There is further discussion of the arson and the  
20 reasons for it?

21 A Right.

22 Q My question to you is, as far as you recall,  
23 were these notes or the content of these notes  
24 about the admissions about the Swift Current  
25 arson disclosed to you?

1 A They were disclosed to me when you gave them to  
2 me.

3 Q Were they disclosed at the trial?

4 A Absolutely not, nor before the appeal, or after  
5 the appeal, they were disclosed to me by this  
6 Commission.

7 Q Now, would it be fair to say at this point in  
8 the pre-trial period, there wasn't any mystery  
9 about the fact that Zanidean had burned his  
10 sister's house because --

11 A No, there wasn't.

12 Q -- you knew it from Driskell and you also knew  
13 that Zanidean had admitted it on the body pack?

14 A And the house is burned.

15 Q And indeed, when Zanidean was cross-examined, he  
16 admitted fairly readily that he committed the  
17 arson? Is that fair?

18 A Yes.

19 Q Would it be fair to say that what was  
20 potentially significant about these admissions  
21 in the notes is not that they provided yet more  
22 evidence that Zanidean had committed the arson,  
23 but rather that the significance came from the  
24 timing and the circumstances in which he raised  
25 this issue with the police?

1 A Yes, absolutely.

2 Q It would be fair to say this would provide some  
3 support to the theory of motive that you were  
4 advancing?

5 A Yes. It would have been delightful for me to  
6 have this, very important for me to have this  
7 before I cross-examined him, before the trial  
8 started actually.

9 Q Can you just elaborate on that a little bit?

10 A You need a basis for cross-examining somebody,  
11 as opposed to ideas in your head. If he was  
12 talking to the police about it this far in  
13 advance, it would have been important for me to  
14 know that to be able to raise that with him.

15 Q You will recall from some of the documents that  
16 we went through earlier this morning, the theory  
17 you were advancing was that he had come forward  
18 with this account about James Driskell in order  
19 to avoid being prosecuted on the Swift Current  
20 arson. Is that correct?

21 A Yes.

22 Q And would the fact that he is raising the Swift  
23 Current arson at his second meeting with the  
24 police be consistent or inconsistent with that  
25 theory, in your view?

1 A Why wouldn't this be considered an admission to  
2 an arson, to a police officer, who could then go  
3 to a Crown Attorney get and charge laid and a  
4 prosecution proceeded with, or have it sent off  
5 to Saskatchewan and have them institute the  
6 prosecution, whichever way it would work?

7 Q Let me put this slightly differently. Your  
8 theory is that he went to the police with the  
9 story about the homicide because he wanted them  
10 to help him, to stop him being prosecuted on the  
11 Swift Current arson?

12 A Yes.

13 Q And lo and behold, what we see is in the second  
14 meeting he has with the police, he is bringing  
15 up the Swift Current arson?

16 A Yes.

17 Q And that is consistent with this theory that you  
18 have as to his motive?

19 A Right.

20 Q And we will turn to this point a little later  
21 when I will take you through your  
22 cross-examination of Mr. Zanidean, and we will  
23 expand on this a little more. For now I would  
24 like to turn to what I have characterized as the  
25 second disclosure issue, and that is what I

1 would call essentially your request for  
2 disclosure of whatever facts about the Swift  
3 Current arson the police had. If I can take you  
4 to volume 1, again, tab 16?

5 A I have it.

6 Q And this is your April 25th, 1991 disclosure  
7 letter, what I have been calling the second  
8 major letter?

9 A Yes.

10 Q If you turn to the second page?

11 A Yes.

12 Q It is page 258, paragraph 9?

13 A Yes.

14 Q There is a question,

15 "What did the Winnipeg City Police have on  
16 the fire in Swift Current,  
17 Saskatchewan...",

18 and it goes on to talk about a couple of other  
19 fires?

20 A Yes.

21 Q And if you turn the page over to tab 17, or turn  
22 the tab over to the tab 17 rather, you will see  
23 that this paragraph, paragraph 9, is one of the  
24 paragraphs that is listed in this fax that  
25 Mr. Lawlor sends to the Winnipeg Police, he is



1 asking for assistance from the police on this  
2 request.

3 A I see that.

4 Q And the answer comes back a few days later, if  
5 you turn to tab 20, the April 29 letter, tab 20?

6 A Yes.

7 Q Paragraph 3 says,

8 "Re paragraph 9, Winnipeg Police have  
9 nothing on these incidents."

10 Have I read that correctly?

11 A Re paragraph 13?

12 Q Paragraph 3, re: paragraph 9, because paragraph  
13 9 in your letter is the request for information  
14 of whatever the Winnipeg Police have on the  
15 Swift Current arson?

16 THE COMMISSIONER: On the first page of tab 20  
17 in the enumerated 3, okay.

18 THE WITNESS: I thank you, Mr. Commissioner, I'm  
19 losing my mind.

20 BY MR. DAWE

21 Q So paragraph 3, are you with me now?

22 A Yes.

23 Q It says,

24 "Winnipeg Police have nothing on these  
25 incidents."

1 A Yes, I see that.

2 Q Now, as we've already seen, in fact what the  
3 Winnipeg Police have are two notebooks with two  
4 admissions from Zanidean about the Swift Current  
5 arson. Is that correct?

6 A That's correct.

7 Q But in addition to that, it appears from what we  
8 now know that they also have a copy of the RCMP,  
9 the Swift Current RCMP arson file. And I take  
10 you to tab 39, in volume 2?

11 A When you say "we," I didn't have this.

12 Q We being the Commission --

13 A Yes.

14 Q I would like to take you to the documents and my  
15 next question will be, did you have them?

16 A No.

17 Q If you can hold off on that question until I  
18 tell you what they are. First document, you  
19 will see, tab 39.

20 A The one directed to the Winnipeg Police Service?

21 Q That's right, it is a telex. If you look to the  
22 bottom, the third line from the bottom, that  
23 last block paragraph.

24 A Yes.

25 Q It says,

1 "Please locate Ray and establish his  
2 whereabouts at the time of the fire."

3 A Yes.

4 Q So what this is, it is a request, it appears to  
5 be a request from the Swift Current RCMP to the  
6 Winnipeg Police to go and find Ray Zanidean and  
7 question him about the fire?

8 A That's right, it does.

9 Q And if you turn over to the next page, this is a  
10 extract from a report by Constable Ross Burton,  
11 the RCMP Swift Current officer who is  
12 investigating the arson?

13 A Yes.

14 Q If you look at paragraph 141, it says,  
15 "Call received from Sergeant Ian Mann of  
16 Winnipeg Police Service arson unit. Ray  
17 Zanidean resides at...",  
18 and he gives an address in Winnipeg.

19 "He will interview him today."

20 A Yes, I don't know who Sergeant Ian Mann, what  
21 his involvement was. I see it here.

22 Q But it appears from this document that he is a  
23 member of the Winnipeg Police arson unit?

24 A Yes.

25 Q And he appears to be, if you take the document

1 at face value, it appears that he is saying that  
2 he is going to go and at least attempt to  
3 interview Zanidean. And the date on this  
4 document, you will note, is August 8th, 1990?

5 A Yes.

6 Q This is about two months before Mr. Harder's  
7 body is discovered?

8 A And I see Constable R.B., is probably R. Burton,  
9 because that's what is referred to in the bottom  
10 left-hand corner of the preceding page.

11 Q That's correct. If you turn to the next  
12 document, we have another report by Constable  
13 Burton. You will note this one is dated  
14 December 14th.

15 A I see that.

16 Q He says,

17 "A copy of this file and file 88-2053...",  
18 which I gather is a file that they had on an  
19 earlier arson at Zanidean's sister's house?

20 A I have no idea.

21 Q That's certainly my understanding, you can take  
22 my word for that as well.

23 A Okay.

24 Q "...are being forwarded to Sergeant Ian  
25 Mann of Winnipeg Police Department arson

1 unit. He will eventually require these to  
2 interview Reath Zanidean."

3 A Yes, Reath and Ray are the same person.

4 Q Yes, that is right.

5 "Reath would be a good suspect for the 1988  
6 arson to this residence."

7 Then cross reference to the other file.

8 A Yes.

9 Q And the last page of this tab, sorry, it is not  
10 the last page, the next page is a letter from  
11 Constable Burton to Sergeant Mann dated the same  
12 day, December 14, 1990?

13 A Yes.

14 Q It says,

15 "It is my understanding that you have  
16 spoken with Tom Anderson of your force and  
17 are aware of the circumstances surrounding  
18 this investigation. Enclosed please find  
19 copies of our two investigations."

20 A I see that.

21 Q "Both relate to arsons at Hayek's  
22 residence...",

23 and Hayek is Zanidean's sister?

24 A Yes.

25 Q "Zanidean would be a good suspect in the

1 first arson as well. Once circumstances  
2 permit please interview Reath Zanidean  
3 regarding this arson also."

4 That being the 1988 arson?

5 A 1988 one, yes.

6 Q Okay. And so to appears, would it be fair to  
7 say that it appears from these documents as of  
8 December of 1990, Sergeant Mann at least had  
9 been sent a copy of the Swift Current RCMP arson  
10 file?

11 A Absolutely.

12 Q And the last document that I will take you to is  
13 tab 41?

14 A Tab 41, yes.

15 Q We have heard quite a bit about this with other  
16 witnesses, but this appears to be an application  
17 form, it is filled out by the Winnipeg Police  
18 and submitted to the RCMP in their attempt to  
19 have Ray Zanidean admitted into the RCMP's  
20 Source Witness Protection Program, this formal  
21 national program that they have.

22 A Okay.

23 Q And there is some page numbers at the bottom of  
24 the page, they are a bit faint, but if I can  
25 take you to page 481, it is about two-thirds of

1 the way through the document?

2 A I see it.

3 Q Down at the bottom of the page there is an item  
4 C. If you look down to the fifth line, starting  
5 on the fourth line it says,  
6 "Swift Current RCMP Constable Burton  
7 confirms they are investigating same..."  
8 And then it gives the file number, file 90-2787.

9 A Right.

10 Q And if I can take you back to tab 39?

11 A Yes.

12 Q Anyway, you will see it is the same file number  
13 referred to in Constable Burton's letter.

14 A Yes.

15 Q And we have heard evidence on this point, it  
16 indicates that the homicide officers who filled  
17 out this form probably had access to the file?

18 A Yes, it seems that way.

19 Q That was a very long line up for a very short  
20 question, and my question is really two  
21 questions. First of all, did you know at this  
22 point, when you are preparing for the trial and  
23 at the trial when you are preparing for the  
24 appeal, that the Winnipeg arson squad had been  
25 looking for Zanidean in August of 1990?

1 A Obviously not. No, I did not.

2 Q And that was, as you indicated, about two months  
3 before Zanidean went to the police?

4 A Correct.

5 Q And the second question is, did you know that  
6 the Winnipeg Police had in their possession a  
7 copy of the Swift Current arson file?

8 A No.

9 Q Now, we know that in the spring in 1991, your  
10 investigator, Brian Savage had some contact with  
11 Swift Current RCMP prior to Driskell's trial.  
12 And then ultimately after the trial, Staff  
13 Sergeant Ferguson came to Winnipeg and took a  
14 statement from Zanidean with you in attendance,  
15 do you recall that?

16 A Yes, we wanted to have the police involved  
17 before the trial ended, and we were in contact  
18 with the RCMP and tried to have the statement  
19 taken from Mr. Driskell before the trial ended,  
20 and they told us that there wasn't sufficient  
21 time.

22 Q Okay. My question for you is simply this: Did  
23 the Swift Current RCMP ever turn over their file  
24 to Mr. Savage or to you?

25 A I didn't know there was a file. No, the answer



1 is no.

2 Q So it would be fair to say that you knew what  
3 Driskell's account was of the arson; is that  
4 fair?

5 A Yes.

6 Q But you didn't know whatever evidence the Swift  
7 Current RCMP had gathered that independently  
8 established how the arson was committed and the  
9 circumstances?

10 A Yes, that's correct, I did not know that.

11 Q The third issue I would like to now turn to  
12 relating to Swift Current is this issue of what  
13 I have characterized as charge resolution  
14 benefits and motive evidence, and sort of deal  
15 with the two together.

16 If I can take you back now to tab 9, volume  
17 1?

18 A Yes, I have it.

19 Q Tab 9. Again, this is the February 7, 1991  
20 letter, the first major disclosure request?

21 A Yes.

22 Q Paragraph 5 at the bottom of the first page --

23 A Yes.

24 Q -- is a request.

25 "We would like the police records of

1 witnesses the Crown proposes to have  
2 testify, together with the outstanding  
3 charges that were not dealt with, and with  
4 parole applications that the police or  
5 others, to the police knowledge, offered  
6 assistance in connection with."

7 A Yes.

8 Q And if you flip over to the next page, page 153?

9 A I have it.

10 Q Paragraph 23 in the middle of the page?

11 A Yes.

12 Q You also ask a more general question about  
13 motives. You ask,

14 "What motives do the police files have for  
15 people to implicate Jim Driskell in the  
16 killing?"

17 THE COMMISSIONER: Slow down.

18 BY MR. DAWE

19 Q 22 says,

20 "What motives do the police files have for  
21 people to implicate Jim Driskell in the  
22 killing?"

23 Have I read that correctly?

24 A Yes, that's correct.

25 Q And paragraph 23, it is another spin on the same

1 issue,

2 "What motives do people have for assisting  
3 the police that are demonstrated in the  
4 police files, and what do the police files  
5 show in connection with these last  
6 mentioned few items?"

7 A Yes, I did ask that in that way.

8 Q If you could just explain what you were getting  
9 at by these requests? You are interested, it  
10 appears in motive?

11 A I wanted to know if people had a motive for  
12 falsely implicating Mr. Driskell, or correctly  
13 if they had a motive, but mainly falsely  
14 implicating him in the killing. And I wanted to  
15 know, in connection with the number 23, whether  
16 or not there were any deals being made to assist  
17 the police with respect to implicating Mr.  
18 Driskell in return for, as you have read  
19 already, benefit by having charges reduced or  
20 not being charged or paroled, dealt with, or  
21 whatever, whatever the motive might be.

22 Q Okay.

23 A If police files have anything. I couldn't, I'm  
24 not a fortune teller, I couldn't see what the  
25 police files contained, but if there was

1 something in there that would indicate that  
2 people were seeking favour, I should know about  
3 it.

4 Q All right. And if you turn over to the next  
5 tab, tab 10, Mr. Dangerfield's February 8th  
6 response?

7 A Yes.

8 Q The first part of his response, he is dealing  
9 with your January 29 letter, and if you turn  
10 over to the third page in, page 158?

11 A Yes.

12 Q He is now dealing with your February 7th letter.  
13 Do you see at paragraph 5, he says,

14 "In answer to your paragraph 5, we will  
15 provide you with the police records of  
16 witnesses that the prosecution proposes to  
17 call, together with the outstanding charges  
18 which were not dealt with, and with parole  
19 applications the police or others might  
20 have influenced to assist any witness to be  
21 called."

22 A That's a partial answer.

23 Q It is more of a promise to give you the  
24 material, he is not actually giving it to you at  
25 this point?

1 A Well, I wasn't just asking about parole. Yes,  
2 it is a partial answer. And I didn't want  
3 police records. Part of what I wanted was  
4 people who wanted not to be charged, I wanted  
5 that too.

6 Q We will get to that in a minute because you do  
7 actually, as I read it, the request gets  
8 somewhat expanded in the next letter.

9 If you flip over to the next page, page  
10 160, paragraph 22 and 23, responding to your  
11 paragraphs 22 and 23, and I won't read them out  
12 to you, but in essence they say that there is  
13 nothing in the police files about motives to  
14 implicate Driskell in the killing or independent  
15 motives to assist the police?

16 A Right, paragraph 23 says that, yes.

17 Q And we talked about this some before, but it  
18 would be fair to say that over the next few  
19 months your attention becomes particularly  
20 focused on the possibility that Zanidean might  
21 have been seeking immunity on the Swift Current  
22 arson in particular?

23 A Yes.

24 Q So, when you come to write your second major  
25 disclosure letter, which at tab 16, the April 25

1 letter, what we see, if we go to tab 16?

2 A Paragraph 5?

3 Q Paragraph 5, exactly, the first page, 257?

4 A Yes.

5 Q Your request has now expanded, it now speaks of  
6 favourable considerations that were given to  
7 witnesses for the not pressing of charges or the  
8 laying of charges and other matters that would  
9 influence them to testify in a particular  
10 fashion?

11 A Right.

12 Q So you have now spotted that the request on  
13 February 7th was perhaps not as expansive as it  
14 should have been.

15 A It was a careful response, or I wasn't expansive  
16 enough.

17 THE COMMISSIONER: Sorry, Mr. Dawe, what  
18 paragraph?

19 MR. DAWE: Paragraph 5 of tab 16.

20 THE COMMISSIONER: Okay.

21 BY MR. DAWE

22 Q Again, if you turn over to the next tab, tab 17?

23 A Yes.

24 Q You will see that this paragraph is one of the  
25 paragraphs that gets referred to the police?

1 A Yes, it does by Mr. Lawlor, yes.

2 Q But it is not answered at this point, so you  
3 raise it again at the May 10th pre-trial, that's  
4 tab 23?

5 A Yes.

6 Q And this is on page 289, the fourth page in?

7 A Yes.

8 Q Paragraph 6?

9 A Yes.

10 Q You begin by setting out as a preamble to the  
11 various times that you have asked the question?

12 A Yes.

13 Q In the middle of the paragraph you say, you  
14 point out you have got CPIC records for Harder  
15 and Zanidean and Gumieny, but you then say,  
16 "The rest of this request yet remains to be  
17 fulfilled. It must particularly be noted  
18 that notwithstanding the records provided  
19 to us in terms of the aforementioned  
20 individuals...

21 THE COMMISSIONER: Slow down a bit.

22 BY MR. DAWE

23 Q "...no response has been made with respect  
24 to the issue of favorable considerations,  
25 not pressing charges in other matters that

1                   would influence them..."

2                   them being these witnesses,

3                   "...to testify in a particular fashion."

4                   And there is more references to your letters?

5    A            Yes.

6    Q            So that's paragraph 6 of your May 10th

7                   questions.  And if you turn now to tab 25 --

8    A            Yes.

9    Q            -- there are three documents in this tab.

10   A            Yes.

11   Q            But you will see if you go through them, it

12                  appears that this question again gets referred

13                  to the police.  Because what we have is a letter

14                  to you dated May 21st from Mr. Lawlor saying he

15                  is attaching some police reports?

16   A            Right.

17   Q            And the next page is a memo or note from

18                  Sergeants Anderson and Paul to Mr. Lawlor dated

19                  May 19th?

20   A            Correct.

21   Q            In which they say they are appending some

22                  supplemental reports, they say that pages 182 to

23                  183 answer the questions that arose out of your

24                  pre-trial.  And at the next page there is a

25                  supplemental report that actually refers



1 specifically to these questions that you put at  
2 the pre-trial?

3 A Right.

4 Q So if I can take you down to question 6 at the  
5 bottom of page 182, the page that is written in  
6 at the bottom?

7 A I see that.

8 Q The second paragraph is a two-part question and  
9 there is a two part answer. The first part  
10 deals with the criminal records. And the second  
11 part, Sergeant Anderson writes,

12 "With respect to the second part of this  
13 question, we are not aware of a single  
14 criminal charge outstanding against a  
15 single subpoenaed witness at the time of  
16 the deceased's disappearance. Furthermore,  
17 protection is the only favourable  
18 consideration given to any witness. We are  
19 not aware of any stayed charges or any  
20 other deals made with any witness in  
21 exchange for testimony."

22 A I see that.

23 Q So that's the response you get at this point.  
24 But as I understand it, the issue gets raised  
25 again by you at the subsequent pre-trial, which

1 I take it is on May 22nd, if you go to volume 2,  
2 tab 29.

3 A Yes.

4 Q You note there is two memos to file in this tab,  
5 and one refers to there being a pre-trial on  
6 May 23rd, and the second one refers to a  
7 pre-trial on May 22nd?

8 A Yes.

9 Q I'm going to just ask you this at the outset,  
10 nothing much turns on this, but what was your  
11 recollection, were there actually two different  
12 pre-trials on different days or was it just an  
13 error on the date on this?

14 A 15 years ago, I don't remember precisely.

15 Q It is possible that both of these memos actually  
16 relate to the May 22nd pre-trial?

17 A Yes.

18 Q If you look at page 338, it is the second of  
19 these two memos, the one dated May 27th?

20 A Yes.

21 Q It says,

22 "With respect to question 6...",  
23 question 6 being your question about favorable  
24 consideration, including the not laying of  
25 charges,

1            "...the Crown said no favourable  
2            consideration was offered. The Crown makes  
3            the point that the RCMP in Swift Current  
4            were notified of the involvement of  
5            Zanidean and it is up to them to pursue or  
6            not pursue the investigation. The Winnipeg  
7            Police can only make agreements with  
8            respect to the area they are responsible  
9            for. The area of Manitoba..."

10          And the way I read this, I think there is an  
11          error in the punctuation, the period should come  
12          after Manitoba?

13          A        You are right.

14          Q        "...they are not able to make agreements  
15                  with respect to what some other police  
16                  force, particularly RCMP will do, and they  
17                  did not."

18          A        Right. I didn't know anybody else was going to  
19                  be reading these, so I didn't make the  
20                  punctuation correctly, and I apologize. I  
21                  thought these were private.

22          Q        If you go back a couple of pages to the other  
23                  memo?

24          A        Yes.

25          Q        The middle of the page it says,

1 "They are not prepared to involve  
2 themselves in the Swift Current fire, that  
3 is another police force."

4 A Right.

5 Q There is a bit of a confusing sentence here.

6 "The RCMP were advised according to  
7 Dangerfield and Lawlor (by Lawlor) in  
8 Dangerfield's presence in the office of Mr.  
9 Justice Morse that Zanidean probably set  
10 this fire. The RCMP chose to do nothing  
11 about it. Any favour extended to Zanidean  
12 did not cover any things outside of  
13 Manitoba and nothing was held out to  
14 Zanidean, in any event, within Manitoba."

15 A Those question marks shouldn't be there. That's  
16 punctuation again. I didn't anticipate that  
17 anybody would ever look at these memos.

18 Q What I interpreted those to be is probably  
19 question marks that your secretary put in  
20 because she didn't know how to spell Zanidean's  
21 name, and in fact spelled it incorrectly.

22 A Yes.

23 Q So just to make sure that I'm interpreting these  
24 memos correctly, as I read them, they seem to  
25 indicate several things, and you can let me know

1 if I'm correct in your view or not.

2 First, it seems that Mr. Lawlor indicated  
3 to you at some point during this pre-trial or  
4 pre-trials, that the Winnipeg Police Service had  
5 some information about the Swift Current fire  
6 which they passed on to the RCMP?

7 A Yes.

8 Q If I can ask you this, did Mr. Lawlor specify  
9 what this information was?

10 A He did not.

11 Q He didn't?

12 A No, he did not.

13 Q By this time it would be fair to say that you  
14 knew, because you had listened to the body packs  
15 or you had seen the body pack transcripts that  
16 Mr. Zanidean had admitted to the arson on the  
17 body pack tape?

18 A Yes, there was five and a half hours of body  
19 pack tapes and I did listen to it. I had to  
20 make arrangements to go to the Public Safety  
21 Building, which I did, and I did listen to them.

22 Q Yes. You are certainly aware of it because you  
23 refer to it specifically when you cross-examine  
24 Mr. Zanidean, as we will see. My question is,  
25 at this point, when you came out of this

1 pre-trial, were you aware that Zanidean had  
2 also, in addition to what he said on the body  
3 pack tapes, that he had also made these  
4 admissions of the Swift Current arson to the  
5 police?

6 A No, I was not.

7 Q And the second point that I take out of these  
8 memos is that you were told by the Crown, it  
9 appears as I read it, probably by Mr. Lawlor,  
10 that the RCMP had independently decided, for  
11 whatever reason, not to charge Zanidean with the  
12 arson, and that this is a decision that they  
13 made on their own, it didn't have anything to do  
14 with the Winnipeg Police?

15 A I was told by Mr. Lawlor, and I assumed that  
16 Mr. Dangerfield was right there.

17 Q What I have just said was, does that fairly  
18 capture your understanding of what their  
19 position was coming out of the pre-trial?

20 A Yes.

21 Q All right. Now, as you will know from reviewing  
22 some of these documents, the inquiry has heard a  
23 considerable amount of evidence on this point  
24 about the Swift Current arson, and there is  
25 considerable conflicts, but the one thing that's

1 not in dispute is Mr. Zanidean, through his  
2 lawyer, David Kovnats, was seeking immunity on  
3 the Swift Current arson. And whether or not he  
4 was offered it or whether he got it, or the  
5 circumstances surrounding that are an area where  
6 there is a great deal of conflict. But there is  
7 no question that he was asking for it. And in  
8 particular, if I can take to you to tab 40?

9 A I see it.

10 Q It is a letter from Mr. Kovnats that he sends to  
11 Bruce Miller, Director of Winnipeg Prosecutions.  
12 If you turn to the second page?

13 A You can turn to any page, I didn't see this  
14 until it was produced to me by this Commission.

15 Q I won't belabour the point. In any event,  
16 paragraph 8, he asks for -- it says,  
17 "As a result of the new identity...",  
18 and this is new identity that Zanidean would  
19 presumably get if he enters the RCMP program?

20 A Right.

21 Q "...any matters outstanding against Ray of  
22 which the Crown is currently aware will not  
23 be proceeded with either in this or any  
24 other province."

25 A Yes, I see that.

1 Q And then if you turn to the next tab, tab 41?  
2 You have already seen this document, this is the  
3 witness protection application?  
4 A Yes.  
5 Q If you go to page 481?  
6 A Yes, I see it.  
7 Q Bottom of the page it says,  
8 "Zanidean's lawyer has requested of Mr.  
9 Bruce Miller, Crown Attorney, complete  
10 immunity from prosecution and a written  
11 guarantee stating same prior to the murder  
12 trial."  
13 And the whole paragraph deals with the Swift  
14 Current arson, so the immunity reference there  
15 is a reference to Swift Current?  
16 A Yes.  
17 Q It says,  
18 "This delicate matter has not yet been  
19 resolved."  
20 A Yes. It says it is the Swift Current --  
21 Q It does, yes, that's right.  
22 A Third line from the top.  
23 Q I won't read these out to you, but you have read  
24 these documents in the course of preparing for  
25 today, I imagine; is that correct?



1 A Yes, you told me to.

2 Q Indeed I did. Just because I told you doesn't  
3 mean that you would necessarily do it, though.

4 "The next tab you will see is another  
5 letter from Mr. Kovnats to Mr. Miller where  
6 again he repeats this request for  
7 immunity."

8 A Yes.

9 Q So my question for you is simply this; were you  
10 aware at this point either -- to put the  
11 question broadly and say before the trial or  
12 during the appeal period, that Zanidean was  
13 seeking immunity on the Swift Current charge  
14 through his lawyer?

15 A I didn't know he was seeking immunity from the  
16 Swift Current charge, period, from his lawyer or  
17 any other way.

18 Q And would this have been a useful fact for you  
19 to have known when you were preparing the  
20 defence?

21 A Yes, it would.

22 Q Can you elaborate on that a little bit?

23 A Well, it is extraordinary, if he went to the  
24 trouble of getting a lawyer to now negotiate for  
25 him, he is really serious into this. He was

1           trying to buy his way out of the charge. And I  
2           would have had to have known that in order to  
3           discredit him and start the discrediting process  
4           of the other witnesses in the case.

5       Q     Okay. The court has heard conflicting evidence  
6           on some other issues, and I will just summarize  
7           it for you very briefly. There has been some  
8           different evidence from different witnesses as  
9           to whether the outstanding Swift Current arson  
10          investigation would or would not be a bar to  
11          Zanidean entering the Witness Protection  
12          Program. There is conflicting evidence as to  
13          whether or not the Winnipeg Police asked the  
14          RCMP to abandon their pursuit of Zanidean.  
15          There is conflicting evidence as to whether or  
16          not the RCMP actually did commit to abandoning  
17          their pursuit of Zanidean. And there is  
18          conflicting evidence about whether or not  
19          Zanidean was told prior to the time he testified  
20          that the Winnipeg Police had obtained what was,  
21          in effect, de facto immunity on the Swift  
22          Current arson? So without getting into --

23       A     If it was conflicting evidence, wouldn't it be  
24           nice for me to have that?

25       Q     My question is, did you know anything about any

1 of these matters?

2 A No. I didn't know the arguments on either side,  
3 or who was testifying, or wanted to say whatever  
4 it was on either side. I didn't even know that  
5 Mr. Kovnats was acting for Mr. Zanidean when I  
6 first went to see him, as a matter of fact. For  
7 some reason I thought it was Nancy Sanderson.

8 Q But he did eventually tell you that?

9 A He did, yes, he did.

10 Q Before I go on, to go through your  
11 cross-examination of Mr. Zanidean, I just want  
12 to deal briefly with one point. And that is, if  
13 I could put you a hypothetical and ask you to  
14 comment on it based on your experience as a  
15 criminal defence lawyer in this province. And  
16 the hypothetical is this: Suppose that a Crown  
17 witness came to the police seeking a benefit in  
18 relation to an outstanding or a pending charge,  
19 and suppose further that the police made  
20 arrangements to give the witness what he wanted  
21 and to take care of the charge, but then  
22 concealed this from the witness so that the  
23 witness could then testify honestly but falsely  
24 that he expected he would be prosecuted on this  
25 charge -- are you with me so far?

- 1 A He couldn't be testifying honestly but falsely,  
2 he would be testifying falsely.
- 3 Q He might honestly believe that he is not going  
4 to be charged if he hasn't been told --
- 5 A Right.
- 6 Q -- to the contrary. But as an objective matter,  
7 it would be untrue. And that this arrangement  
8 has not been disclosed to the defence. I guess  
9 my first question for you is, is this something,  
10 a situation that you have ever encountered, to  
11 your knowledge?
- 12 A No.
- 13 Q And in your opinion, as a matter of ethics and  
14 matter of practice, would this be something, an  
15 appropriate arrangement for the Crown to make  
16 with the witness?
- 17 A No, it wouldn't.
- 18 Q Can you elaborate on that a little bit?
- 19 A We don't encourage witnesses to lie in court.  
20 We don't allow witnesses to tell a lie in court.  
21 We don't fool the courts. We don't make secret  
22 arrangements in order to allow a witness to tell  
23 an untruth in court. We don't do that, not  
24 Crowns, lawyers don't do that, including Crowns.
- 25 Q All right. We have now gone through the first

1 three of the six disclosure points, and these  
2 are the three that relate specifically to Swift  
3 Current. Before I move on to the last three, I  
4 would like to take you fairly briefly through  
5 your cross-examination of Mr. Zanidean about the  
6 Swift Current arson. And confusingly enough,  
7 the cross-examination is actually in two  
8 different places. We have included part of it  
9 in the first book at, it is actually in the  
10 first set of books, it is in the second book I  
11 believe. And the second part of it is in volume  
12 3, if I can ask you to have both of them  
13 available?

14 A I do.

15 Q Just to preface this by summing up the matters  
16 that we have just gone over, it would be fair to  
17 say that there were essentially four major  
18 things that weren't disclosed to you relating to  
19 the Swift Current arson. They were, firstly,  
20 the circumstantial evidence that was in the  
21 Swift Current arson file that tends to suggest  
22 that the arson was insurance fraud, the file  
23 that the Winnipeg Police apparently had?

24 A Even before that, that there was a file, and  
25 then what you say here, yes to both of them.

1 Q And secondly, this indication in the RCMP file  
2 that Sergeant Mann had been actively looking for  
3 Zanidean to question him about the arson in  
4 1990?

5 A Of course.

6 Q That is the second thing. The third thing, the  
7 fact that Zanidean had raised the arson on his  
8 second day with the homicide investigators?

9 A It was very important to know that it was  
10 important to Mr. Zanidean, that witness.

11 Q And he had raised it expressly as a matter that  
12 might affect his credibility? That is what he  
13 said.

14 A Well, he is bargaining. He is bargaining with  
15 the police, he wants to make himself a more  
16 credible witness, otherwise he wouldn't be a  
17 credible witness, and otherwise the prosecution  
18 might fail, as it ought to have.

19 Q And lastly, the fourth main point, as I take it  
20 from your evidence, that hasn't been disclosed  
21 to you at this point when you are  
22 cross-examining Zanidean, is the fact that he,  
23 through his counsel, is seeking immunity in the  
24 Swift Current arson?

25 A Yes. That was not disclosed to me and it should

1           have been.

2       Q     If I take you now to tab 34?

3       A     I mean, maybe I'm not being plain enough. Even  
4           if the benefit isn't agreed to by the other  
5           side, by the police or prosecution, the fact  
6           that someone is seeking a benefit in return for  
7           selling a false story is important for defence  
8           counsel to know.

9       Q     If I can take you now then to volume 2, tab 34,  
10           it is the extract from the transcript of the  
11           cross-examination.

12      A     Yes, I see it. I have it.

13      Q     If you start at the second page, page 41, top  
14           right-hand corner?

15      A     I have it.

16      Q     You ask him,

17                    "What do you know about a fire in Swift  
18                    Current?"

19           A     I know about a fire in Swift Current.

20           Q     I'm suggesting to you so there is no  
21           misunderstanding that you set a fire in  
22           Swift Current?

23           A     Yes, I did.

24           Q     To collect insurance money?

25           A     Not to collect insurance money.

1 Q For what purpose?

2 A I had a vendetta against my sister."

3 It goes on to talk about the vendetta theory and  
4 the story that he waited until she didn't have  
5 insurance and that is why he burned down the  
6 house when he did?

7 A 20 and 21,

8 "I waited until she didn't have insurance  
9 on her house and I burnt down her house."

10 Q I suggest to you, would it have been useful to  
11 you at this point to have had this information  
12 in the Swift Current file suggesting that this  
13 was in fact an insurance fraud arson?

14 A Absolutely.

15 Q If you flip over the page, page 42, starting  
16 with line 17?

17 A Yes.

18 Q It says,

19 "Q And the police found out about that?

20 A Yes, they did.

21 Q And you're not charged?

22 A Not yet.

23 Q Not yet? Does it depend on how you do  
24 in court today?

25 A No. What they told me was they give



1 the Swift Current RCMP the information I  
2 give them..."

3 It is tab 34 for those that are missing it.

4 "...and that was it. Then I talked to my  
5 lawyer."

6 Turn over the page, page 43,

7 "Q You talked to your lawyer?

8 A Right.

9 Q About making a deal to avoid being  
10 charged in Swift Current?

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

12 And it goes on. If you turn over the page then  
13 to page 44?

14 A Yes.

15 Q You put it to him, you say.

16 "I'm suggesting to you..."

17 this is line 2,

18 "...that the whole purpose of your trying  
19 to implicate Jim Driskell in a murder is to  
20 keep yourself out of jail on the Swift  
21 Current fire; what do you say to that?

22 A I say that's not true. If I did it  
23 just to get myself out of jail, that's,  
24 then I did the wrong thing, because I lost  
25 a fortune -- for me it is a fortune since

1                   this started."

2                   And the suggestion that you put to him, that  
3                   essentially encapsulates your theory that this  
4                   is his motive for going to the police?

5     A            I wasn't keeping it a secret.

6     Q            And I don't know if I need to take you to each  
7                   of these references, but you returned to this  
8                   theme later on, if you go to volume 3 now?

9     A            Yes.

10    Q            Tab 57, the second of these tabs, there is just  
11                   a continuation that we didn't put in the first  
12                   volume 2. And if you look in particular, these  
13                   are just -- the pages jump somewhat because we  
14                   didn't include the entire cross-examination. If  
15                   you look at page 72, what is going on here, to  
16                   set the stage, is that you are playing the body  
17                   pack tape in court, and then you are having it  
18                   stopped and you are asking questions about it?

19    A            That's what happened, yes.

20    Q            So there is a reference to the connection  
21                   between "you and me and Barry's car"?

22                   THE COMMISSIONER: Just a moment.

23                   THE WITNESS: The very top of the page.

24                   THE COMMISSIONER: The top of page 72.

25                   THE WITNESS: That's correct. As the tape was

1 being played, from time to time I put up my  
2 hand, which was meant to stop the tape and I'm  
3 going to ask a few questions now.

4 BY MR. DAWE

5 Q Zanidean admits that he and Jim went to  
6 Saskatchewan and burnt Zanidean's sister's  
7 house. And around line 12 you ask him,

8 "That is Jim knew you burnt the house down?

9 A Jim was with me.

10 Q That's how he knew?

11 A Yeah.

12 Q And he could be a witness against you?

13 A Yeah.

14 Q Not very much of a witness now, now  
15 that you are pointing a finger at him;  
16 would that be fair?

17 A I don't know.

18 Q Isn't that the reason that you are  
19 testifying today?

20 A I told you that wasn't the reason  
21 already, but I will tell you again, no,  
22 that is not the reason."

23 A Right, that's the way it went.

24 Q Then the next page, you return to this again,  
25 line 19, you put it to him that he is testifying

1 in order to discredit Jim Driskell from  
2 testifying against and being a witness against  
3 you? Line 19 and 20?

4 A That's my question.

5 "You made a story, a fictitious story, in  
6 order to avoid being prosecuted for the  
7 Swift Current fire, in order to discredit  
8 Jim Driskell from testifying against and  
9 being a witness against you."

10 That's what I put to him.

11 Q Right. And the last reference I will take you  
12 to briefly, it is towards the end, it is the  
13 third page in from the end, page 98.

14 A Yes, I have it.

15 Q And you suggest to him again,

16 "Mr. Zanidean, would I not be fair in  
17 suggesting to that you could not have a  
18 better advocate for your cause...",

19 line 20,

20 "...that is to keep you out of jail, than  
21 the Winnipeg Police. That you wanted the  
22 Winnipeg Police to help you out with the  
23 RCMP police in Swift Current?

24 A I wanted them to but they said they  
25 couldn't."

1 Turn the page,

2 "And that's the reason you implicated Jim  
3 Driskell?

4 A No, I told you why I phoned Crime  
5 Stoppers already.

6 Q You wanted to discredit Jim Driskell so  
7 he couldn't be a witness against you?

8 A That is not true."

9 A Yes.

10 Q So that's the theme that you have come back to  
11 repeatedly during your cross-examination. My  
12 question then, after that lengthy wind up, is if  
13 you can just indicate, would it have assisted  
14 you in conducting this cross-examination to have  
15 known, firstly, that Zanidean was seeking  
16 immunity from the Swift Current arson through  
17 his lawyer as a condition for testifying?

18 A Yes.

19 Q And secondly, that the Winnipeg Police had been  
20 actively looking for Zanidean in August, two  
21 months before he went to them with this story  
22 about Driskell?

23 A It would have been very helpful.

24 Q And thirdly, that Zanidean had disclosed his  
25 involvement in the Swift Current arson to the

1 police on the second day he met with them?

2 A The two police officers, yes.

3 Q Before I turn to the next disclosure, there is  
4 one other question that I would like to put to  
5 you. It doesn't really fit in directly with the  
6 theme of Swift Current, but it is something that  
7 I shouldn't leave uncovered. Were you aware  
8 that, at the time of the trial, that a few weeks  
9 earlier Mr. Zanidean had gone to Alberta and  
10 been arrested on a material witness warrant and  
11 brought back?

12 A There is a number of statements, facts you have  
13 put in that, and I wasn't aware of any of them.  
14 Alberta no, brought back, no, witness protection  
15 or whatever you said -- material witness, no, I  
16 didn't know those things. I knew he was being  
17 paid, he said -- I think he testified rather he  
18 was being paid about \$50 or something a day for  
19 accommodation. I can't remember if he said  
20 hotel or what he said.

21 Q I will return to this in just a minute, I just  
22 want to deal with a couple of other things  
23 first. Turn now to what I'm characterizing as  
24 the fifth area of disclosure, and that's the  
25 area of witness protection benefits apart from

1 charge immunity. We dealt with charge immunity  
2 and not laying of charges already?

3 A Right.

4 Q Now we are talking about other kinds of benefits  
5 that may or may not be characterizable as having  
6 to do with witness protection. If I can take  
7 you back now to your February 7th letter, volume  
8 1, tab 9?

9 A Yes.

10 Q Page 152, second page?

11 A Yes.

12 Q Paragraph 6?

13 A Yes.

14 Q You say,

15 "We would like to have the detail of the  
16 Witness Protection Programs Mr. Dangerfield  
17 mentioned in court..."

18 And I take it that you are referring to  
19 something he said on the record on the motion on  
20 February 6th?

21 A Dangerfield defined to the court the Witness  
22 Protection Program as meaning a form of  
23 surveillance and protection so that they could  
24 secure the witness should any untoward thing  
25 happen to them. I wanted to know the detail of

1           that. That didn't seem to be a Witness  
2           Protection Program.

3       Q     So you wanted to know the details. And his  
4           response the next day, February 8th at tab 10?

5       A     Yes.

6       Q     The answer in essence at paragraph 6, page 158  
7           is essentially that you can't have the details.  
8           What Mr. Dangerfield says is,

9                     "In answer to your paragraph 6, we can not  
10                    provide the details of the protection  
11                    offered witnesses for fear..."

12      A     What page is this?

13      Q     Page 158.

14      A     158?

15      Q     Paragraph 6.

16      A     Yes, I see that.

17      Q     "In answer to your paragraph 6, we can not  
18           provide the details of the protection  
19           offered witnesses for fear of giving them  
20           away but can assure you that the protection  
21           amounts to provision of monies to help  
22           support them while they are protected and a  
23           constant surveillance over them."

24      A     Yes.

25      Q     It is essentially the point that you just made



1 about what he said on February 6th.

2 So as I understand the correspondence that  
3 follows, what seems to happen is that you have  
4 been met with a fairly categorical refusal to  
5 give you this stuff, so you don't raise it  
6 again; is that fair?

7 A Well, I wasn't going to go away. I don't care  
8 what they were trying, I wasn't going away.

9 Q But you have been given a definitive answer, and  
10 the answer is, you are not going to get it, so  
11 there wouldn't have been a lot of point, it  
12 would be fair to say, to keep asking the  
13 question?

14 A I waited until the trial and I asked it of  
15 Mr. Zanidean. I didn't expect that the police  
16 would sit there and just listen to him perjure  
17 himself.

18 Q Now, you mentioned this earlier, you had this  
19 meeting which is set out in these file memos,  
20 the file memos are dated June 10th and they are  
21 all at tab 33. But the meeting itself, as I  
22 understand it from the memos, was on June 2nd,  
23 and this is the meeting that you had with David  
24 Kovnats?

25 A What tab is that?

1 Q Tab 33.

2 A Yes, I have it.

3 Q And what you learned, as I recall from your  
4 interview summary, you are not entirely sure how  
5 you learned this but it is most likely something  
6 that Kovnats would have told you, you learned  
7 that he is acting for Zanidean?

8 A Well, it starts off on page 402 that Ian Garber  
9 told me that David Kovnats was in a flap about  
10 getting a dressing down from George Dangerfield  
11 when a client of Kovnats said he wasn't going  
12 through with some kind of a deal. Then I was  
13 trying to figure out who the client could be,  
14 and I thought the best way of resolving of all  
15 of that would be to see Mr. Kovnats directly.  
16 So I went to his house.

17 Q And if you turn over two pages to page 404, it  
18 is the third of these memos. It is a bit  
19 difficult to tell what order they are in, it is  
20 the one that begins,

21 "I have just come from David Kovnats  
22 house..."

23 A Yes.

24 THE COMMISSIONER: The tab number?

25 MR. DAWE: Tab 33, the third page in, page 404.

1 BY MR. DAWE:

2 Q The next sentence,

3 "His client..."

4 who you now know is Zanidean, or at least

5 you find out during the course of this

6 meeting with Kovnats,

7 "...has still not signed a witness

8 protection agreement."

9 THE COMMISSIONER: Sorry, where?

10 BY MR. DAWE

11 Q The second sentence, the top of the page. If

12 you turn over the page to page 405, fourth line

13 down from the top?

14 A Right.

15 Q "He..."

16 being Kovnats,

17 "...wasn't sure that his client would see

18 talking to me as jeopardizing his deal with

19 the Crown."

20 A Right.

21 Q So, would it be fair to say that after this

22 meeting with Kovnats, you knew that Zanidean

23 was, through Kovnats, was negotiating some kind

24 of witness protection package, if you can put

25 that way, and that he had some kind of a deal

1 that he thought might be jeopardized if he  
2 talked to you?

3 A I don't know how to answer that. I didn't know  
4 what he was -- the reason I don't know how to  
5 answer that is I didn't know whether the deal,  
6 what that word "deal" was. I didn't know it was  
7 an arrangement with the police that he not be  
8 prosecuted for something or other, if that was  
9 the deal. I don't know if it was some other  
10 arrangement that he had with the deal, or I  
11 didn't know if it was a money payment that was  
12 the deal. I didn't know what the deal was.

13 Q Okay. But --

14 A So it would be wrong to say that the word deal  
15 means money. I just wasn't sure what the deal  
16 was. Mr. Kovnats was very scared and didn't  
17 want to reveal too much to me.

18 Q So, it would be fair to say then that you knew,  
19 I guess first of all, that Kovnats was acting  
20 for Zanidean?

21 A Yes. He said he was a real estate agent, and I  
22 knew that to be the case, and he said that  
23 Mr. Zanidean had been using him on a number of  
24 real estate transactions.

25 Q And you knew that he was involved in some kind

1 of negotiations with the Crown about something?

2 A Yes.

3 Q And that it had something to do with Zanidean's  
4 status as a witness in this case?

5 A The Crown had scared Mr. Zanidean and  
6 Mr. Zanidean had phoned Mr. Kovnats because he  
7 knew him because of those real estate deals.

8 Q Right. And the question that I have, which I  
9 think you have already answered, is did Kovnats  
10 tell you what it was that he was negotiating  
11 with the Crown about?

12 A Absolutely not. But I certainly wanted to know.

13 Q But he wouldn't tell you.

14 A He wouldn't tell me.

15 Q Understandably, I would point out.

16 A I wanted to know anyways.

17 Q All right. So it would be fair then to say that  
18 when the time came, when Zanidean got up on the  
19 witness stand and you cross-examined him, it  
20 would be fair to say that you didn't have any  
21 information about what arrangements he had made  
22 with the Crown and what arrangements he was  
23 asking for, apart from this assurance that you  
24 have received from Mr. Dangerfield about  
25 protection being restricted to support money and

1 police surveillance?

2 A Yes, that's correct. To make a longer answer --  
3 I have been told to keep my answers short in  
4 other proceedings -- I was about to say that  
5 Mr. Kovnats wouldn't be the kind of lawyer that  
6 I would have expected to be arranging witness  
7 protection deals with the police. There are a  
8 number of other lawyers that the police usually  
9 use when that occurs. Mr. Kovnats didn't enter  
10 my mind as being one of them.

11 Q He is not someone that you have come across in  
12 this context before?

13 A Or since.

14 Q All right. So even though you don't have any  
15 information in your back pocket, if I can put it  
16 that way, but nevertheless you proceed to  
17 cross-examine Zanidean at some length about what  
18 benefits he is receiving. Do you recall that?

19 A Yes.

20 Q I'm not going to read the transcript out to you,  
21 it has been filed and I think we are all  
22 familiar. It would be fair to say -- and you  
23 have read it as well, I am sure -- it would be  
24 fair to say that the gist of Zanidean's  
25 evidence -- the reference here is tab 34, pages

1 44 to 47, volume 2.

2 A Yes.

3 Q And the gist of what he says, as I read it, is  
4 that essentially his room and board is being  
5 paid for, but this is going to end as soon as he  
6 finishes testifying?

7 A He said that.

8 Q His mortgage payments are in arrears and he is  
9 on the verge of losing his house, and he has  
10 made no arrangements for dealing with this  
11 problem?

12 A I'm not being paid for nothing," he says at line  
13 18.

14 Q Well, about the mortgage payments  
15 particularly -- you have turned the page to page  
16 45?

17 A All they are doing if I don't -- if I keep on  
18 reading in the next sentence,

19 "All as they're doing is paying my  
20 accommodations where I'm staying right  
21 now."

22 And then he goes on to say room and my meals,  
23 and that's it.

24 Q Right.

25 A Mortgage payments, he says at line 17.

1            "...are in arrears right now since then,  
2            and I'm on the verge of losing my house;  
3            and you can check that out."

4            He defies me to do --

5        Q        And the next question is,

6            "What arrangements have you made for that?"

7            His answer is,

8            "I have made no arrangements for that."

9        A        And the next question is,

10            "Have you signed an agreement?"

11            Because I knew he had a lawyer, Mr. Kovnats.

12            And his answer was no.

13        Q        Yes, so that's the second point. The third  
14            point that emerges out of this is that Zanidean  
15            says, he indicates that he expects to be  
16            relocated after the trial and given a new  
17            identity, but he says there has been no mention  
18            of start-up costs. Do you recall that?

19        A        Yes, vaguely.

20        Q        If you like, I can take to you it.

21        A        It is at line 19, page 46.

22        Q        Exactly.

23            "They never mentioned start-up costs."

24            And we have already seen this last point, he  
25            claims that he has loss a fortune since this



1 whole thing started?

2 A Yes.

3 Q Would it be fair to say that you didn't have any  
4 specific information that you had received,  
5 either from the Crown or from anybody else for  
6 that matter, that you could have put to Zanidean  
7 to challenge these things he was saying?

8 A I wouldn't agree with that. If you would change  
9 the word "specific," and leave that word out, I  
10 didn't have any information to that effect.

11 THE COMMISSIONER: Mr. Dawe, whenever it is  
12 convenient?

13 MR. DAWE: I could probably finish this area,  
14 but it may take me longer than five minutes. So  
15 why don't we take the break now and we can  
16 return to this?

17 THE COMMISSIONER: The inquiry reporter has had  
18 a long hard morning.

19 MR. DAWE: She has, it was an early start. This  
20 is a good time for a break. Thank you.

21 THE CLERK: All rise. This Commission of  
22 Inquiry is adjourned until 2:00.

23 (Proceedings recessed at 12:45 p.m. and  
24 reconvened at 2:00 p.m.)

25

1 THE CLERK: All rise. This Commission of  
2 Inquiry is now re-commenced. Please be  
3 seated.

4 MR. CODE: Mr. Commissioner, if I could steal  
5 the floor back for a minute. I know everybody's  
6 happy that I've been firmly in my seat for the  
7 last little while.

8 THE COMMISSIONER: We didn't say that, Mr. Code.

9 MR. CODE: This is Exhibit 19, which you'll  
10 recall Mr. Kovnats referred to in his  
11 re-examination --

12 THE COMMISSIONER: Yes.

13 MR. CODE: -- out of the disclosure volumes.  
14 I'll circulate copies to my colleagues, if that  
15 could be marked as Exhibit 19, which I think it  
16 precedes Mr. Brodsky's. (Previously marked)

17 BY MR. DAWE:

18 Q Good afternoon, Mr. Commissioner, and  
19 Mr. Brodsky.

20 Mr. Brodsky, I recall when we left off  
21 before lunch we had gone through the disclosure  
22 about the witness protection benefits, other  
23 than the Swift Current, the possibility of  
24 immunity from the Swift Current charges. I have  
25 taken you to what Mr. Zanidean said in his

1 testimony when you cross-examined about this,  
2 and asked you whether you had any contrary  
3 information that you could have used against  
4 him, and you said you didn't.

5 What I would like to turn to now, if I may,  
6 is the information that we, meaning the  
7 Commission, now has on some of these issues.  
8 So if I can take you to the second volume, tab  
9 44?

10 A Yes, I have it.

11 Q There is a series of documents. And this is a  
12 selection from a much larger body of  
13 correspondence that all deals with the  
14 arrangements that are being made about  
15 Mr. Zanidean's house. And I won't take you  
16 through these in detail, but if I can just  
17 summarize what they set out. The gist of the  
18 agreement that appears to have been reached  
19 regarding Mr. Zanidean's house and his mortgage  
20 is that the mortgagee would take title of the  
21 property for a nominal payment of \$1. The  
22 mortgagee would then, in turn, relieve Zanidean  
23 of his debt under the mortgage, including the  
24 arrears. And the Manitoba Department of Justice  
25 would then pay Zanidean a sum of money, a little

1 over \$7,000, that would be equal to his equity  
2 in the house.

3 And what you'll note on the first letter,  
4 it indicates this deal has essentially been  
5 worked out by April 24, 1991, but it hasn't been  
6 finalized. And if I can take you back now to  
7 tab 42, the same volume?

8 A Yes.

9 Q This is a letter from David Kovnats to Bruce  
10 Miller dated June 4th, so sometime after the  
11 April house deal. And the first paragraph  
12 indicates,

13 "Mr. Zanidean does not wish to sign the  
14 house transaction until all matters are  
15 finalized."

16 So what it appears is that an agreement has been  
17 worked out to, effectively, from Zanidean's  
18 point of view, take the house off his hands and  
19 restore his equity and his credit rating. And  
20 it hasn't been finalized because he doesn't want  
21 to sign the documents until some other matters  
22 are dealt with.

23 So my question is, and I think I already  
24 know the answer, did you know anything about  
25 this house transaction when you cross-examined

1           Zanidean?

2    A    Absolutely not.  He denied it.  And no one stood  
3           up to correct him, and he denied it.  I did not  
4           know anything about this, or any part of all of  
5           these things, credit ratings and jobs and  
6           recreations, and something about a Constable  
7           Orr promising a Witness Protection Program, I  
8           don't know who he is or what he has to do with  
9           this.  I didn't know any of this, or equity, or  
10          how the equity was -- you said \$7,000, I don't  
11          know how that was arrived at.  I didn't know  
12          there would be a payment for equity.  He denied  
13          it in court.

14   Q    And without belabouring the point, I don't want  
15          to take you through all of the documents that we  
16          have about other financial matters involving  
17          Zanidean, but just to summarize, you'll see in  
18          this June 4th letter --

19   A    He wants lots of things.  He wants a motorbike,  
20          I see now in paragraph 5 there.

21   Q    Yes.  And if you turn over the page, or you've  
22          already turned over the page it looks like, if  
23          you look down at the next paragraph, paragraph  
24          6, you'll see he is now asking for, or he is  
25          suggesting he will take \$30,000 cash payment in

1           lieu of entering into the RCMP Source Witness  
2           Protection program. Do you see that?

3    A       Yes, I do.

4    Q       And we also know, if you turn to the next tab,  
5           tab 43, that as of June 21st, about ten days  
6           after he testifies, there is apparently an  
7           agreement in place where he'll be paid a sum of  
8           something like, it says,

9                       "...not to exceed \$20,000..."

10          Now, we know from other documents that he  
11          ultimately receives a \$20,000 cash payout. And  
12          we've also heard from a number of sources that  
13          many of the people who were dealing with  
14          Mr. Zanidean during this period --

15    A       It doesn't say he is going to get \$20,000. He  
16          talks about, it is understood the cost of the  
17          relocation won't exceed \$20,000. I don't know  
18          what else he got.

19    Q       That's right. And we know, I can advise you,  
20          and you can take it from me, that there are  
21          other documents in the file that indicate  
22          that he eventually receives a cheque for  
23          \$20,000.

24    A       Okay.

25    Q       The other -- and I take it you didn't know

1 anything about these negotiations or any of this  
2 stuff; fair?

3 A I didn't know there were negotiations. I didn't  
4 know what agreements there were.

5 Q All right. We have heard, and the Commission's  
6 heard, a fair bit of evidence to date from a  
7 number of the people who dealt with Mr. Zanidean  
8 during this period, and that would include  
9 Officers Anderson and Paul, Staff Sergeant  
10 Vandergraaf, Corporal Orr, who have all  
11 expressed the view, one way or another, that  
12 Mr. Zanidean was making what they thought were  
13 extravagant financial demands and demanding  
14 more than he should have received. And did you  
15 know anything about these demands that he was  
16 making?

17 A No. I didn't know about any negotiations.  
18 Whether they were extravagant or legitimate, I  
19 didn't know about them.

20 Q All right. Can you explain to us, how would  
21 knowing this information and, in particular, if  
22 I can ask you this to put this information  
23 together with the information that we now know  
24 about Swift Current, and if you can just  
25 articulate for us how you would have been able

1 to use this information in preparing  
2 Mr. Driskell's defence?

3 A Well, most things done in the dark are in the  
4 dark for a reason. In this particular case, if  
5 this man wanted to buy certain things in return,  
6 for which he would swear to a scripted scenario,  
7 it would be important to know. If he thought  
8 that he could get more by bargaining, I would  
9 have to know about the bargains. What was he  
10 paying? And the jury should know, more  
11 importantly, than me.

12 You'll recollect, and I don't have the  
13 transcript here, but I'm sure you do, that  
14 during the course of the trial, he is not the  
15 only one who said that the police wrote out for  
16 me what I was supposed to say. And if I could  
17 establish with him that that's, in fact, what  
18 happened and he got paid for it, well, then I  
19 could move on to the other witnesses and give  
20 them more credibility when they said the same  
21 thing.

22 There are many reasons why we should know  
23 that a witness is being bought, or a witness,  
24 that he is being paid, whether it's in money or  
25 in kind, before he gets on the stand, and what



1 he expects for his testimony.

2 Q All right. So would you agree that it matters  
3 both what they are getting paid and also what  
4 they are asking to get paid?

5 A And what they expect. Sometimes people expect  
6 that if they give favourable testimony, they  
7 will get favourable consideration. And if they  
8 are bargaining for it, then for sure they expect  
9 it. This man, according to these letters that  
10 you've shown me, has engaged a lawyer. I mean,  
11 he's really into it.

12 Q And I've alluded before lunch as well to this  
13 circumstance in which he would leave for Calgary  
14 and is arrested on a material witness warrant.

15 A I don't know why he went to Calgary.

16 Q Yes. But he is arrested -- he seems to have  
17 left the province and is arrested on a material  
18 witness warrant at the same time that these  
19 negotiations are ongoing. So would that have  
20 been a point that you would have been able to  
21 use as well, had you known about it?

22 A All of it. As you can see, from my repeated  
23 requests for disclosure, that I wasn't going to  
24 be put off by half answers or just a little bit  
25 of answers. And I would have used all of the

1 things that came out of the bargaining process  
2 in trying to assail his character and his  
3 evidence and have the jury see him for what he  
4 was.

5 Q Thank you. If I can turn now to what I've  
6 identified as the sixth disclosure issue, the  
7 specific disclosure issue. And, again, if I can  
8 take you back to this document, please, the  
9 May 10th list of questions, at tab 23, volume  
10 1?

11 A Yes.

12 Q If you go to page 293, towards the end, page 6  
13 at the top of the page, page 293 down at the  
14 bottom.

15 A Yes.

16 Q The last page, it is the last question in the  
17 document, question number 23. And there you  
18 ask,

19 "What information did the police have in  
20 their files with respect to Zanidean's  
21 involvement in the drug scene? And has  
22 Zanidean ever been an informant for the  
23 police, in terms of drugs or other  
24 matters?"

25 A Right.

1 Q It's a fairly general question about Zanidean's  
2 history as a police informant, if he has one?

3 A Right.

4 Q And before I take to the Crown's response to  
5 this question, I would just like to take you to  
6 one other document from your file, and that's in  
7 the other volume, tab 45.

8 A Right.

9 Q And tab 45 is this memo to file dated June 25,  
10 1991.

11 A I see it.

12 Q Tab 45, the first paragraph you indicate that,  
13 "During the course of the preparation for  
14 this case, I attended at the Clerk of the  
15 Courts Office and obtained the search  
16 warrant and the information to search,  
17 together with the return."

18 Can you tell me which search warrants and which  
19 information are you referring in this memo; do  
20 you recall?

21 A It's the search warrants in connection with the  
22 charge involving Mr. Harder that resulted in the  
23 charges of the chopshop.

24 Q The search that was executed in 1989?

25 A Yes.

1 Q That's right. And I point out, I don't need to  
2 take you to it, but just for reference at tab  
3 12, you'll see that, as I understand it, you  
4 already have disclosure of the information  
5 relating to the October 9th, 1990 search that  
6 was executed in connection with the homicide  
7 investigation?

8 A Correct.

9 Q So, really, this would only make sense that if  
10 you were going to court to get another  
11 information, it would have to be the 1989  
12 information?

13 A Yes. I have already said that, yes.

14 Q I just wanted to indicate that it is clear from  
15 your documents that you had already had the  
16 information on the current charges.

17 And you go on to say,

18 "We were attempting to ascertain who the  
19 informant was, to determine motive and  
20 whether there was any information  
21 implicating Driskell, particularly in the  
22 thefts that we were not aware of, and  
23 whether the whole of the thieving rested on  
24 the back of Perry Dean Harder."

25 So, on the one hand, you are asking the Crown

1 about Zanidean's informant history, and on the  
2 other hand you are conducting your own  
3 investigation about who the informant was on the  
4 chopshop charges?

5 A Yes.

6 Q And before we see how these two are related, I  
7 will take you to the Crown's response, and  
8 that's back in volume 1 at tab 25.

9 A Yes.

10 "The attached police report answers all of  
11 your questions."

12 Q Yes. If you flip over the page there is a  
13 response to question 23, which is about  
14 Zanidean's informant history. So that's at page  
15 183 in the police report?

16 A Tab?

17 Q Tab 75.

18 A This is volume 1?

19 Q The very last page of volume 1.

20 A The very last page of volume 1, yes.

21 Q It's got page 183 written in the circle around  
22 it down at the bottom of the page?

23 A Yes, I see it.

24 Q You see the last question on that page is  
25 question 23?

1 A Right.

2 Q That's a reference to your question 23 of the  
3 May 10th list of questions, which is the one  
4 about Zanidean?

5 A I assume that, because it says,  
6 "Pre-trial conference questions  
7 continued."

8 Q Indeed, I will read it to you.

9 "The Winnipeg Police Department has no  
10 information on file, that we are aware of,  
11 relating to Mr. Zanidean's involvement in  
12 the drug scene."

13 That's not the important part. The important  
14 part follows:

15 "We are not aware of Mr. Zanidean ever  
16 having acted in the capacity of a police  
17 informant prior to his involvement..."

18 and I think the next thing is crossed out,

19 "...prior to his involvement with James  
20 Driskell."

21 A Yes, I see that.

22 Q So it's fairly -- the language of that answer is  
23 curious, because if you turn down now to tab 46  
24 in the other volume?

25 A Yes.

1 Q You see there is a handwritten sheet of paper,  
2 it is not a police notebook, it just seems to be  
3 an ordinary sheet of paper with handwriting on  
4 it. It says Ray Zanidean and his address at the  
5 top?

6 A Yes.

7 THE COMMISSIONER: I'm sorry, Mr. Dawe, I am a  
8 little behind here.

9 MR. DAWE: So we are at tab 46 at volume 2.

10 THE COMMISSIONER: Okay.

11 BY MR. DAWE:

12 Q Thanks. And I can advise you, Mr. Brodsky, it  
13 is not apparent from the face of the document,  
14 but these have been identified by Sergeant Paul  
15 as being notes in his own handwriting. And he  
16 has indicated, as I recall his evidence, that  
17 the notes were made during his -- on the first  
18 day that they had dealings with Zanidean. As I  
19 recall what he testified, they were either made  
20 during the initial telephone call they had with  
21 him on October 9th, or they were made when they  
22 met with him later day in Lockport. So it is  
23 one or the other, but he has identified them as  
24 being notes of a conversation with Zanidean on  
25 October 9th, 1990.

- 1 A Right.
- 2 Q If I can take you down to the bottom of the  
3 first page?
- 4 A I see that,  
5 "Ray called Crime Stoppers about them."
- 6 Q And if you read the stuff above, the "them"  
7 being referred to is James Driskell and Perry  
8 Harder?
- 9 A Yes.
- 10 Q It goes on to say,  
11 "Ray just left shop when it was raided.  
12 Got stopped from the police. Got \$700 from  
13 Crime Stoppers."
- 14 A Yes.
- 15 Q "Phoned day before raid because Jim was  
16 loading stolen goods in trailer."
- 17 A Okay.
- 18 Q So what this appears to amount to is an  
19 admission by Zanidean that he was the informant  
20 who called Crime Stoppers on the chopshop  
21 charges?
- 22 A And it also appears that Sergeant Paul is the  
23 person writing the report, or part of the report  
24 at tab 25 that you've shown to me before.
- 25 Q Yes.



1 A And he has now given this handwritten note that  
2 Zanidean is collecting money from Crime Stoppers  
3 as an informant.

4 Q Well, in fairness, I should note that the tab 25  
5 report actually seems to be written by, the  
6 author who signs it seems to be Sergeant  
7 Anderson, but Sergeant Anderson and Sergeant  
8 Paul are partners.

9 A Right, that's what it says, yes.

10 THE COMMISSIONER: What's your observation,  
11 though, if you look at tab 46, the last page --  
12 or, I'm sorry, tab 25 the last page in that  
13 first volume, what comment do you have about the  
14 very last sentence on the last page?

15 "We are not aware of Mr. Zanidean ever  
16 having acted in the capacity of a police  
17 informant prior to his involvement with  
18 James Driskell."

19 And I don't know if there is another word in  
20 there.

21 MR. DAWE: I think it is something that has been  
22 X'd out.

23 THE COMMISSIONER: Yes.

24 THE WITNESS: Yes. I have no comment on that.

25 THE COMMISSIONER: Okay, all right.

1 BY MR. DAWE:

2 Q Well, if I can suggest to you --

3 A I can tell you that I took from that that he  
4 wasn't an informant. I didn't read it closely  
5 to say that he became a police informant at the  
6 time of James Driskell, I did not take it that  
7 way.

8 THE COMMISSIONER: Okay.

9 THE WITNESS: But I see what the words say.

10 BY MR. DAWE:

11 Q So in response to this answer, did you infer  
12 from this that Zanidean had been the informant  
13 on the chopshop charge?

14 A Absolutely not.

15 Q And while it may be literally true to say that  
16 Zanidean was not a police informant, prior to  
17 his involvement with James Driskell, insofar as  
18 James Driskell was also involved in the  
19 chop-shop charge, would it be fair to say that  
20 this answer doesn't make clear the salient fact  
21 that Zanidean appears to have been the  
22 informant?

23 A Well, that was my question. The question that  
24 you referred me to on page 293, at tab 23, I  
25 didn't say after Zanidean was involved with

1 Driskell. I wanted to know if he had ever been  
2 an informant for the police in terms of drugs or  
3 other matters, period.

4 Q Other matters.

5 A I didn't limit it, it was not limited in any  
6 way. So I didn't think that I was being fooled  
7 with when I -- I guess I was.

8 Q Let me ask you this, when did you first learn  
9 that Zanidean was, in fact, the chop-shop  
10 informant, if I can call him that?

11 A Long after the trial.

12 Q If you had known this at the time of the trial,  
13 perhaps you can explain for us what use you  
14 would have been able to make of this  
15 information?

16 A Well, it's obvious that trees grow from acorns.  
17 I mean, this is the start of the attack we would  
18 have made on Mr. Zanidean, and then we would  
19 demonstrate that he had motive to implicate  
20 Mr. Driskell and to be fearful of him and to  
21 want him in a position where he couldn't do him  
22 damage. He was an unsavoury character. I  
23 needed to show the jury that.

24 Q Okay. The last --

25 A The police knew that. I am sorry.

1 Q That's fine. Anything else that you want to  
2 add?

3 A Yes. I talk too much.

4 Q I'm sure none of your learned colleagues will  
5 agree with you. But the last area I would like  
6 to deal with in terms of pre-trial disclosure,  
7 and I will deal with this fairly briefly, but on  
8 several different occasions you raise the  
9 possibility with the Crown, in your  
10 correspondence, being granted what Mr. Code and  
11 I, at least, have been calling open box  
12 disclosure. I don't know if that's a term that  
13 anyone ever uses in Manitoba?

14 THE COMMISSIONER: I've never heard it in  
15 Ontario either.

16 MR. DAWE: I've only heard it from him.

17 MR. CODE: You haven't done enough trials with  
18 Mr. Pinkofsky because it's his favourite  
19 concept.

20 BY MR. DAWE:

21 Q Anyway, what I mean by that is an opportunity is  
22 for you, yourself, or you and your agents, to go  
23 through the Crown and/or the police files  
24 yourself, rather than relying on them to go  
25 through them and pulling out the documents for

1           you.

2                   Just to trace the history of this request,  
3           if you go back again to tab 7, this is a memo to  
4           file that you write in preparation for the  
5           February 6th motion, the trial motion?

6    A       Yes.

7    Q       And if I can just take you to page 110 down at  
8           the bottom towards the end, page 9 at the top of  
9           this note, again at tab 7?

10   A       Page 110, yes.

11   Q       110?

12   A       Yes.

13   Q       The fifth paragraph down, you refer to this case  
14           Grywinski.

15   A       Yes.

16   Q       You note that in Grywinski you were able to go  
17           to Mr. Dangerfield's office and go through the  
18           files yourself?

19   A       Yes.

20   Q       I won't make you turn this up. But I will just  
21           put a note on the record that you referred to  
22           this practice on the second day of the motion on  
23           February 13th, and the reference is tab 11,  
24           pages 182 to 184.

25                   And then by the time we get to the

1 April 25th disclosure letter, which is at tab

2 16 --

3 A Yes.

4 Q -- you're now expanding on this request  
5 somewhat, because rather than simply asking for  
6 an opportunity to go through the Crown's files,  
7 if you turn to the very last page, paragraph 21.  
8 This is tab 16.

9 A Yes.

10 Q Tab 16, page 259, paragraph 21.

11 A Yes.

12 Q You ask, this is addressed to Mr. Dangerfield,  
13 so you ask him,

14 "Do you have an objection to my reviewing  
15 the Winnipeg Police Department file, either  
16 by myself, by the investigator I have  
17 assisting me, or jointly."

18 So you are now, as I understand it, asking not  
19 to just have access to Mr. Dangerfield's file,  
20 but to be allowed an opportunity to go and look  
21 at the police file that presumably is being kept  
22 at the police station?

23 A That's correct.

24 Q And then you reiterate this request in your May  
25 10th list of questions, and again I don't think

1 I need to have you turn it up, but the reference  
2 is tab 23, page 291, paragraph 16. And the last  
3 document I will take you to on this point is  
4 volume 2, tab 29.

5 A Yes.

6 Q Volume 2, tab 29, these are the two memos to  
7 file dealing with these late May pre-trials.  
8 And at page 339, it's tab 29 --

9 A Yes.

10 Q -- the second of the two memos, about a third of  
11 the way down the page it says,

12 "With respect to question 16, Dangerfield  
13 advises he will not provide."

14 And I just realize now that I actually need to  
15 take you to the questions because the numbering  
16 is different. If you go to tab 23?

17 A Yes.

18 Q Tab 23, paragraph 16, at page 291 of tab 23.

19 A Yes.

20 Q Paragraph 16 simply refers back to paragraph 21  
21 of your April 25th letter?

22 A Yes.

23 Q It says you are still awaiting a reply. What  
24 that means is paragraph 16 is the open box  
25 disclosure request.

1 A Yes.

2 Q And the Crown appears to be saying that they  
3 will not provide it. And that's consistent with  
4 the note that you have on the questions memo,  
5 which says, as I read it, "won't provide"?

6 A Yes.

7 Q So I've got a few questions for you arising out  
8 of this sequence. The first is, is this ability  
9 to go into the police files or have your  
10 investigator go into the police files and look  
11 for material yourself, is that something that  
12 was granted to you in previous cases --

13 A Yes.

14 Q -- as you recall?

15 A Yes. Mr. Dangerfield had in the previous cases,  
16 the one I referred to, initially charged,  
17 Mr. Grywinski was charged after that. I went  
18 into his office and he had the file there on his  
19 big desk, and he told me what I could look at,  
20 what we would have to discuss, and what I  
21 couldn't look at.

22 Q Okay. So you had an opportunity in other cases  
23 to look at the Crown file. The question I asked  
24 you is just slightly different. Have you ever  
25 had a situation where you were granted what you



1           were asking for ultimately here, which is an  
2           opportunity to go down to the police station and  
3           look at the police file?

4       A     That usually didn't happen that way.  You could  
5           look at some things on a police file.  For  
6           instance, you could interview a police officer,  
7           if you made prior arrangements and the police  
8           department permitted it.  Then you could go  
9           through an examination of the materials he had.  
10          And yes, I've done that on many occasions in  
11          Manitoba and Ontario.  I've gone down to  
12          identification officer's work station and gone  
13          through the material he had and got an  
14          explanation of what he did and why he came to  
15          the conclusions that he came to.  I've done that  
16          in Manitoba, Saskatchewan and Ontario.  It's not  
17          an unusual thing.

18       Q     Right.  And when you meet with an officer like  
19           that, what was the practice, would you get an  
20           opportunity to go through the officer's notebook  
21           at that point?

22       A     Well, usually they didn't like that.  Usually  
23           what they wanted to do was give the notes to the  
24           Crown and you could sit with the Crown and get  
25           disclosure from the Crown.  You didn't get

1 disclosure from the police. Unless, as I say,  
2 it was maybe an identification officer or an  
3 officer that they didn't think was particularly  
4 relevant to the case. Usually you didn't go  
5 down to the police station.

6 In this case, as you will recall, they  
7 invited me down to the police station because  
8 they said, come down and we will listen to the  
9 tapes together, five and a half hours worth,  
10 which I did.

11 Q So from your perspective, what would the value  
12 have been in being granted the kind of access  
13 you were seeking here?

14 A Well, I wanted to know what was surrounding the  
15 interviews with Mr. Zanidean, how it came to be  
16 that he gave this statement, not just what the  
17 statement was, I wanted to see what  
18 encouragements he got, what discouragements he  
19 got, how it came that -- how long it took, who  
20 was with him, lots of things that might appear  
21 peripheral to the Crown but not to a defence  
22 lawyer.

23 Q Right. And was there any concern in your mind  
24 that there might be documents or information in  
25 the police file that Mr. Dangerfield didn't

1 have?

2 A I'm sure in lots of cases the Crowns get  
3 disclosure, and on later review it turns out  
4 they didn't get as much as they thought they  
5 were going to get. I wasn't going to be  
6 satisfied if Mr. Dangerfield was satisfied, I  
7 wanted to be satisfied.

8 Q Thank you. I think that answers my question.

9 If I can turn now to a different area. We  
10 dealt now with the disclosure in the pre-trial  
11 period, up to and running through the trial. I  
12 would like to now shift the focus to a couple of  
13 disclosure issues that emerge in the post-trial  
14 period. In particular, I am sure we can divide  
15 up usefully into the post-trial period for the  
16 first year and a half so after the trial when  
17 the appeal is pending, and then the period  
18 thereafter.

19 A Yes.

20 Q So just to set the stage, as I understand the  
21 sequence, you end up representing Mr. Driskell  
22 on his appeal and you file a notice of appeal on  
23 his behalf shortly after a guilty verdict; is  
24 that right?

25 A Right.

1 Q The appeal remains before the Court for about  
2 the next year and a half until December of  
3 1992 --

4 A You're correct.

5 Q -- until it was dismissed. There are two  
6 particular developments that I would like to  
7 focus on that happened during this year and a  
8 half period when the appeal is before the  
9 courts.

10 And the first one is this anonymous phone  
11 call that you get. And just, again, to set the  
12 stage here, just in terms of the dates, you will  
13 recall that Mr. Zanidean testifies on June 11th,  
14 and the trial then ends with a guilty verdict on  
15 June 14th. So six days after the trial ends,  
16 which is nine days after Zanidean has testified,  
17 if I understand from your file, you get an  
18 anonymous phone call from a person who claims  
19 that they have information that an important  
20 witness, as they put it, lied at Driskell's  
21 trial. The reference -- because fortuitously,  
22 you make a tape-recording of the call, and you  
23 have it transcribed. And the transcript is at  
24 tab 47, page 429. It's also referred to in a  
25 memo to file at tab 49, page 441. But we've

1 already had the tape played in these  
2 proceedings. And the transcript is  
3 self-explanatory, so I don't think there is any  
4 value in my reviewing it with you now. But  
5 suffice it to say, tell me if I've summarized  
6 this accurately based on your recollection, the  
7 anonymous caller purports to be a third party,  
8 who is calling on behalf of this important  
9 witness?

10 A Right.

11 Q But he let's it slip several times that it's  
12 really him. It's the one of the oldest, most  
13 peculiar attempts in the world to pretend that  
14 he is calling for a third party. But what he  
15 ultimately does is says that he is going to talk  
16 to his own lawyer and then get back to you next  
17 week?

18 A Right.

19 Q Do you recall that?

20 A Yes.

21 Q So my first question is, did you ever hear from  
22 this guy again?

23 A No -- I don't know.

24 Q I should probably rephrase that. Did the  
25 caller --

1 A If this is Mr. Zanidean, then I did hear about  
2 it because he asked me how the appeal was going.

3 Q Right. But that was some time later. Let me  
4 rephrase the question then. Did this anonymous  
5 caller, who said he was an important witness,  
6 call you back in the next week, like he said he  
7 was going to?

8 A Or ever. Neither he, nor his agent, nor his  
9 lawyer, nor anyone on his behalf ever called me  
10 back.

11 Q And when Zanidean did call you back, this is  
12 referred to in your statement, that's some time,  
13 almost a year later, in the spring of '92, in  
14 any event; is that right?

15 A Yes.

16 Q And he doesn't say, oh, by the way, I was the  
17 anonymous caller --

18 A No.

19 Q -- Zanidean?

20 A No. He didn't say that.

21 Q Let me ask you this, did you draw any  
22 conclusions from the fact that this caller, who  
23 said he was going to call you back, didn't call  
24 you back?

25 A Yes. I assumed that he was sorry that he had

1 called me and straightened out whatever problems  
2 he had and was history.

3 Q Yes. Now, before I get into how you reacted to  
4 this anonymous call and what you did, to give  
5 the full context here, I think it's important  
6 that we recognize that this wasn't the only  
7 anonymous call that you got around this time; is  
8 that fair?

9 A That's fair.

10 Q And if you look at tab 48?

11 A Yes.

12 Q You've set out some of the documents from your  
13 file talking about some of the other calls that  
14 you get, or your office gets, or Mr. Garber's  
15 office gets around this time period.

16 The first document, page 413 of tab 48, you  
17 will see is the memo about this June 8th, 1991  
18 call you get at 1:30 in the morning from a  
19 female who asks if you are looking for Ray  
20 Zanidean, who says he might want to talk to you  
21 and gives you the address of the motel, the  
22 Downs Motor Inn?

23 A I didn't record this one, I just wrote it out as  
24 best I could remember as soon as the  
25 conversation took place.

- 1 Q And I understand from the memo that you send  
2 Brian Savage out to investigate this motel?
- 3 A We took the case seriously, and if it was 1:30  
4 in the morning, it was too bad, it was 1:30 in  
5 the morning. We wanted to get Mr. Driskell's  
6 evidence established, so I sent him out.
- 7 Q And he didn't find anything?
- 8 A He found some hay in the back of a wagon and  
9 things. He didn't find anything that was useful  
10 in any event.
- 11 Q Let's note parenthetically, it appears from  
12 police documents that we now have, which I will  
13 take you to momentarily, that Zanidean was  
14 actually staying in a different hotel?
- 15 A I didn't find him.
- 16 Q Pardon me?
- 17 A I didn't find him. I tried to.
- 18 Q Turn over two pages further, page 408?
- 19 A Yes.
- 20 Q There's a phone memo pad, and it appears to be  
21 addressed to, I believe that's "IG". So who  
22 would that be?
- 23 A A secretary in my office.
- 24 Q It's addressed to "IG", is that the secretary?
- 25 A I assume, yes.



1 Q What I recall from your interview is that you  
2 concluded this was likely a message for Ian  
3 Garber?

4 A It could be.

5 Q Is that a possibility?

6 A It could be Ian Garber.

7 Q But in any event, it's a call to your office or  
8 to Mr. Garber's office, one way or the other.

9 A You're probably right, it's probably from  
10 Garber, because I had a secretary named Ivy, but  
11 I don't think she was there at that time. I  
12 think Vera Hill was my secretary at the time.

13 Q And also I suggest that it would be more likely,  
14 if your secretary was taking it, that the caller  
15 wouldn't likely call and leave a message for  
16 your secretary. Would that be fair?

17 A Yes.

18 Q Can I ask you this? You see it's on a memo pad  
19 that says Gregory Cartwright and a phone number?

20 A Yes.

21 Q Who is Gregory Cartwright?

22 A I think they made stationary.

23 Q I think they make stationary. It's a stationary  
24 company.

25 MR. DAWE: I apologize, I'm from out of town.

1 THE COMMISSIONER: Thought it was Bonanza.

2 BY MR. DAWE:

3 Q In any event, the gist of this message is this  
4 woman says, the message is that Driskell is  
5 innocent, and she, the caller, is not going to  
6 keep quiet any longer, she is going to start  
7 talking and will call back around 4:30 or 5:00  
8 or tonight? To your knowledge, did she ever  
9 call back?

10 A No.

11 Q So it seems she changed her mind about this?

12 A I don't know what her mind was.

13 Q The next tab, sorry, the next page, same tab,  
14 still tab 48.

15 A Right.

16 Q This is a memo about a June 19th call you get  
17 from someone who gives you information that  
18 Driskell's not guilty and that you should be  
19 investigating Laurie Coleman and a person known  
20 as Big Foot.

21 A Those are two different people. And, as a  
22 matter of fact, I did try to do some  
23 investigation with regard to those two people.

24 Q Right. And the information here is not just  
25 that they are responsible, but that the gun is

1 in Coleman's home. And am I reading that  
2 correctly?

3 A Yes.

4 Q Now, it appears from your file, and as you've  
5 indicated, that when you get these calls you  
6 have your investigator investigate them. So as  
7 we have seen after the --

8 A Not just my investigator, sometimes I did,  
9 sometimes Mr. Garber did, I mean, sometimes the  
10 other person in the office did.

11 THE COMMISSIONER: Mr. Garber and you shared  
12 offices, did you?

13 THE WITNESS: No. No, he didn't -- he was on  
14 the case initially, and then stayed because he  
15 was on the case initially, but he didn't share  
16 an office.

17 THE COMMISSIONER: All right, sir.

18 BY MR. DAWE:

19 Q Just to maybe, if I can elaborate on this a  
20 little bit --

21 A But he did help me out.

22 Q Just to elaborate on this, Mr. Garber was  
23 originally Mr. Driskell's counsel on this and  
24 then he brought you in?

25 A Yes.

1 Q Perhaps you can explain why it was that  
2 Mr. Garber had to remove himself from the case?  
3 A Well, there was a question whether or not there  
4 was a conflict, because he took the position  
5 that Mr. Driskell had no reason to be afraid of  
6 Mr. Harder, because as soon as the charges were  
7 pled to, the charges against Mr. Driskell would  
8 go away. If that wasn't agreed to by the Crown,  
9 then he would have to testify. If he had to  
10 testify, it would be hard for him to testify  
11 from a counsel's chair.  
12 Q They do call him as a witness, am I right?  
13 A Yes.  
14 Q So, anyway, to get back to the point that I was  
15 making, if you flip over that page, to page  
16 234 --  
17 A Yes.  
18 Q -- there is a memo here in which you talk about  
19 sending Mr. Savage out to investigate this call  
20 that you got about Coleman and Big Foot?  
21 A Coleman is not Big Foot.  
22 Q I know. Coleman and Big Foot, I said, they are  
23 two different people.  
24 A Right.  
25 Q Thanks for making that clear. Tab 49, if you

1 flip over the next tab?

2 A Right.

3 Q There is a July 2nd letter, it appears to be a  
4 letter from you to Legal Aid requesting  
5 authorization to have your detective do some  
6 further investigation?

7 A Yes.

8 Q If I interpret that correctly?

9 A Yes. And I apologize for the retainer being  
10 public like this. I didn't know that my file  
11 was going to be exposed in the fashion that it  
12 has been.

13 Q And if you can turn a few further pages into  
14 that tab, another 1, 2, 3, 4, 5, 6 pages in,  
15 it's the second last page in the tab, tab 49,  
16 page 457?

17 A Yes.

18 Q This is a memo to file from you dated July 26th,  
19 1991?

20 A Yes.

21 Q It's about a conversation that you had with  
22 Brian Savage on July 22nd. In the second  
23 paragraph it says,

24 "He...",

25 "he" meaning Savage,

1           "..has heard nothing further in the course  
2           of his interviewing about who may have made  
3           the calls to me. Everyone has denied  
4           either making them or knowing who made  
5           them."

6           Which calls would this be in reference to?

7    A       The one that you referred to.

8    Q       The anonymous call from the person who said he  
9           is the important witness?

10   A       Primarily, yes.

11   Q       So you've got Savage out there looking for him.  
12           And he hasn't been able to find him; fair?

13   A       I had Savage, as I say, and I had some juniors  
14           in my office and myself, everybody was busy  
15           trying to figure out or to find -- I apologize,  
16           to find out who made that call, and if we could  
17           get him back on line and find out what he was  
18           really talking about.

19   Q       And if you turn over the next page then, page  
20           458, the September 9, 1991 memo --

21   A       Yes.

22   Q       -- from you to Leonard Tailleir. Maybe at the  
23           beginning can you just explain for us who  
24           Leonard Tailleir is?

25   A       Like I've said, I had some juniors in my office

1           who was helping me with the file. Leonard  
2           Tailleur was one of them.

3           THE COMMISSIONER: It's pronounced Tailleu?

4           THE WITNESS: Tailleu. Let me rephrase that, I  
5           pronounce it Tailleu.

6           BY MR. DAWE:

7       Q     Let me put it this way, the only person I have  
8           ever heard pronounce is it Mr. Brodsky, so I  
9           pronounce it Tailleu, too.

10                    Anyway, the gist of the memo is you are  
11           instructing Mr. Tailleu that if you don't hear  
12           anything further from the detective by  
13           September 15th, he should come see you about  
14           preparing -- perhaps, if I can ask you first,  
15           which detective is it that you are referring to  
16           there?

17       A     Savage.

18       Q     And what was it that you were awaiting for  
19           Savage to provide you?

20       A     Well, we were very anxious not just to see  
21           whether the person who said the police put words  
22           in his mouth, who he was and if we could get him  
23           back on track, but we wanted to see if we could  
24           do something further toward figuring out,  
25           finding out -- I apologize again -- who was

1 responsible for this killing. So we were trying  
2 to track people with guns, and why if people  
3 moved away right after the killing, and a lot of  
4 things that. I mean, 15 years ago, I don't  
5 remember all of the things we were trying to do,  
6 but that's generally what we were doing. And  
7 then it came to the point where the important  
8 thing now was to get on with the appeal. Our  
9 searches were coming to naught.

10 Q All right. So, in effect, Savage is out there  
11 looking for information that you might use to  
12 ground a fresh evidence application --

13 A Yes.

14 Q -- if I can put it that way? And you are  
15 instructing Leonard Tailleir that he at some  
16 point --

17 A Don't wait for him. Let's get the appeal on.  
18 He may not find anything. And if he does,  
19 terrific. But if he doesn't, let's just get  
20 going.

21 Q Okay. Now, you recall, from when we spoke to  
22 you in May, it is set out in the summary of your  
23 interview at tab 1, that you told us that you  
24 didn't recognize the caller's voice when he  
25 called you on June 20th, but you thought, or you



1           suspected that it might be Zanidean, just from  
2           the content of the call?

3    A    Yes.

4    Q    And it would be fair to say, I suppose, that if  
5           the caller was telling the truth, and he really  
6           was an important witness in the trial, that  
7           narrowed the field somewhat?

8    A    Yes.

9    Q    Because it had to be either Zanidean or Gumieny,  
10           for all practical purposes?

11   A    You're right.

12   Q    They were the two most important witnesses in  
13           the case.

14           We also now know that some time later in  
15           the summer of 1993, when Inspectors Hall and  
16           Ewatski interviewed Jim Driskell at Stoney  
17           Mountain, and the tape is played for them of  
18           this call, which either Driskell or Janie  
19           Duncan, the private investigator who is retained  
20           at that point, have a copy of, Mr. Driskell  
21           tells Inspectors Hall and Ewatski that he can  
22           recognize the caller as Zanidean. And I  
23           understand from your interview summary that you  
24           didn't, to the best of your recollection, you  
25           didn't play the tape for Driskell while the

1 appeal was pending or have him try to identify  
2 the caller by voice recognition?

3 A It wouldn't have helped.

4 Q It wouldn't have helped. Can you elaborate on  
5 that, why do you think it wouldn't help?

6 A I could go to -- it wouldn't have impressed the  
7 Court of Appeal, in my opinion, to have a fellow  
8 who was convicted of murder saying that one of  
9 the principal witnesses is a liar and now I want  
10 to be acquitted. I needed the police to say  
11 that, not Mr. Driskell.

12 Q So what you needed, if I can sum this up, what  
13 you needed was some sort of independent evidence  
14 not coming from Driskell that the guy on this  
15 phone call was Zanidean and not some crank?

16 A Yes.

17 Q Is that a fair way to put it?

18 A Yes.

19 Q And absent those things --

20 A And even then, I'm sure the Court of Appeal  
21 would have wanted to know what it was the lies  
22 were about and a little more elaboration on what  
23 the fellow was talking about, and what the story  
24 is that he was told to tell. I think we needed  
25 more.

1 Q All right. If I can turn now to what we know  
2 now know, as opposed to what you knew at the  
3 time, I will summarize this for you. And it is  
4 in the documents that we have already reviewed,  
5 but what we now know is that Zanidean and Al  
6 Paul, one of his two police handlers, have a big  
7 argument on January 20th. Zanidean threatens to  
8 Paul that he is going to go the press and say  
9 that his testimony has all been lies. He then  
10 stomps out of the room, with a backwards shot to  
11 Paul that he was saying something to the effect  
12 that he would show the police not to fuck around  
13 with him. And what happened -- he then goes off  
14 to his room and they don't know exactly what  
15 happens.

16 But as a result of this incident, they  
17 decide the next day, the police, apparently in  
18 consultation with the Crown, decide to  
19 discontinue their protection of Zanidean. They  
20 check out of the hotel and they tell Zanidean he  
21 is on his own. And when they check out,  
22 Sergeant Paul obtains a copy of the telephone  
23 records of all of the calls that have been made  
24 from the hotel room. And we have these records,  
25 they are appended to the supplementary report at

1 tab 50 of volume 2. And I don't need you go to  
2 it. I will just state that for the record.

3 What Sergeant Paul indicates in this report  
4 is that a few days later he reviews these phone  
5 records and he discovers that a call has been  
6 placed from Zanidean's hotel room, on June 20th  
7 at 4:53 p.m. to your office.

8 A So my suspicion was right.

9 Q Right.

10 A But I didn't know it at the time.

11 Q And just to indicate, your memo about this call  
12 says the call is at 4:55 p.m. so they dovetail  
13 very closely.

14 A Right. The Court of Appeal still wouldn't go on  
15 my guesses and hunches.

16 Q Right. But, in any event, just to finish the  
17 story of what we now have, Sergeant Paul  
18 preserves the phone records. But it appears,  
19 from what we've heard so far, that he doesn't  
20 make any notes, either of the blow-up with  
21 Zanidean, or of the evidence that he now has  
22 obtained about the call to your office. He  
23 doesn't produce a supplementary report on the  
24 incident, as far as we know, until  
25 September 1993, when he does so at the request

1 of Inspectors Hall and Ewatski?

2 A Well, the fellow was saying, you put words in my  
3 mouth and you watched me lie in court and I told  
4 the lies you gave me, of course, he wouldn't  
5 have made a note of it.

6 Q All right. Well, leaving that aside, what I  
7 really want to ask you is, during the time the  
8 appeal is pending before the court, did you ever  
9 get disclosure of either of these things?

10 A No.

11 Q Either the fact that there had been a big  
12 argument between the police and Zanidean, the  
13 fact that he had threatened to recant his  
14 evidence, or the fact that they had phone  
15 records showing he called your office, none of  
16 these things?

17 A Those are three things, and no.

18 Q Did I say two things? Those are three things  
19 and no, okay.

20 If you had the information, what would you  
21 have done with it?

22 A I would have had more of an investigation done  
23 in connection with that. I would have told the  
24 Court of Appeal that. I would have gone to the  
25 Crown with an application to stay the appeal for

1 a while until we can investigate that. And then  
2 we would have tracked down Zanidean, as best we  
3 could, and found out why he was recanting, what  
4 the recantation was, and go back again to all of  
5 the things I was asking before, was he an  
6 informant against Driskell? What were the lies  
7 and things, all of those things. It would have  
8 been another investigation.

9 Q Okay. And with the goal being that the fruits  
10 of the investigation would potentially be  
11 something that you could put into a fresh  
12 evidence application, is it?

13 A Well, it's a start. But if you start with  
14 Zanidean, now you are going to go to Gumieny.  
15 If this happened to one, and I already knew from  
16 Mr. Kara, I forget his first name, his lawyer,  
17 Sam Starbit, that allegation was that words  
18 being put into his client's mouth too in the  
19 court, then I would have more of a basis to go  
20 and attack Gumieny, or at least see what's going  
21 on there. Because up to that point, I had  
22 nothing to go on with regard to Gumieny.

23 Q Thanks. If I can turn now to what's really the  
24 last area in sort of the post-appeal disclosure  
25 that I would like to take you through, and

1           that's this issue of -- turning again to the  
2           Swift Current file.  And, again, I will frame  
3           the question by giving you a great deal of  
4           background, but this is really the second  
5           development that we are now aware of during the  
6           appeal period.  Just to sort of set the stage  
7           again, it would be fair to say that during June  
8           and July of '91, sort of in the time before the  
9           trial and right after the trial, and in the  
10          month that follows, if I can summarize it this  
11          way, you are pursuing the strategy that you've  
12          devised of having Driskell offer himself up as a  
13          witness against Zanidean in the Swift Current  
14          charges?

15        A     Yes.

16        Q     And the idea is that he would be a witness on  
17               condition that he, being Driskell, would be  
18               granted immunity on the Swift Current charge?

19        A     That wasn't the condition.  That was our  
20               starting point.

21        Q     Okay.

22        A     We agreed that he was going to make a statement,  
23               period.  We would first ask for immunity, and if  
24               we got it, terrific.  If he didn't, he was going  
25               to make a statement in any event.

1 Q So he makes the statement. And then as I read  
2 the documents, the immunity request is conveyed  
3 by the RCMP up through channels in Saskatchewan;  
4 is that fair?

5 A Yes.

6 Q Maybe you can just tell us a bit about what your  
7 goals were, what you hoped would come out of  
8 this approach in terms of defending  
9 Mr. Driskell?

10 A I was getting nowhere with the Crown's office in  
11 Winnipeg. I was getting nowhere with the police  
12 in Manitoba. And I thought that I had to, in  
13 some fashion, organize a credible attack on  
14 Mr. Zanidean. So I decided rather than just  
15 yelling louder, I would call the police. I've  
16 already used up the police forces that I've  
17 talked about. So I went to the RCMP in  
18 Saskatchewan, in the hopes that they would do an  
19 investigation and come up with something that I  
20 could use, because they would be a credible  
21 organization and credible voice in the clearing  
22 of my client's name.

23 Q Okay. And if I can just draw your attention to  
24 this report that's from Mr. Savage at tab 32.

25 A Yes.



- 1 Q The second page in, page 363 --
- 2 A Yes.
- 3 Q -- indicates that Mr. Savage is advising you  
4 that he has spoken to Staff Sergeant Ferguson.
- 5 A Right.
- 6 Q But Ferguson advises they will be unable to  
7 interview Driskell prior to his trial because  
8 they, being the RCMP, cannot make arrangements  
9 on such short notice, so they will interview him  
10 following his trial.
- 11 A That's awful news. I would have liked to have  
12 seen the trial postponed a little, because this  
13 is awful news. We wanted this disclosure, or  
14 this investigation by the RCMP to take place  
15 during the trial. We didn't want to wait until  
16 somebody could say it's sour grapes.
- 17 Q The one thing that emerges at the trial itself  
18 is that -- and correct me if I'm wrong, my  
19 understanding is that this would have been  
20 new to you at this point -- is that Zanidean  
21 tells the story about how the fire in Swift  
22 Current was an act of revenge against his  
23 sister?
- 24 A Yes.
- 25 Q As you recall, was that the first time you heard

1           that tale?

2    A       It's 15 years ago.  I don't remember if that's  
3           the first time I heard that.

4    Q       All right.  Fair enough.  But, in any event,  
5           you knew from Driskell that that wasn't true;  
6           right?

7    A       Yes.

8    Q       Because you knew that he was being paid for it?

9    A       Yes.

10   Q       So I take it after the trial --

11   A       Mr. Zanidean and his sister were in some kind of  
12           a scam to -- I think the story went, she  
13           couldn't sell her house or she didn't get what  
14           she wanted, or couldn't get what she wanted, or  
15           something like that, so she had it burned.

16   Q       So even though you wanted, or you would have  
17           preferred the charge to be laid against Zanidean  
18           before the trial, when that didn't happen, once  
19           the --

20   A       I didn't need a charge against Mr. Zanidean.  I  
21           needed the RCMP to say that what Mr. Driskell  
22           was telling me, that it was a commercial fire  
23           arson, that they did it for money, and the true  
24           circumstances, I needed confirmation from the  
25           RCMP in order to attack Mr. Zanidean.  Whether a

1 charge came from it or not, that would have been  
2 better if a charge would have come.

3 Q Fair enough. The point I'm trying to make, I  
4 guess, is this, that after Zanidean testifies  
5 under oath that it's a revenge fire, then the  
6 RCMP investigation takes on a new significance  
7 because this now gives you a vehicle by which  
8 you can establish that he has, potentially  
9 establish that he has perjured himself; is that  
10 fair?

11 A He did perjure himself, yes, you're right,  
12 apparently perjured himself.

13 Q All right. So the sequence of events is set out  
14 at a series of documents at tab 51. And I will  
15 take you through them fairly briefly, just to  
16 set the stage for what my -- eventually I will  
17 actually have a question here somewhere, you'll  
18 be pleased to know. But, in any event, the  
19 sequence of documents, if you turn to page 444  
20 of tab 51, the second document in?

21 A Yes.

22 Q It's a memo to file about your attendance at  
23 this interview by Staff Sergeant Ferguson on  
24 June 27th with Driskell?

25 A Yes.

1 Q And then flip over the page, a few days later,  
2 July 2nd, Staff Sergeant Ferguson writes you?

3 A You are referring, wait a minute, you are  
4 referring to,  
5 "It is apparent that after the argument  
6 between the writer and Zanidean over the  
7 witness protection, Zanidean carried  
8 through..."

9 Q No, we are on tab 51 now.

10 A Sorry, I'm on tab 50, I apologize.

11 Q Okay. Tab 51 is a series of documents all in  
12 the same tab. And the first one, the first and  
13 second documents are kind of repetitive, but  
14 they both deal with the arrangements to have  
15 Ferguson come to Winnipeg and interview  
16 Driskell?

17 A Right.

18 Q And the first document I took to you is page 44,  
19 and it just indicates when this happened?

20 A Right.

21 Q It was June 27th. The next page, it's a letter  
22 from Ferguson to you?

23 A Right.

24 Q And he's providing a copy of the statement and  
25 he says he is forwarding his report to

1 Saskatchewan Justice with a request for the  
2 formal granting of immunity to any arson charge  
3 against Driskell?

4 A Right.

5 Q So that's the point I alluded to before about  
6 referring the immunity request up the channels.  
7 If you turn over the page, page 453?

8 A Yes.

9 Q It is another file memo, this one about a  
10 conversation you seem to have with, it says "the  
11 RCMP Staff Sergeant." And I take it that's  
12 Ferguson --

13 A Yes, it is.

14 Q -- from the name below. And he says, he tells  
15 you he has got a meeting about the immunity  
16 issue on Tuesday, the following week. That's  
17 the third paragraph?

18 A Yes.

19 Q And he suggested that he is expecting immunity  
20 for both. And I take it that means both  
21 Driskell and Zanidean, is that how you interpret  
22 that?

23 A It could, yes.

24 Q And as I read this, you are attempting to  
25 dissuade him from granting immunity to Zanidean.

1           And you say, well, why don't you get immunity  
2           for Driskell first and see how that goes?

3    A       Right.

4    Q       And then the last document in this tab, the next  
5           page, page 455, is a letter to you dated  
6           July 18th, in which Staff Sergeant Ferguson  
7           indicates that he has now met with the Criminal  
8           Operations Supervisor in Regina on the 18th, and  
9           he has been instructed that more investigative  
10          background be supplied?

11   A       Right.

12   Q       So, in effect, he is writing to tell you that he  
13          has been ordered by superiors to go conduct a  
14          further investigation before they will decide on  
15          the immunity issue. Do you recall that?

16   A       I see it. It is right in front of me.

17   Q       Yes, that too. Now, at this point the paper  
18          trail and your file, unfortunately, runs a bit  
19          dry. And we don't have any further  
20          correspondence in your file that we may have  
21          liked to locate from the RCMP, or from anybody  
22          else for that matter, explaining what happened  
23          with the RCMP investigation or what you knew  
24          about it. So if I can just ask you, from your  
25          memory, what do you recall about how this all

1           wound up after this July 18th letter?

2    A       I'm not sure I understand that, how it all ended

3           up?

4    Q       Well, you've been told -- on July 18th you get a

5           letter from Staff Sergeant Ferguson saying that

6           we are going to conduct a further investigation

7           and get back to you?

8    A       I spoke to Mr. -- I went out to the

9           penitentiary, as it says on page 513.

10   Q       Yes, that's the next document.

11   A       To discuss this with --

12   Q       Actually, I think the 513 document is actually

13           Leonard Tailleux is going to the penitentiary --

14   A       Yes.

15   Q       -- to deal with it?

16   A       And I spoke to Mr. Driskell myself, and he did.

17           And I spoke to Mr. Savage on a number of

18           occasions, and where the memos are, I don't

19           know. And I don't know why the file went dry.

20           I just don't know.

21   Q       Well, leaving aside the question of where the

22           documents are --

23   A       Or if.

24   Q       -- what's your own recollection of how this

25           matter was resolved? Let me put it this way, to

1 your knowledge, was Zanidean ever charged?

2 A It wasn't resolved because I was advised that  
3 there was a blockage from on high in connection  
4 with the prosecution of Mr. Zanidean, or the  
5 further investigation of him. Why there was a  
6 blockage, I was not informed or given any  
7 detail. Who the blockage came from or how long  
8 it would last, I just didn't know.

9 Q Okay. And do you recall --

10 A And I tried to go wander around talking to this  
11 Crown, that person, this person. Mr. Savage,  
12 try and talk to your old friends on the force,  
13 see what you can find out, what's this blockage  
14 about? I couldn't.

15 Q Okay. Do you recall who told you about this  
16 blockage originally?

17 A I think it was Savage, as a matter of fact.

18 Q Okay. Do you recall --

19 A I think he was in quite a bit of a huff because  
20 there was no reason given for the blockage. I  
21 apologize for the word, but I think that was the  
22 word that was used at the time.

23 Q And do you recall whether you made any inquiries  
24 yourself?

25 A Of course I made inquiries.



1 Q Do you remember who you inquired of?

2 A Everybody that I could see that could do  
3 something or might know something about it.  
4 It's a significant thing.

5 Q Can you remember anyone in particular you talked  
6 to?

7 A Well, I probably talked to the Director of  
8 Prosecutions, maybe I talked to Mr. Whitley.  
9 Anybody, I would talk to anybody who could stop  
10 an investigation in another province.

11 Q Okay.

12 A I may have talked to -- and they all, whoever I  
13 spoke to -- and I apologize for not remembering  
14 who I specifically spoke to -- said take it up  
15 with Dangerfield. And he just repeated the same  
16 old thing, we don't control the Saskatchewan  
17 Police forces.

18 Q All right. And if I can just take you to this  
19 memo that Mr. Tailleux writes you on May 11,  
20 1992, you'll note that he refers to -- the last  
21 document on tab 51.

22 He speaks of showing Driskell a letter that  
23 was received from the RCMP, and he goes on to  
24 say,

25 "...and, of course, he...",

1 he being Driskell,

2 "...is not happy about it."

3 Are you able to remember what this letter was  
4 and what it was about?

5 A No. I assume it's the letter that precedes that  
6 page 455, the one that they are continuing --  
7 no, I don't.

8 Q Well, the dates don't really match. The first  
9 letter is July of 1991, the next memo is written  
10 in May of 1992.

11 A I don't remember what letter, like I say.

12 Q Okay. You have no recollection. That's fine.

13 All right. Well, if I could now take to  
14 you tab 54, I'll just go through with you what  
15 we now have in terms of documents about what  
16 things are going on that you may not have known  
17 about during this period. First of all, if you  
18 turn two pages into the tab, tab 54, the second  
19 document of the tab, it is a letter headed  
20 January 16, 1992?

21 A Yes.

22 Q Addressed to Bruce Miller?

23 A Yes.

24 Q If you turn over the page, it's on Saskatchewan  
25 Public Prosecution's letterhead, and it's a

1 letter from Richard Quinney, the Acting  
2 Executive Director?

3 A Right.

4 Q And just to summarize the letter, I won't read  
5 it out to you, but the gist of it is, in  
6 essence, Mr. Quinney is writing to Mr. Miller  
7 and he is advising him that, first of all, that  
8 the Swift Current RCMP has investigated further  
9 and they have satisfied themselves that the fire  
10 was, in fact, insurance arson, as Driskell said?

11 A Yes.

12 Q It wasn't a revenge arson, which is what  
13 Zanidean testified to, as you know.

14 A Right.

15 Q Secondly, there appears to be information  
16 Mr. Quinney knows about from the Swift Current  
17 RCMP to the effect that they were told by  
18 Sergeant Anderson of the Winnipeg Police that  
19 Zanidean had threatened that he would recant his  
20 evidence against Driskell at trial, the evidence  
21 that he gave against Driskell at trial, to the  
22 media, if he was charged with the Swift Current  
23 arson?

24 A Right.

25 Q And the third point is that Mr. Quinney has

1 concluded, on the basis is a bit uncertain, but  
2 he has concluded that there is, if I can put it  
3 this way, that there is sufficient evidence that  
4 if Zanidean had somehow been granted immunity on  
5 the Swift Current arson, that it would allow  
6 him, Zanidean, to successfully raise an abuse of  
7 process argument if he is now charged with it,  
8 so that is the reason he is not being charged by  
9 Saskatchewan, it appears?

10 A Right.

11 Q And then if you turn over to the next letter,  
12 the March 9th, 1992 letter? Mr. Quinney writes  
13 to Mr. Miller again, this time he encloses a  
14 report that sets out the evidentiary basis for  
15 the RCMP's conclusions that he has referred to  
16 already.

17 A Yes.

18 Q And then if you turn over the next page in the  
19 tab, the July 7th memo addressed to  
20 Mr. Dangerfield from Mr. Miller, it appears  
21 that, Mr. Miller seems to be forwarding the  
22 Saskatchewan material to Mr. Dangerfield?

23 A It looks that way.

24 Q So the question that I have for you is, was this  
25 information that was in Mr. Quinney's letters to

1 Mr. Miller disclosed to you before the appeal  
2 was argued?

3 A Absolutely not, nor were they hinted at, or  
4 suggested. In no fashion were they disclosed to  
5 me.

6 Q And if you turn over to the next page, we now  
7 have a memo dated March 11, 1993, so I will just  
8 note parenthetically, this is now in the  
9 post-appeal period, at least in terms of the  
10 appeal to the Court of Appeal?

11 A Yes.

12 Q It has been dismissed in December of 1992?

13 A Yes.

14 Q And there is again a memo from Mr. Miller to  
15 Mr. Dangerfield questioning, raising the  
16 question of whether the Saskatchewan information  
17 has been disclosed to counsel of Mr. Driskell,  
18 that being you, and whether, if it was not  
19 disclosed, whether they should do so now.

20 So the last document on the tab, on its  
21 face it seems to be a letter, a memo from  
22 Mr. Whitley to Mr. Miller in which he refers to  
23 George, Mr. Dangerfield, having drafted a letter  
24 to you to accompany this disclosure when it's  
25 made?

1 A "I respectfully request that you review  
2 the draft responses prepared."

3 But I don't know if he did or he didn't.

4 Q But leaving aside that, and obviously you are  
5 not privy to the inner workings of the  
6 Department of Justice, my question -- this is  
7 all just by way of a set-up -- my question to  
8 you is, did you ever receive a letter enclosing  
9 the Saskatchewan material in 1993 or any time  
10 after?

11 A I didn't get the Saskatchewan material. I  
12 wasn't advised of the Saskatchewan material,  
13 even if I didn't receive. It wasn't suggested  
14 to me there was such material. The findings  
15 were not referred to me in any fashion, or, as  
16 I've already said, even hinted at. I didn't  
17 know anything about it.

18 Q Okay. My last question for you is really sort  
19 of a double barreled question, but perhaps you  
20 can just explain for us, if you had received  
21 this material, and the double barrel part of the  
22 question is, if you had received it before the  
23 appeal was argued in the Court of Appeal, or if  
24 you had received it after the appeal was argued,  
25 explain what would you have done with it?

1 A I would have been -- it would have formed the  
2 basis of the appeal, one. Two, we would adjourn  
3 the appeal and try to convince the Crown not to  
4 proceed, or we would have made a motion for  
5 fresh evidence, if we had to. But we certainly  
6 wouldn't have let it go. In my opinion, then  
7 and now, it would have secured the acquittal of  
8 Mr. Driskell.

9 Q All right. And if you had received it after the  
10 appeal was dismissed, what would your --

11 A But I still could have made my motion for fresh  
12 evidence. I mean, it wasn't my fault that I  
13 didn't get it. If I got it after the  
14 conviction, I still could make a motion to the  
15 court to re-open. And it depends on when, how  
16 long after the appeal, as to whether I would  
17 have gone to the Supreme Court and made my  
18 motion or incorporated that new material in that  
19 appeal. But I wouldn't have just let it go.

20 Q All right. And would you agree that one of the  
21 options at the Supreme Court is you can always  
22 apply for an extension of time, even if you are  
23 out of time?

24 A Yes.

25 Q It is not unheard of it. Okay. Thanks, those

1 are my questions. It is now almost 3:15. I am  
2 not sure if this is an appropriate time for the  
3 afternoon recess, or we should just carry on,  
4 but I will leave that up to the Commission.

5 THE COMMISSIONER: Okay. Who is going to begin?  
6 Would you like a recess now, then?

7

8 MR. LOCKYER: I don't mind, by all means.

9 THE COMMISSIONER: Okay. 15 minutes.

10 THE CLERK: All rise. This Commission of  
11 Inquiry is now recessed.

12 (Proceedings recessed at 3:15 and  
13 reconvened at 3:32 p.m.)

14 THE CLERK: All rise. This Commission of  
15 inquiry is now recommenced, please be seated.

16 THE COMMISSIONER: Go ahead, Mr. Lockyer.

17 MR. LOCKYER: Thank you, Mr. Commissioner.

18 BY MR. LOCKYER

19 Q Mr. Brodsky, as one defence counsel to another,  
20 sir, how do you feel about the way you got  
21 treated in this case?

22 A Very badly.

23 Q Can you elaborate?

24 A Well, the people who I thought were my friends,  
25 honest and honourable, kept things from me that



1           they ought not to have, and somebody spent time  
2           in prison for years because of it. I was  
3           astonished that that would happen.

4    Q       When did you first start -- do you remember when  
5           you first really started finding out that you  
6           were sort of almost on a trial by ambush, a  
7           trial where things were kept from you that  
8           shouldn't have been? When did you first start  
9           realizing just how bad it was?

10   A       When I had asked the same questions over and  
11           over again, and you either get no answer, part  
12           of an answer, or what are you bothering me for,  
13           I knew something strange was up.

14   Q       Am I right, Mr. Brodsky, that perhaps you really  
15           only started getting actual answers in 2003?

16   A       Yes.

17   Q       And in 2003, sir --

18   A       I had the questions during the trial, I  
19           certainly didn't have the answers until 2003,  
20           you're right.

21   Q       Right. And then you started getting them bit by  
22           bit, is that right, sir?

23   A       Right.

24   Q       And you were -- sorry, Mr. Commissioner, we have  
25           a book of materials here for Mr. Brodsky's

1 questioning?

2 THE COMMISSIONER: This will be Exhibit 21, is  
3 it?

4 THE CLERK: Yes, Mr. Commissioner.

5 (EXHIBIT 21: Book of materials for Mr.  
6 Brodsky's exam by Mr. Lockyer)

7 BY MR. LOCKYER:

8 Q And I am not going to refer to all of the  
9 documents in here, sir, but I will refer to some  
10 of them. I will start by referring to a couple  
11 of affidavits that you swore in support of  
12 Mr. Driskell's release application in November  
13 of 2003. Do you remember that, sir?

14 A I do.

15 Q And you were asked to prepare these in part as a  
16 way of demonstrating to the court that was going  
17 to hear Mr. Driskell's application, that  
18 material that was now before the court had not  
19 been made available to you back at the time of  
20 trial, or at the time of the appeal; is that  
21 right?

22 A You're right.

23 Q Could we just go to the first affidavit that you  
24 swore, sir, which is at tab 8? That's sworn by  
25 you on October 27th, 2003. The bail was

1 actually held towards the end of November of  
2 2003?

3 A Yes.

4 Q And if you go to paragraph 9, 10, 11 and 12,  
5 sir, I wonder if you could read out paragraph 9  
6 first of your affidavit?

7 A "It was never disclosed to me that  
8 Mr. Zanidean had been placed in a Witness  
9 Protection Program, or anything like such a  
10 program, nor was I ever advised that the  
11 Province of Manitoba was paying him  
12 substantial sums of money prior to his  
13 testimony and intended to pay him further  
14 sums of money after his testimony. In  
15 particular, I was never advised that  
16 Mr. Zanidean was to receive a considerable  
17 cash payment after he testified against the  
18 applicant."

19 All of that I said then, swore to, and it's true  
20 now.

21 "In the winter of 2003 I was advised..."

22 Q Okay. Before you move on, just taking paragraph  
23 9, sir?

24 A Okay.

25 Q It's fairly to the point. When was it and how

1 was it that you received the information in  
2 paragraph 9 that you were then able to say you  
3 had never known before?

4 A I think I saw a letter. I wasn't very  
5 successful.

6 Q No. I think that's a mild way -- sort of an  
7 understatement, you weren't. But I'm asking you  
8 when you got the information? Do you remember  
9 how long before you swore this affidavit?

10 A Not long before it.

11 Q Not long, a matter of weeks or months?

12 A Yes.

13 Q And it's all true, paragraph 9, sir?

14 A Absolutely.

15 Q And that information, sir, just focusing for a  
16 minute on Mr. Zanidean, the information that you  
17 didn't get or that you have listed there or  
18 itemized there in paragraph 9 would you have  
19 enabled to you do what where Mr. Zanidean was  
20 concerned?

21 A Well, the whole complex of the trial would have  
22 been changed in different -- you're talking  
23 about the letter that is at tab 4. If I had  
24 that information before me, I could have  
25 attacked Mr. Zanidean, established that he was a

1 liar, so found by the RCMP. I would have been  
2 able to establish that his story was a bought  
3 one. I then could have moved on to Kara, who  
4 said his was a threatened one. He had to hire a  
5 lawyer, a Mr. Starbit, because of his problems  
6 in court. And then we would have had a basis  
7 for attacking Mr. Gumieny, which up to the time  
8 he testified, and after, I had no basis for  
9 knowing anything about Mr. Gumieny. The whole  
10 complexion of the trial would have changed had I  
11 known the things that I see in paragraph, and  
12 swore to in paragraph 9.

13 Q And paragraph 10, sir, if you could read that  
14 out?

15 A "In the winter of 2003, I was advised by  
16 representatives of AIDWYC that..."  
17 And I have to pause, Mr. Commissioner, because I  
18 called AIDWYC, and it is a good thing that I was  
19 lucky enough to have them intercede, because I  
20 was certainly getting nowhere. And I just want  
21 to congratulate them for getting where I  
22 couldn't.

23 "In the winter of 2003, I was advised by a  
24 representative of AIDWYC that it had now  
25 been disclosed that Mr. Zanidean received a

1           total amount in excess of \$64,000..."

2           which is astounding, I interject, to me,

3           "...for his involvement in the applicant's

4           prosecution. Failure to disclose this

5           information prevented the applicant from

6           making full answer in defence at his

7           trial."

8           It is clear, he was talking about \$50 and losing

9           his house, and \$50 a day for testifying and

10          losing his house. And oh, my gosh, what a

11          horrible situation he was in, and then it turns

12          out that he got \$64,000, a humongous -- that's a

13          very large amount of money.

14    Q       It turned out to be more than \$80,000 by the

15              time the Department of Justice had finished in

16              Ottawa, sir.

17    A       \$64,000 is a lot of money.

18    Q       I'm sorry?

19    A       If 64 is a lot of money, 80 is a lot more.

20    Q       Indeed. And short of what you were told by

21              Mr. Zanidean, the \$50 a day and the losing of

22              his house, I mean, what impression do you think

23              the jury had of Mr. Zanidean, and why he was

24              there, and what the consequences to him were of

25              being there, by the time your cross-examination

1 of him had finished? I mean, did you sit down  
2 at the end of your cross-examination and feel,  
3 by gum, I've got him, and the jury is going to  
4 think that he is just here for his own purposes?

5 A No, I didn't. I thought that the jury might  
6 think that he put himself at risk by coming to  
7 court. He gave up all of this material things,  
8 these material things. It cost him in many  
9 ways. Why would he do this? Why would he come  
10 to court? He didn't say anything in the  
11 transcripts of the wiretapped conversations with  
12 Mr. Driskell that would indicate that he was  
13 lying here. I mean, I was afraid the jury would  
14 see him as a person who put himself out to see  
15 that Mr. Driskell was convicted of a crime he  
16 had committed, when, in fact, Mr. Driskell  
17 didn't commit any crime.

18 Q And did anyone say a word to you, sir, after the  
19 cross-examination of Mr. Zanidean had concluded?  
20 Mr. Dangerfield in particular, or Mr. Lawlor,  
21 for that matter, to say, you know what, Greg,  
22 you just heard a tissue of lies and we have got  
23 to tell you all about it?

24 A Absolutely, they did not. Nobody did, nobody  
25 said it, nobody hinted at it.

1 Q Not a word?

2 A Not a word, not a whisper.

3 Q Paragraph 11, sir?

4 A "During the trial I wanted to know whether  
5 Mr. Zanidean had been promised..."

6 THE COMMISSIONER: Mr. Brodsky, just remember  
7 the reporter.

8 THE WITNESS: Okay. Thank you.

9 "During the trial I wanted to know whether  
10 Mr. Zanidean had been promised that he  
11 would not been prosecuted for an arson in  
12 Swift Current if he cooperated with the  
13 authorities in the prosecution of the  
14 applicant. I saw this as a crucial issue  
15 to his credibility. Mr. Zanidean denied  
16 this was so in his testimony in the  
17 applicant's trial. I have been asked by  
18 AIDWYC's representatives whether I had been  
19 told by the authorities that Mr. Zanidean's  
20 denial was false or that the authorities  
21 had good reason to believe it may be false.  
22 The answer is I have not."

23 That was true when I swore it, it is true.

24 Q Now, at the time that you swore that, sir, I  
25 understand you hadn't yet had a chance, if I



1 remember rightly, to see the Perry Dean Harder  
2 homicide review; is that right? It was still  
3 under wraps, so to speak?

4 A Why it was being kept from me, I don't know.  
5 Yes, that's right.

6 Q Well, it wasn't just you, it was sort of  
7 everyone else as well, sir. But just for your  
8 information, sir, the last part of that  
9 paragraph, really it was extrapolated from a  
10 section of the review. Hopefully everyone has  
11 it. Does everyone have it? But page 79 of the  
12 review, sir. And you know the review is written  
13 by four senior officers, including the present  
14 Chief of Police?

15 A Yes.

16 Q And they spent quite a lot of time talking about  
17 this whole issue surrounding whether or not  
18 Mr. Zanidean was given immunity from prosecution  
19 on the arson in Swift Current, sir. And at page  
20 79, towards the bottom of the page, and I'm just  
21 reading sort of a five line summary of it, they  
22 say the following:

23 "Nevertheless, after reviewing this aspect  
24 of the investigation, it is evident an  
25 issue can be made as to how the Winnipeg

1 Police Department dealt with Ray Zanidean.  
2 A strong suggestion may be made that some  
3 sort of a deal was struck with him in which  
4 he would be granted immunity from  
5 prosecution for the Swift Current arsons if  
6 he testified against Driskell."

7 Now, did you have any evidence yourself, sir, or  
8 any disclosure yourself, back in 1991, to  
9 support that suggestion, let alone to support  
10 that strong suggestion?

11 A I had nothing.

12 Q You just had your own feelings; am I right?

13 A But I can't go to court with gut feelings.

14 Q Right. And it's on that basis, sir, that I  
15 think that that paragraph of the affidavit,  
16 paragraph 11, came to be sworn.

17 And then paragraph 12, sir?

18 A "Neither in preparation for the applicant's  
19 trial, nor for his subsequent appeal, was I  
20 ever advised that Mr. Gumieny had been  
21 placed in a Witness Protection Program and  
22 paid substantial amounts of money. In the  
23 winter of 2003, I was advised by  
24 representatives of the Association for the  
25 Defence of the Wrongfully Convicted of

1           these facts. This information should have  
2           been disclosed to me so that I could  
3           conduct an effectively cross-examination of  
4           Mr. Gumieny."

5           He was a very, very important witness in this  
6           case.

7    Q    Yes. And?

8    A    I had nothing. He wasn't getting even the \$50 a  
9           day. There was nothing that I had to say that  
10          he was telling a story that was full of lies.  
11          It was a very difficult situation to be in for  
12          Mr. Driskell. I had no basis to attack him. I  
13          didn't know about any money and I didn't know --  
14          I didn't know about all of the lies.

15   Q    And do you remember, sir, whether you even  
16          attempted to do to Mr. Gumieny what you did to  
17          Mr. Zanidean, or attempted with Mr. Zanidean in  
18          cross?

19   A    I didn't, because I didn't have a basis for  
20          doing it. Asking a question will rebound badly  
21          on counsel and his client if it's just up in the  
22          air. You are just throwing -- making spurious  
23          allegations with no proof at all.

24   Q    So Mr. Gumieny, by the end of his  
25          cross-examination, is just up there with a

1 witness as a nasty background but no apparent  
2 motive to lie? Am I right?

3 A That's right. Nasty background ties with my  
4 client, a friend of my client, makes him sound  
5 nasty too --

6 Q Yes.

7 A -- if he's associating with fellows like  
8 Mr. Gumieny.

9 Q As well, sir, you swore a second affidavit, I am  
10 going to come back to this affidavit later, but  
11 at the next tab you swore a second affidavit on  
12 the 21st of November, 2003. Do you remember  
13 that?

14 A Yes.

15 Q And this affidavit was as a result of a  
16 disclosure of the -- or primarily as a result of  
17 the disclosure of the exchange of correspondence  
18 that was going on between Saskatchewan Justice  
19 and the Manitoba Justice in the period early  
20 2002. Do you remember that?

21 A Yes.

22 Q You have been taken through it by Commission  
23 Counsel?

24 A Yes.

25 Q And you've had a chance, well, indeed it was all

1 attached as an exhibit to this affidavit, so you  
2 had a chance back in 2003 to see that  
3 correspondence for the first time?

4 A Yes.

5 Q Which was disclosed, if you look at tab 1, to  
6 Mr. Driskell's counsel by way of a letter from  
7 Mr. Schille on November 18th of 2003. Do you  
8 see that as the first exhibit, so to speak?

9 A Tab 1?

10 Q To your affidavit of November 21st?

11 A Yes.

12 Q "Please find..."

13 reading Mr. Schille's letter,

14 "Please find enclosed correspondence

15 relating to the involvement of

16 Mr. Zanidean..."

17 A Yes, I see that.

18 Q "...in the arson of his sister's home in  
19 Swift Current in Swift Current,  
20 Saskatchewan. It is clear this information  
21 should have been disclosed. The internal  
22 correspondence attached references a draft  
23 letter that was prepared for Mr. Brodsky.  
24 In my dealings in this matter, I have  
25 always operated on the assumption that

1           Mr. Brodsky was made aware of this  
2           information back in 1993. The Crown file  
3           does not contain any copy of a draft letter  
4           or any other evidence that such a letter  
5           was sent."

6           I will just ask you a couple of questions  
7           arising out of that.

8           First of all, sir, the correspondence from  
9           Saskatchewan Justice, you'll recall that there  
10          were two letters, one in January of '92 and one  
11          in March of '92, from Mr. Quinney of  
12          Saskatchewan Justice, both saying that the  
13          information contained in those letters, or  
14          urging Manitoba Justice, should I say, to  
15          disclose the information contained in those  
16          letters to you pursuant to the decision in  
17          Stinchcombe?

18        A        Yes, I do remember that.

19        Q        Remember that? Stinchcombe was in operation in  
20          early '92; is that right, sir?

21        A        Yes.

22        Q        Do you happen to remember when it was handed  
23          down? I think it was November 6th of '91, for  
24          your information, I think. I know it was  
25          November of '91.

- 1 A Okay, I accept that. I think they were --
- 2 Q You are now --
- 3 A I think they were encouraging, not just because  
4 of Stinchcombe, I think they were encouraging  
5 the turning over of the material to me because  
6 it was material. And Stinchcombe clearly said  
7 that disclosure had to be made, it wasn't an  
8 optional thing. You didn't have to like it, you  
9 just had to do it.
- 10 Q Well, let me ask you this, sir, we're back in  
11 early 1992, there is these two letters coming in  
12 from Saskatchewan Justice, a justice system  
13 which really has nothing to do with the Driskell  
14 case, except by chance; right?
- 15 A Right.
- 16 Q Through a connection with a material witness --
- 17 A Yes.
- 18 Q -- for the prosecution. Can you think of any  
19 reason why Mr. Dangerfield, Mr. Miller,  
20 Mr. Whitley, Mr. Lawlor, and God knows who else,  
21 couldn't have at least come to you and said  
22 something to you about it?
- 23 A No.
- 24 Q I mean, were you seeing -- do you see these  
25 people regularly, sir, in your practice? You

1 cross their paths?

2 A Yes, I saw them regularly.

3 Q Were you in contact from time to time with  
4 Mr. Dangerfield and/or Mr. Lawlor as you  
5 prepared the appeals?

6 A I was in contact with them, not just on this  
7 case, I was in contact with them a lot.

8 Q Right.

9 A They never said anything, and they should have.

10 Q Did the --

11 A That is -- I don't want to be too picky, but it  
12 shouldn't have been just at a meeting to talk  
13 about Driskell. They should have just told me  
14 when they saw me in the hallway or in the street  
15 or anywhere. It was important material that  
16 should have been turned over to me.

17 Q It seems to me it is a matter, it involves  
18 matters on which you have been making numerous  
19 disclosure requests, am I right?

20 A Yes.

21 Q It involved matters on which you had  
22 cross-examined the material Crown witness?

23 A Yes.

24 Q It arguably established matters which showed  
25 that that material Crown witness had not told



1 the truth?

2 A Yes.

3 Q Is that right?

4 A Yes.

5 Q Could you think of any reason they wouldn't have  
6 told you about that, sir?

7 A They were embarrassed.

8 Q Embarrassed?

9 A You are asking me to guess. I mean, I couldn't  
10 do this in a courtroom. But can I think of a  
11 reason? There is no reason. The only thing I  
12 can think of is they were embarrassed they  
13 hadn't done it.

14 Q Perhaps I can ask you, move you forward 11  
15 years, sir, and here we have Mr. Schille saying  
16 in this letter to Mr. Driskell's counsel,

17 "In my dealings with this matter, I have  
18 always operated on the assumption that  
19 Mr. Brodsky was made aware of this  
20 information back in 1993."

21 Having said that, he then says in the next  
22 sentence,

23 "The Crown file does not contain any copy  
24 of a draft letter or any other evidence  
25 that such a letter was sent."

1 Has Mr. Schille ever spoken to you about those  
2 two mutually contradictory sentences, which seem  
3 to say the complete opposite of each other, one  
4 after the other?

5 A No. And I don't want to be silly, but obviously  
6 if I would have got it in 1993, there would have  
7 been a motion to the court right away. There  
8 would have been a flurry of letters to the  
9 Crown's office. I would have acted on it. As  
10 you can see from the rest of my file, I don't  
11 sit on things, and didn't in connection with  
12 Mr. Driskell. Not only is there no copy of that  
13 letter, or a disclosure made to me, there is no  
14 responses. There should have been, and would  
15 have been, had disclosure been made to me.

16 Q But has Mr. Schille ever said anything to you  
17 about this, sir?

18 A No.

19 Q In 2003, when he wrote this letter or  
20 thereafter?

21 A No.

22 Q Never said a word?

23 A No.

24 Q And you weren't cross-examined on your  
25 affidavits that you filed in support of the

1 release application; is that right?

2 A No, I was not --

3 Q Were you questioned --

4 A -- nor was I asked to.

5 Q Sorry?

6 A Nor was I asked to be cross-examined. It is not  
7 that I refused.

8 Q Well, I am not sure that you would have the  
9 right to, quite honestly. Once you file an  
10 affidavit, you are fair game, you might say.

11 Did anyone from the Crown's office,  
12 Manitoba Justice, ever call you, sir, about the  
13 contents of your affidavit?

14 A No.

15 Q Have they ever spoken to you, ever? Has anyone  
16 ever addressed you about this case? Has anyone  
17 ever come to you and said, do you know what,  
18 Greg, we didn't behave very well, we kind of  
19 didn't really do it right in this case, we're  
20 sorry, can you pass on an apology to your  
21 client, anything like that, ever a word?

22 A No.

23 Q No.

24 A I am not going to make a facetious answer, but  
25 no.

1 Q I am not asking you to, it is a fair question.

2 A I would assume they would be walking on the  
3 other side of the street when I came by. It is  
4 an embarrassment.

5 Q Have any of the counsel here today, sir, who  
6 represent any of these people passed any word on  
7 to you from their clients?

8 A No.

9 Q Up to this moment?

10 A No. Do you mean that I should have, as  
11 Mr. Schille says, it is clear the information  
12 should have been disclosed?

13 Q No. I am way beyond that. I am talking at a  
14 general level as to an explanation from any of  
15 the counsel here on behalf of their clients as  
16 to how things weren't disclosed to you?

17 A No.

18 Q Or an apology that things weren't disclosed to  
19 you?

20 A No.

21 Q Or an apology to your client, through you, your  
22 former client?

23 A No.

24 Q Nothing. I want to take you through, sir, one  
25 or two of the things that happened during the

1 course of the proceedings prior to trial that  
2 Mr. Dawe didn't refer you to, I don't think he  
3 referred you to. Remember the two fairly  
4 lengthy adjournment proceedings that took place  
5 that you were -- that the Crown was trying to  
6 force you on in April, as I remember it, of '91  
7 to make the trial proceed, and you were  
8 resisting that, saying you couldn't possibly be  
9 ready for trial that soon, especially in light  
10 of the fact that you were still trying to pursue  
11 a number of avenues of disclosure. Do you  
12 remember that?

13 A Absolutely, I do remember.

14 THE COMMISSIONER: Just out of curiosity,  
15 Mr. Brodsky, are there many preferred  
16 indictments in Manitoba, or Winnipeg, I should  
17 say?

18 MR. LOCKYER: You are jumping ahead of me.

19 THE COMMISSIONER: Sorry.

20 MR. LOCKYER: We have a letter that we are going  
21 to file.

22 THE COMMISSIONER: I'm sorry. I will take back  
23 my question. Don't answer.

24 THE WITNESS: I'll do whatever the commissioner  
25 says.

1 MR. LOCKYER: That's wise. I will be coming to  
2 that, believe me, Mr. Commissioner.

3 BY MR. LOCKYER

4 Q But as the Commissioner points out so wisely --  
5 I couldn't resist -- the disclosure requests  
6 were being made in the context of an indictment  
7 having been preferred, no preliminary hearing;  
8 am I right?

9 A I said to the trial judge, I hadn't had a  
10 preliminary inquiry, I said I had to investigate  
11 this, that and the other thing. It's all -- you  
12 have it in the material. The court reporter  
13 took it down, all of the things I wanted to do  
14 and couldn't do. I didn't have the opportunity  
15 of having a preliminary inquiry, and I just  
16 wasn't ready to go on with this trial and I said  
17 so, and I said so loudly.

18 Q Well, let's see where you said so, sir. If you  
19 go to tab 8 of Commission Counsel's book, that's  
20 volume 1, this is the first occasion that  
21 Mr. Dangerfield seeks to force you on to trial  
22 in April.

23 A Yes.

24 Q It's a proceeding of February 6 of 1991. At  
25 this time both you and Mr. Garber still

1 represented Mr. Driskell. If you will look at  
2 page 1, you will see, just to put it in context,  
3 Mr. Dangerfield commences the proceedings by  
4 saying -- are you with me?

5 A Yes.

6 Q "My Lord, this is an application by the  
7 prosecution to fix a trial date...",  
8 for the trial of James Patrick Driskell upon a  
9 charge of murder. And then refers to  
10 Mr. Lawlor's affidavit that I will be coming to  
11 in due course.

12 A Right.

13 Q And in the course of Mr. Dangerfield's  
14 submissions to the courts, he said at 139, if  
15 you are using the numbers at the bottom of the  
16 page, this is after you've spoken and say that  
17 you need -- there are substantial items of  
18 disclosure that you need?

19 A Yes.

20 Q Mr. Dangerfield says at line 24,  
21 "Now, we have given him everything we have.  
22 Now, if he wants records of a broken  
23 nose...",  
24 and that is a reference to Mr. Harder having his  
25 nose broken in prison, do you remember that?

1 A Yes.

2 Q "...and who did it; if it's available to  
3 us, he'll have it. If that information  
4 exists, he'll have it. If he wants  
5 information with respect to various  
6 scientific witnesses about whom he seems to  
7 know, and we don't have it, we will do our  
8 level best to get it for him. That's the  
9 point. There are certain pieces of  
10 information he has recited that I don't  
11 think were ever requested.",

12 he being Mr. Brodsky,

13 "And we cannot second-guess counsel in his  
14 defence because we don't know, but what he  
15 wants, he will have. That's as far as we  
16 can go. What we have given him now is as  
17 complete a case as the Crown has produced  
18 to date."

19 Do you remember that, sir, that exchange, sir?

20 A Yes.

21 Q Did you take some confidence from that, sir,  
22 that you were getting full and complete  
23 disclosure in this case?

24 A No.

25 Q Oh, all right. Because?



1 A I said so in the very next line.

2 Q Okay. At page 146, sir, of the same transcript  
3 at line 3, Mr. Dangerfield perhaps uses a  
4 certain element of sarcasm here. He says,

5 "There is no rule that I am aware of that  
6 Mr. Brodsky is to conduct every murder case  
7 in the Province of Manitoba. If he has  
8 been hired by someone and he can't appear,  
9 that is too bad. That accused, unless  
10 there is a compelling reason to say  
11 otherwise..."

12 And bear in mind, this is two months before he  
13 is trying to set the trial date down, all right.  
14 You have said you had another case going on at  
15 that time. Do you remember that?

16 A Not set the trial date down, but he wanted the  
17 trial to proceed.

18 Q "That accused, unless there is a  
19 compelling reason to say otherwise, that  
20 accused is perforce driven to finding  
21 someone else who can appear. We are not  
22 particularly concerned about Mr. Brodsky's  
23 complaint about things he hasn't got. I  
24 mean, one can compile a list of things one  
25 hasn't got endlessly. I am surprised

1 Mr. Brodsky only lass 17 or 18 pages there.  
2 I would have thought if he puts into  
3 listing things he hasn't got, he could have  
4 come up with a veritable volume of things.  
5 The fact is, if he wants these things or  
6 needs these things, or information  
7 requiring his investigator to go and  
8 investigate these things, he need only ask  
9 whoever his investigator might be."

10 Do you remember that exchange, sir?

11 A Investigate these things he need only ask?

12 Q No, just the whole exchange, everything  
13 Mr. Dangerfield said?

14 A Yes, I do.

15 Q Was that reflective, sir, of the attitude that  
16 you were getting from Mr. Dangerfield in this  
17 case?

18 A Yes. But I think that my point was he need only  
19 ask, I think he was referring to ask him, not my  
20 investigator.

21 Q And then he says over the page.

22 "If Mr. Brodsky is going to investigate the  
23 impossible, then I doubt if September of  
24 next year will be sufficient time to do  
25 this, or the year following."

1 A Yes.

2 Q And then at the bottom of that page, and the bit  
3 in the middle I am going to talk about in a  
4 minute, at line 22,

5 "We have been absolutely fair with  
6 Mr. Brodsky. He knows that anything he  
7 needs that we have, he will get, including  
8 an examination of police reports if that  
9 becomes necessary. Beyond that, we can't  
10 go."

11 Do you remember Mr. Dangerfield saying that,  
12 sir?

13 A Yes. And I took him up on that and I asked him  
14 for the police reports and to investigate that,  
15 and he said I couldn't.

16 Q I believe, sir, you've since discovered that, in  
17 terms of police reports, you perhaps got less  
18 rather than more; is that right?

19 A Yes.

20 Q For example, and I think we've accumulated the  
21 number of police reports, you didn't get, just  
22 involving the four officers that we've heard  
23 about at some depth already in this case.

24 First of all, in the case of Sergeants  
25 Anderson and Paul, sir, there were 26 of their

1 police reports you were missing. Does that  
2 number surprise you?

3 A I'm hearing that for the first time today. Yes.

4 Q In the case of Osborne and Williams, sir, you  
5 didn't have a single one of their supplementary  
6 reports. Does that surprise you?

7 A Nor did I know to ask for them. The answer is  
8 yes, it surprises me.

9 Q And included in those reports, sir, was -- I  
10 understand you have become aware, you remember  
11 how Zanidean -- do you remember how Mr. Zanidean  
12 explained why he contacted the police in the  
13 first place?

14 A Not exactly, but it amounted to he was looking  
15 through a window and he saw a police officer and  
16 a fellow named John, who was a big guy in a car  
17 with a police officer, and he said, oh, they are  
18 going to make trouble for me. And then he went  
19 off to the police to make his complaint, or his  
20 story.

21 Q By the time of trial, you knew the John to be --

22 A Gumieny.

23 Q And have you since become aware, sir, of the  
24 impossibility of that claim?

25 A Well, Mr. Gumieny was already in the police

1 station, he couldn't have been, at the time he  
2 was spotted --

3 Q Mr. Zanidean?

4 A No -- yes, Mr. Zanidean was in the police  
5 station. Mr. Gumieny, the timing didn't allow  
6 that to happen.

7 Q And did you know, sir, that you were missing the  
8 following documents, you were missing the  
9 original interview of Mr. Gumieny on October 6th  
10 of 1990, never disclosed? As far as you knew,  
11 Mr. Gumieny had contacted the police  
12 October 9th --

13 A Yes.

14 Q -- of 1991?

15 A You're correct.

16 Q But the report of October 9th, sir, when this  
17 event supposedly took place, that Mr. Zanidean  
18 saw Mr. Gumieny, the report of October 9th  
19 respecting the police first encounter with  
20 Mr. Zanidean, you didn't have the Supp report so  
21 you didn't know what time it was that  
22 Mr. Zanidean had called the police?

23 A Yes. That's what I was referring to before. If  
24 I had the timing of when it was that  
25 Mr. Zanidean was talking about, and you look at

1           when Mr. Gumieny was making his statement, we  
2           would have been able to establish the  
3           impossibility of Mr. Zanidean's assertions.

4       Q     There were other ways of finding out the same  
5           information, sir. The notes of Sergeant  
6           Anderson would have revealed the same  
7           information to you. Did you have those?

8       A     No.

9       Q     Another way of finding out the same piece of  
10          information, sir, the notes of Sergeant Paul  
11          would have contained that information. Did you  
12          have access to those?

13      A     No. Sergeant Paul was a minor character in the  
14          course of this case, who testified about the  
15          distance between Mr. Driskell's house and where  
16          the body was found. He did not -- I did not  
17          know his significance in this case.

18      Q     And looking at it from the other side of the  
19          coin, sir, the Gumieny side of the coin, the  
20          supplementary report for October 9th, dealing  
21          with when the police first came into contact  
22          with Mr. Gumieny, you didn't have that either;  
23          is that right, sir?

24      A     No. Nor was it hinted at.

25      Q     So to put together that -- to put together the

1 materials so that you could attack the whole  
2 basis on which Mr. Zanidean came forward, you  
3 didn't have a single document that would enable  
4 to you do that --

5 A That's correct.

6 Q -- disclosed to you?

7 A That's correct.

8 Q Despite Mr. Dangerfield's assurances, just the  
9 two we have heard of back in February, that you  
10 would have, just reading the last one,

11 "He knows that anything he needs to have he  
12 will get, including an examination of  
13 police reports if that becomes necessary."

14 A Yes.

15 Q At tab 11, sir, you're back in court again, once  
16 more dealing with the issue of whether you will  
17 be forced on to trial in April. We are now  
18 looking at -- if you go to the third page of the  
19 tab, you will be looking at a transcript of the  
20 proceedings on February 13th.

21 A Right.

22 Q So we have moved on a week from the previous  
23 appearance.

24 A Right.

25 Q And you're in front of Mr. Justice Hewak. And

1 at page 191 of these proceedings, sir  
2 Mr. Dangerfield once again seems to be  
3 exasperated by the disclosure positions you are  
4 taking. At line 22 he says,

5 "I don't know, unless Mr" --  
6 are you with me?

7 A I am absolutely with you on page 22.

8 Q "...unless it is the duty of prosecution  
9 nowadays to take defence counsel by the  
10 hand, step by step through the case, and  
11 anybody other case that anybody was ever  
12 associated with, who has given or will give  
13 evidence in this -- I don't know what he  
14 wants."

15 THE COMMISSIONER: I'm sorry, Mr. Brodsky is  
16 following you, I'm not.

17 MR. LOCKYER: Tab 11.

18 THE COMMISSIONER: Tab 11 of Exhibit 21 or tab  
19 11 of exhibit 15A?

20 MR. LOCKYER: Of 20A, yes, 20.

21 THE COMMISSIONER: Commission Counsel for  
22 Mr. Brodsky.

23 THE WITNESS: I'm in tab 11.

24 BY MR. LOCKYER:

25 Q Page 20A, filed this morning, tab 11, 191 at the



1 bottom, at 22, line 22.

2 "I don't know, unless Mr. -- unless it's  
3 the duty of prosecution nowadays to take  
4 defence counsel by the hand, step by step  
5 through the case, and every other case that  
6 anybody was ever associated with, who was  
7 given or will give evidence in this -- I  
8 don't know what he wants."

9 Meaning what Mr. Brodsky wants.

10 A Yes.

11 Q Is there an element of cynicism and sarcasm  
12 there, sir?

13 A Yes.

14 Q And was that indicative of this case, disclosure  
15 in this case, as far as you were concerned?

16 A Yes.

17 Q My friend, Commission Counsel, sir, took you  
18 through your various requests for open box  
19 disclosure?

20 A Yes.

21 Q And ultimately brought you to where  
22 Mr. Dangerfield simply refused to give it to  
23 you. Do you remember that?

24 A Yes.

25 Q Did he ever give you any reason for refusing to

1 give it to you, sir?

2 A He said at page 189 of that same transcript --

3 Q I was going to take you to that after your  
4 answer.

5 A Okay. The reason was, he said that I was asking  
6 for the impossible. I was wasting everybody's  
7 time by asking too many questions. When I got  
8 an answer, I wasn't satisfied with it anyways,  
9 and the case would never get tried if the  
10 disclosure was made of the questions that I  
11 wanted. And I was harping -- harping means I  
12 continued to ask him about the Swift Current  
13 fire and his -- of the Swift Current fire. And  
14 he didn't agree that it was moving the case  
15 along.

16 Q If we go back to 189, sir, which you've just  
17 referred to, go back 2 pages in tab 11?

18 First of all, there was a reference at the  
19 top to Mr. Sophonow's case, which of course -- I  
20 am not sure if it was over. Yes, it would have  
21 been over in 1991 in the sense of the acquittal  
22 in the Court of Appeal, am I right?

23 And then line 11, he refers,  
24 Mr. Dangerfield is talking here, and he's  
25 referring to the case that you had referred to

1 earlier in your argument.

2 A Bunn (ph) and Ross were the first two charged,  
3 and Grywinski was the next one charged.

4 Q And he says at line 11, Mr. Dangerfield.

5 "The last case that my friend and I were  
6 together when I was so generous, as he  
7 says, arose because two men had been  
8 acquitted of the same murder. My friend  
9 told me that he was going to prove that  
10 they actually did it. I didn't know how.  
11 And rather than spend hours of my time  
12 trying to figure out what was in his mind,  
13 I called him down and showed him the files,  
14 said pick out what you want, and he did,  
15 and it didn't work."

16 Presumably what he means by that is your client  
17 was convicted, is that what he means by that, it  
18 didn't work?

19 A Yes.

20 Q "The reason we haven't done it in this  
21 case is he has provided me with a shopping  
22 list. I've tried to answer those  
23 questions. He has got everything that we  
24 have at the moment. I don't know what else  
25 to give him. I don't know what else he

1           could look for. He talks about motives  
2           existing in other people against whom  
3           Harder was going to testify. I don't know  
4           of any other people against whom Harder was  
5           going to testify, because it isn't even  
6           certain he was going to testify against  
7           Driskell. My friend has that in the report  
8           he says he spent last night, all night,  
9           pouring over. He has the names of the  
10          three counsel involved, Killeen, a lady  
11          named Levine, who was then a prosecutor, a  
12          Mr. Ray Wyant, who was still a prosecutor.  
13          And all those people knew was that Harder  
14          was coming to court on the day of his  
15          preliminary and pleading guilty. He had  
16          made some suggestions he might give  
17          evidence against Driskell but he had never  
18          made any promises. There were no  
19          statements, no arrangements, except the  
20          statements he had made of himself, what he  
21          had done, I presume."

22           Do you remember words to that effect being said  
23           by Mr. Dangerfield, sir?

24    A     Yes.

25    Q     And add that to what you just said as to why

1 Mr. Dangerfield explained to you that he  
2 wouldn't give you the kind of disclosure that  
3 you were asking for?  
4 A Yes.  
5 Q That's the reasons that you were given?  
6 A Yes.  
7 Q You've made some reference to the Kara brothers,  
8 Mr. Brodsky, in your evidence?  
9 A I did, yes.  
10 Q And as we know, one of them testified at  
11 Mr. Driskell's trial and one did not; is that  
12 right?  
13 A That's correct.  
14 Q When did you first find out that the Karas were  
15 repudiating the statements that the police claim  
16 they had given?  
17 A During the trial.  
18 Q Now, I think it was a lot earlier than that,  
19 actually. If you go to tab 15, perhaps that  
20 will help you out?  
21 A Okay.  
22 MR. WOLSON: What tab is that?  
23 BY MR. LOCKYER:  
24 Q Yes. Tab 15, sir, of the second page of  
25 Commission Counsel's book.

1 A Tab 15?

2 Q Yes, go to the second page of tab 15, will you?

3 A My handwritten note, yes.

4 Q Well, the typed note reflects what is on the  
5 handwritten note on the first page.

6 A Yes.

7 Q If you would read that first paragraph, sir?

8 A "I met with Brian Savage on October 25th  
9 and he tells me that the Kara brothers,  
10 Ashif and Shafik will not support the  
11 statements they made to the police. They  
12 are from Uganda and they are afraid of the  
13 police. They said whatever they were told  
14 to say. They were not told of any  
15 conspiracy charge. The heading of the  
16 statement that said they had a right not to  
17 make a statement because they may be  
18 considered for a charge of conspiracy is  
19 not accurate. There was no such warning  
20 given to them. They did not say the things  
21 the police have recorded.

22 Sam Sarbit is their lawyer, they saw Sam  
23 before speaking to Savage, and as the file  
24 will record, I had to write a letter to Sam  
25 Sarbit before they would see Brian Savage.

1 Savage doubts that Ashif will agree that  
2 Driskell wanted Sodium Pentothal and will  
3 not support that. In determining the  
4 validity of this, we discussed talking to  
5 the administrator at the Health Sciences  
6 Centre. Brian Savage will attend on him.  
7 It is not possible for orderlies to get  
8 control of the medications, they are locked  
9 up. They will get someone to testify to  
10 this for me. Ashif Kara has no access to  
11 the drug cabinet. Ashif says in his  
12 statement that he was supposed to have said  
13 that he did have access and gave some to  
14 Driskell. He will deny it. The director  
15 of security will say that he couldn't have  
16 it anyways."

17 Q And then if I move you on from there, sir, to  
18 tab 26, which is the first tab of the next  
19 volume?

20 A Yes, I have it.

21 Q And I think that's a letter that you get from  
22 Mr. Savage?

23 A Yes.

24 Q Where he talks to you about what the Kara  
25 brothers had said to him. Do you see that?

1 A Right.

2 Q If you can just take us through that?

3 A "Since my last report you have been given  
4 statements taken from Shafik Kara, Ashif  
5 Kara, Crystal Dawn McKay."

6 Q Skip to the next paragraph?

7 A "The Kara brothers both denied they had  
8 given information to the Winnipeg City  
9 Police. They said they were told certain  
10 facts by the Winnipeg City Police who  
11 wanted them to confirm the facts. They  
12 said the statements were signed because  
13 they were afraid of the police and wanted  
14 to go home. They both said they were  
15 detained and denied counsel. Shafik also  
16 says he was assaulted by the Winnipeg City  
17 Police. Both brothers say they never have  
18 been questioned by the police about  
19 anything prior to October 23, 1990, and  
20 because of their upbringing they were  
21 fearful of the 'police' and said what the  
22 police wanted them to say in order to get  
23 out of the Public Safety Building and go  
24 home.  
25 Mr. Lauren How and Moe Atkinson, Health



1 Sciences Centre Security, were interviewed.  
2 Ashif Kara worked as a porter (orderly) at  
3 the Children's Hospital since May of 1982.  
4 In his duties as a porter he would have  
5 access to certain drugs as he worked in the  
6 operating area. Apparently doctors are  
7 notorious for leaving syringes laying  
8 around in the OR and also in their  
9 operating gowns. It was part of Kara's  
10 duties to clean up after operations and he  
11 could easily obtain a syringe. Often they  
12 were left with drugs with them as a full  
13 syringe might not have been required."

14 Q All right. If I could just stop you there. So  
15 by this time, presumably May the 19th, sir, what  
16 are your views as to the significance of the  
17 information you are receiving regarding the  
18 Karas?

19 A Well, that the police were scripting stories for  
20 them. The police were telling them what to say.  
21 The police were encouraging, if their story was  
22 to be believed, them to lie in court.

23 Q All right. So if we move from there, sir, to  
24 the information that you weren't given about  
25 Mr. Zanidean, in particular, and also

1 Mr. Gumieny, in terms, just looking at it under  
2 the general headings, the information about  
3 Mr. Zanidean's desire to get immunity from  
4 prosecution in Swift Current?

5 A Yes.

6 Q And the success that, at least according to the  
7 Perry Dean Harder homicide review, he may well  
8 have got, the payments that were being made to  
9 him, and subsequently found out the payments  
10 that were being made to Gumieny as well, the way  
11 these two were making their demands and the way  
12 that they were -- their demands were being met,  
13 and considering the way that Mr. Zanidean  
14 supposedly came forward, seemingly not fitting  
15 within the scenario that we now know appears in  
16 the supplementary reports and notes of the  
17 police officers. If you put all that have  
18 together, sir, and move off of a microscopic  
19 view of the case, in other words looking at each  
20 witness individually and an ability to attack  
21 credibility of Zanidean and the ability to  
22 attack the credibility of Mr. Gumieny, can you  
23 look at it in a somewhat broader picture, also  
24 taking into account what you had already learned  
25 through your investigator, I noticed, not

1 through disclosure, about the Karas?

2 A Well, I know that -- it's difficult to overstate  
3 the fact that --

4 Q Do you mean understate?

5 A Either. The problem is that if the Karas were  
6 right and people were prepared to go to those  
7 lengths to secure a conviction, then we have a  
8 culture in the police and prosecution that  
9 should not be tolerated. I mean, if that was  
10 correct what they said --

11 Q They being?

12 A The Karas.

13 Q Yes.

14 A I mean, then --

15 Q I am more interested in combining in what you  
16 now know, but wasn't disclosed to you about  
17 Zanidean and Gumieny as well?

18 A No. But if what they were saying was --

19 Q You keep saying they, and I don't know what you  
20 mean by that?

21 A The Karas, if the Karas were saying that they  
22 had a scripted story.

23 Q Yes.

24 A Zanidean is now buying into the program and will  
25 go along with the story too if he's paid this or

1           that. That also would have been true for  
2           Gumieny, if we would have had the basis to prove  
3           it, it would have been also true for Gumieny.  
4           And the whole case then would have been made up  
5           not of actual facts, not of truthful testimony,  
6           but of puffery, lies and perjury.

7    Q       What would have done --

8    A       The problem is, you look through a microscope  
9           and you can say, okay, I could have attacked  
10          Zanidean on this lie, I could have attacked  
11          Gumieny on that lie, I could have attacked Kara  
12          on this or that, why didn't you go to a lawyer  
13          sooner, that's isolated.

14   Q       He actually went to a lawyer too late.

15   A       The problem is, it seemed to be accepted. And  
16          if it's accepted that this is the way to do  
17          things, that it's okay to do things like this,  
18          then it doesn't say very much for the system of  
19          justice in Manitoba.

20   Q       Would you have seen it, sir, as giving you the  
21          ability to attack, let's put it this way, the  
22          integrity of the entire police investigation?

23   A       Of course. I mean, there's no doubt about it.

24   Q       And what about the integrity of the prosecution  
25          itself, sir, on the part of the prosecutors,

1 given their failures to disclose?

2 A Somebody should have said, that man is lying  
3 when he did. Somebody should have said, you  
4 should know this before he gets on the stand.  
5 In fact, it shouldn't have been somebody, they  
6 should have told me.

7 Q Well, we know Vandergraaf was sitting in the  
8 courtroom. We can presume that Lawlor was  
9 sitting in the courtroom. We know that  
10 Dangerfield was sitting in the courtroom, sir.

11 A Yes.

12 Q And that takes me to the last tab of my friend's  
13 book of documents, tab 25, which is a police  
14 report that we have looked at time and time  
15 again. But I think it's worthwhile just asking  
16 you to look at it one more time. Sir, if you  
17 look at the last two pages of tab 25?

18 A Yes.

19 Q Now, you have already commented to Mr. Dawe on  
20 the answer to question 23?

21 A Yes.

22 Q Is that right? Do you want to read that again?

23 "The Winnipeg Police Department has no  
24 information on file that we are aware of  
25 relating to Mr. Zanidean's involvement in

1           the drug scene. We are not aware of  
2           Mr. Zanidean ever having acted in the  
3           capacity of a police informant prior to his  
4           involvement with James Driskell."

5           I think the Commissioner asked you about this,  
6           what did that cause you to believe, in effect?  
7           To which your response was, well, I assumed that  
8           he had only been an informant this one time.

9    A    Yes.

10   Q    When he called in about Mr. Driskell being  
11       involved in the murder of Perry Harder; right?

12   A    Right.

13   Q    And it was then pointed out to you that actually  
14       if you look at the wording, it could well  
15       include in it Mr. Zanidean informing on  
16       Mr. Driskell having stolen property in his  
17       garage a year earlier, do you realize that? And  
18       you didn't pick up on that?

19   A    Now I do, yes.

20   Q    But certainly it's not exactly clearly stated in  
21       the answer to question 23, is it?

22   A    No. And these bold words on the paper are  
23       surrounded by all the of the verbiage that was  
24       going on at the time, or the discussions that  
25       were going on at the time, and I took it not in

1 the technical way, I took it that he wasn't an  
2 informant.

3 Q Do you expect responses to disclosure requests,  
4 sir, to be answered in "technical ways"?

5 A No.

6 Q That you have to play around with their  
7 ambiguity to see what it is they mean?

8 A When the consequence is someone spending their  
9 life in prison, sir, no, I don't.

10 Q If you go back to the answer to question 6, sir,  
11 on the previous page, one might say you see an  
12 even worse example of what you are seeing in  
13 answer to question 23. Do you want to read that  
14 answer out to us?

15 A "With respect to criminal records  
16 subpoenaed, other than police and  
17 professional witnesses, we have submitted  
18 copies of all criminal records. The  
19 absence of such a record for a particular  
20 witness indicated that the witness has no  
21 such record. Exceptions to this are  
22 Zanidean and Gumieny whose records were  
23 submitted previously.

24 With respect to the second part of this  
25 question, we are not aware of a single

1 criminal charge outstanding against a  
2 single subpoenaed witness at the time of  
3 the deceased's disappearance. Furthermore,  
4 protection is the only favourable  
5 consideration given to any witness. We are  
6 not aware of any stayed charges or any  
7 other deals with any witness in exchange  
8 for testimony."

9 Q In light of what you now know, sir, what do you  
10 think of that answer?

11 A Well, there is no polite way of putting it.

12 Q Pardon?

13 A There is no polite response, Mr. Lockyer.

14 THE COMMISSIONER: I get your answer.

15 BY MR. LOCKYER:

16 Q I guess, sir, it might be said, sir, by some  
17 that this was the adversarial process at work?

18 A At worst, is that what you said?

19 Q At work?

20 A At work, yes.

21 Q Do you see it as that?

22 A No, at worst maybe, but this is not the  
23 adversarial system. We don't play with perjury.  
24 We don't countenance perjury. We don't  
25 encourage it. And When we see it, no matter



1           whether you are on this side or that side, you  
2           do something about it.

3    Q       Now you've had a chance to see what happened.

4    A       And you don't make up stories for witnesses to  
5           tell, and you don't sell them or buy them. I  
6           apologize.

7    Q       How did your meetings with Mr. Kovnats play into  
8           your concerns or suspicions, sir, about this  
9           case back in May and June of 1991?

10   A       Well, I thought the case was totally out of  
11          hand. I thought everything was out of hand in  
12          connection with the case and the ethics and the  
13          rules and the way we conduct cases. If a  
14          lawyer, I mean, well, he's a lawyer, if a lawyer  
15          can be assaulted in the fashion that Mr. Kovnats  
16          described to me, if he could be so afraid of the  
17          police and of his position, not of being  
18          charged, but of the consequences to him, as  
19          Mr. Kovnats described them to me, then we're in  
20          a very sorry state. I mean, he's just a lawyer  
21          trying to protect a witness.

22   Q       Do you see -- you've now seen some of the  
23          letters, have you, that were exchanged between  
24          Mr. Kovnats and Manitoba Justice; is that right,  
25          sir?

1 A Yes, I have.

2 Q Were any of those disclosed to you, sir?

3 A No, they weren't, nor was I told about them.

4 Q Can you think of any reason why they shouldn't  
5 have been disclosed to you, sir?

6 A They obviously should have been. The reason I  
7 went to Mr. Kovnats' house was to find out about  
8 them. He wouldn't tell me about them, and  
9 neither did anybody else tell me about them.

10 Q But you see them as a part of a legitimate  
11 disclosure process, that they should have been  
12 disclosed?

13 A Well, when there is a motion for a speedy trial  
14 that says you've got all of the disclosure, and  
15 right after that there's a continual written to  
16 and fro'ing about how much we are going to pay  
17 for your evidence, of course I would have  
18 thought that the initial statement would have  
19 been amended to include this negotiation, these  
20 negotiations.

21 Q Now, you are something of a veteran defence  
22 lawyer in this province and in the city, am I  
23 right, sir?

24 THE COMMISSIONER: Well, and in other provinces.

25 MR. LOCKYER: I'm sorry?

1 THE COMMISSIONER: And in other provinces.

2 MR. LOCKYER: But I am really focused on  
3 Manitoba, is that right, sir?

4 THE WITNESS: I practice law.

5 BY MR. LOCKYER

6 Q And can you tell us, sir, whether what happened  
7 to you in the Driskell case is symptomatic, in  
8 your opinion, of serious investigations by  
9 police officers in Manitoba?

10 A Well, that's what I was trying to get at before.  
11 If they thought they were going to get away with  
12 intimidating the lawyers, if they thought that  
13 they were going to get away with -- if they  
14 thought it was okay to overlook these kinds of  
15 things, then you don't only worry about  
16 Mr. Driskell, you worry about the prosecution,  
17 period.

18 Q I was focusing on the police, first of all, the  
19 Winnipeg Police Service, and then going to move  
20 to the prosecution. But is the kind of things  
21 that you experienced in Driskell something that  
22 has happened in other cases?

23 A Well, you know that it happened in -- the court  
24 inquiry uncovered a considerable amount in Mr.  
25 Sophonow's case. We know that when the timing

1 of a car ride, certain car ride is made by a  
2 witness whose initial statement and pinpoint  
3 timing is not disclosed to me and then it is  
4 repeated here. And I understand now that  
5 another fellow, I don't know if I'm supposed  
6 today say any names or not, but Mr. Ostrowsky  
7 has a case before the courts and there is going  
8 to be -- when I acted for him, certain  
9 assertions were made to me in court that I  
10 understand are going to be dealt with, and I see  
11 that there is a hair and fiber committee that  
12 was set up, and it is established that Mr. Unger  
13 had evidence that was, I don't know if the word  
14 is misrepresented, but put to the jury in an  
15 incorrect way. And I see in the Robert Star  
16 case that we have hairs that were found in his  
17 car and he was convicted. And when they were, I  
18 guess when they wanted to polish that evidence,  
19 the DNA on those hairs established they didn't  
20 come from the victim, so the victim wasn't in  
21 Mr. Star's car. And I see that right here in  
22 the Driskell case, when they said that three  
23 hairs came from the deceased in the back of  
24 Mr. Driskell's car, and then they do a DNA  
25 examination and what we find is three hairs were

1           there, all right, but they came from three  
2           different people, none of whom were the  
3           deceased. I mean, I apologize for going on so  
4           long, but, yes, there is lots of cases.

5    Q       So is there a lack of checks and balances, in  
6           your opinion, sir --

7    A       It seems to be.

8    Q       -- within Manitoba Justice?

9    A       Or I don't know the rules.

10   Q       Or?

11   A       Or I don't know the rules.

12   Q       Or you don't know the rules. All right.

13           What about support from the judiciary, sir,  
14           do you find support from the judiciary in this  
15           regard? Take Driskell, for example?

16   A       Are you talking about my fight to get the -- not  
17           an early trial date?

18   Q       I'm asking you as a veteran defence lawyer of  
19           this province, this town, sir?

20   A       I think judges are all good.

21   Q       That's a safe answer. From every province?

22   A       Any judge I've ever appeared before is just  
23           good.

24   Q       Have you thought, and I don't really want you to  
25           answer this so much as --

1 THE COMMISSIONER: Mr. Brodsky may not remember  
2 it, but he has appeared before me.

3 BY MR. LOCKYER:

4 Q Oh, has he?

5 A And you were good, too.

6 Q This may be better left for Mr. Kennedy, sir,  
7 but have you given some thought to some changes  
8 that could be made in this province to improve  
9 matters? I am not asking you what they are so  
10 much as have you given thought to it?

11 A Yes, I have.

12 Q Okay.

13 A In light of what I didn't know about in this  
14 case, and the fact that so many people seem to  
15 think that what was going on was all right, I  
16 have, yes.

17 Q All right. Well, I will let Mr. Kennedy ask you  
18 about that.

19 And I want to move into a matter that the  
20 Commissioner raised with you, sir, and that's  
21 the use of the preferred indictment in this  
22 case. First of all, if we can just look at how  
23 it came to pass in this case. And really where  
24 it appears to have come from can be best  
25 gleaned, I think, from Mr. Lawlor's affidavit,

1           sir, of February 4th of 1991, which was the  
2           affidavit relied on by Mr. Dangerfield to  
3           justify the early trial date.

4    A    Yes.

5    Q    And perhaps we can assume part of that affidavit  
6           was also related to the application for the  
7           preferred indictment. In fact, I think we have  
8           good reason to think it was. If we look at tab  
9           6 of Commission Counsel's book of materials,  
10          sir?

11   A    Yes.

12   Q    You see there Mr. Lawlor's affidavit?

13   A    Yes.

14   Q    And I just want to take you through a few of  
15          those paragraphs, sir. First of all, paragraph  
16          16 --

17   A    Yes.

18   Q    -- reads,

19                "I am informed by members of the Winnipeg  
20                Police Department and do verily believe  
21                that the accused has several close  
22                associates in Winnipeg who are willing to  
23                assist him in defending the charge against  
24                him and who are actively seeking out  
25                witnesses in this matter to try to dissuade

1                   them from testifying."

2                   That's tantamount, of course, to an allegation  
3                   of Mr. Driskell trying to obstruct justice in  
4                   his own murder prosecution; right?

5       A       Yes.

6       Q       Did you ever get any disclosure of anything like  
7                   that, sir?

8       A       Absolutely not.

9       Q       Other than a bare statement in Mr. Lawlor's  
10                  affidavit?

11      A       Absolutely, I didn't. I never received any  
12                  disclosure of that.

13      Q       And is it your belief, sir, that that played,  
14                  that kind of sentiment or that kind of claim  
15                  played a significant role in the granting of  
16                  preferred indictment?

17      A       Well, I don't know what was in the Attorney  
18                  General's mind, but I assume it would.

19      Q       Paragraph 21, sir,

20                  "I am informed by members of the Winnipeg  
21                  Police Department and do verily believe  
22                  that they have information that James  
23                  Driskell is actively recruiting people to  
24                  help him establish an alibi defence."

25      A       That's ridiculous. It's a true statement in



1           that it's contain in the affidavit, but that  
2           never happened. I don't know where that came  
3           from.

4    Q       Nothing ever disclosed to you?

5    A       I never received anything, I was about to say  
6           that, I never did receive anything by way of  
7           disclosure or a suggestion by any Crown or  
8           police officer to that effect.

9    Q       Is it fair to say, sir, that that might have had  
10           something to do with the preferred indictment  
11           application as well?

12   A       Well, of course, if I were the Attorney General  
13           and this is the only information I got, why  
14           wouldn't I believe?

15   Q       24,

16           "I am informed by members of the Winnipeg  
17           Police Department and do verily believe  
18           that on January 23rd, 1991, the garage at  
19           the rear of a material Crown witness in  
20           this matter was broken into and set on fire  
21           and that the Winnipeg Police Department are  
22           treating this as an arson."

23           We heard, interesting enough, sir, from Sergeant  
24           Anderson this week that he thought it was quite  
25           likely that Zanidean had set the fire himself,

1 given the similarity between the fire in his  
2 garage and the claims thereafter for insurance,  
3 and the fire in Swift Current. Did anyone ever  
4 make this suggestion to you, sir?

5 A No. I thought it could have been the Karas'  
6 place that had been put on fire.

7 Q No, it was Zanidean's garage apparently.

8 A Well, you see the way it is worded, you can draw  
9 lots of conclusions, some of which may be  
10 correct and some not.

11 Q Well, I guess the inference of 24, sir, is that  
12 Mr. Driskell set the fire at the rear of a  
13 material Crown witness?

14 A Yes.

15 Q And now we hear, 11 years later, from one of the  
16 investigating officers who dealt with the very  
17 person whose garage was burned that he had his  
18 suspicions that he is the one who did it?

19 A Yes.

20 Q You didn't hear any of that I guess?

21 A No, I didn't.

22 Q Of the appearance of Mr. Dangerfield based on  
23 this affidavit, am I right?

24 A No, I didn't.

25 Q Paragraph 26, sir,

1 "I am informed by members of the Winnipeg  
2 Police Department and do verily believe  
3 that more than one material witness and  
4 their families are currently under 24 hour  
5 police protection and will continue to be  
6 so until the trial of this matter is  
7 completed."

8 Do you know what that meant, sir, or who they  
9 were referring to? Do you to this day know who  
10 that meant or who they were referring to, who as  
11 of February of '91 was under 24 hour police  
12 protection?

13 A No.

14 Q Certainly to my knowledge it was not Mr. Gumieny  
15 or Mr. Zanidean?

16 A No. I don't know who else it would be. And I  
17 must say that we spend a lot of time, with a lot  
18 of names, talking to a lot of people, it never  
19 came out.

20 Q And yet, sir, you were confronted, or  
21 Mr. Driskell was confronted with a successful  
22 application for a preferred indictment. And  
23 could you just explain to us the problems that a  
24 preferred indictment creates for the defence?  
25 It may be obvious to some of us, but not to

1 everyone.

2 A Well, the main thing is preferred indictment  
3 means that you don't have a preliminary inquiry.  
4 It means that you don't have the time to go  
5 through the investigation of, for instance, the  
6 police lab reports. It means that you don't  
7 have a chance to go through the witness  
8 statements and compare them to other witness  
9 statements. It means that you don't have the  
10 opportunity of mounting a full defence. It  
11 means that you don't have the opportunity of  
12 challenging evidence to see how it will stand up  
13 in court. It means -- and I told that, as a  
14 matter of fact, to the judge in the case, of all  
15 of the things that I wanted to do and was unable  
16 to do. Things like, in an eyewitness case you  
17 want to find other people who look like Mr.  
18 Sophonow, as a name we have already used before.  
19 In this case, we wanted to track down the fires.

20 Q I didn't hear the word?

21 A Fires.

22 Q Oh, fires, yes.

23 A There was more than one fire, and there was more  
24 than one person who left directly after the  
25 disappearance of the deceased in this case, and

1 we wanted to track them down. It doesn't allow  
2 you to go through the investigations that you  
3 want to do. And for the judge to say, okay, all  
4 right, all right, you can have a few more weeks,  
5 it is just insufficient, and it doesn't allow  
6 you to say to a preliminary hearing judge, the  
7 trial shouldn't be on that charge, it should be  
8 on this charge.

9 Q Or on no charge at all?

10 A Or on no charge at all.

11 Q Does the absence --

12 A And not only that --

13 Q Sorry.

14 A -- but it encourages, the preliminary inquiry  
15 encourages Crown attorneys to understand the  
16 strength of their case. So more cases are  
17 settled if there is a preliminary inquiry, in  
18 cases where the evidence warrants it.

19 Q Does the preliminary inquiry, sir, also assist  
20 you in exploring for matters that you need  
21 disclosure of that haven't been disclosed?

22 A Well, let's use this Driskell case as an  
23 example.

24 Q Right.

25 A If we had a preliminary inquiry, I would have

1           said to the police officer on the stand, okay, I  
2           want to see the book, your notes that you  
3           referred to surrounding Mr. Zanidean's  
4           statements, surrounding what led up to them.  
5           Let me look. Because we used to, in the old  
6           days, stand next to the police officer and he  
7           would read out from his book, and then we would  
8           read out from his book and see what we missed.  
9           And Stinchcombe said, well, that's a silly  
10          system. We should get disclosure, and you  
11          shouldn't have to read fast, quickly over the  
12          police officer's shoulder, hoping he is not  
13          taller than you, and prepare an instant answer  
14          to whatever you are reading there, and compare  
15          this officer's notebook to that officer's  
16          notebook to see if they contain the same  
17          information, because they don't always.

18        Q        I understand, sir, a partner of yours made  
19                inquiries some time ago of the Attorney General  
20                of the province in an attempt to ascertain how  
21                often the preferred indictment is used by the  
22                Attorney General. Is that right?

23        A        Yes, my associate did that.

24                THE COMMISSIONER: Finally my question got  
25                asked.

1 BY MR. LOCKYER:

2 Q Yes. We got there. And that letter that your  
3 partner, sir --

4 A My associate.

5 Q We have a copy of, the registrar has a copy of  
6 it. Could it be filed as the next exhibit,  
7 please, sir?

8 THE COMMISSIONER: Exhibit 22 is it?

9 THE CLERK: Exhibit 22.

10 (EXHIBIT 22: Letter dated June 27, 2006)

11 BY MR. LOCKYER:

12 Q I only got it last night from Mr. Brodsky, it is  
13 really very recent dated June 27 of 2006, sir.

14 A Yes.

15 MR. LOCKYER: I have some copies, I have a few.

16 I might say, Mr. Commissioner, I have asked  
17 Mr. Olson if he would be so kind as to try to  
18 get more information in this regard, take us  
19 back, if he can, to 1990, so we have a broader  
20 range, a broader picture. And also to, if he  
21 can, to provide perhaps at a general level the  
22 basis on which direct indictments are granted by  
23 the Attorney General. And I've asked Mr. Olson  
24 if he can try to obtain that information for us.  
25 Because this is simply a statistics as to

1 numbers from 2001 on.

2 BY MR. LOCKYER

3 Q And the numbers, sir, range between two in 2001  
4 to 15 in 2005; is that right?

5 A That's correct.

6 Q And certainly where I come from, sir, I think it  
7 can be said that is a large number. We  
8 certainly don't have that number in my province.

9 A Well, we didn't used to have that number in  
10 Manitoba.

11 Q Okay. Using your experience, sir, as best you  
12 can, first of all, let me ask you this: Do you  
13 know what kinds of motive are used by the  
14 Minister or by the Ministry in engaging the  
15 right under the Criminal Code to seek a  
16 preferred indictment?

17 A I wish I did. They don't allow me -- as a  
18 matter of fact, I asked Mr. Dangerfield in  
19 another case if I could make submissions to the  
20 Minister. I didn't care if I got a response or  
21 not, but at least I would feel more involved if  
22 I could make a submission --

23 Q Yes.

24 A -- even if I didn't know what his or the Crown's  
25 submission was. But I was told, no, I couldn't



1 make a submission, and I am not entitled to make  
2 any submission or argument to the Attorney  
3 General when it came to direct indictments. So  
4 I don't know what the Attorney General or any of  
5 them have been told. They don't tell me.

6 Q Do you know how many times you have run into  
7 them in your career, sir, say in the last 15  
8 years?

9 A Preferred indictments?

10 Q Yes.

11 A Quite a lot lately. Not too often 15 or 20  
12 years ago. And the reason they used to be  
13 granted 15 or 20 years ago is when there was an  
14 attempt to kill one of the witnesses, for  
15 instance --

16 Q Yes.

17 A -- there would be a direct indictment. But  
18 there would have to be an extraordinary reason  
19 before the Attorney General would prefer an  
20 indictment.

21 Q And the allegations were never tested, certainly  
22 in the Driskell case, the allegations were never  
23 tested, as far as you know?

24 A Yes. And in another case where there was a  
25 preferred indictment, there was an accused and

1           they had a very lengthy, lengthy preliminary  
2           inquiry, and then they charged somebody else and  
3           they said, well, there was already a preliminary  
4           inquiry in connection with the other fellow.

5       Q     Well, that's hard to necessarily argue with that  
6           so much.

7       A     But it was so rare that you knew the reason,  
8           whether you agreed with it or not, at least you  
9           knew the reason.  When I see nine in the last  
10          year, in 2006 -- it is 2006 still, and I see  
11          that we've got nine so far.  Is it the same  
12          reason in all nine cases?  I doubt it.  What are  
13          the reasons?  I don't know.  Have we abolished  
14          the preliminary inquiry by the use of the  
15          preferred indictment?  I suspect so, in Manitoba  
16          anyways.

17       Q     And there's no consultation with defence counsel  
18           at all before the indictment is preferred, am I  
19           right?

20       A     None.  As I've already said, I even asked, don't  
21           tell me what the Crown says if you are  
22           embarrassed of what you put in the letter to the  
23           Attorney General.  Let me write, let me say --  
24           let me have a say.  There is no submission  
25           permitted by defence counsel.

1 MR. LOCKYER: Is this a good time to break,  
2 Mr. Commissioner?

3 THE COMMISSIONER: It is. Thank you. We will  
4 see you tomorrow at 9:30.

5 THE WITNESS: Yes. I'll be here whatever time  
6 you say.

7 THE COMMISSIONER: Thanks, Mr. Brodsky.

8 THE CLERK: All rise. This Commission of  
9 Inquiry is now adjourned.

10 (Proceedings adjourned at 4:46 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.

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Cecelia Reid

COURT REPORTER

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Lisa Reid

COURT REPORTER

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