

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

The Honourable Patrick LeSage, Q.C. Commissioner

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

Wednesday, August 9, 2006

Volume 14

INQUIRY PROCEEDINGS

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1 WEDNESDAY, AUGUST 9, 2006

2 Upon commencing at 9:30 a.m.

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

5 THE COMMISSIONER: Yes, Mr. Lockyer.

6 MR. LOCKYER: Good morning, Mr. Commissioner.

7 BY MR. LOCKYER

8 Q Mr. Brodsky, we left off yesterday talking about
9 the use of the preferred indictment in this case
10 and the bases on which -- or basis on which it
11 was sought and obtained. And are you familiar
12 with the policy directives of the Attorney
13 General's office in this regard, sir, in your
14 province?

15 A No, I'm not.

16 Q All right. I think Mr. Kennedy is going to ask
17 you about that. I think he has them.

18 Moving into another area, sir, that was
19 touched on by Commission Counsel yesterday in
20 his questioning of you, is this issue of the use
21 of material witness warrants. You heard,
22 through Commission Counsel yesterday, that
23 Mr. Zanidean was apprehended or arrested in
24 Calgary pursuant to a material witness warrant
25 on May 26th of 1991, I think it was, and was in

1 fact still subject to a recognisance pursuant to
2 that bond when he testified.

3 A I heard that.

4 Q And was yesterday the first time that you heard
5 that?

6 A I think so, yes.

7 Q Yes. And you said yesterday that that seemed to
8 you to be information that should have been
9 disclosed to you?

10 A Oh, of course it should have been.

11 Q Yes. I wanted to bring to your attention, sir,
12 because I don't know if you knew this, did you
13 know that -- perhaps I'll remind you of a few
14 dates. First of all, Mr. Driskell was
15 arrested --

16 A I think, to be more exact, I found out about the
17 material witness warrant last week.

18 Q Okay.

19 A Last week.

20 Q All right. I'm not sure that undermines the
21 point.

22 A I'm just trying to be accurate.

23 Q Right, suffice to say, 15 years after the event,
24 yes.

25 Just to remind you, sir, Mr. Driskell was

1 arrested on October 23rd of 1990, and within an
2 hour or two, I think it was actually in about an
3 hour and a half after that, the two Kara
4 brothers were being questioned by the police for
5 the first time. And as well on that day,
6 Mr. Gumieny was re-questioned by the police,
7 having been questioned on several occasions
8 previously, all right?

9 And we now know, sir, that on that day,
10 October the 23rd, the day of Mr. Driskell's
11 arrest, both Karas were, so to speak,
12 apprehended, albeit they were in the police
13 station at the time, on material witness
14 warrants and released on recognizances. Did you
15 know that, sir?

16 A That I didn't know.

17 Q I think you knew they were obliged to report to
18 the police who had questioned them every week.
19 I think that came out in the evidence. Do you
20 remember that?

21 A Yes.

22 Q Was that material information, as far as you
23 you're concerned, sir?

24 A Yes.

25 Q I mean, it does kind of indicate a lack of

1 confidence in their own witnesses, that
2 immediately after they supposedly provide
3 voluntary statements, the police feel it
4 necessary to place them on material witness
5 warrants?

6 A Well, there has to be a basis of restricting
7 someone's liberty. And I assume the basis would
8 be that they thought that they wouldn't either
9 conform to the statements they gave, or they
10 would run away in order to not say those things
11 in court. There has to be a reason why a
12 warrant would go out to someone not charged with
13 an offence.

14 Q And the evidence of Shipman and Morin, sir, if
15 you will remember on the voir dire at the trial,
16 was that they were very cooperative and helpful
17 and so on and so forth. And do you remember
18 that?

19 A Well, it was completely different than what
20 their lawyer said.

21 Q I understand. But this witness warrant is being
22 issued at the very time that they are claiming
23 they are being so cooperative?

24 A Yes.

25 Q And in the case of Mr. Gumieny, sir, on the same

1 day, did you know that he also was, so to speak,
2 apprehended on a material witness warrant that
3 day and released pursuant to it?

4 A No. I apologize for interrupting, but the
5 Gumieny business, he was a very important
6 witness as far as I was concerned. I didn't
7 know anything about him. I didn't know any
8 basis to be suspicious of him. The fact that a
9 warrant had been considered necessary by either
10 the prosecution or the police would have been an
11 in-road and an idea which to move from in
12 connection with Mr. Gumieny.

13 Q So that from October 23rd on, the police had
14 what one might call a supervisory control over
15 both the Karas and Mr. Gumieny; you weren't
16 aware of that?

17 A You can call it supervisory control, but it was
18 more like a tight leash.

19 Q All right. Where they were actually being
20 required to report weekly to the very officers
21 who claim they had given them their voluntary
22 statements?

23 A They could yank, pull that leash, Yes. It is a
24 continual reminder of whose in control, the
25 police.

1 Q From a broader perspective, sir, is this a
2 practice that you're aware of in this city?

3 A It's not a general practice.

4 Q I'm sorry?

5 A It's not a general practice.

6 Q Right.

7 A I didn't know to ask about it, because it only
8 applies to somebody, I would think, who's
9 running away, who they have to bring back from
10 Thailand or someplace.

11 Q They might have trouble apprehending them on the
12 warrant if they were in Thailand, Mr. Brodsky,
13 as an aside.

14 A No. No. I'm talking about the reason for the
15 warrant. And if they have to extradite the
16 fellow back and go through trouble to keep him,
17 then they may want to --

18 Q Before he goes?

19 A Yes.

20 Q I see. So it is not something that you've come
21 to know as being a tool of the police, or the
22 prosecution, to keep what you might call --
23 sorry, the word is just gone -- what is the
24 word?

25 THE COMMISSIONER: I think "leash" was his word.

1 MR. LOCKYER: I am trying to think of the word
2 for nasty witnesses?
3 MR. LIBMAN: Hostile witness?
4 BY MR. LOCKYER:
5 Q Unsavoury. The word wasn't coming to me.
6 A Mr. Lockyer, I apologize for interrupting.
7 Q Yes.
8 A When you ask me was it a policy, there may have
9 been lots of material witness warrants that I
10 didn't know about.
11 Q As in this case?
12 A As in this case.
13 Q Yes.
14 A Now that I know about it in this case, I'm
15 wondering about other cases that I did back
16 then.
17 Q Moving on from there, sir, I want to talk now
18 about post-conviction disclosure issues and
19 focus on the two distinct periods, the first
20 period being post-conviction but prior to and up
21 to you arguing Mr. Driskell's appeal in December
22 of 1992?
23 A Right.
24 Q And then talk about the period after you've lost
25 the appeal in December of 1992?

1 A Well, the appeal was denied.

2 Q I understand.

3 A I'm not sure I lost it. I hope I didn't lose
4 it.

5 Q Sorry, fair comment. Mr. Driskell lost.

6 A Yes.

7 Q In that pre-appeal period, sir, and Commission
8 Counsel took you through some of this, a number
9 of things came to light. Quite how far they
10 came into the light is what I want to ask you,
11 but they certainly became -- they either
12 occurred or became known to or better known to
13 the authorities. All right?

14 A Yes.

15 Q And I just want to quickly take you through
16 them. First of all, on June 20th, we now know
17 that Mr. Zanidean not only anonymously, as a
18 third party, recanted to you his evidence, but
19 also recanted to one of the officers to whom he
20 had been speaking and indeed been reporting to,
21 speaking to since October of 1990 and reporting
22 to since May 26th, Sergeant Paul.

23 A One of his handlers, I think that's the term.

24 Q Yes, one of his handlers, indeed. And of course
25 they knew as well from the phone records, as

1 you've heard, that he had made that call or made
2 a call to you.

3 You also heard yesterday, sir, about the
4 monies paid to Mr. Zanidean, the one particular
5 payment of \$20,000?

6 A Yes.

7 Q And I think you have the book of materials that
8 we've prepared --

9 A Yes.

10 Q -- for your questioning.

11 A Yes. And there is a letter that refers to the
12 \$20,000 in that booklet.

13 Q At tab 3 there's a letter respecting that
14 \$20,000 payment?

15 A I don't remember the tab number, but, yes, there
16 is a letter in there, in the booklet.

17 Q The position that has been taken at this
18 inquiry, Mr. Brodsky, is that that -- I'm not
19 sure if it's a subliminal position or a direct
20 position, but I want to put it to you, whatever
21 it is -- is that that \$20,000 payment to
22 Mr. Zanidean really wasn't significant and
23 really wasn't discloseable because it was
24 nothing more than compensation for the
25 aggravation he had had to go through by way of

1 moving and so on and so forth. Do you
2 understand that?

3 THE COMMISSIONER: I think it was put that, to
4 make him economically whole.

5 BY MR. LOCKYER:

6 Q Yes.

7 A Yes.

8 Q To restore him to where he would have been, but
9 for testifying?

10 A Yes.

11 Q That is the position that has been either
12 directly or subliminally presented at this
13 Commission, sir. Do you buy that?

14 A No.

15 Q Why not?

16 A They had paid for his testimony. We had talked
17 about some of the things he was getting, a bike
18 and different matters. They didn't have to --
19 he didn't have to run away, and they didn't have
20 to pay him that. There was no need for that.
21 It wasn't making him economically whole. That's
22 the -- you can present that as the usual basis
23 for paying, but I don't think it applied in this
24 case.

25 In any event, shouldn't I have been known

1 about that? Shouldn't we have been able to go
2 through what it was that he lost and how the
3 \$20,000 was arrived at? I think we talked
4 yesterday, somebody said it was at first \$30,000
5 he wanted, and then \$20,000. I mean, how much
6 was the evidence worth? I'm not sure.

7 Q Of course, the jury, in the meantime, during
8 your cross-examination of Mr. Zanidean, had only
9 heard what he had lost, not how he had been --
10 and even if you take that subliminal message --
11 how he had been compensated for what he had
12 lost?

13 A What the jury heard wouldn't have amounted to
14 \$20,000, Mr. Lockyer. He was talking about \$50
15 a day and some meal expenses, certainly not
16 \$20,000. He was talking about a very small
17 amount. The \$20,000, I've no idea where that
18 comes from. I understand the theory of it, but
19 I don't think it applies in this case.

20 Q Well, actually, the meal expenses, for your
21 information, were part of the \$50, so it wasn't
22 \$50 plus.

23 A Okay. I apologize.

24 Q That's all right. So would it be your position,
25 sir, that in situations like this, that indeed,

1 in Mr. Zanidean's situation, that each and every
2 penny paid to him should have been disclosed to
3 you?

4 A Yes. There should be no embarrassment about
5 putting somebody in the same economic position
6 they would have been in, but for the testimony.
7 Why should there be a problem with that?

8 Q And before he testified --

9 A I mean, even Mr. Zanidean talked about it at the
10 trial.

11 Q I didn't hear you?

12 A Even Mr. Zanidean talked about it at the trial.

13 Q Yes. Well, from the answers that he gave, sir,
14 you weren't aware that literally in the few days
15 before he testified, he was attempting to
16 bargain through his counsel to get a \$30,000
17 payment after he testified?

18 A No. But if he was going to lie in court, the
19 lawyers were right there. Nobody puts perjured
20 testimony -- nobody ought to put perjured
21 testimony on the stand. The lawyers were right
22 there. I would have thought it would have been
23 corrected.

24 Q The --

25 A And he should have been cautioned not to lie

1 about it.

2 Q The third item, sir, which had become, I won't
3 say public knowledge because it hadn't, but had
4 become Crown knowledge, put it that way,
5 Manitoba Justice knowledge, certainly, by the
6 time of the appeal were these letters that were
7 going to and fro with Saskatchewan Justice,
8 between Manitoba Justice and Saskatchewan
9 Justice. I think my friend asked you about them
10 yesterday.

11 A Yes.

12 Q Where they were discussing that Saskatchewan
13 Justice was saying he was given immunity, and we
14 feel in a position where we have to accord to
15 that promise because if we didn't, and he were
16 prosecuted, he could allege abuse of process and
17 would likely win?

18 A Yes.

19 Q An abuse of process argument?

20 A It says that in the letter, yes.

21 Q And I think two letters were shown to you
22 yesterday, one of January 16th and one of
23 March 9th of 1992, which is still in the midst
24 of the appeal period, in which Saskatchewan
25 Justice asks that Manitoba Justice fulfill their

1 Stinchcombe obligations to you?

2 A Yes. And he also said that his sister, Miss
3 Hayek, they were in a difficult position with
4 her because what do they do with her, in view of
5 his assertion that he had immunity? Because you
6 recall the story he told in court wouldn't have
7 implicated her in the fire, but the real facts
8 certainly did, because she was to receive an
9 economic benefit.

10 Q You're a trial and appeal lawyer, sir, you're
11 not a judge. But using your experience as a
12 trial and appeal lawyer, and I know one can --
13 if there is one thing you can't predict in this
14 business, it's a Court of Appeal. But if you
15 had had those items, and let's just quickly
16 recount them, the recantations of Zanidean to
17 you and to the police, provable to you, and of
18 course provable through the police; the monies
19 paid to Zanidean, bearing in mind his evidence
20 under cross-examination, and a particular focus
21 on this so-called final payment of \$20,000 in
22 December of 1992; and the correspondence between
23 Saskatchewan Justice and Manitoba Justice which
24 certainly put very much on the table, the
25 evidence that, in fact, Mr. Zanidean had been

1 granted immunity on the Saskatchewan arson
2 charge, and then relating that to how he had
3 responded to questions in cross-examination; if
4 you had had those weapons in your armoury, sir,
5 in December of 1992, when you went before the
6 Manitoba Court of Appeal, do you think it might
7 have made a difference on the appeal?

8 A I'm certain that it would have. And it likely
9 would have resulted -- in my mind, it would
10 have resulted in either a new trial being
11 ordered or an acquittal being directed. Because
12 Zanidean was the basis on which the Crown's case
13 stood. Without Zanidean, there would be no
14 conviction.

15 Q Might it have also given you a basis, if a new
16 trial had been ordered, sir, for an abuse of
17 process application on a re-trial?

18 A Well, of course.

19 Q Because of the non-disclosure --

20 A Of course.

21 Q -- out of the first trial?

22 A Yes.

23 Q And those various items, sir, that came up
24 post-conviction, pre-appeal, you never heard a
25 glimmer of any of them; is that right?

1 A No, not a hint. And don't you think that if I
2 would have got that kind of information before
3 the Court of Appeal, I wouldn't have started on,
4 and so what happened with Mr. Gumieny, did he
5 have the same kind of arrangement? Don't you
6 think I would have started with important
7 witnesses? I wouldn't have let it go with just
8 one Mr. Zanidean. I mean, I had a whole case
9 there.

10 Q And who argued the appeal for the Crown, sir?

11 A Mr. Dangerfield.

12 Q Did he have Mr. Lawlor's assistance?

13 A Yes.

14 Q So the two of them were there in the Court of
15 Appeal?

16 A Yes.

17 Q Mr. Code suggests that may not be accurate.

18 A It may not.

19 Q May not.

20 A I'm prepared to rely on the court record.

21 Q I think it was just Mr. Dangerfield, counsel of
22 record.

23 Moving on to the next stage of the
24 proceedings, or I guess you might almost say
25 lack of proceedings, the only proceedings going

1 on after the appeal is Mr. Driskell is sitting
2 in jail serving his life sentence. But as you
3 now know, Mr. Brodsky, post-conviction,
4 post-appeal, a number of further matters became
5 known, if they weren't already known, they
6 certainly became known thereafter to, at the
7 very least, members of the Winnipeg Police
8 Service, the higher-ups, and also certainly to
9 some degree to Manitoba Justice. Are you aware
10 of that, sir?

11 A Yes.

12 Q You were a part of the publicity that took place
13 in 1993, in which the Winnipeg Sun did a few
14 stories over a period of three or four days --

15 A Yes.

16 Q -- on Mr. Driskell's case; am I right?

17 A Yes.

18 Q And what was your understanding as to what that
19 led to, sir, what did that cause?

20 A It caused an uproar, questioning of the
21 legitimacy of the conviction.

22 Q Yes.

23 A And I think there was an inquiry, an internal
24 police inquiry --

25 Q Right.

1 A -- that resulted in that, so that the police
2 could say whether the conviction should stand.

3 Q And there was some questions in the house asked
4 about it; am I right?

5 A We didn't stop working just because the Court of
6 Appeal dismissed the appeal. We wanted to put
7 pressure on whoever we could to encourage the
8 exposing of the things that would undermine that
9 conviction.

10 Q I want to just take you through a few things
11 that came out of that police review, sir, and
12 ask you if they would, in your opinion, have
13 been important matters in terms of an attempt to
14 undermine Mr. Driskell's conviction, the
15 validity of it?

16 A All right.

17 Q First of all, sir, and we have now moved into
18 1993, the police came into re-contact with
19 Mr. Gumieny. And the next thing that happens is
20 Mr. Gumieny also now threatens to recant his
21 evidence and, indeed, does recant his evidence
22 when talking to one of his handlers. Would that
23 have been -- the question almost sounds stupid,
24 but would that have been something that would
25 have been helpful to you, sir, to know?

1 A It would have been helpful during the trial,
2 before the appeal, after the appeal, of course
3 it would have been helpful.

4 Q Something that the officers who did the
5 investigation that led to the homicide review,
6 sir, discovered, that had not previously been
7 seen, at least one would think it had previously
8 been seen by the Winnipeg Police Service
9 officers, or of course by Manitoba Justice
10 either, were the RCMP files in Swift Current,
11 particularly PC Burton's files and his reports,
12 and Sergeant Ferguson's files and his reports,
13 and some reports prepared by more senior
14 officers than those two. And those documents
15 were really the basis, form the basis for what
16 led to Mr. Quinney writing the letters that he
17 did from Saskatchewan Justice, or on behalf of
18 Saskatchewan Justice to Manitoba Justice. Are
19 you with me?

20 A Yes, I am.

21 Q And in there then is substantial evidence now
22 that was not previously available to perhaps
23 anyone other than the participants in the events
24 at the time, but wasn't available to anyone
25 other than the participants in the events at the

1 time, that was discovered by the authors of the
2 homicide review, would that information, sir,
3 have been something of importance in an attempt
4 to overturn or have reviewed Mr. Driskell's
5 conviction?

6 A Yes, of course. I don't know why they didn't
7 let me have that documentation.

8 Q The Karas, sir --

9 A And they knew from the press -- I apologize --
10 but they knew from the press that I was still
11 acting for, or trying to act for Mr. Driskell
12 and trying to press for the overturning of his
13 conviction. It was not a secret.

14 Q And you likewise knew that Mr. Driskell was
15 trying to do the same thing?

16 A Yes.

17 Q The Karas, sir, I just want to read you a few
18 extracts from that report in that regard, and I
19 am looking at page 95 at the moment of the
20 homicide review. I will just read it to you, if
21 I may. It said,

22 "After spending a considerable amount of
23 time with the Kara family, we found the two
24 brothers who have no police records, appear
25 to be honest, hard-working individuals with

1 a sense of morals. It appears their father
2 has played and still plays a significant
3 role in their lives and who, by his own
4 admissions, have set very high standards
5 for his son's conduct."

6 Over the page at 96,

7 "We believe the Kara brothers did have some
8 involvement with Driskell, but the truth of
9 this involvement exists somewhere between
10 what they say occurred and what is
11 suggested by Ray Zanidean. We can also see
12 why they tried to downplay their
13 involvement with Driskell, fearing the
14 wrath of their father. We can understand
15 why the investigators were of the opinion
16 that they were involved with Driskell,
17 having been supplied with this information
18 from their 'star' witness, Ray Zanidean.
19 The truth of the matter may never be
20 learned, but we agree with Mr. Justice
21 Morse when he told the jury it would have
22 been difficult if such events and facts
23 could be made up separately by different
24 persons and not have some essence of truth
25 to them."

- 1 Now, that last point, just picking up there for
2 a minute and interrupting what I'm reading to
3 you, was of course a key factor in the Crown's
4 case. How did Gumieny, Zanidean and the
5 Karas --
- 6 A The striking similarities.
- 7 Q -- independently make up these series of stories
8 which interlock?
- 9 A Right.
- 10 Q Which then brings into question, well, the
11 integrity of the police investigation. If you
12 can demonstrate that the integrity of the police
13 investigation is highly suspect, which I think
14 you talked about yesterday, then that theory
15 sort of collapses --
- 16 A Right.
- 17 Q -- like a house of cards?
- 18 A Right. If we could establish that the stories
19 were scripted by somebody who had control of the
20 facts, or whatever facts they wanted to put
21 forward in court, then the stories will fit
22 together.
- 23 Q So taking into account, sir --
- 24 A I asked to speak to Mr. Zanidean --
- 25 Q Right.

1 A -- for instance.

2 Q Taking into account, sir, what's said there, and
3 you've read this report, am I right, sir?

4 A I don't remember if I read it or not. I read
5 portions of it.

6 Q Do you think that there is -- there is other
7 things they say about the Karas, but for the
8 moment I just wanted to read you those passages.
9 Do you think it would have been helpful, sir, to
10 try to go after Mr. Driskell's conviction
11 post-appeal, if you had had those opinions about
12 the Kara brothers?

13 A Yes.

14 Q At page 163, they actually comment directly
15 on -- the authors of the homicide review, and
16 these are senior police officers, these aren't
17 PCs talking; am I right?

18 A Right.

19 Q You remember who the four of them were, do you?
20 One now is Chief of Police?

21 A Yes.

22 Q "It appears..."

23 it says at page 163,

24 "...investigators armed with significant
25 information that was given to them by Ray

1 Zanidean attempted to and did get the Kara
2 brothers to incorporate this into their
3 statements. Based on our experience and
4 interview with him, it is our opinion Ashif
5 Kara's statement is not verbatim, but
6 appears more likely to be a summary of the
7 interview."

8 A Right.

9 Q Which is really in effect saying, we think that
10 Shipman and Morin lied in their evidence at the
11 trial, isn't it? Because that's what they said,
12 that it was verbatim?

13 A Yes.

14 Q Would that have been helpful information to you,
15 sir?

16 A It would have been helpful, yes. It is not as
17 large a point as the payments to Mr. Zanidean,
18 but it would have been helpful.

19 Q There is a reference at page 57, sir, to
20 something I actually don't know the answer to, I
21 just thought of it this morning, where the
22 authors of the report say -- they are talking
23 about Mr. Driskell's claims of innocence where
24 he claims that -- they say,
25 "Mr. Driskell, in effect, is basing his

1 allegations on newspaper articles gathered
2 over the years and is speaking of
3 Sergeants David Shipman and Ronald Morin.
4 This would tie in with Ashif Kara recanting
5 his statement taken by Shipman and Morin.
6 It appears to be an attempt to use these
7 articles for his own benefit."

8 What newspaper articles are they talking about,
9 do you know, sir, involving Sergeants Shipman
10 and Morin?

11 A No, I don't. The Winnipeg Sun was carrying a
12 number of articles. The answer is, I don't
13 know.

14 Q Okay. Fair enough.

15 A I don't remember.

16 Q I will ask Chief Ewatski when he comes,
17 presumably, he might better answer that.

18 A I don't think I had a copy that have report when
19 it came out. I don't know when I got it. I
20 thought I got it around the time of the bail
21 application.

22 Q Yes, did you. You had first seen it in 2003,
23 that was the first chance you would have had to
24 see it.

25 A So I couldn't done anything with it if I didn't

1 know about it.

2 Q At page 77 of the report, sir, this is the last
3 reference I am going to make to it, it is just a
4 small extract.

5 "On July 13, 1991, Zanidean's wife Susan
6 Fehr was arrested for impaired driving in
7 Swift Current. She claimed she could not
8 be charged because she and her husband were
9 under the Witness Protection Program. She
10 also commented she believed Driskell did
11 not commit the murder and police in
12 Winnipeg would not allow her to testify in
13 court."

14 Would you have wanted that information, sir?
15 Would that have been helpful to you?

16 A Of course. Of course.

17 Q Now, none of this information was provided to
18 you, sir?

19 A No.

20 Q Apparently, what was in the homicide review was
21 never even forwarded, or the review itself,
22 certainly, there is some dispute between the
23 police and Manitoba Justice as to exactly what
24 information was communicated, but the report
25 itself was never passed on to Manitoba Justice.

1 And indeed Manitoba Justice, as I think we are
2 going to see in the next witness, as best I can
3 tell, refused to even request a copy of the
4 review. Do you follow? So when requests then
5 were made of Manitoba --

6 A I follow the fact, but I am not sure about the
7 logic in that.

8 Q Well, there may be a logic in it, Mr. Brodsky,
9 if you follow it though.

10 A They didn't want to have it because then they
11 might have to disclose it?

12 Q You got it. You got it. Because that's exactly
13 what happened. Manitoba Justice were requested
14 to disclose the review. And Manitoba Justice's
15 reaction, in writing, was to throw their arms up
16 in the air, in effect, and say: Sorry, we
17 haven't got it. We can't give it to you.

18 I wonder if I can just -- and I think
19 Mr. Kennedy is going to get into this more with
20 you than I am, but if that reflects your
21 experience in any way, in terms of Manitoba
22 Justice in a sense trying to avoid its
23 disclosure obligations by not obtaining
24 information from the police so that it can't
25 then disclose it to the defence?

1 A No. I didn't expect that they would do that. I
2 knew that the police officers had the idea that
3 you shouldn't put things in your notebook that
4 you have to give to the Crown, because the
5 disclosure rules would require them to turn
6 them, turn that material over to the defence.
7 So some stuff goes in your book and some stuff
8 doesn't go in your book. I apologize for the
9 word "stuff," but some material goes in your
10 book, some doesn't, I understand that. But I
11 didn't think the Crown was part of that.

12 These are honourable people, these Crown
13 attorneys. Some of them are my -- some of
14 them -- they are my friends. I didn't expect
15 that.

16 Q So this case is a bit of a shocker to you?

17 I'll leave it. Have you thought, and again
18 this is sort of straying somewhat into
19 Mr. Kennedy's area, but have you thought about
20 the kind of changes that might be put into
21 place, sir, to try to stop these kinds of
22 situations arising in the future?

23 A I have a little. You asked me that yesterday --

24 Q In another context I did.

25 A Yes.

1 Q Okay. Let me ask you this, sir, and again
2 relying on your time around, so to speak, is
3 there a sense of entitlement that exists in
4 either the police or the Crown's office, that
5 you're aware of, that essentially, we're in
6 command and we can do what we want because no
7 one's really ever going to effectively challenge
8 it?

9 A Well, that was what I was trying to express
10 yesterday. The problem wasn't so much what
11 happened, what was disclosed and what wasn't
12 disclosed, what they were told to say, what they
13 weren't told to say and things like that, the
14 payments. The problem, the main problem was
15 that people didn't seem to think, or don't seem
16 to think that it's wrong. The problem is that
17 if they don't think it's wrong, then we are not
18 talking about Mr. Driskell, we are talking about
19 it being exposed in Mr. Driskell's case, but if
20 that's the attitude, then I'm not sure about
21 other cases.

22 Q Do you blame yourself at all, sir, for what
23 happened to Mr. Driskell?

24 A Well, I wasn't able to get the material that I
25 was seeking. Had I got it, he wouldn't have

1 been convicted.

2 Q Remember, I took you yesterday to your two
3 affidavits that you filed in support of, or as a
4 part of Mr. Driskell's release application in
5 November of '93, sir. And I just want to take
6 you back to tab 8, if I may, and ask you to read
7 paragraph 13 of your affidavit?

8 A Wait a minute.

9 Q Tab 8?

10 A 8 of the --

11 THE COMMISSIONER: This one here.

12 MR. LOCKYER: The buff coloured.

13 THE COMMISSIONER: Exhibit 21.

14 THE WITNESS: Okay, I have it.

15 BY MR. LOCKYER:

16 Q Could you read paragraph 13 of your affidavit,
17 sir, and the heading?

18 A The trial testimony of Ian Garber.

19 Q Mr. Garber was here yesterday; is that right?

20 A He was here for -- I saw him come in, I don't
21 know how long he was here for, but he was here
22 yesterday afternoon, I think.

23 Q Yes. Carry on.

24 A "I called Mr. Ian Garber as the only
25 witness in the applicant's defence because

1 he had conducted the applicant's defence on
2 his theft and possession charges on which
3 Mr. Harder was his co-accused. In this
4 capacity, Mr. Garber dealt directly with
5 Crown Counsel, Raymond Wyant, knew that
6 Mr. Wyant would withdraw all charges
7 against the applicant as soon as Mr. Harder
8 pleaded guilty, and told the applicant
9 this. I have always been troubled by Crown
10 Counsel, George Dangerfield's
11 cross-examination of Mr. Garber wherein he
12 suggested to him that he was being
13 untruthful in his testimony about the
14 Crown's position regarding the theft and
15 possession charges. Mr. Dangerfield took
16 this position despite the fact that he had
17 no evidence in his possession, nor any
18 information to support his allegations that
19 Mr. Garber's testimony was false. In fact,
20 all of the information that he had
21 suggested that Mr. Garber's testimony was
22 entirely truthful."

23 Q "In fact, all of the information that he
24 had suggested that Mr. Garber's testimony
25 was entirely truthful."

1 Could you expand on that, what you said in that
2 paragraph, sir?

3 A The cross-examination of Mr. Garber, the
4 cross-examination of Mr. Garber was very heated.
5 It was belittling to Mr. Garber.
6 Mr. Dangerfield left the impression with the
7 jury by his questions that the judge should have
8 been told what the agreements were, if he was
9 really telling a story which was truthful, the
10 judge should have been told. He went through
11 the -- he asked Mr. Garber, did the particulars
12 reveal that your client made a statement? I
13 mean, he belittled Mr. Garber in saying that it
14 was inappropriate conduct on his part to tell
15 Ray Wyant, who was the Crown attorney, senior
16 Crown attorney there, that somebody else, as he
17 put it, another man's client was going to plead
18 guilty. It made him out like he was
19 incompetent. Why would you have a preliminary
20 on such, if the case was such an easy one, he
21 asked him.

22 Q Well, you were there at the time, sir. Was the
23 import of Mr. Dangerfield's cross-examination at
24 the end of the day that Mr. Garber's not telling
25 the truth?

1 A Yes.

2 Q And did you ever try to interview Mr. Wyant, who
3 of course would have known -- who really would
4 have been quite decisive as to whether or not
5 Mr. Garber was telling the truth?

6 A I think I did. I think.

7 Q And was he a judge by this time, in 1991?

8 A I don't think so.

9 Q He was still a Crown attorney?

10 A He could have been a judge. I don't remember.
11 I wouldn't want to be --

12 THE COMMISSIONER: By what time, '91?

13 MR. LOCKYER: Yes.

14 THE COMMISSIONER: I thought he was still a
15 Crown.

16 MR. LOCKYER: I think he probably was, too.

17 MR. LIBMAN: '95.

18 MR. LOCKYER: 1995, I hear he was appointed a
19 judge, so he would have been a Crown there.

20 BY MR. LOCKYER

21 Q You are saying you interviewed him. I think I'm
22 right in saying there is no note in your file
23 about him being a Crown?

24 THE COMMISSIONER: We have a statement from
25 Mr. Wyant.

1 MR. LOCKYER: I will just clear this up. Yes,
2 we do, that's true.

3 THE WITNESS: The interview, I think, was done
4 by Mr. Garber.

5 MR. CODE: If I could just interject for a
6 moment, Mr. Commissioner. I'm somewhat
7 concerned about the line of cross-examination
8 relating to Mr. Garber's evidence and the way in
9 which Mr. Dangerfield cross-examined him.

10 We interviewed Mr. Garber in the
11 investigative phase of the Commission and
12 prepared a witness statement, which we sent to
13 him, and we still haven't got it back from him.
14 He has had it for oh, a week, ten days,
15 something like that, and we are still waiting to
16 get back his revisions to it. So it's somewhat
17 unfair to my friend, who will have to
18 cross-examine on this, Mr. Prober, if the issue
19 becomes raised and he's not equipped with our
20 interview of Garber.

21 I don't share Mr. Lockyer's views about
22 this issue, after having carefully reviewed it
23 myself, and after having questioned Mr. Garber
24 carefully about it. And I'm just somewhat
25 concerned that Mr. Lockyer is opening up an

1 issue here that Mr. Prober's not in a position
2 to deal with properly, because he doesn't have
3 the Garber interview yet. So I simply want to
4 tell Mr. Lockyer that he should proceed with
5 some caution perhaps in this area.

6 MR. LOCKYER: That's fair. I don't think I knew
7 that.

8 MR. CODE: No.

9 MR. LOCKYER: No.

10 MR. CODE: No. I told Mr. Prober, when
11 interviewing Mr. Dangerfield, because we
12 interviewed Mr. Dangerfield after we had
13 interviewed Mr. Garber, and I told Mr. Prober I
14 was not going to pursue this issue, having
15 satisfied myself on the matter after having
16 interviewed Garber.

17 Unfortunately, we still don't have the
18 Garber interview back, so neither Mr. Lockyer,
19 nor Mr. Prober have the benefit of what I have
20 had the benefit of.

21 THE COMMISSIONER: Mr. Lockyer --

22 MR. LOCKYER: I will move on. It sounds the
23 safest thing to do under the circumstances.

24 THE COMMISSIONER: Thank you. I appreciate it.

25

1 BY MR. LOCKYER:

2 Q The next area I wanted to ask you, sir, about,
3 and it's always a bit dangerous to ask a defence
4 lawyer about this area, but it's the area of
5 funding.

6 A Funding?

7 Q Funding, yes.

8 A Yes.

9 Q You have worked long enough in this province,
10 sir, to know how the Legal Aid plan works here;
11 am I right?

12 A Yes.

13 Q And could we focus on the issue of funding for
14 people who claim that they are in prison but
15 that have been convicted of a crime that he or
16 she did not commit. Are you aware of the
17 funding, whether there is any funding for people
18 who make those claims, sir?

19 A Generally there's not. I think the director of
20 Legal Aid told me that --

21 Q That's Gerry McNeilly; is that right?

22 A Yes, that they are prepared to fund two
23 extraordinary applications a year.

24 Q Extraordinary application meaning people who
25 claim to be wrongfully convicted?

1 A Or it could be fresh evidence, some
2 extraordinary -- yes, it would amount to
3 wrongful convictions. I don't know what the
4 extraordinary would be. He never defined it,
5 and I don't know how they arrived at it. And
6 who knows? It's silly.

7 Q All right. And just to advise the
8 Commissioner --

9 A Because I said to him, what happens if there is
10 none in one year and four the next year? I
11 mean, don't you worry about the legitimacy and
12 the viability and the likelihood of success of
13 the applications? And I don't have a basis for
14 how the number two came.

15 Q Just so that the Commissioner can receive a
16 little assistance, can you tell us in a couple
17 of sentences, sir, how the Legal Aid plan works
18 in Manitoba, how it operates? I don't think
19 it's similar to the Ontario plan.

20 A Lawyers receive about \$57 an hour, \$57 an hour
21 being what they are entitled to charge. In
22 significant cases, they receive obviously less
23 than that because there is a cap put on what
24 they will get, no matter how many hours they
25 work. So that in this case, for instance, we

1 clearly wouldn't have been earning \$50 an hour
2 or \$30 an hour, because there's a cap put on,
3 it's called big case management, and they allow
4 you a certain number of hours and that's how
5 much they are going to pay for.

6 Q I understand that there is also -- running
7 alongside the funding of private counsel, there
8 is also a public defender system as well; is
9 that right?

10 A Well, it's a staff counsel system.

11 Q Right. Mr. Libman is usually a part of it; is
12 that right?

13 A Yes. He's a part of it.

14 Q Okay. Finally, sir, I wanted to ask you about,
15 and you did talk about it in passing a little
16 yesterday, about the RCMP laboratory system in
17 this province. But before I do that, just a
18 couple of things with respect to Mr. Driskell's
19 case. You're aware, of course, of the -- and I
20 think you've talked about them yesterday -- the
21 DNA results with respect to the hairs that were
22 purportedly from Mr. Harder and seized from
23 Mr. Driskell's van.

24 A Yes.

25 Q Was it your understanding, sir, that the

1 probative value of that evidence at trial
2 derived from the fact that Mr. Harder had never
3 been in Mr. Driskell's van?

4 A Yes. It was the exact same thing in the Star
5 case. They put the deceased in the vehicle.

6 Q Yes.

7 A That's a key by virtue of the hair comparisons.

8 Q Microscopic hair comparisons?

9 A Yes. And those are just two examples.

10 Q If I could take you to -- sorry?

11 A Those are two examples, and they seem to be the
12 only basis on which the Crown could show the
13 deceased ever was in the accused's vehicle.

14 Q And if I could just take you to a couple
15 of --

16 THE COMMISSIONER: Just as a matter of
17 curiosity, just refresh my memory, what was the
18 end result in Star?

19 THE WITNESS: He was convicted of first degree
20 murder of two people in the first trial.

21 THE COMMISSIONER: I remember the facts.

22 THE WITNESS: The second trial he was convicted
23 of the manslaughter in connection with one of
24 the young ladies.

25 THE COMMISSIONER: Okay.

1 BY MR. LOCKYER:

2 Q On the re-trial, was that a plea or a trial?

3 A No, it was a trial.

4 Q It was a trial. A re-trial after the Supreme
5 Court decision?

6 A It was a re-trial after the Supreme Court
7 ordered a new trial, yes.

8 Q Right.

9 A And it was by virtue of going to trial the
10 second time that the Crown decided to improve
11 their case by having those hairs not only
12 compared microscopically by Mr. Christianson,
13 but to have the DNA done on them as well. And
14 that's when this, oh, my gosh, the three hairs,
15 the hairs in the Star vehicle were not from the
16 deceased.

17 MR. LOCKYER: Mr. Commissioner, we've supplied
18 the testimony of Mr. Christianson on the Star
19 case to Commission Counsel as well from the
20 first trial.

21 THE COMMISSIONER: One always looks at cases
22 through your own eyes and, of course, I
23 looked -- I was a judge at the time it was
24 decided, and I looked at it from the perspective
25 of the jury charge.

1 THE WITNESS: Yes.

2 THE COMMISSIONER: And it didn't make me
3 thrilled.

4 THE WITNESS: I appeared three times in the
5 Supreme Court on the Star case. They weren't
6 thrilled either. It was argued many times, a
7 few times.

8 BY MR. LOCKYER:

9 Q Just a couple of things in this regard where
10 Mr. Driskell's case is concerned, sir. At tab
11 26, this is the memorandum from Mr. Savage -- or
12 it's a letter, actually, from Mr. Savage to you.
13 And at page 309 at tab 26, he tells you - he
14 talks about your memo of May 9th. I am not
15 entirely sure if we have that. And I don't --
16 I'm not sure if we have that. We don't? I'm
17 not sure if we have that. But leaving that
18 aside --

19 MS. CARSWELL: Sorry, where are you,
20 Mr. Lockyer?

21 BY MR. LOCKYER

22 Q Page 309, tab 26, a little more than halfway
23 down, there is a paragraph beginning,
24 "Your memo of May 9, 1991 re: Harder and
25 the van sold by Driskell to Bannerman..."

1 Okay. Apparently we do have the May 9th. It's
2 at tab 22. I don't need to refer to it, then.

3 "...re Harder and the van sold by Driskell
4 to Bannerman was discussed with Bannerman.
5 To his knowledge, Harder was never in this
6 van, nor did he know about it."

7 And was that consistent with what Mr. Driskell
8 was telling you as well, sir?

9 A Yes, absolutely.

10 Q At tab 9, sir, which is your second affidavit.

11 A Tab 9?

12 Q Sorry, of the buff colour. Sorry, the buff.

13 A Yes.

14 Q You said at paragraph 7,

15 "In my pre-trial interviews with the
16 applicant in 1990 and 1991, he always
17 advised me, without qualification, that
18 Perry Harder had never been in his 1979
19 Chevrolet van, licence plate number 907
20 HKB. This is the vehicle from which the
21 three scalp hairs were seized that
22 Mr. Todd Christianson testified matched
23 those of Mr. Harder."

24 Is that true, sir?

25 A Yes, absolutely true, and I swore to it.

1 Q Mr. Commissioner, if you have a look at this
2 affidavit, since we are on that page, the top of
3 page 3, the same page, there is a misprint, the
4 second dot, so to speak. A memorandum from
5 Bruce Whitley to S. Whitley, Q.C. dated April
6 19, 1993 it should say -- it says 2003. Do you
7 follow?

8 THE COMMISSIONER: Yes.

9 MR. LOCKYER: And you just get confused if you
10 read it and say, what memo is that?

11 THE COMMISSIONER: Yes.

12 BY MR. LOCKYER:

13 Q Now, you've had a chance, sir, I think you're
14 aware now of four cases, Mr. Driskell's being
15 one of them, in which there have been
16 post-conviction examinations to determine
17 whether hair microscopy comparison evidence was
18 accurate; is that right?

19 A Yes.

20 Q There is the case of Mr. Driskell, Mr. Star,
21 Mr. Unger, and Mr. Sanderson?

22 A Mr. Sanderson, yes.

23 Q And the results in all four of those cases where
24 this has been done, sir?

25 A The comparison was, by examination, shown to be

1 inaccurate.

2 Q In each and every case?

3 A Yes.

4 Q With respect to each and every hair in each and
5 every case?

6 A Yes.

7 Q So they have a 100 per cent record you might
8 say --

9 A Yes.

10 Q -- of being wrong?

11 A I'm happy to say I wasn't counsel in each and
12 every case.

13 Q No. You were counsel on certainly two.

14 A Two.

15 Q Is that right?

16 A Two.

17 Q All right. Now, can you tell us a little bit
18 about what sort of the -- what your opinions
19 are of the RCMP lab system, sir, insofar as it
20 is used in this province? And we are going to
21 hear a lot more about it, but I thought that it
22 might be helpful to hear from a veteran, so to
23 speak?

24 A Well, the lab system generally is a good system
25 and the people there are cooperative and try and

1 get along.

2 Q Yes.

3 A And I've been there -- in fact, I've been there
4 to the lab in Regina. I've been to the lab in
5 Winnipeg, obviously. Different places, I've
6 been to the Centre of Forensic Sciences, I've
7 been to Scotland Yard's Lambeth Road, I've been
8 to a variety of labs. There are good people
9 working for the RCMP.

10 Q Is there anything about the lab that you don't
11 like, sir?

12 A Well, because they work so much with the police,
13 sometimes they try very hard to see through the
14 microscope what they hope to see, what will help
15 the case.

16 Q So if they are asked to look at some hairs to
17 see whether they come from Perry Dean Harder,
18 they will look through the microscope and bingo,
19 they will see them?

20 A Well, that's the reason. It is not an
21 independent -- how do I put it -- it is not like
22 a collection of facts. Sometimes you are given,
23 or I think they are given the background, they
24 are told what to look for, and then they have to
25 see if they can see it.

1 Q Yes.

2 A Sometimes they see it. Mr. Christianson seemed
3 to see it.

4 Q So there is a bias there, is that what you are
5 saying, an inherent bias?

6 A Unfortunately.

7 Q And you say you have been to the Centre of
8 Forensic Science, sir. That, as you may know,
9 is not a police lab. You are aware of that, are
10 you?

11 A Yes, that's why -- yes, that's why I wanted to
12 see the difference.

13 Q You want to see the difference, okay.

14 A I wanted to see the difference.

15 Q Yes. And what do you think of the police lab
16 system, sir, the idea of the lab being under
17 police authority?

18 A Well, I understand, we used to have police
19 magistrates.

20 Q Yes.

21 A We don't have them anymore because it's an
22 anachronism. It's not independent. It doesn't
23 look independent. I guess an example I could
24 use, and I shouldn't be telling anecdotes, but I
25 see another former client of mine here, when I

1 had to have a hair, a glove examined, I took it
2 to a Vancouver City analyst, not a police
3 laboratory. I think that police shouldn't be
4 running them. I think they should be
5 independent. I think, like the chief medical
6 officers run, do the autopsies, not police
7 officers, I think it should be run and operated
8 by an independent non-profit agency.

9 MR. LOCKYER: All right. Thank you. Maybe
10 Mr. Kennedy will ask you a bit more about that.
11 Thank you, sir, those are my questions.

12 THE COMMISSIONER: I have not had anything to do
13 with a lab for many, many years. My question
14 is, could you refer something to the lab in
15 Manitoba and be assured of confidentiality?

16 THE WITNESS: Absolutely not. The opposite
17 would be true.

18 THE COMMISSIONER: When asking that, I don't
19 know what the policy is.

20 THE WITNESS: But I know what the policy is
21 because I've tried that.

22 THE COMMISSIONER: But as I say, I don't know
23 what the policy is in Ontario --

24 THE WITNESS: Yes.

25 THE COMMISSIONER: -- so I am not using that as

1 a criteria.

2 MR. LOCKYER: It is the same, the CFS will not
3 give you a privileged opinion.

4 THE COMMISSIONER: Okay.

5 THE WITNESS: But if you are going to take a
6 chance, you are better off with an independent
7 laboratory than a non-one.

8 MR. LOCKYER: It is actually discussed at some
9 length in Justice Kaufman's report on Morin,
10 that issue.

11 THE COMMISSIONER: Which report?

12 MR. LOCKYER: In Justice Kaufman's report of the
13 Morin inquiry, he discusses that issue of
14 confidentiality --

15 THE COMMISSIONER: Yes, okay.

16 MR. LOCKYER: -- at the Centre of Forensic
17 Sciences.

18 THE COMMISSIONER: Mr. Kennedy, would you like
19 to follow?

20 MR. KENNEDY: Yes. Thank you, Mr. Commissioner.
21 Just one second, Mr. Commissioner, to get
22 organized.

23 BY MR. KENNEDY

24 Q Now, Mr. Brodsky -- thank you, Mr. Commissioner.
25 Mr. Brodsky, I have five areas that I would like

1 to review with you. The first area will be the
2 use of the preferred indictment or the direct
3 indictment.

4 Are you aware, Mr. Brodsky, that there is a
5 policy statement of the Manitoba Department of
6 Justice in relation to the use of direct
7 indictments under section 577 of the Criminal
8 Code?

9 A No. I'm not surprised.

10 MR. KENNEDY: Mr. Commissioner, these are
11 documents that were prepared as additional
12 documentary disclosure from the Government of
13 Manitoba and Department of Justice by Mr. Olson.
14 I have discussed this with Mr. Olson prior to my
15 examinations. It is my understanding that he
16 has copies to file with the Commission. Thank
17 you.

18 THE COMMISSIONER: All right. That will be,
19 what are we, 23? Exhibit 23?

20 THE CLERK: Yes, Mr. Commissioner.

21 THE COMMISSIONER: It's copies of a Manitoba
22 Justice Policy Directive re preferred
23 indictments.

24 (EXHIBIT 23: Copy of Manitoba Justice
25 Policy re preferred indictments)

1 BY MR. KENNEDY

2 Q Mr. Commissioner, I thought it might be helpful
3 to refer to these now, as the issue of the
4 direct indictment has been the subject of
5 examination.

6 What you will see there, Mr. Brodsky, is
7 that there is a policy statement -- there are
8 two. One is dated August 27, 1996?

9 A Yes.

10 Q And the second is dated December 2004. If I
11 could ask you to look at the August 27, 1996
12 policy statement first?

13 A I am.

14 Q If I could ask you to look at the rationale at
15 page 3?

16 A At page 3?

17 Q Yes, sir.

18 A Yes.

19 Q Do you see that the statement,

20 "The power to indict an accused directly
21 must be exercised with restraint. Where no
22 preliminary inquiry has been held, a direct
23 indictment deprives the accused of a
24 significant opportunity to test the Crown's
25 case and must therefore only be used where

1 exceptional circumstances justify such a
2 procedure."

3 Now, this is what you were saying yesterday, is
4 that correct, Mr. Brodsky?

5 A Yes.

6 Q I want to go on a little bit further, though, in
7 the next paragraph.

8 "The fairness of the procedure in
9 proceedings under section 577(b) will be
10 enhanced by receiving, wherever practical,
11 the views of defence counsel who will
12 invariably have a different and often
13 useful perspective on the merits of the
14 case and the procedure."

15 Have you ever been consulted, Mr. Brodsky, for
16 your views or asked for your views on the issue
17 of a preferred indictment?

18 A To the contrary. I have asked to make
19 submissions to the Attorney General and have
20 been told I can't.

21 Q Do you know when that would have been? Or has
22 it occurred on more than one occasion,
23 Mr. Brodsky?

24 A It occurred on more than one occasion.

25 Q Any idea when the last time that would have

1 occurred?

2 A No. Probably in the last two years --

3 Q Okay.

4 A -- the last time.

5 Q I now want to you look at the --

6 A Because the direct indictments are coming before
7 preliminary inquiries are set. Two weeks
8 before -- this is an emotional topic -- two
9 weeks before the preliminary inquiry is to take
10 place, the Attorney General is handing down a
11 direct indictment. And it is an unfair
12 procedure. It is an unfair proceeding. It's
13 upsetting.

14 Q Okay. I want you to next look, Mr. Brodsky, at
15 the policy statement or policy directive of
16 December 2004?

17 A How would they -- all right, I'll leave that.
18 It's nice to -- now that I have this. Okay, I'm
19 looking at it.

20 Q Okay. I want you now to go, what you see, and
21 I'm sure Mr. Olson will go through it with you
22 in more detail, but the outline when the direct
23 indictment should be used, the procedure. I
24 want to go to the rationale again, sir, if I
25 could ask you to look at page 3?

1 A Right.

2 Q So this is 2004.

3 A Page 3, you mean page 2?

4 Q No, there is a page 3 to this document.

5 THE COMMISSIONER: Well, it's numbered 2 in the
6 one that we have.

7 MR. KENNEDY: Okay. Well, what I'm looking has
8 a page 3.

9 THE WITNESS: I see the word "rationale", it's
10 at the bottom of page 2.

11 MR. KENNEDY: The bottom of page 2 -- no, I've
12 got a page 3 to my documents, Mr. Commissioner.
13 Okay.

14 THE COMMISSIONER: It is like you have an extra
15 half hour or two.

16 THE WITNESS: I can't help you because I have
17 never seen this.

18 BY MR. KENNEDY

19 Q I'll read you this comment, because it's the
20 same, Mr. Commissioner, and I'm sure we can get
21 a copy of this page. This is the 2004 policy
22 directive.

23 "The fairness of the procedure will be
24 enhanced by receiving, wherever practical,
25 the views of defence counsel who will

1 invariably have a different and often
2 useful perspective on the merits of the
3 case and the procedure. It is recognized
4 that cases will arise where the prejudice
5 to the case in soliciting the views of
6 defence counsel will substantially
7 outweigh the prejudice to the accused in
8 not doing so. And in such cases,
9 preserving the integrity of the case should
10 prevail."

11 That's the same sentences, or the same two
12 sentences that are in the 1996 directive.

13 Again, in 2004, Mr. Brodsky, this issue of
14 enlisting defence counsel is in the policy
15 directive. You're saying, as you previously
16 testified --

17 A You're telling me that there is a policy
18 directive that I don't know about, and no
19 defence counsel that I know of knows about it,
20 and I'm supposed to respond to it? If I don't
21 know about it, I don't know about it.

22 Q My question for you, Mr. Brodsky, is, are you
23 aware -- we know you've never been asked for
24 your position -- are you aware if any of the
25 defence counsel in Winnipeg or in Manitoba have

1 ever been asked for their views on the use of
2 the preferred indictment?

3 A No. No. Why do you think that we applied to --
4 we were so concerned about the issue of
5 preferred indictments that we applied under the
6 Freedom of Information Act. I mean, it's very
7 disconcerting what's happened with preferred
8 indictments in Manitoba. And a policy, if there
9 was a written policy, as you are telling me
10 there is, and I accept what you are telling me,
11 certainly would have been helpful.

12 Q Mr. Brodsky, you stated yesterday, you testified
13 yesterday that there appears to be a -- the
14 numbers appear to be increasing in terms of the
15 use of the preferred indictment; is that
16 correct?

17 A Well, they don't appear, they are.

18 Q Okay. And in the years 2005, 2006, is 2006 -- I
19 don't have that letter in front of me -- is 2006
20 also on that letter, Mr. Brodsky?

21 A Yes. There is 15 in 2005, and the date of the
22 letter, which is June of 2006, there was 9
23 already.

24 Q So although this policy directive is in 2004,
25 you've never been consulted?

1 A No. And I have to tell that you these direct
2 indictments that are listed by number here have
3 involved some of my cases.

4 Q Mr. Brodsky, do you have any suggestions for
5 this Commission as to how the use of the
6 preferred indictment, the system for the use of
7 preferred indictment can be improved in this
8 province?

9 A Well, we have to figure out, not how to use it
10 more often, we have to figure out how to use it
11 less often. We shouldn't be taking away the
12 preliminary inquiry. We shouldn't be taking
13 away the opportunity to have disclosure, not
14 worry about continuing disclosure which goes
15 along as matters proceed now even during the
16 trial, where you can't respond to the
17 disclosure, where you can't get your witnesses
18 together when it's more difficult to prepare a
19 proper defence.

20 Q So your first suggestion, Mr. Brodsky, is that
21 there should be -- the use of the preferred
22 indictment should be limited?

23 A Absolutely.

24 Q Sir, would a system for justifying the preferred
25 indictment, would that be helpful? In other

1 words, where the Crown would have to put forward
2 their reasons, as a matter disclosure, to you as
3 to why the preferred indictment is being
4 utilized?

5 A Yes.

6 Q Also --

7 A And allow me to respond to it.

8 Q That was my next point, sir, is that in the
9 policy directives there appears to be the issue
10 of allowing defence counsel to comment, which is
11 not the practice. Would that also be helpful,
12 sir?

13 A Yes.

14 Q Do you have any other comments, sir, on the use
15 of preferred indictments, in terms of the
16 improvement in this province?

17 A No. I don't agree with this business of
18 preferred indictments. It's too readily --
19 their use is to prolific.

20 Q Sir, issues two and three that intertwine --

21 A How would I know, in any event, what the
22 Attorney General is being told by the Crown
23 attorney and how that's going to effect the
24 proceeding in the case? I mean, we're talking
25 about -- Mr. Lockyer was talking about, in any

1 event, about Legal Aid. And the Attorney
2 General, who funds Legal Aid, that is funds the
3 defence, is also funding the payment system for
4 witnesses to testify in the case. Mr. Lockyer
5 was talking about the \$20,000, \$60,000. Or I'm
6 told now it's \$80,000, or \$84,000, somebody
7 said. Don't you think that some of this
8 information on how much a witness should be paid
9 comes from -- we had to prefer indictment. You
10 know, there has been some fooling around going
11 on in this case, and witnesses are scared, and
12 those are things that defence counsel would like
13 to respond to.

14 THE COMMISSIONER: Supposing you were the
15 Government of Canada, how would you change it?
16 And I'm talking about the Government of Canada
17 now, not the provincial?

18 THE WITNESS: Yes. I would change it by having
19 a requirement that the preferred indictment come
20 with the reasons that the indictment was
21 preferred. I would allow -- and I would say
22 that should only take place after consultation
23 with the Crown and the defence. That is
24 submissions should be made -- allowed to be made
25 in connection with the preferring of the

1 indictment. There may be some legitimate
2 mistakes that are made that could be easily
3 answered by defence counsel, as an example. How
4 can you respond to it if you don't know about
5 it?

6 BY MR. KENNEDY

7 Q Mr. Lockyer makes the point, Mr. Brodsky, and I
8 don't know if you are aware of this, that
9 Manitoba Justice has claimed privilege for why
10 they used the preferred indictment in this case.
11 Were you aware of that?

12 A They can call it whatever they want. I've said
13 on a number of occasions that I have asked to
14 make submissions to the Attorney General, and I
15 am told I can't. I said the Attorney General
16 can throw it away, he doesn't have to act on it.
17 He doesn't have to tell me what he thinks about
18 my submission. Why can't I just make a
19 submission?

20 MR. CODE: Again, I have to rise. I don't think
21 that could be accurate. We have the memo that
22 Mr. Lawlor prepared for the Attorney General
23 requesting the preferred indictment in this
24 case.

25 MR. OLSON: There has to be some accuracy to

1 what's being put to this Commission.

2 MR. CODE: There is no claimed privilege over
3 the -- the request was put to him in writing.
4 We have the document. There is no claim of
5 privilege on it.

6 MR. LOCKYER: I don't think that's right,
7 Mr. Commissioner, but we can sort it out.

8 THE COMMISSIONER: We will sort it out.

9 MR. LOCKYER: Yes.

10 THE COMMISSIONER: It seems two experienced
11 counsel think that it's not right.

12 THE WITNESS: I didn't talk about privilege --

13 THE COMMISSIONER: No. We are talking about the
14 privilege issue.

15 THE WITNESS: Yes. In connection with my
16 representing Mr. Driskell, we didn't talk about
17 privilege.

18 THE COMMISSIONER: Right.

19 BY MR. KENNEDY

20 Q Okay. If we can move, Mr. Brodsky, if we can
21 move to the next point and, sir, we have gone
22 through this with Mr. Lockyer, so I want to stay
23 focused here now.

24 A Right.

25 Q In terms of the disclosure issue, there is two

1 issues here, on the pre-appeal and the
2 post-appeal disclosure.

3 A Yes.

4 Q Can you make any suggestions, sir, to this
5 Commission as to how -- first in the pre-appeal
6 disclosure, how information that is in the
7 possession of the police gets to the Crown?

8 A Well, if information that could be relevant to
9 the case comes into the possession of the Crown,
10 that should be disclosed to the defence counsel.
11 The appeal should be adjourned until it could be
12 analyzed, so I think that should happen.

13 Q Sir, would you agree that a system whereby a
14 designated police officer will be put in place
15 who would make the disclosure to a designated
16 Crown might be helpful?

17 A Absolutely. Let me back up a bit. When we are
18 talking about relevant, it could make a
19 difference, somebody has to decide that.
20 Sometimes the lawyers involved in the case get
21 too psyched up on the merits of their case and
22 don't see the other side. So I think that what
23 should happen is that there should be a
24 designated police officer who is not part of the
25 investigation, and I think there should be a

1 Crown attorney who is not part of the
2 investigation, to whom these materials should be
3 forwarded and who should make the decisions. In
4 that way we wouldn't have like this case, you
5 would know who to go to, you would know who the
6 designated officer is, a system we don't have
7 now.

8 Q Sir, in terms of post-appeal disclosure, do you
9 have any comment on whether or not the setting
10 up of a body in Manitoba, similar to the
11 Committee for reviewing post-appeal claims of
12 wrongful convictions would be helpful?

13 A Well, until the Federal Government sets up an
14 independent, non-profit committee to determine
15 wrongful convictions, and whether there are
16 wrongful convictions, we should have a body set
17 up in Manitoba. It should be a non-profit body.
18 It should be an inquisitorial, as opposed to an
19 adversarial body. It should be comprised of,
20 for instance, a retired Superior Court judge, it
21 should have a senior retired police officer on
22 it, and it should have a senior defence lawyer
23 on it, and probably a representative of Legal
24 Aid on it.

25 Q In terms of the RCMP lab system, Mr. Lockyer

1 went through that point with you. Is it my
2 understanding -- is my understanding correct
3 that you're suggesting that there should be a
4 government agency set up similar to the Centre
5 of Forensic Sciences in Toronto as opposed to a
6 police agency?

7 A It should be an independent, non-profit agency
8 run by a civilian authority, not just civilian
9 employees, in Manitoba.

10 Q The fourth issue I wanted to deal with you, sir,
11 is the issue of the unsavoury witness.

12 A Yes.

13 Q The individuals -- what does an unsavoury
14 witness mean to you?

15 A An unsavoury witness is a term that the Supreme
16 Court used in a case called Vetrovec, which
17 means that the jury has to be warned about
18 accepting that witness's evidence and looking
19 for support for that witness because of the
20 nature of whatever arrangements he may have, his
21 interest in the case, his lengthy criminal
22 history, convictions for perjury, outstanding
23 charges, unsavoury witness are as defined in
24 those terms by the trial judge.

25 Q I'm going to make a number of suggestions to

1 you, sir, and see if you agree with me on this.

2 In terms of trying to avoid the problems that
3 arose in this case, the negotiations, would you
4 agree that it would be preferable to have the
5 negotiations with this kind of witness on
6 videotape, if at all possible?

7 A Of course. Of course. If we are going to talk
8 about buying his testimony for money, we want to
9 know why -- how it comes that he tells the story
10 that it tells?

11 Q Number two --

12 A That is all of the interchanges, all of the
13 contact with the unsavoury witness should be on
14 video, not just his formal statement.

15 Q Number two, sir, would you agree, would it be
16 helpful to have full and complete disclosure of
17 the authorities dealing with the unsavoury
18 witnesses and counsel, if the unsavoury witness
19 has counsel?

20 A Yes. As in this case with Mr. Kovnats, it would
21 have been extremely helpful to have the
22 interchange of the correspondence.

23 Q Number three, would you agree it would be
24 helpful, sir, to have any and all payments to
25 such a witness fully documented either on

1 videotape and/or in writing and disclosed?

2 A That goes without saying, of course. You see,
3 when I'm dealing with a Crown attorney, I'm not
4 dealing with the person -- I am perhaps not
5 dealing with the person who is organizing the
6 payment for the witness. It should be
7 disclosed. The amounts should be disclosed.
8 And how the negotiations went, if it goes, I
9 will say X, but I am not going to say it unless
10 I get that much money or this kind of mortgage
11 payment, or whatever, whatever, I would like to
12 know that.

13 Q Number four, sir, that any other favours,
14 considerations, future promises or
15 post-testimony benefits must be disclosed in
16 full, so that the witness himself knows what he
17 or she is getting and no more or no less?

18 A Yes, I agree with that.

19 Q Five, that all post-conviction dealings with the
20 unsavory witness must be fully documented and
21 disclosed?

22 A Yes.

23 Q And number six, that the criminal, what I will
24 refer to as the criminal history of the
25 unsavoury witness, which would include

1 psychiatric records, criminal records,
2 outstanding charges, should all automatically be
3 disclosed?

4 A I think, I would go a little further than that.
5 I think if a witness has a psychiatric history
6 that could bear on his testimony, or his ability
7 to take an oath, the Crown should request it,
8 the police should obtain it, and it should be
9 disclosed.

10 Q Sir, my final area with you is, you used a term
11 during your testimony yesterday under the
12 examination --

13 A Unsavoury witnesses who get paid, by the way --
14 I don't want to stand here on a podium -- but
15 unsavoury witnesses who get paid, by the way,
16 are no better than jail's informants who get
17 paid in another way.

18 Q The last area I want to un cover with you, sir,
19 is yesterday in your testimony you used a term
20 in your testimony "Crown culture" at some point.

21 A Yes.

22 Q What does that mean to you?

23 A It means standing by and allowing unfair or
24 unethical or inappropriate things to happen in a
25 courtroom, and just standing by and letting

1 them.

2 Q Earlier today, sir, you said that what was
3 bothersome, or one of the things that was
4 bothersome in this case was not only that they
5 allowed, the Crown allowed certain evidence to
6 be given, but they thought it was okay?

7 A Well, yes, they thought it was okay because they
8 didn't say anything.

9 Q Sir, I'm going to read you, very quickly, an
10 excerpt from the report recently conducted in
11 Newfoundland by former Chief Justice Antonio
12 Lamer. And at page 155 of that report he
13 states:

14 "What is disturbing is the picture that
15 emerges from the cumulative effect. It
16 reflects a Crown 'culture' that is not
17 objective but overreaches to pursue every
18 possible legal avenue that will make life
19 difficult for the accused."

20 And Is that the kind of thing you're talking
21 about?

22 A Yes. I won't -- Mr. Lockyer raised before -- I
23 won't ask for the Ewatski report because I might
24 have to disclose it. I won't ask -- don't tell
25 me that, because I will have to disclose it. I

1 mean, if you're going to be dealing with a
2 witness and paying him money, then have another
3 Crown attorney, let's laminate this. It's like
4 the police officers who take the statements from
5 a witness, have it improved, have it changed,
6 have another change, and then have another
7 statement taken by somebody else, other police
8 officers, and then produce only the last
9 officer's. It's not right.

10 Q Sir, do the problems and attitudes that you've
11 described over the last day in your testimony,
12 can you offer us any opinion as to whether or
13 not they still exist in the Province of
14 Manitoba?

15 A I hope they don't, but I was surprised in this
16 case.

17 Q Your affidavits were filed in 2003, October and
18 November 2003?

19 A Yes.

20 Q Is that correct?

21 A Yes.

22 Q And I want to read to you, sir, two
23 recommendations from Commissioner Lamer in
24 Newfoundland, in the Newfoundland report, and
25 see if you agree with these, or will they be

1 helpful in Manitoba.

2 "The Minister of Justice of Newfoundland
3 and Labrador should establish an
4 independent review of the DPP's office.
5 This review should ensure that steps have
6 been taken and identify further steps that
7 should be taken to eliminate the Crown
8 culture that contributed to the wrongful
9 conviction of Gregory Parsons and was
10 evident in the prosecution of Randy Druken.
11 This review should also conduct the
12 assessment referred to in the previous
13 paragraph so that the government may
14 allocate adequate resources to modern DPP's
15 office. This also requires a comprehensive
16 review and a revision of the Crown policy
17 manual."

18 A Yes.

19 Q Would that be helpful, sir?

20 A Yes, it would.

21 Q And then the final recommendation of
22 Commissioner Lamer, I will paraphrase it for
23 you. At paragraph 171, he suggests that a
24 Criminal Justice Committee should be established
25 to have an ongoing dialogue that would involve a

1 retired judge, a representative of the Minister
2 of Justice, a representative of the defence bar,
3 a representative of the DPP, a representative of
4 the Legal Aid Commission and the two police
5 forces in Newfoundland.

6 Would such a committee be helpful in
7 Manitoba?

8 A Of course. Instead of my foot stomping, you are
9 preferring too many indictments, or you are
10 denying me a preliminary inquiry, or whatever,
11 instead of foot stomping or yelling on a radio
12 program, I should have such a committee to go
13 to, to air my concerns.

14 Q Okay, those are my --

15 A When I say I, I mean defence counsel, I
16 apologize.

17 MR. KENNEDY: Those are my questions,
18 Mr. Brodsky. Thank you, Mr. Commissioner.

19 MR. LOCKYER: Can I just address that preferred
20 indictment issue, because I think I have sorted
21 it out, for me?

22 THE COMMISSIONER: Go ahead.

23 MR. LOCKYER: I did -- it's quite right that the
24 application documents -- there is two of them.
25 There is a memo from Mr. Dangerfield to

1 Mr. Lawlor, and a memo from Mr. Lawlor to
2 Mr. Whitley. And they have been disclosed to
3 the Commission. They were not disclosed,
4 though, to Mr. Driskell pre-trial, post-trial,
5 post-conviction, prior to -- indeed, they were
6 not disclosed to anyone. Privilege was claimed.
7 And we tried to get them in preparation of
8 Mr. Driskell's post-conviction release
9 application, and the application to the Minister
10 of Justice in Ottawa. And they were
11 specifically denied to us as being privileged
12 documents, but they have been disclosed to the
13 Commission.

14 THE COMMISSIONER: Thank you.

15 MR. LOCKYER: So hopefully that sorts that out.

16 THE COMMISSIONER: Thank you.

17 MR. LOCKYER: I'm sorry if I misspoke myself in
18 a whisper to Mr. Code.

19 THE COMMISSIONER: Mr. Gates.

20 BY MR. GATES

21 Q Good morning, Mr. Commissioner.

22 Mr. Brodsky, my name is David Gates and I'm
23 here representing the RCMP. I have a few
24 questions, very few, I hope, around your
25 involvement with Swift Current.

1 As I understand your evidence, Mr. Brodsky,
2 you have, to this day, never seen the RCMP Swift
3 Current investigation of the arson involving
4 Mr. Driskell and Ray Zanidean?

5 A I don't know how to answer that. I don't know
6 what I don't know. If you show me something I
7 haven't seen, then I will see it. I've seen
8 some of it. I saw an analysis of Mr. Driskell's
9 statement.

10 Q Yes.

11 A I don't know if that's what you're talking
12 about?

13 Q I'm speaking more broadly about the RCMP
14 investigation file.

15 A No.

16 Q Whether or not --

17 A No.

18 Q -- that was ever disclosed to you?

19 A No.

20 Q Did you ever go to Swift Current in conjunction
21 with your work on Mr. Driskell's defence?

22 A I did not.

23 Q Have you ever met Constable Burton, the RCMP
24 officer who was the lead investigator of the
25 arson investigation?

1 A No. The only one I dealt with is Staff Sergeant
2 Ferguson.

3 Q Did you ever speak or have written communication
4 with now Inspector Burton, then Constable
5 Burton?

6 A I didn't know he was involved, so the answer is
7 no.

8 Q In the materials that Commission Counsel took
9 you through yesterday and that have been part of
10 the disclosure, there are a few letters between
11 you and Staff Sergeant Ferguson of the Swift
12 Current detachment. Did you ever meet Staff
13 Sergeant Ferguson, other than when he came to
14 Winnipeg to take the statement from your client,
15 Mr. Driskell?

16 A Not that I recollect.

17 Q You've mentioned a couple of times, over the
18 course of the last day and a bit, a Mr. Savage?

19 A Yes.

20 Q And can you tell us, perhaps in a very summary
21 way, what Mr. Savage's role was, relative to
22 your defence of Mr. Driskell on the murder
23 charge?

24 A His name is Brian Savage. He is a private
25 investigator. He had an office here in

1 Winnipeg. And I used him as an investigator
2 because he had been particularly effective in a
3 number of cases when he was an investigating
4 officer for the RCMP. And I found him to be
5 able to communicate very well with people that
6 were difficult to communicate with. And when he
7 went into private practice, after having come
8 from Internal Affairs, I thought that he would
9 be an effective investigator for me in this
10 case.

11 Q As I understand it, Mr. Brodsky, Mr. Savage was
12 your point of contact with the Swift Current
13 RCMP detachment?

14 A Yes, he was. I thought that he may know some
15 people in the RCMP, who may know other people
16 who would be able to get this investigation
17 going.

18 Q Would it be -- am I correct in assuming as well
19 that Mr. Savage had a role in this file that you
20 were involved in that went far beyond the Swift
21 Current component?

22 A Yes.

23 Q Was it --

24 A He did many things. Like the railroad engineers
25 said: I recognize a certain taillight. And he

1 went out with me out to the scene and we looked
2 for cars with taillights. He did a lot of
3 things.

4 Q Did Mr. Savage -- sorry, was it Mr. Savage who
5 raised with the Swift Current RCMP the
6 possibility of Mr. Driskell cooperating and/or
7 becoming a witness against Mr. Zanidean and his
8 sister in that prosecution or potential
9 prosecution?

10 A Yes.

11 Q Is that how it came about?

12 A I asked him to communicate -- as I didn't know
13 how to do that, and I asked him to communicate
14 with the RCMP in Swift Current, or Saskatchewan
15 in any event, to see if they would take a
16 statement from my client and get an
17 investigation moving.

18 Q As I understand what we went through with
19 Commission Counsel yesterday, you and/or
20 Mr. Savage had expressed some interest in having
21 that process take place before Mr. Driskell's
22 trial?

23 A The statement was taken before -- wait a
24 minute -- the statement was to have been taken
25 before the conviction. In fact, it was supposed

1 to take place before the trial, I don't know why
2 it didn't. We wanted it to take place before
3 the trial concluded, and we were advised -- I
4 was advised by Mr. Savage that the RCMP thought
5 that there wasn't sufficient time.

6 Q Yesterday, Mr. Brodsky, if I understood you
7 correctly, you spoke of, and I believe this is
8 your word -- again, correct me if I'm wrong,
9 sir -- that there was at some point some
10 blockage in terms of what was going on in Swift
11 Current?

12 A Yes.

13 Q Can you expand a little bit on that? I wasn't
14 sure that I entirely followed what you were
15 trying --

16 A I am not sure that the word was used at the time
17 was blockage.

18 Q Okay.

19 A That is a word that I have now adopted as
20 explaining the stoppage, the blockage, the
21 inability to proceed further, the directive not
22 to proceed, I don't know what the appropriate --
23 sorry -- I don't know what the appropriate term
24 would be.

25 Q Can you perhaps pinpoint or zero in on when this

1 took place or when you first became aware or
2 concerned that there was some impediment, if I
3 can use that word?

4 A Shortly after the conviction, when we weren't
5 getting a response back, and then we got a
6 letter saying, we are going to do a little more
7 investigating, and nothing was happening, it was
8 shortly after that.

9 Q Were you ever of the understanding or impression
10 that Swift Current was not proceeding with this
11 investigation?

12 A Yes. Well, it was on hold. I don't know what
13 not proceeding means. They weren't going to do
14 it until whatever the directive was, was lifted.

15 Q Okay. Perhaps let me be a little more specific.
16 Was it ever your understanding that Swift
17 Current had terminated their investigation of
18 the arson?

19 A Of course. It's 2006 now.

20 Q Okay. Sorry.

21 A By and by I figured out that if nothing's
22 happening, nothing will happen.

23 Q When did you become aware that they had
24 terminated their investigation?

25 A It's not like the end of a string. I just

1 assumed that they weren't going to -- whatever
2 the order or directive was to put a stop to, or
3 a hold on the investigation, I, by and by,
4 figured out that this bulb isn't going to burn
5 anymore.

6 Q Okay. Just a couple of questions around --

7 A I really wanted to know why there was a
8 blockage. Then I would be able to know -- be in
9 a position to know if it was going to be
10 restarted again. I didn't know what they were
11 talking about. I'm sorry if I'm talking too
12 much.

13 Q No. No. The other aspect of this in terms
14 of -- in addition to when you became aware, how
15 did it manifest itself?

16 A Nothing happened, that's how it manifested
17 itself.

18 Q Was there anything other, anything else that led
19 you to the conclusion that you articulated
20 yesterday and today that there was a blockage or
21 a stoppage?

22 A Yes. Staff Sergeant Ferguson said, we are
23 getting good stuff from your client. He gave a
24 good interview. We've got material to proceed
25 with, and we're doing good work here, and I will

1 have to take instructions.

2 Q And after you met with the Staff Sergeant
3 Ferguson in Winnipeg, and I understand you were
4 present when the statement was taken from Mr.
5 Driskell?

6 A Yes. On the second floor of the Safety
7 Building.

8 Q Did you ever hear from Staff Sergeant Ferguson
9 again?

10 A Indirectly, through Mr. Savage.

11 Q Okay. I just want to ask you a couple of
12 questions, Mr. Brodsky, about some questioning
13 that was put to you by my friend Mr. Lockyer
14 earlier today, and having to do with the crime
15 lab here in Winnipeg?

16 A Yes.

17 Q As I understand what you said, and you said a
18 number of things, your point was that sometimes
19 they, they being the crime lab staff, try very
20 hard to help the case?

21 A Yes.

22 Q That's how I recorded your comments.

23 A Yes.

24 Q And do you have any personal experience with
25 that?

1 A I have this case. I have Mr. Christianson's
2 testimony in this case.

3 Q And --

4 A And I have the Star case, where Mr. Christianson
5 testified in that case.

6 Q And can you perhaps be a little more specific
7 about why you say, in this case, that
8 Mr. Christianson, to use your words from earlier
9 today, tried very hard to help the case? What
10 makes you say that?

11 A I looked at his testimony.

12 Q Pardon me?

13 A I looked at his testimony.

14 Q And is there anything other than his testimony
15 that leads to you that conclusion?

16 A It's primarily his testimony that I rely on.

17 Q Is there anything else? When you say
18 "primarily", is there anything else?

19 A If we're talking about RCMP labs in general, and
20 I would -- in Manitoba, for instance, we used to
21 do DNA analysis. We now have a DNA process
22 which says the head of it will be, I think, in
23 Halifax, and the extraction is going to take
24 place on the same DNA in Regina. And it will be
25 interpreted in Edmonton, and then sent to Ottawa

1 so that somebody can send me a report. I
2 understand the RCMP has a budget to work within.
3 And I see that maybe they are saving money by
4 having all of these labs for the one DNA
5 examination. But it would seem to me that if we
6 had an independent agency that was responsible
7 for the laboratory work, they would advocate a
8 little louder to stop that kind of business from
9 going on.

10 Q So as I understand what you are telling us,
11 you've got some concerns about the --

12 A Effectiveness?

13 Q -- effectiveness and the splintering of the
14 process into various components in various parts
15 of the country?

16 A Yes. And I understand, in any event, they use
17 civilian employees anyway, not just police
18 officers. So I'm not sure why the head can't be
19 a civilian also, a civilian authority.

20 MR. GATES: Thank you very much, Mr. Brodsky.

21 Those are my questions. Thank you, sir.

22 THE COMMISSIONER: I think this would be a good
23 time for the morning recess.

24 THE CLERK: All rise. This Commission of
25 Inquiry is now in recess.

1 (Proceedings recessed at 11:07 and
2 reconvened at 11:23 a.m.)

3 THE CLERK: Rise. This Commission of inquiry is
4 now re-opened. Please be seated.

5 THE COMMISSIONER: Ms. Carswell.

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

7 BY MS. CARSWELL

8 Q Mr. Brodsky, I will introduce myself to you,
9 although we have met in the past, my name is Kim
10 Carswell and I'm working for the Winnipeg Police
11 Service at this inquiry.

12 I just want to take you to the general
13 practice --

14 A This happens from doing too many cases. I
15 wonder if you would move the mike a little
16 closer to you so I can hear a little better,
17 please?

18 Q Sorry, is that better?

19 A Yes.

20 Q I will try to keep my voice up. I didn't want
21 to bang the microphone on you.

22 A But I want to understand.

23 Q And the general practices that you've told us
24 about is that you dictate rather lengthy file
25 memos on a dictaphone. They are typed up by

1 your secretary and then placed in the file. And
2 it would be fair to say that that's something
3 that you ask your associates to do for you as
4 well; is that correct? We've seen numerous
5 memos in the material, both the material filed
6 and the material you've provided through
7 Mr. Libman, where there are memorandum from your
8 associates to you on the things they have done
9 on the file?

10 A I would say that my practice is my practice.
11 It's not everybody in my office's practice. And
12 I would say that we don't have enough memos in
13 the office I'm in now, nor have we had enough
14 memos in the past. And obviously I don't keep
15 enough memos either, otherwise I would have them
16 after the appeal.

17 Q But certainly with respect to the associates who
18 would assist you on a file of this nature, your
19 desire or expectation of them, if they did
20 something significant, was they would produce a
21 memo for you that you could review and then it
22 could be placed in the file. Would that be
23 fair?

24 A For the exact same reason as I dictate memos to
25 myself for the file, someone telling me

1 something, I may forget it later on, or I may
2 not realize its significance until later. So
3 when we were working -- when we work together on
4 files, I like my associates to memo the file so
5 I can have a record to review later.

6 Q Absolutely. And we all know about your habit of
7 working late into the night, so that would allow
8 you to have reference to their material and
9 their thoughts and actions when you're working
10 on a file by yourself?

11 A Yes.

12 Q And I think it's clear, and you've mentioned
13 this, I think it would be clear from a review of
14 your file that it may be that some of the memos
15 that may have been in existence have gone astray
16 at some point in this process?

17 A Yes. It is inconceivable -- I guess, it's
18 conceivable, but it's strange, in any event,
19 that there's lots of memos up until the trial
20 concludes and then somehow there is not very
21 many.

22 Q Yes. Now, your position was clear, and I'm not
23 going to take issue with your position, and I
24 will let you know that, that you should have
25 received the information with respect to the

1 financial and charge negotiations that went on
2 with Mr. Zanidean. And there is no doubt in
3 your mind you should have had it at the point
4 when the Crown knew about that information;
5 correct?

6 A Yes, absolutely.

7 Q And it's fair that the processes set out in
8 Stinchcombe and that we are all familiar with is
9 that disclosure works that police provide the
10 information to the Crown attorney?

11 A Yes.

12 Q The Crown attorney provides it to defence
13 counsel after whatever editing they might choose
14 or not choose to do?

15 A Yes. You're correct.

16 Q It's not the case now, nor has it ever been
17 really, that police disclose directly to defence
18 counsel?

19 A I have in the past met with police officers.

20 Q And I'm going to get into that. But you
21 indicated they were reluctant to give you notes
22 and that they preferred to provide them through
23 to the Crown?

24 A Yes. It's only when that doesn't succeed, then
25 have you to think of other ways of getting

1 material.

2 Q Right. And I was just going to say, you talked
3 about arranging interviews with police members
4 in other cases you've involved in, which
5 provided you with an opportunity to review their
6 notes, in some cases?

7 A That's right. And one case in Brampton, I had a
8 Crown attorney bring in all of the investigators
9 into this big boardroom. And when I got my
10 disclosure, I got it in that way, so that I
11 could ask directly the police officer's
12 questions, in the presence of the Crown
13 attorney.

14 Q Do you recall, because I can't find anything in
15 your file, whether filed by Commission Counsel
16 or my review of your file, that you made any
17 attempt in this case to request an interview
18 with any of the involved police officers?

19 A No. It wasn't the police officers that I wanted
20 to interview. I wanted to interview
21 Mr. Zanidean.

22 Q Certainly you wanted to interview Mr. Zanidean.
23 And I am going to get into your attempt to
24 interview Mr. Zanidean a bit later with one
25 respect. But you wanted to know about the

1 police officer's contacts with Mr. Zanidean,
2 that was one of your disclosure requests?

3 A Yes.

4 Q And my question to you is, did you make an
5 attempt to interview that police officer, and we
6 know in this case it's Anderson and Paul, either
7 of those officers, to talk to them about their
8 contacts with Mr. Zanidean?

9 A The answer is no. But you're assuming that I
10 knew who the handlers were and their
11 involvement. I didn't. I was told that the
12 Detective Paul was going to be giving evidence
13 and his involvement in the case was to measure
14 distance between Mr. Driskell's house, I think
15 it was, and the place where, the railway tracks
16 where the body was found. I didn't know how
17 extensive his involvement was.

18 Q All right. If I could refer you then, just for
19 a moment, to Exhibit 20D, and that's this long
20 sheet that Commission Counsel gave you at the
21 start of your testimony. I don't think anyone
22 has yet referred to it.

23 A I apologize too, but I left it here last night.

24 Q That's fine.

25 A Here it is.

1 Q That's fine, I'll be very specific.

2 A Okay.

3 Q If you could go to page 3, please, of that
4 exhibit? And what this purports to be is an
5 index prepared by Mr. Libman of your file, or
6 Mr. Libman's associates -- no? Commission
7 Counsel?

8 MR. DAWE: It's actually prepared by Commission
9 staff --

10 MS. CARSWELL: All right. Sorry, Mr. Libman.

11 MR. DAWE: -- from the file provided by
12 Mr. Libman.

13 THE COMMISSIONER: I'm sorry, Ms. Carswell, I
14 didn't mark down the number. Exhibit 20?

15 MS. CARSWELL: It is 20D, D as in dog.

16 THE COMMISSIONER: Thank you.

17 MS. CARSWELL: Sorry, Mr. Libman, my apologies.

18 BY MS. CARSWELL

19 Q If you turn to page 3, then, it shows the
20 witness statements that you had, and in
21 particular from Ray Zanidean that were located
22 in your file?

23 A Right.

24 Q And you can see, by pursuing that list, that in
25 every case it is either Paul or Anderson, or

1 Paul and Anderson, who had contact with
2 Mr. Zanidean?

3 A Right.

4 Q So it would be fair to say then that you would
5 have had knowledge of who the officers were who
6 were dealing with Mr. Zanidean in relation to
7 the taking of his statements?

8 A Yes, you're right. And I see at the bottom of
9 that page 3 that Shikatani from Kenora is
10 listed. And I didn't talk to Shikatani,
11 although I tried to. What I did do when I
12 couldn't read his notes is to ask the Crown to
13 talk to him.

14 Q Right. And, ultimately, we know that you
15 received a typed copy of his notes as well as a
16 can-say --

17 A Right.

18 Q -- at some point in the process?

19 A Yes.

20 Q It was fairly clear in the evidence that we have
21 heard at this inquiry that the benefits that
22 were being negotiated for Zanidean, that
23 negotiation was being conducted between
24 officials of Manitoba Justice and counsel for
25 Mr. Zanidean. And that would be something that

1 is not unusual. Normally Manitoba Justice
2 negotiates the witness protection ultimate
3 arrangements with the witness; is that your
4 experience?

5 A Yes.

6 Q And if that was the case, and if the evidence we
7 have heard is correct, and, in fact, we have
8 even heard that in some cases Mr. Zanidean was
9 approaching the Manitoba Justice officials
10 directly to negotiate on his own behalf, and we
11 have heard evidence that the Winnipeg Police
12 Service was out of the loop, to use a colloquial
13 term, on what the state of negotiations were,
14 then potentially a police officer who might have
15 been sitting in the courtroom room, and we have
16 only heard about Staff Sergeant Vandergraaf in
17 the courtroom, he may have been as out of the
18 loop as to the state of the negotiations as you
19 were. Would that be fair to say?

20 A Yes.

21 Q That's certainly a possibility?

22 A Yes, not an impossibility.

23 Q Do you recall seeing anyone else other than
24 witnesses who were testifying, any other
25 Winnipeg Police Service members in the courtroom

1 while the trial was going on, other than Staff
2 Sergeant Vandergraaf?

3 A I can't answer a question like that. 15 years
4 ago, a case like this I assume would have
5 attracted police officers, but I can't say there
6 were other police officers in the courtroom. I
7 can't say that there were. It's a long time
8 ago.

9 Q It certainly is. And you were certainly
10 concerned, from the outset, that deals were
11 being made with the witnesses, and you weren't
12 being informed?

13 A Yes. That's why I went to see Mr. Kovnats.

14 Q Right.

15 A Right away.

16 Q Yes, as soon as you found out. But I want to
17 take you back a little further. Because it
18 appears that you were even trying to speak to
19 Mr. Zanidean, or have your investigators speak
20 to Mr. Zanidean earlier than that. And I would
21 like to you look at tab 23, please, in the
22 Commission Counsel's book of documents for you.
23 It is in volume number 1. And if you could turn
24 to the page that is numbered, at the bottom,
25 300?

1 A Tab which?

2 Q Tab 23.

3 A Tab 23.

4 Q And there's numbers at the bottom. And if you
5 could go to page 300 --

6 A I have it.

7 Q -- which is the second page of your memorandum
8 as a result of the pre-trial conference with
9 Mr. Justice Morse?

10 A Right.

11 Q And you'll see that on the second page there is
12 a note that starts with, I am going to call it a
13 paragraph although it is not indented, a note to
14 Vera, who I assume was your secretarial support
15 at the time?

16 A Yes, Vera Hill.

17 Q Yes. And if you go to the bottom of that
18 paragraph it says,
19 "I also asked Gregg Lawlor to provide me
20 with an opportunity of having my
21 investigator meet with Zanidean."

22 A Right.

23 Q "He will take that up with Dangerfield and
24 get back to me."

25 A Yes.

1 Q Do you see that?

2 A Yes, do I.

3 Q Did you ever get a response to that request to
4 meet with Mr. Zanidean, have your investigator
5 meet with Mr. Zanidean? I can't find a memo
6 from you.

7 A We didn't get permission to meet with
8 Mr. Zanidean. I repeated that on a number of
9 occasions. And I see that it is memoed here,
10 but I repeated that on a number of occasions. I
11 got the usual, you can meet with anybody you
12 want.

13 Q And who was it who told you that?

14 A I think it was Mr. Dangerfield.

15 Q It wasn't a police officer? You weren't dealing
16 with a police officer?

17 A No, it wasn't a police officer.

18 Q If I could take you now to tab 33 in the same
19 large book that Commission Counsel filed on your
20 behalf, and this is the second volume which has
21 been marked as Exhibit 20B.

22 A Tab 33, yes.

23 Q Tab 33, and this tab contained your three
24 memorandums of your dealings, or your
25 recollection of your dealings, I will call them

1 musings, and I don't mean to be offensive --

2 A That's a good word.

3 Q -- in respect of your meetings with Mr. Kovnats
4 on June 2nd, which we know is the Sunday before
5 the trial starts?

6 A Yes, Sunday night, in the evening.

7 Q And it appears as I read these memorandums
8 that -- and I'm referring, in particular, to
9 page 402, that this whole issue comes to your
10 attention through Mr. Garber?

11 A Yes.

12 Q Who hears rumours down at the courthouse about
13 something that's gone on at the Public Safety
14 Building?

15 A Right.

16 Q And because of that, and because you're
17 interested in what the negotiations are for the
18 witness, I take it you would have contacted
19 Mr. Kovnats, likely by telephone, and then asked
20 to meet him at his house, or did you just show
21 up at his house? And if you don't recall,
22 that's fine.

23 A I apologize to Mr. Kovnats, I didn't want to
24 give him much time to think about it, so I
25 probably called him and told him I was coming.

1 I didn't ask, I just wanted to show up.

2 Q All right.

3 A I imposed on him, I agree. And I went to his
4 house late at night. And I just didn't want him
5 to find an excuse not to meet with me.

6 Q And if I can take you then to one of the next,
7 actually the third of the memorandums, it's at
8 page 404, and I'm just going to refer you, once
9 you're there --

10 A Yes, I'm there.

11 Q -- to what I take from this about the
12 information with respect to the witness
13 protection arrangements that Mr. Kovnats gave
14 you that night --

15 A Yes.

16 Q -- that you put in the memo. And the first is
17 on page 1, you write,

18 "His client has still not signed the
19 witness protection agreement."

20 A Right.

21 Q "He promises for it to be delivered by way
22 of signed paper."

23 A Right.

24 Q And then on the second page,

25 "He wasn't sure that his client would see

1 talking to me as jeopardizing his deal with
2 the Crown."

3 And then you go on to ask him to give you a
4 message, either way, whether he's prepared to
5 meet with you. And then this is another attempt
6 you make at meeting with Mr. Zanidean, or having
7 Mr. Savage meet with Mr. Zanidean. And you are
8 advised that there has to be -- or that there
9 has been some conversation with Mr. Miller on
10 that point already. And that's on page 1 of
11 your memo.

12 A It's on page?

13 Q The indication that there had already been
14 discussions --

15 A Yes.

16 Q -- about a meeting is on page 1?

17 A Yes. He told me that he would pass on my
18 request that I be allowed to meet with his
19 client, in his presence, to Bruce Miller, who
20 said his client would call him at 2 o'clock
21 tomorrow, June 3rd.

22 Q Right. Which is the first day of trial, as we
23 know?

24 A Yes.

25 Q So it's clear, if you take a look at this

1 memorandum, that you get certain information out
2 of Mr. Kovnats, you get the information that he
3 is in the process of negotiating a deal with the
4 Crown attorney's office?

5 A Yes. I'm not sure what the -- I was absolutely
6 mistaken about the deal. I have to tell you
7 that it did not enter my head that he was being
8 paid tens of thousands of dollars.

9 Q No. And I'm not suggesting it was. But
10 certainly this memorandum seems, to me, to be
11 confirmation to you that Mr. Kovnats, who tells
12 you he represents Mr. Zanidean, is in
13 negotiation with the Crown on a deal that's to
14 be entered into. It's not finalized yet, not
15 signed yet, but he is certainly talking a deal
16 with the Crown, if we can put it in the
17 vernacular?

18 A Mr. Kovnats expressed to me primarily that his
19 representations were to keep his client from
20 going to jail because the police were very angry
21 with him. And I got the impression that the
22 issue of his living arrangements or protection
23 payments, whatever the proper term is, was a
24 small part of that, not as significant as it
25 turned out to be. I was just -- he didn't tell

1 me that.

2 Q No. And I'm not suggesting he told you the
3 significance or the details of the negotiation,
4 Mr. Brodsky. But I am suggesting that if I read
5 your memo correctly, what he did tell you was
6 there was a negotiation going on?

7 A Yes. And he also told me, as you see in this
8 memo, that even he couldn't find Zanidean. It
9 is no use my trying. I had to arrange it if I
10 was going to do it, because I couldn't do it on
11 my own. And he was saying that he was
12 frustrated that he was being kept from his own
13 client, and they would arrange some kind of
14 phone call the next day, it didn't matter if he
15 was available, convenient, not, for him to talk
16 to his own client, and he thought that was
17 inappropriate.

18 Q Certainly. And we've heard that type of
19 evidence from Mr. Kovnats, to be fair, he has
20 talked about how during this period of time that
21 it was his client contacting him and not him
22 having access to his client.

23 It's also clear, I think, from your
24 memorandum that is at the last page of that tab,
25 and that's at page 409.

1 A Yes.

2 Q And it's dated June 17th. And when I read this
3 memo, I had some difficulty because normally
4 your memorandum are fairly good at being able to
5 figure out -- I can figure out what date they
6 were dictated on. And I'm wondering if you can
7 assist me with this one at all or not? Because
8 it certainly indicates that you didn't hear from
9 him on the 3rd. Did you dictate it on that date
10 or was it just that your expectation was that he
11 was to get back to you on the 3rd, or are you
12 just unable to help me at this time?

13 A I would expect that the memo was dictated after
14 the 3rd, and I'm guessing now.

15 Q All right. But certainly, I take it that you
16 did not get any reply from Mr. Kovnats?

17 A No, I did not.

18 Q Because I haven't been able to find a memo of
19 that, and I'm sure that had he contacted you,
20 that would have been something that you would
21 have dictated?

22 A Yes. As I've said in the previous memo, I
23 didn't even expect Mr. Kovnats to continue on.
24 I thought, the way he was talking, he was going
25 to get off this case. He didn't want to go to

1 jail himself, and he didn't want to be in
2 trouble with whoever. And I've indicated in the
3 memo that I thought that I would be meeting with
4 another lawyer soon, or at least Mr. Zanidean
5 would be retaining another lawyer soon.

6 Q Right. And he talked about a couple of lawyers
7 in his conversation with you, one a former
8 partner of yours who he had phoned, and then he
9 talked about phoning Mr. Weinstein after he
10 finished talking to you, sort of at the end of
11 his conversation with you?

12 A No --

13 Q That was just --

14 A That was my expectation.

15 Q If you look at page 4 or 5?

16 A No, I remember that. But it may be that I was
17 guessing that the lawyer that Mr. Zanidean would
18 be using would be Mr. Weinstein. In fact, I
19 asked Mr. Kovnats, how did you get to me, how
20 did you get Mr. Wolson, if you're the lawyer,
21 what do you need to call a lawyer for?

22 Q Now, you indicated in your evidence yesterday
23 that at the point you learned that there was a
24 lawyer involved with Mr. Zanidean, in your view,
25 that lent extra seriousness to these

1 negotiations? You knew he was seriously
2 negotiating for some benefits?
3 A Yes.
4 Q Is that a fair statement --
5 A Yes.
6 Q -- of your evidence yesterday?
7 A Yes.
8 Q And yet after I look at these memos at tab 33,
9 Mr. Brodsky, I can't find any memo in your file
10 that indicates that, as a result of your meeting
11 with Mr. Kovnats, you approached the Crown
12 attorney and said: What is going on? I have
13 been told there's a deal. The lawyer for the
14 witness says that there's a negotiation going
15 on. I want to know what the deal is? Did you
16 do that?
17 A I think I did that.
18 Q There's no memo in your file.
19 A I don't know.
20 Q So is that not something that in your normal
21 practice you would have memoed? It seems to me
22 a significant point, you memo approaching the
23 Crown about not wanting, or wanting certain
24 particulars about conversations you had with
25 them?

- 1 A It was probably more along the lines that it had
2 nothing to do with the case. I was going to say
3 that I spoke to a Crown attorney saying: You
4 shouldn't act like that because you are going to
5 get yourself into trouble. He is liable to make
6 a report, not to the police, but to somebody
7 else, and you are going to get yourself into
8 trouble. I didn't make a memo of it because it
9 had nothing to do with guilt or innocence.
- 10 Q But it certainly had to do, we have heard, and
11 it's your position that it would have had to do
12 with the credibility of Mr. Zanidean?
- 13 A I did not realize, again, the amounts of
14 dollars that was being negotiated, or what was
15 being negotiated, or what Mr. Kovnats was
16 doing. Mr. Dangerfield had described the
17 Witness Protection Program as more of a
18 surveillance type business than a payment for
19 testimony.
- 20 Q Right.
- 21 A And Mr. Kovnats said that he had been doing all
22 of the land deals for Mr. Zanidean. I mean, I
23 was in the dark as to what the deal was. The
24 deal was to keep him out of jail. The deal
25 was -- but I didn't know what the deal was. And

1 I didn't have it in my head what the deal was
2 because Mr. Kovnats just didn't want to tell me.

3 Q No. And I'm not suggesting, Mr. Brodsky, that
4 you had it in your head. What I'm suggesting
5 is, based on your evidence, both with Commission
6 Counsel and with Mr. Lockyer this morning about
7 the import of those matters --

8 A Yes.

9 Q -- and how important it would have been for
10 your attack on the credibility of Mr. Zanidean.
11 And I think you referred to it as acorns
12 growing --

13 A Yes. It would have been very, very important
14 for me to know that a witness was retained --
15 was so interested in the money aspect of being
16 paid for his testimony that he retained a lawyer
17 to do that, and that he was negotiating, not
18 just a one-time meeting, he was negotiating
19 through a lawyer for payment for his testimony.
20 That really would have been a significant matter
21 and important for me to have known. If I didn't
22 say it before, I am saying it now, it would have
23 been significant for me to know.

24 Q And I appreciate your evidence on that point.
25 My question to you is, given the significance of

1 finding out that information, and given your
2 practice of memoing your files on significant
3 information that would have related to your
4 ability to attack the main witness in the
5 Zanidean trial, if you had approached
6 Mr. Dangerfield, based on my reading of your
7 file, this is something that we should expect to
8 see a memo on. And I can't find one.

9 A Yes.

10 Q So --

11 A I can't find one either.

12 Q Certainly, to be fair to you, you mention it, or
13 it's brought up with you in your interview with
14 Commission Counsel. So if you could go to tab
15 1?

16 A Yes.

17 Q It's at page 8 in the third paragraph.

18 A Yes.

19 Q And you indicate that you might have spoken to
20 Dangerfield informally, and I am not going to
21 get into the rest of that paragraph because I
22 don't think it's germane to the issues.

23 A Right.

24 Q And we have already been there. But there was
25 nothing in there that indicates that you

1 discussed with Mr. Dangerfield the information
2 that you had been given from Mr. Kovnats? In
3 other words, that there was a deal in the works?

4 A Yes. It doesn't say that.

5 Q By you certainly acknowledge today that that was
6 a matter that you were very interested in. You
7 wanted to know what the deal was?

8 A Well, the second paragraph on that page 8

9 "When Brodsky went to see Kovnats he wanted
10 to know what the deal was that Kovnats'
11 client was reneging on."

12 Q Yes.

13 A I wanted to know that.

14 Q But my question is not whether you asked Mr.
15 Kovnats. But once you are armed with the
16 information from Mr. Kovnats, whether you then
17 approached either of the Crown prosecutors, or
18 someone at Manitoba Justice, and said: I've now
19 been told this by the lawyer for the main
20 witness, and there's a deal in the works.
21 What's the deal? What are the terms of the
22 deal?

23 A No, there is no memo. The memo that you saw on
24 the Kovnats' memos, that I thought as a result
25 of the difficulty Kovnats seemed to be giving

1 the police, that he probably would be dropped
2 from the witness list altogether.

3 Mind you, I didn't know what the difficulty
4 was that he was giving the police, just that he
5 was.

6 Q No, I understand. And I'm not suggesting,
7 Mr. Brodsky, to be clear, if I haven't been,
8 that you understood what the terms of the deal
9 were.

10 A Right.

11 Q My question to you is, once you have been
12 advised that there's a deal in the works, I can
13 find no evidence in the file that you -- by way
14 of a memo or a letter or a disclosure request,
15 that you then approach the Crown and say: I now
16 have this information. Tell me what the deal
17 is?

18 A Kovnats' information to me was that his
19 involvement was to keep his client out of jail.
20 That is the prime thing he was talking about.
21 He wasn't talking about negotiating for money.
22 And you will see that aside from Mr. Kovnats, I
23 had already at least three letters and an
24 appearance before a high court judge in which I
25 asked for any information concerning the

1 payment, the considerations given to
2 Mr. Zanidean.

3 Q Right. I'm just now suggesting, Mr. Brodsky,
4 that this seems to me to be a fairly significant
5 piece in the puzzle that you now get some
6 confirmation that what you've been concerned
7 about, what you've been worried is happening
8 behind your back, is actually happening behind
9 your back. And I'm asking you -- I can't find
10 any indication of what you did?

11 A You are absolutely right. You said I worked
12 late nights, that's true. Maybe I should have
13 added that to one of the letters that I wrote.
14 In retrospect, 15 years later, after 15 years of
15 contemplation of what else I could have done, I
16 guess you're right. But I repeat, I didn't know
17 what the deal was or the significance of it. I
18 thought it had more to do with his keeping his
19 client out of jail than getting paid. I thought
20 the payment part was not the -- I thought
21 Mr. Kovnats was afraid of losing his real estate
22 business.

23 Q Again, I'm not suggesting you knew.

24 A Yes.

25 Q All right?

1 A Yes.

2 Q So I'm going to move on now. So if you could
3 please look at tab number 1, page 6, again in
4 Commission Counsel's book, and which is Exhibit
5 20A?

6 A Page 6, yes.

7 Q Yes, page 6. I am going to read to you the
8 paragraph, the first full paragraph. It says:

9 "Brodsky thinks it is extremely unlikely
10 that the Winnipeg Police would have made an
11 informal deal with the RCMP not to charge
12 Zanidean, i.e. an exercise of charging
13 discretion rather than a formal immunity
14 agreement behind the Crown's back.
15 Dangerfield and Lawlor would not have
16 wanted to be fooled with in this manner and
17 would have been very angry if they had
18 found out. Dangerfield, in particular, was
19 a pretty tough guy. In Brodsky's opinion,
20 Dangerfield, like any Crown, would have
21 insisted on being kept informed about a
22 matter that went to the credibility of one
23 of his key witnesses."

24 A Yes.

25 Q That's what you told the Commission Counsel and

1 that's accurate?

2 A Yes.

3 Q And I take it you would --

4 A They gave it to me and said to look at it, if
5 it's wrong, correct it. And I said it is right
6 and it is right.

7 Q And that's not just a statement about
8 Mr. Dangerfield, as you say. No Crown attorney
9 likes to be surprised?

10 A Right.

11 Q And, in fact, on a major case like this, it
12 would be fair to say that, looking back to 1990,
13 '91, police and the Crown would be having
14 regular meetings on a case of this import;
15 correct?

16 A Absolutely.

17 MS. CARSWELL: If I could ask that the letter
18 dated June 20th of 1991, addressed to Herb
19 Stephen -- I have provided a copy to Madame
20 clerk. We've seen this before, but it's in
21 another exhibit, but I thought it would be
22 easier if the witness had it. So it's a
23 two-page letter?

24 THE CLERK: It's already marked?

25 MS. CARSWELL: It's marked within another

1 volume.

2 MR. LIBMAN: Al Paul's exhibit.

3 THE CLERK: Did you want this marked as the next
4 exhibit?

5 MS. CARSWELL: I understand it's in Mr. Paul's
6 volume. Mr. Commissioner, we can either mark it
7 or not. I know it was entered, but instead of
8 pulling out the volumes, I thought it would be
9 easier for the witness.

10 THE COMMISSIONER: Why don't we mark it as an
11 exhibit.

12 MS. CARSWELL: All right.

13 THE COMMISSIONER: And then somebody can tell me
14 later what tab it correlates in what other
15 exhibit?

16 THE CLERK: Exhibit 24.

17 THE COMMISSIONER: Exhibit 24. And this is a
18 letter?

19 MS. CARSWELL: This is a letter from
20 Mr. Dangerfield to the then Chief of Police,
21 June 20 of 1991.

22 (EXHIBIT 24: Letter dated June 20, 1991, Mr.
23 Dangerfield to Chief of Police)

24 MR. CODE: It's in Exhibit 21.

25 THE COMMISSIONER: Is this the commendation

1 letter?

2 MS. CARSWELL: Yes, it is.

3 THE COMMISSIONER: All right.

4 BY MS. CARSWELL:

5 Q I will show you this, Mr. Brodsky, because it
6 appears that after the hearing Mr. Dangerfield
7 wrote to the Chief of Police commending the
8 officers involved for their work. You've not
9 seen this before, I take it?

10 A I have never seen this.

11 Q And I take it that you would find this letter to
12 be consistent of what I just read you out of
13 your statement?

14 A Yes.

15 Q That if Mr. Dangerfield was fooled or surprised
16 by the assertions that came out in
17 cross-examination with respect to Mr. Zanidean,
18 he wouldn't have been happy with the officers,
19 nor would he have written this type of letter,
20 would he?

21 A No. You're absolutely correct.

22 Q Now, when I took down your --

23 A At least he shouldn't.

24 Q When I took down your evidence yesterday, you
25 said something about in your view in dealing

1 with the file, you wanted to be satisfied
2 yourself you had everything, you weren't going
3 to be satisfied just based on, I believe it was
4 Mr. Dangerfield's assertion you referred to,
5 that he was satisfied, you are going to keep
6 digging and see what is in the file?

7 A Every defence counsel wants to decide what's
8 important to the defence. He doesn't want to be
9 told what's important to the defence by the
10 Crown.

11 Q I suspect that extends to more than defence
12 counsel, every lawyer wants to decide what's
13 important to their client and not have someone
14 else tell them?

15 A Yes.

16 Q You made very specific requests in a number of
17 documents. I don't intend to take you through
18 them again unless you want me to --

19 A No.

20 Q -- because it is not important for the purposes
21 of this question. But there is no general
22 request in any of the material I have found to
23 have all of the police officer's notes, is
24 there?

25 A No, not that I remember -- I can't think of any

1 request.

2 Q I can't find one. I mean, I'm open to anyone
3 correcting me here but I've been through them.

4 A I don't remember one.

5 Q I would like to take you to tab 30, that's in
6 volume 2, Exhibit 20B.

7 A Tab 30?

8 Q Tab 30.

9 A Yes.

10 Q And this is a disclosure response by Mr. Lawlor
11 dated May 24 of 1991. And if you turn over the
12 page to the police supplemental --

13 A Yes.

14 Q -- which is numbered 185, it indicates that he
15 is sending you at least two police officers'
16 notes, that being Pilote and Happychuk.

17 A Right.

18 Q All right. Now if you look to that volume that
19 I took you to before, Exhibit 20D, the list of
20 the material from the police department found in
21 your file?

22 A What page?

23 Q You can look through the whole document, but I
24 can tell you that I have looked through this
25 document, and I have looked through the copy

1 that your counsel put in at Exhibit 21 at tab
2 10.

3 A Right.

4 Q And there is no indication that your file
5 contained those notes of Pilote and Happychuk at
6 the time that it's turned over.

7 A Right.

8 Q All right?

9 A I accept that.

10 Q So at one point those notes would have been in
11 your file, it appears from this documentation.

12 A If they were sent, they ought to have been in my
13 file.

14 Q Well, if they weren't sent, you would have
15 responded, would you not?

16 A Probably, yes.

17 Q And I can find no response from you saying,
18 excuse me, Mr. Lawlor, but those notes weren't
19 included, may I have a copy?

20 A Yes.

21 Q Tab 19 is a further example. And if you look at
22 tab 19, that's a disclosure response dated
23 April 26th of 1991. And you will see paragraph
24 1 indicates that you've got notes on interviews
25 of Berens, Driskell and Larkin.

1 A Yes.

2 Q Again, going through the Exhibit 20D, the only
3 police officer's notes indicated are the OPP
4 officer. There's no indication of those notes
5 existing in the file that we have today?

6 A That's correct.

7 Q So at some point those notes appear to be lost
8 or misplaced out of your file?

9 A Or didn't come. Because I was persisting in
10 finding out what Ron Driskell had to do, and
11 what his involvement was, and why they thought
12 that he was a suspect, and whatever these notes
13 refer to, either -- they must have been either
14 minimal or --

15 Q My point is not, Mr. Brodsky, what the substance
16 of the note was, but it appears that the note
17 came. And now the record we have of your file
18 doesn't contain those officers' notes.

19 A Yes.

20 Q I can tell you, and I don't know if you know
21 this, I know someone will leap up to correct me
22 if I'm wrong, that we've heard evidence that
23 Sergeant Paul's notes were supplied to the Crown
24 and found within the Crown attorney's file at
25 some point after May 17th of 1991. Do you ever

1 recall seeing those?

2 A No.

3 Q Is it possible that those notes came to your
4 attention with the other notes that have now
5 gone astray from your file?

6 A No. Paul was involved with the taking of all of
7 these statements from Mr. Zanidean, no. The
8 answer is no, they are not in the same category
9 as Ron Driskell or Larkin or -- no. The answer
10 is, he was significant. These are people not as
11 significant.

12 Q All right. And if we can look at exhibit 21,
13 and this is the document book filed by
14 Mr. Lockyer with the buff cover.

15 A Right.

16 MS. CARSWELL: And tab 10, there is a
17 memorandum, and I am not going to ask you to go
18 through it because I suspect this is the part of
19 Mr. Lockyer's examination about what the Crown
20 had in its file and the number of documents that
21 you didn't have, and he didn't reference that to
22 a document.

23 MR. LOCKYER: That's right.

24 BY MS. CARSWELL:

25 Q So I am taking it from the fact that it's in

1 here, that this is an analysis done in 2003 --

2 A Yes,

3 Q -- of the Crown file. And the police file.

4 A Does it say I'm missing 100 pages of typed
5 police reports?

6 Q No. It is suggesting that you might be missing
7 that, depending on the numbering of the pages
8 that you got. And there's a suggestion that
9 those be looked at. I take it, from my learned
10 friend putting specific numbers to you, what he
11 has done is he has compared the material in this
12 document with the material that was found in
13 your file. And do you know anything about that?
14 Because the numbers came a bit out of the blue
15 yesterday.

16 MR. LOCKYER: That's quite right. My friend's
17 deductions are correct.

18 THE WITNESS: Okay. I will have the answer this
19 way.

20 BY MS. CARSWELL:

21 Q All right. So given that we now know that there
22 is some material that you were provided with
23 that's now gone missing, those numbers are
24 obviously not entirely accurate?

25 A Right.

1 Q That would be fair?

2 A Okay.

3 Q Because we know, and again I can put a document
4 to you, but I think you will take it from me
5 that what happened in 1993, when the police
6 decided that they would review this to determine
7 whether disclosure had been made, they actually
8 went and picked up the pink copy from the Crown
9 attorney's office so they could do a page by
10 page comparison. Did you know that?

11 A No.

12 Q But you would take that from me that that
13 happened?

14 A You wouldn't lie to me.

15 Q You're right, I wouldn't.

16 Now, I want to talk to you about the
17 Zanidean phone call.

18 A Yes.

19 Q We've heard the call already, and the reference
20 to it in your material is at tab 47 of
21 Commission Counsel's volume, that's the second
22 volume.

23 A Yes.

24 Q And it's also referred to at tab 1, that's your
25 statement?

1 A Yes.

2 Q And if you could open them both?

3 A Yes.

4 Q And that's at tab 1.

5 A Right.

6 Q Specifically at page 9. And it's clear from
7 your interview of Commission Counsel, and I am
8 not going to read it to you, and it's also clear
9 in the affidavit that you filed that was at tab
10 8 in Exhibit 21, that you did not recognize the
11 voice, but that you were pretty sure that
12 this was Mr. Zanidean when the phone call was
13 over?

14 A By the time -- yes. I didn't recognize the
15 voice. But by virtue of what he was saying, and
16 as the call progressed, well, it was a
17 presumption.

18 Q It was pretty obvious that it was either likely
19 Mr. Zanidean or Mr. Gumieny. And given the fact
20 that he talked about deals and having a lawyer,
21 pretty much narrowed it down to Mr. Zanidean,
22 didn't it?

23 A I didn't know about any deals with Mr. Gumieny,
24 so I wouldn't -- it wouldn't have been either
25 one of those two, that is why I thought it was

1 Mr. Zanidean.

2 Q And as a result of that call, you decide that
3 it's important enough -- and Commission Counsel
4 has taken you through these letters, but for the
5 record they are at tab 49 -- to approach Legal
6 Aid Manitoba to get some funding for an
7 investigator to do some extra work to determine
8 if we can find out who's the caller on this
9 call, as well as some of the other calls you
10 were getting; correct? That's at tab 49 in your
11 document book number 2.

12 A Yes.

13 Q And in that same tab, if you could turn to page
14 442, and this is the second page of a memorandum
15 that's dated July 4th of '91, but appears to
16 have been likely dictated around the 20th, the
17 date of the call. Because if you go to the
18 second page it says,

19 "I reviewed all of this with Brian Savage
20 in my office on June 20th, all of which was
21 prior to the conversation I had with the
22 unidentified person."

23 A Right.

24 Q And then you talk about verbal things said to
25 him by Driskell that weren't true,

1 "...fed by police, and the caller wouldn't
2 tell me his name or sex of the person
3 calling, but indicated he would talk to
4 that person about getting a lawyer and then
5 call me back next week."

6 A Right.

7 Q So on June 20th, you told Mr. Savage about the
8 call in an oral briefing at your office?

9 A Right.

10 Q And then if I take it from that paragraph, he
11 was going to, Mr. Savage, was supposed to follow
12 that up; correct?

13 A Yes.

14 Q Did you give Mr. Savage a copy of the tape?

15 A I don't remember if I gave him a copy of the
16 tape or the transcript.

17 Q Well, if we go to tab 47, you wouldn't have
18 given him a copy of the transcript on June 20th,
19 because it appears it wasn't typed until
20 June 26th?

21 A Right.

22 Q Do you recall if you made copies of the tape?

23 A No, I didn't make any copies. As a matter of
24 fact, I had forgotten by the end of the ten
25 years after the trial that the tape still was in

1 existence.

2 Q You indicate at tab 1, page 9, that you didn't
3 play the call for Driskell?

4 A Right, I did not.

5 Q And you've explained your reasons why?

6 A Yes.

7 Q Do you know if Mr. Savage played the call for
8 Mr. Driskell?

9 A No. He didn't tell me he did. I would have
10 expected he would have told me that he did if he
11 did.

12 Q Right. And this is again a point, if you take a
13 look at the memorandum at page 457, which is
14 dated July 26th of '91, and talks about a
15 telephone conversation you had with Savage on
16 July 22nd?

17 A Right.

18 Q He talks and he tells you during that
19 conversation, if you look at the last line, that
20 he is going to go see Driskell to find out if
21 Driskell can shed any light in connection with
22 the phone calls?

23 A Calls.

24 Q Calls, yes, plural.

25 A Yes.

1 Q Do you know if he did that? Again, searching
2 through your file, I can find no report from
3 Mr. Savage, nor a memorandum from you that
4 indicates the result of this.

5 A The answer is, I won't guess, I don't know if he
6 did. I think he did.

7 Q You think he did? Because certainly to me it
8 would be logical to take the tape that purports
9 to be a witness, or someone related to a witness
10 against Mr. Driskell, presumably someone he may
11 know, to him to have it played, to see if can he
12 give you any sense or give Mr. Savage any
13 sense --

14 A No.

15 Q -- of who the person was?

16 A No. At that point what I wanted from Mr. Savage
17 and from Mr. Driskell is, is there a crack in
18 the coherence of the Crown's case, that is, is
19 there somebody's wife or girlfriend phoning that
20 will tell me that their hubby or significant
21 other is prepared to recant or told a funny
22 story, or whatever. I was more concentrating on
23 the ladies that were calling --

24 Q Right.

25 A -- than I was on this conversation.

1 Q Right. But certainly in this conversation, this
2 witness -- I think anyone hearing this
3 conversation would find it hard to say that they
4 actually believed that this was someone phoning
5 for someone else, you would agree with me?

6 A I didn't.

7 Q I mean, this is obvious that this is a witness
8 at the trial?

9 A To me. But you have the words of it.

10 Q No. I have the words of it. And I'm just
11 saying that, to me, Mr. Brodsky, it would be
12 logical to play this for Mr. Driskell, given the
13 fact that Mr. Gumieny and Mr. Zanidean and the
14 Kara brothers, the witnesses who were at the
15 trial, were people known to him?

16 A What difference would it make what Mr. Driskell
17 said? What do I do with it? I did not -- it
18 may be obvious to you, but I did not think it
19 significant. I could not even find
20 Mr. Zanidean.

21 Q You didn't tell the Crown about this tape? You
22 didn't play it for Mr. Dangerfield or
23 Mr. Lawlor?

24 A No.

25 Q You didn't tell police about this tape? You

1 didn't play it for police in 1991?

2 A No, I didn't. If I thought that this tape would
3 have been the basis, could form the basis of a
4 motion for a fresh evidence application, then
5 they certainly would have had it.

6 Q But you knew it was important. You went to
7 Legal Aid and you said, this is important, these
8 calls were important.

9 A This was the start -- I apologize for
10 interrupting.

11 Q No, that's fine.

12 A You can finish, all right.

13 Q You knew they were important. You went and
14 sought funding for an investigator?

15 A Yes.

16 Q And we know that Legal Aid only funds a certain
17 portion for the investigation; correct?

18 A Well --

19 Q They only come back and they say, okay, you can
20 have 20 hours. That's at tab 49 --

21 A Yes.

22 Q -- page 452, that's the letter that you sent to
23 Mr. Savage telling him that he has been
24 authorized 20 hours of investigative time,
25 correct?

1 A Yes, you're right. This phone conversation was
2 not a recantation. It seemed to be a
3 declaration that the guy was going to come and
4 see me after he talked to a lawyer, and then we
5 can get something for real.

6 Q That's exactly right. But my learned friend,
7 Mr. Lockyer, has been referring to it all
8 morning as a recantation. It's not a
9 recantation. What it is, is exactly what you've
10 just described it as. It's an unhappy
11 individual who is saying, I am going to go to a
12 lawyer because the Crown screwed me over;
13 correct?

14 A Yeah. It also says that they told him what to
15 say.

16 Q But you say it's not a recantation?

17 A Yes. Well, we all can interpret the words
18 whichever way we want, but the words are the
19 words. And you can see the words that are
20 there.

21 Q If it was a recantation, it was pretty
22 important? A witness saying that he had said
23 things that weren't true on the stand? It's
24 what was the start --

25 A We're talking about the label now. The words

1 are the words.

2 Q That's right. It's the start of the acorn for
3 the tree again?

4 A Right.

5 Q Now, if I could take you to tab 22.

6 A Yes. The police knew about it. So the police
7 told this person to say these things, and he was
8 supposed to say that he knew it on his own
9 somehow.

10 Q Right.

11 A "Like you know, as well as I do, they
12 never had much on Jim, and I said: Right.
13 And a lot of it was made up and a lot of it
14 was bullshit."

15 Q Um-hum.

16 A So you can call that a recantation, or you can
17 call it an unhappy witness. You can call it
18 whatever you like, but those are the words.

19 Q Yes, I understand. Now, if I could take you
20 then to tab 52, please, there is another memo
21 from your file and it's dated March 16th of
22 1992.

23 A Yes.

24 Q Related to a March 6th telephone call, I take it
25 also of 1992?

1 A Yes.

2 Q And it's a telephone call you received from Ray
3 Zanidean?

4 A Yes.

5 Q And he phones you, and I'm going to read what he
6 says and what you write in your memo. It says,
7 "On March 6th Reg Zanidean phoned me. He
8 wanted to known..."

9 A The question mark there is probably my secretary
10 saying it is phonetic, it sounds like Reg.

11 Q Yeah. I am just trying to read the memo as it
12 appears, Mr. Brodsky. I don't want to
13 correct --

14 A Yes.

15 Q I understand it's your secretary taking the
16 dictation down.

17 A Right.

18 Q There is nothing to turn on that.

19 A Right.

20 Q "He wanted to know if Driskell's appeal
21 was over yet and I told him no. He asked
22 where it was. I told him in the court
23 system. The appeal hadn't been heard yet
24 so no decision had been rendered. He asked
25 me if he could phone back in a month or two

1 to see how things were going with the
2 appeal. I told him I could give him the
3 result only after it was delivered. Up to
4 this point, he called himself Mr. Zanidean.
5 I asked him if he was the..."

6 and again we have a blank, and we know it is Ray
7 Zanidean,

8 "...who testified at the Driskell trial.

9 He said he was. I said, oh, and hung up."

10 A Right.

11 Q Can I ask you why you didn't ask him if he was
12 the one who called earlier in July, given you
13 suspected it was him?

14 A I didn't think of it.

15 Q Certainly, it struck me that this was unusual
16 that the star witness for the Crown would be
17 phoning you asking you about the appeal. Does
18 it strike you as unusual?

19 A But that's the point. The point is, if I knew
20 that he was going to be calling, I would have
21 been better prepared to deal with him. This is
22 out of the blue. And you're right, the star
23 witness doesn't usually, and especially a fellow
24 I was calling a liar so many times in the
25 presence of everyone in the courtroom, it was a

1 surprise that he would phone me. I didn't
2 expect it.

3 Q Right. And I would like now, if you could, to
4 go back and let's take a look at the police
5 perspective on the July, on the June 20th call,
6 the June 20th call, if we can; all right?

7 A All right.

8 Q And if you could go to tab 50 in volume 2 for
9 this, please?

10 A Tab 50, yes.

11 Q You've already heard from Commission Counsel
12 that as the day goes on, Mr. Zanidean and
13 Mr. Paul are in an escalating series of
14 arguments?

15 A All right.

16 Q And you've read this for yourself, I don't need
17 to read it to you. And as the day goes on, the
18 situation gets out of hand, and we have
19 Mr. Zanidean saying that he is going to go to
20 the press and tell the press that his testimony
21 had all been lies and that he would really --
22 and then there is an expletive that we have all
23 heard.

24 A Right.

25 Q He then leaves the room, and we know at that

1 point -- if you could go to what is the fifth
2 page in on that document? And I apologize, they
3 are not numbered, but it is the fifth page in,
4 it's the page of --

5 A Phone calls?

6 Q -- phone calls from the Travel Lodge.

7 A Right.

8 Q And the call to you is noted, it is written on
9 there, G. Brodsky, you see that, that is your
10 phone number there? I'm sorry, I have jumped
11 ahead of you. Did you find the page?

12 A No.

13 Q It is the fifth page?

14 A Oh, yes, I see it.

15 Q Okay. You've got it now?

16 A Oh, yes, I do, 957-3535.

17 Q Yes. And you can see that before that, and
18 we've heard from Mr. Kovnats, and certainly we
19 have heard from Al Paul, that as the day went on
20 there were a number of calls going back and
21 forth between Mr. Zanidean and Mr. Kovnats. And
22 you see those reflected, his phone number being
23 957-1700. And on that day I counted a series of
24 nine phone calls to his counsel.

25 A Right.

1 Q The last one being of almost 14 minutes in
2 duration before this all happens. Do you see
3 that?
4 A Yes.
5 Q There's an intervening call between that and the
6 call to you. And we know that that's a call
7 between Sergeants Paul and Anderson. And I'm
8 not going to read that number into the record.
9 You can take it from me that that's that call.
10 There is then an indication that a call is
11 placed to that number, which we now know is your
12 number, that lasts seven minutes?
13 A Right.
14 Q And .4?
15 A That's what it says.
16 Q A police officer, having this log in hand, might
17 know, or would know that Mr. Zanidean called
18 you, called your office?
19 A That's my office number, yes.
20 Q He wouldn't know whether or not he talked to
21 you? He might have been placed on hold by a
22 receptionist and given up and hung up?
23 A I can't tell you what would be in the police
24 officer's head.
25 Q No, I understand that. But I'm asking to you

1 look at this record and say, can you tell me,
2 from this record, that the person making that
3 call actually spoke to you?

4 A It doesn't say he did. It just says that the
5 phone was connected for 7.4 minutes.

6 Q Right.

7 A That's all it says.

8 Q You can't tell what the content of that
9 conversation was, can you?

10 A It doesn't say. It doesn't say.

11 Q There is no indication here that any media
12 person was called?

13 A Media person?

14 Q Media -- because you'll recall the threat was,
15 I'm going to phone the media and I'm going to
16 tell them that my testimony was all lies?

17 A Right.

18 Q Mr. Zanidean's threat wasn't that he was going
19 to phone you. He was going to call the media.

20 A Okay.

21 Q There is no call to the media there, I can tell
22 you.

23 A I accept that. I don't know what these numbers
24 are. I accept that.

25 Q The only way that you can link the content of

1 that call to the call happening is with your
2 transcript; would that be fair?

3 A The content --

4 Q The only way we know that Mr. Zanidean actually
5 spoke to you, and what he said, was if we have
6 the transcript of the call?

7 A Well, I would presume that nobody was going
8 to -- a person as volatile as Mr. Zanidean
9 wouldn't wait 7.4 minutes and then hang up. If
10 it were me, knowing Mr. Zanidean, I would have
11 presumed that there was a conversation, because
12 he was not the kind of fellow that would wait
13 7.4 minutes.

14 Q A conversation with who?

15 A Well --

16 Q With someone in your office?

17 A Yes.

18 Q But not necessarily with you?

19 A Well, that's my -- that 3535 is the number that
20 goes into my private office. You're right,
21 somebody else could have been in my private
22 office.

23 Q Vera could have picked it up?

24 A No.

25 Q Well, she has picked up other calls for you?

1 A Vera could have picked it up.

2 Q So --

3 A But what would she do with it for 7.4 minutes?

4 Q I am not asking what she would have done with
5 it, Mr. Brodsky. I'm pointing out to you that
6 the only way the police, looking at it now, the
7 police could have known what happened during
8 that conversation was if they had the transcript
9 you had?

10 A The only way they would have known the words
11 that were spoken is if they had the transcript.
12 I would not presume that Vera was on the phone
13 with the fellow at 7 minutes, I assume that's
14 the start time, 7 minutes to 5 o'clock. That
15 4:53, is that the start time or is that the
16 concluding time? I assume that's the start
17 time. I wouldn't presume that if I were looking
18 at this record. I would just --

19 Q But you wouldn't presume what the content of any
20 conversation was, looking at this record, would
21 you? Nor would you presume a conversation had
22 taken place?

23 A We're getting into an argument now. I would
24 presume what I would do is to go back to the
25 history of what had happened just before with

1 Mr. Zanidean, and listened to what his threats
2 were, or conversations were, and then see what
3 the phone call was, and see that there was a
4 phone call, and try and put two and two
5 together. I may be wrong. You are right, I
6 would not know exactly what was said in the
7 call.

8 Q But you had, sir, the ability to make that
9 connection, if you had reported this to the
10 police? This wasn't something that was, you
11 know, your notes scribbled on a pad. You
12 actually had a tape-recording --

13 A Yes.

14 Q -- of someone who you felt to be a witness
15 saying, I have just committed perjury. You know
16 this, guy, he has probably just committed
17 perjury, he said what the police told him to
18 say.

19 A And I'm going to talk to a lawyer about it.

20 Q Right.

21 A And I'll talk to you again later.

22 Q But certainly, from your perspective,
23 Mr. Brodsky, you must acknowledge that this was
24 an important, or could be a potentially valuable
25 piece of information to your client? You went

1 to Legal Aid. You pursued it.

2 A And I saved the tape.

3 Q Yes, and you saved the tape.

4 A Yes. And I had my secretary transcribe it.

5 Q Right. And if the tape had been provided to
6 police at the time, or the Crown at the time,
7 then at the time in '91, we would have been able
8 to know that Ray Zanidean made this call?

9 A I'm sure you're going to raise that in argument
10 later.

11 Q I will take you now to tab 54, please, in volume
12 2?

13 A Yes.

14 Q We heard in evidence -- I am just going to give
15 you some background to this -- that after the
16 events that occurred in the hotel room in June
17 of 1991 that we've just talked about, that the
18 next day the Winnipeg Police Service withdrew
19 its support of Ray Zanidean and he was, in
20 effect, no longer provided with Winnipeg Police
21 Service protection; is that right?

22 A Okay.

23 Q And we know that at that time Officers Anderson
24 and Paul stopped having to deal with him
25 anymore, a fact for which I can tell you they

1 both seemed very happy about.

2 A Well, I assume that from your presumption when
3 you said "having to deal with him."

4 Q If you take a look, please, at the letter from
5 Mr. Quinney under tab 54, which is dated
6 January 16th of 1992. Again, these aren't
7 numbered, but I am going to be referring to the
8 second page of that letter.

9 A I see it, yes.

10 Q Okay. If, after June 20th, Sergeants Anderson
11 and Paul no longer deal with Mr. Zanidean, if
12 you could take a look at the second paragraph in
13 that letter to Mr. Miller? It relates to
14 Sergeant Anderson reporting to the RCMP a threat
15 by Mr. Zanidean to recant. And I'd like to you
16 take a look at that. It says,

17 "On July 16 of '91, Sergeant Anderson
18 advised them..."

19 A Wait.

20 Q I'm sorry?

21 A "I would like to advise you...",

22 in the second paragraph,

23 "I would like to advise you that during the
24 course of their investigation dealing
25 with...",

1 is that what you are referring to?

2 Q Yes. If you go further on it says,
3 "The RCM Police indicate that on July 16,
4 1991, Sergeant Anderson advised them that
5 Zanidean had stated to him after the murder
6 trial that if he was charged with the
7 arsons in Saskatchewan, he would go to the
8 media and state that he only told the
9 Winnipeg Police Service what they wanted to
10 hear."

11 It sounds very similar to the recantation threat
12 we have just dealt with in tab 53; correct?

13 A Yes.

14 Q And, in fact, if we take their evidence as
15 accurate that they no longer dealt with
16 Mr. Zanidean, it would appear to me that this
17 threat in the Quinney letter of January 16th of
18 1992, is a reflection of Sergeant Anderson
19 telling the RCMP about that threat. Does that
20 make sense to you as well?

21 A You're guessing and you want me to guess, I can
22 guess.

23 Q That's fine.

24 MR. CODE: I don't think that can be a proper
25 question, asking Mr. Brodsky to comment on the

1 correct interpretation of this letter. It's
2 between two other parties.

3 BY MS. CARSWELL:

4 Q All right. Now, in 1993, you've mentioned that
5 you participated in a series of media stories
6 that were released in relation to Mr. Driskell?

7 A All right.

8 Q And during that period of time you were still
9 actively involved on Mr. Driskell's behalf?

10 A Yes.

11 Q And, in fact, we know from reviewing the file
12 that Mr. Fairney -- do you know Mr. Fairney?

13 A Michael Fairney was a student in my office, an
14 articling student.

15 Q Right. And he was assisting you in this matter
16 on occasion, is that fair?

17 A Okay.

18 MS. CARSWELL: I am going to show you a
19 document, Madame clerk, it is a memo to
20 Mr. Brodsky from Michael Fairney re Driskell
21 dated June 8 of 1993. This document has not
22 been entered before.

23 THE COMMISSIONER: Okay. This will be Exhibit
24 25.

25

1 (EXHIBIT 25: Memo dated June 8, 1993 to
2 Brodsky from Michael Fairney re Driskell)

3 MS. CARSWELL: I don't believe it has. Has
4 Mr. Dawe just coughed?

5 MR. DAWE: No. I am coughing for other reasons.
6 However, it would be of some assistance to the
7 rest of the parties if Ms. Carswell could
8 indicate the source of the disclosure materials
9 that this came from.

10 BY MS. CARSWELL:

11 Q Absolutely. And I was about to, Mr. Dawe. It
12 is in volume 3 of Mr. Brodsky's materials at
13 page 110.

14 A Do you want me to get that?

15 Q No. If you have this, this is a new document
16 out of the materials supplied from your file,
17 Mr. Brodsky.

18 A Okay.

19 Q And I just point out, it appears that
20 Mr. Fairney attends with respect to an interview
21 that is conducted of Cheryl Maygard.

22 A Right.

23 Q Who was interviewed as part of the review.

24 A Right.

25 Q And this is the type of memo that we talked

1 about earlier, that you would have expected to
2 receive from junior counsel who was assisting
3 you?

4 A If I send my student down to do something, I
5 expect to be reported back to in this way.

6 Q Right. And which leads me to my last question,
7 and I'm sure you'll be happy about that. I've
8 looked through your material and I can find no
9 similar memo detailing Mr. Fairney's attendance
10 with Ms. Duncan, the investigator, and with
11 Mr. Driskell when they met with the review team
12 on August 30th of 1993.

13 A Yes.

14 Q Do you recall such a memo?

15 A No.

16 Q That would be something you would have wanted to
17 be informed on; correct?

18 A Yes.

19 Q So it's possible that's another one of the
20 pieces of paper that may have gone astray from
21 your file?

22 A Yes, if there was a piece of paper.

23 MS. CARSWELL: There was. Thank you.

24 MR. WALLUM: Mr. Commissioner, Chris Wallum.

25

1 BY MR. WALLUM:

2 Q Mr. Brodsky, as I'm sure you're aware that I act
3 for Mr. Whitley in this matter. I just have one
4 very brief area to ask a question about, which
5 we can do before the lunch break.

6 Yesterday, Mr. Brodsky, you gave some
7 evidence, and Mr. Gates touched upon it this
8 morning, about the blockage that you were
9 experiencing with respect to whether
10 Mr. Zanidean was being prosecuted for the arson
11 in Swift Current?

12 A Yes.

13 Q And if I recall your evidence yesterday, you had
14 indicated that you may have talked to the
15 Director of Prosecutions, Stu Whitley, and
16 others in respect of this blockage?

17 A Yes.

18 Q However, I take it that it is not your evidence
19 that you have a recollection of actually
20 speaking with Mr. Whitley about that issue?

21 A You're correct.

22 Q It is something you don't ever recall speaking
23 to Mr. Whitley about?

24 A I don't have a specific recollection of speaking
25 to him. I have a recollection of speaking to

1 somebody.

2 MR. WALLUM: Those are my questions. Thank you.

3 BY MR. WOLSON:

4 Q Good day, Mr. Brodsky.

5 A Yes.

6 Q You've been referred to as a veteran criminal
7 lawyer. You've had probably hundreds, if not
8 thousands, of trials prior to Stinchcombe?

9 A Yes.

10 Q And you've had those trials, both in this
11 province, and we will leave other provinces
12 aside except for Ontario, and many, many trials
13 in Ontario prior to Stinchcombe?

14 A Yes.

15 Q There's no question that 1991, up to the fall
16 and back, that we laboured in this province
17 under totally different disclosure practices
18 than in Ontario?

19 A Yes. Ontario, yes.

20 Q You would get, in Ontario, prior to Stinchcombe,
21 you would have gotten books of disclosure which
22 included witness statements. You would get
23 that?

24 A Especially Northwest Ontario I did.

25 Q Yes.

1 A I got not only witness statements, but I got the
2 can-says.

3 Q Yes, can-says of witnesses?

4 A And I got an executive summary, I got more
5 material.

6 Q You would have gotten can-says where witnesses
7 hadn't made statements. And you would have had,
8 by comparison, almost night and day in terms of
9 disclosure between --

10 A You're absolutely correct.

11 Q Yes. As a matter of fact, in this province, by
12 way of example, and you and I are both very
13 familiar with the Thomas Sophonow matter, the
14 initial disclosure on Sophonow was a page and a
15 half. Do you recall that?

16 A I don't remember if it was a page and a half or
17 two pages. It was short.

18 Q Dictated by a Crown attorney on the telephone,
19 and this was a major homicide case where there
20 were eyewitness identifications; right?

21 A Right.

22 Q There were --

23 A Or misidentifications.

24 Q Absolutely. And there were all kinds of issues,
25 and yet disclosure was just as brief as it could

1 possibly be by way of a couple of pages. And
2 then later, added to that, a pathology report
3 and very little else; you recall that?

4 A In some cases, yes. In some cases you got more
5 disclosure. The practice differed depending on
6 the Crown attorney and depending on where in the
7 province you were getting your disclosure from.

8 Q Right. But the point being that when my friend,
9 Mr. Lockyer, has indicated to you that in this
10 case, the Harder homicide case, that the
11 disclosure that you received, he said to you, do
12 you realize that you didn't get many of the
13 supplementals that were prepared by Sergeants
14 Anderson and Paul, or Williams and Osborne, that
15 was true, you didn't get many of them, did you,
16 in this case?

17 A That's right. I was taken through them
18 yesterday.

19 Q But that was the standard of the day pretty well
20 in those days. As a matter of fact, many Crown
21 attorneys wouldn't give you any supplementals at
22 all. You would agree with that?

23 A In some cases.

24 Q In homicide cases, some Crown attorneys would
25 not provide to you supplementals at all?

1 A I don't recollect that.

2 Q Well, were you getting supplemental reports in
3 all of your homicides -- and I know you've done
4 many prior to Stinchcombe. My suggestion to you
5 is that the supplementals you received, at the
6 best of times, would have been very sparse?

7 A In some cases you got more disclosure and in
8 some cases you got less.

9 Q Well --

10 A Supplementals, by supplementals you mean the
11 typed --

12 Q The police supplemental reports that were
13 prepared internally by investigators, you would
14 rarely get those I suggest to you?

15 A Mostly you got the statements of the witnesses.

16 Q If you got those. There were many cases where
17 you didn't get those?

18 A Well, it is pretty hard to proceed to trial if
19 you didn't have a statement of the witness.

20 Q Well, that was happening, I would suggest to
21 you. Crown attorneys would not like to give out
22 even statements of witnesses in the
23 pre-Stinchcombe days, irrespective of policy,
24 that was happening?

25 A But that's why, whether they liked it or not,

1 that's why I wrote those letters, because I
2 didn't go to trial unless I was as prepared as I
3 could be. And I couldn't be prepared unless I
4 had the witness's statement in my hand, so if he
5 said something different than he said in his
6 statement, I would be able to -- I would have
7 the ability to cross-examine him.

8 Q Well, you are talking now about witness
9 statements. Let's go back to supplementals for
10 a second, and then we will cover witness
11 statements.

12 A Okay.

13 Q Supplementals were not something that you would
14 ordinarily get?

15 A I didn't always get them.

16 Q No. Witness statements, you sometimes got them,
17 not all the time, and you would have to make
18 applications to the court to try to get them?

19 A Or applications for an adjournment. We got
20 them -- but why wouldn't we get them?

21 Q Well, I don't know why we wouldn't get them, but
22 I suggest to you they weren't coming on a
23 frequent basis pre-Stinchcombe?

24 A I think what Stinchcombe did is make sure that
25 we got them in every case.

1 Q I understand that.

2 A As opposed to saying we weren't getting them
3 before Stinchcombe, and all of a sudden in
4 November we started getting them in large
5 packages, I just don't think it happened that
6 way.

7 Q Well, I'm going to suggest to you that when
8 counsel says to you that in this particular case
9 that there was so much you didn't get, that
10 there was more or less the norm at the time. I
11 am not saying it was right, but that was the
12 norm at the time, wasn't it? We weren't getting
13 anywhere near what we should have had in those
14 days; you would agree with that statement?

15 A We didn't always get what we should have got. I
16 can't say that -- you are making it sound,
17 though, that in every case we got some puny
18 little folder and that was called disclosure.
19 No, we got more than that in order to defend the
20 case.

21 MR. WOLSON: We will follow up on that. It's
22 now quarter to 1:00. I seem to always be the
23 one at the microphone when we have to break, but
24 I will follow up on that this afternoon.

25 THE COMMISSIONER: It's a big plan.

1 MR. WOLSON: I understand, it's a conspiracy.

2 THE COMMISSIONER: Okay. 2:00 o'clock.

3 THE CLERK: All rise. This Commission of
4 Inquiry is adjourned until 2:00.

5 (Proceedings recessed at 12:47 and
6 reconvened at 2:00 p.m.)

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

9 THE COMMISSIONER: Please go ahead, Mr. Wolson.

10 BY MR. WOLSON:

11 Q Mr. Brodsky, we left off discussing issues of
12 disclosure, and my suggestion to you is that the
13 climate then, prior to Stinchcombe, in Manitoba
14 was, A, dependent on who the Crown was?

15 A That's right.

16 Q B --

17 A I agree with that.

18 Q -- the disclosure that we got was slim, almost
19 irrespective of who the Crown was, although some
20 Crowns were better?

21 A If we were to say hit and miss, I would agree
22 with that.

23 Q And as it was, Mr. Dangerfield was probably, of
24 the Crown's doing homicide cases, was probably
25 more fulsome in his disclosure than others?

1 A Yes.

2 Q And even having stated that, in hindsight, there
3 were a lot of things that you would like to have
4 had in this case, even though you would say,
5 generally speaking, Mr. Dangerfield was better
6 in disclosure than others?

7 A Yes.

8 Q And that's one of the reasons, not the only
9 reason, but one of the reasons that you used to,
10 and still may, on major cases you would often
11 retain a private investigator who would do your
12 investigation, so you could perhaps get more
13 disclosure than you would otherwise have?

14 A Yes, and I found that the police sometimes
15 didn't take directions from me.

16 Q Leaving aside the police?

17 A I mean that facetiously, of course.

18 Q Leaving aside the police, by your retention of
19 Savage in this case, you found out a lot of
20 things that you would otherwise have not found
21 out because of the disclosure issues in those
22 days?

23 A Right.

24 Q It is not a question in those days of hiding
25 evidence, it was a culture that existed with

1 the Crown's office that it was just accepted
2 that the disclosure was not very fulsome at all?

3 A I assume it varied from Crown to Crown, but you
4 may be right.

5 Q Now, just by way of comparison, in the Sophonow
6 case, you learned after the fact that you
7 weren't given the kind of information that would
8 have been very important in cross-examining
9 jailhouse informants, for instance?

10 A Yes.

11 Q So matters that you would expect, that by way of
12 today's standards of disclosure that would be
13 absolutely discloseable evidence, in those days
14 simply wasn't disclosed.

15 A What Stinchcombe did was to take it from hit and
16 miss to these are the rules for all cases.

17 Q You would say today that, and you were asked
18 questions by Mr. Kennedy on issues of disclosure
19 today, we get box loads of materials?

20 A You don't get envelopes, you get boxes, you are
21 right.

22 Q And by way of the changes that have come about
23 post-Stinchcombe is that, one of the major
24 changes, the incidents that happened in this
25 case would not happen today? You would have

1 disclosure about any arrangement that was made
2 with any witness, we get that now?

3 A Yes. I had it from Mr. Dangerfield even before.

4 Q But you didn't have it in this case?

5 A I didn't have it in this case, no.

6 Q One of the issues that you had to deal with in
7 this case was the fact that there were two key
8 witnesses, Gumieny and Zanidean, who both
9 incriminated your client?

10 A Yes.

11 Q And you had to deal with the cumulative effect
12 of both of them?

13 A Right.

14 Q And you will recall, in his address to the jury,
15 that Mr. Dangerfield reviewed Zanidean and said
16 to the jury that he was not -- or that he was an
17 unsavory character?

18 A I think he said that, yes.

19 Q I'm paraphrasing, but words to that effect?

20 A Yes.

21 Q And that he had a criminal history?

22 A That was in the evidence and Mr. Dangerfield
23 said that in the address.

24 Q But you should believe him anyway?

25 A Yes, he said that.

1 Q So one of the problems that you had in this case
2 was overcoming the two witnesses who
3 incriminated your client?

4 A Yes.

5 Q Now, we know that Sergeant Paul testified in
6 this case?

7 A Right, he did.

8 Q And although he testified on a fairly narrow
9 issue, I'm advised that he had his notebooks
10 with him, laid out in front of him in the
11 witness box?

12 A Oh --

13 Q Do you know that?

14 A No.

15 Q Do you recall that?

16 A No.

17 Q Let me ask you, in those days, and I'm going
18 back again to yesteryear, when a policeman
19 testified, you were often able to look at his
20 notes, not just over his shoulder, but you would
21 say to the judge at the time, I want to see the
22 witness' notes, and you would almost always get
23 them, and there were case authority for that at
24 the time?

25 A But the case authority was that if somebody used

1 a document to refresh their memory and their
2 evidence was as a result of refreshed memory,
3 then you would look at what the document was
4 that they used to refresh their memory. And if
5 it was a police officer using a notebook, then
6 you could look at the notebook.

7 Q And there was all kinds of ways that you, as a
8 skillful lawyer, would know how to have the
9 police officer refer to his notes. And we used
10 to play those games all of the time. And you
11 did, true?

12 A I don't think it is a game.

13 Q But we used to get the officer to refer to his
14 notes?

15 A Sometimes.

16 Q Did you do that with this witness, Sergeant
17 Paul?

18 A No.

19 Q If the Crown had his notes, would you have
20 expected to get them?

21 A In view of what I know that the Crown had, in
22 view of the arrangement for payment and the
23 negotiating, I would have expected to get them.
24 And especially from Mr. Dangerfield, because as
25 I have already indicated in an earlier case I

1 had just done with him, when there was witness
2 immunity granted, he told me.

3 Q Let me --

4 A If it substantially affects the credibility of
5 the principal witness or witnesses, then I would
6 expect that any counsel, not just
7 Mr. Dangerfield, would tell me, or tell any
8 defence counsel.

9 Q My friend, Ms. Carswell, referred you to your
10 statement where you indicated that George
11 Dangerfield was known to be a pretty tough kind
12 of prosecutor, a tough guy?

13 A I said that and I agree with that.

14 Q And that if he were taken off guard with your
15 cross-examination of Zanidean regarding the
16 arson in Swift Current, you would expect that
17 Mr. Dangerfield would have had a recess before
18 he re-examined and gotten to the bottom of it?
19 You would expect that?

20 A Yes.

21 Q And in view of the transcript, that didn't
22 happen? There was no recess after you
23 cross-examined --

24 A I refer to the Sophonow case when we had a
25 witness on a Friday that was unexpected, they

1 put the case over to Monday so that he could do
2 his cross-examination, prepare that is over the
3 weekend for what was unexpected, what happened
4 in court in an unexpected way.

5 Q And in this case there was no recess after your
6 cross-examination, prior to his re-examination,
7 the re-examination just went on?

8 A That's right.

9 Q Right after you finished?

10 A You are right.

11 Q And if he had had felt blind-sided by the
12 police, that is if they had withheld information
13 from him that was critical to the case, you
14 would have heard about it?

15 A I would have heard about it on the next block.

16 Q Now, I just want to take you to tab 1 of 20,
17 20A, tab 1 of your statement?

18 A Yes.

19 Q Page 1, the middle paragraph under A?

20 A Yes.

21 Q Let me ask you first of all, in the second
22 paragraph you indicate,

23 "The Crowns went to lunch together, and if
24 you told someone something, four others
25 would know about it before the hour was

1 out."

2 In other words, what you are saying is that you
3 would expect if one of them had an important
4 piece of information, it would likely be
5 conveyed to the others?

6 A Yes.

7 Q That was your experience?

8 A Yes.

9 Q And if Bruce Miller had information that was
10 critical to the credibility of Zanidean, for
11 instance, you don't have a doubt in the world
12 that he would pass that on to Mr. Dangerfield,
13 who was trial counsel? That would be a given in
14 your mind, I take it?

15 A It was a given.

16 Q And I take it you would subscribe to the theory
17 that the Crown is the Crown, so that if one
18 senior Crown has critical information on the
19 case, that's information to all of the Crown?
20 You would expect that?

21 A Well, yes. You wouldn't withhold things,
22 especially from the Crown counsel who was the
23 counsel in the courtroom.

24 Q I want to ask you about your meeting with David
25 Kovnats which is at tab 33. That's your

1 June 10th memo in the middle, or one page into
2 tab 33?
3 A Right.
4 Q If you go to the June 10th date, you will see
5 that this memo was prepared -- are you there,
6 June 10th?
7 A You are talking about the second memo?
8 Q "I have just come from David Kovnats'
9 house at 89 Eastgate."
10 That's how it starts?
11 A Yes.
12 Q If you go halfway down that page?
13 A Right.
14 Q It is pretty clear that you are making this memo
15 on June 2, because you are talking about a
16 potential meeting the next day, June 3?
17 A Right.
18 Q So we can conclude that this memo was dictated
19 on the 2nd of June?
20 A Yes.
21 Q Now --
22 A His client would call me tomorrow at
23 2:00 o'clock, June 3rd.
24 Q There is two things that you learned, you may
25 have learned more, but two things of --

1 A Again, I told him I wanted to talk to him
2 tonight, the case is starting tomorrow. So you
3 are right.

4 Q So June 2 is the date. But there is two things
5 that you learned in particular that was of
6 importance to you. You learned at page 405,
7 that according to what Mr. Kovnats said, that he
8 is not sure whether his client will speak to you
9 because it may jeopardize his deal. So you
10 learned of a potential deal, that's one thing
11 you learned?

12 A Right.

13 Q And the second thing you learned is that, at
14 page 404, that your request to speak to Zanidean
15 would be passed on to Mr. Miller?

16 A That's right.

17 Q Now, knowing you as I do, you are a bull for
18 preparation, there is no question about that.

19 A Okay.

20 Q Armed with that information, and being that you
21 would be seeing Mr. Dangerfield for the next few
22 weeks -- you were going to trial the next day?

23 A Yes.

24 Q You certainly would have said to him, what is
25 this about a deal? Whether you have noted it in

1 a memo or not, that's something that you would
2 almost for certain do. Am I not right in that
3 regard?

4 A I think my focus primarily was on this
5 interchange with Mr. Kovnats, a physical one,
6 and the deal would be on my mind also, whatever
7 the deal was.

8 Q So given that, and certainly you were prodding
9 Mr. Zanidean when you cross-examined him, trying
10 to determine whether he had a deal?

11 A Yes, and I had written a number of letters
12 asking about whether there is any --

13 Q Given that that was important to you in your
14 cross-examination of Zanidean, you would likely
15 agree with me, despite the fact that we don't
16 have a memo, you would have been busy at the
17 time, you were in trial, you would have likely
18 said to Mr. Dangerfield, what is this about a
19 deal?

20 A Yes.

21 Q Were you told that there was a deal?

22 A No.

23 Q On issues of witness protection --

24 A If I was told there was a deal, I'm going to say
25 the obvious, but if I was told there was a deal,

1 I certainly would have put it to Mr. Zanidean in
2 the court room.

3 Q Well, if you were told there was a deal, you
4 would have gotten all of the information,
5 obviously?

6 A Yes, or tried to.

7 Q When a witness is in a witness protection
8 situation, that's one area where even today,
9 post-Stinchcombe, you may not find out too much
10 about that witness in terms of witness
11 protection issues. Would you agree with that
12 statement?

13 A Are you referring to like the new name and new
14 identity and location of the witness?

15 Q Anything like that, you wouldn't find that out?

16 A Yes, that's correct.

17 Q Now, my friend, Mr. Lockyer, examined you today
18 on the Kara brothers?

19 A Yes.

20 Q And questioned the credibility of Officers Morin
21 and Shipman. You got the opportunity to
22 cross-examine them, did you not, on this case?

23 A I think so.

24 Q Pardon me?

25 A I think so.

- 1 Q Yes, you did. And you knew a lot about the Kara
2 brothers, because while you didn't get
3 disclosure of it, your private investigator was
4 able to learn a lot about the Kara brothers and
5 provide you with that information?
- 6 A You are correct.
- 7 Q And just for the record, tabs 7, 15 and 26 are
8 memos and reports from Mr. Savage, who advised
9 you that the Karas would likely be retreating
10 from their statements?
- 11 A Yes.
- 12 Q That gave you the background of the Kara
13 brothers?
- 14 A Some background, yes.
- 15 Q And you probably knew more about the Karas --
16 and just before I ask you this question,
17 Mr. Dangerfield was the kind of Crown that, and
18 you make this in your statement, you make this
19 statement, that didn't ordinarily interview
20 witnesses?
- 21 A Yes, that's correct.
- 22 Q You probably knew more about the Kara brothers
23 than anybody else, because you had Mr. Savage
24 investigating them?
- 25 A I don't know what anybody else knew about the

1 Kara brothers.

2 Q You knew a lot about them?

3 A I did, yes, and I had spoken to their lawyer as
4 well.

5 Q Just one final area, tab 6, which is a motion,
6 an affidavit of Gregg Lawlor?

7 A Yes.

8 Q And you were asked about this particular tab,
9 and you were asked about some of the statements
10 made in the affidavit that were statements
11 indicating or pointing the finger at your client
12 perhaps doing things that he shouldn't have been
13 doing?

14 A Right.

15 Q And in effect, assailing your client's credit?

16 A That's correct.

17 Q Did you ask for disclosure about those matters?

18 A Yes.

19 Q Did you cross-examine Mr. Lawlor on those
20 matters, on his affidavit?

21 A He is an officer of the court, I didn't
22 cross-examine him, but I certainly met with him
23 the next morning --

24 Q And you got the disclosure?

25 A -- February 6th, I met with him for some

1 considerable time, and in the afternoon I appear
2 before Mr. Justice Morse -- no, I appeared
3 before the court.

4 Q Mr. Brodsky, did you get the disclosure from him
5 of the points that he was making?

6 A No. I said to the judge, if there is -- I did
7 not get the disclosure, and I said to the judge,
8 to counsel and the judge, that if they had a
9 basis for making those insinuations, they should
10 let me have it.

11 Q So you wouldn't think of cross-examining him on
12 them then?

13 A But I met with him, and he is an officer of the
14 court, I don't think that judges look too kindly
15 on cross-examining Crown attorneys who are
16 prosecuting the case.

17 Q I see. You didn't?

18 A I met with him, and then I asked him in the
19 presence of the judge.

20 Q Let me ask you one final question. You were
21 asked about material witness warrants. You were
22 asked that by my friend Mr. Lockyer. Do you
23 recall being asked those types of questions?

24 A Yes.

25 Q They were more or less, for any witness who had

1 critical evidence to give that had some criminal
2 background, they were more or less the order of
3 the day back then, were they not? You saw them
4 in many of your cases, material witness
5 warrants?

6 A I saw them in cases, but it wouldn't be a
7 secret.

8 Q That's right, it wouldn't be a secret. They
9 would often --

10 A It would appear on a docket, you could see Joe
11 Blow, material witness.

12 Q So if you wanted to find out if Zanidean or
13 Gumieny or the Karas were on material witness
14 warrants, you could have an easy search done for
15 that?

16 A I didn't know to search, number 1; and number 2,
17 I'm not sure even now, if this material witness
18 warrant was returnable to the Queen's Bench, it
19 wouldn't be so easy to find out.

20 Q They appear on a Provincial docket, don't they?

21 A Pardon me?

22 Q They appear on the Provincial docket?

23 A If the warrant is out -- it could be. But I
24 didn't know to look, I had no idea I should be
25 making that kind of a search.

1 Q Even though it would be the order of the day for
2 witnesses who were not necessarily of a fixed
3 nature, fixed address and so forth, that was
4 very common back in the 1990s, early 1990s and
5 late '80s, that was happening all of the time,
6 wasn't it?

7 A I would say it happened not all of the time. I
8 would say that it happened from time to time, in
9 order for a witness to be impressed on the
10 significance of their testimony so that --

11 MR. WOLSON: Thank you very much, sir.

12 MR. PROBER: Mr. Commissioner, good afternoon.

13 THE COMMISSIONER: Mr. Prober.

14 MR. PROBER: I will be going next, as you can
15 see, and if you are ready.

16 THE COMMISSIONER: I am.

17 BY MR. PROBER:

18 Q Good afternoon, Mr. Brodsky. You and I know
19 each other, of course, and in fact we have done
20 a number of cases together?

21 A Yes, and I hope I'm ready too.

22 Q Pardon me?

23 A And I hope I am ready too.

24 Q You are always ready. And as usual, in this
25 case, the Driskell case, you worked like a

1 Trojan. I'm not going to pick up on the word
2 bull used by Mr. Wolson, because I might
3 accidentally add another word to it. But as
4 defence counsel, you and I know that the Crown
5 can only disclose what it has been given by the
6 police; correct?

7 A Right.

8 Q It is pretty basic, the Crown cannot disclose
9 something they don't have or something they
10 haven't been given. We know that, right?

11 A Right.

12 Q And as defence counsel, we know as well that the
13 Crown depends on the police for its information
14 by way of supplementals, by way of narratives,
15 by way of witness statements and notes if
16 requested; correct?

17 A Right.

18 Q And continuing on with some general observations
19 before I get to the specifics, as a general
20 comment on this particular case, you wouldn't
21 know what the police disclosed or didn't
22 disclose to the Crown in this case?

23 A You are right.

24 Q Correct? In fact, as I recall you were asked a
25 question by Mr. Dawe, Commission Counsel, to the

1 effect that, were you concerned the Crown was
2 not getting information from the police or all
3 of the information from the police? I think you
4 answered, there are lots of cases the Crown
5 didn't get as much as they expected. Is that
6 correct, that was your answer?

7 A If it wasn't, it was a good answer.

8 Q Yes, I agree. And then you went on to add that
9 you are not going to be satisfied that
10 Dangerfield is satisfied, or any other Crown,
11 you want to be satisfied yourself; right?

12 A I didn't want Mr. Dangerfield or any other Crown
13 deciding what was relevant for my defence.

14 Q Right. And then you made a comment at the
15 commencement of Mr. Lockyer's cross-examination,
16 the people -- and I checked with the reporter on
17 this comment -- the people who I thought were my
18 friends, honest and honourable, kept things from
19 me that they ought not to have. But that is
20 premised on the assumption, is it not, that they
21 had those things or information to give you;
22 right?

23 A Yes, or were purposely not getting the
24 information, because if they got it, they would
25 have to give it to me.

1 Q Right. But you don't know that? You don't know
2 what happened?

3 A No.

4 Q The point is that your comment --

5 A That is my supposition, you are right.

6 Q -- that you felt you were not getting the things
7 that you ought to have is really based on the
8 assumption or the premise that they had those
9 things to give you. And you don't know that, do
10 you?

11 A Look at all of the trouble I had with the Swift
12 Current fire, look at how many letters I wrote
13 asking the same darn thing over and over again.

14 Q Right.

15 A And getting answers which were partial answers,
16 not complete answers, and so I have to ask it
17 over and over again.

18 Q But we will go to that in a moment. But you
19 will recall, when you were taken to the
20 documents, that the Crown went to the police to
21 get that information for you; correct?

22 A That's what they said they would do.

23 Q Yes. And I will show you documents in a moment.

24 A I remember that. They said they would do that,
25 they said they would go to the police and get

1 that information.

2 Q Right. Okay. And --

3 A Both Mr. Lawlor and Mr. Dangerfield said that.

4 Q And they did, and I will show you where they

5 did, if you don't recall.

6 A But I am accepting that they did.

7 Q We will get to the specifics in a moment. But

8 you and I are both in the business of reasonable

9 doubt, right? And maybe, just maybe the Crown

10 didn't have the information to give you, right?

11 A I haven't seen the Crown's file, so I don't

12 know.

13 Q You don't know what they have, you don't know

14 what they were given by the police or not given

15 by the police; correct?

16 A That's right. Well, I know some of what they

17 were given by the police, because I got some

18 disclosures.

19 Q Right, but you --

20 A I don't know everything that they got.

21 Q -- you don't know what was not given to them by

22 the police?

23 A That's a better way of putting it.

24 Q And that's one reasonable explanation for your

25 concern, I suggest, that you really don't know

1 what was not given to them or what was not told
2 to the Crown by the police, correct? You would
3 have no idea of that; right?

4 A Right.

5 Q Now, I think Mr. Wolson touched on this, but the
6 Dangerfield you and I knew, and that you
7 referred to in your statement to the inquiry as
8 a good, honourable and trustworthy prosecutor,
9 gave you more disclosure than you got from most
10 Crowns; correct?

11 A Yes.

12 Q And you have no reason --

13 A He had the patience at the beginning, furthering
14 Mr. Wolson's point, to sit for an hour on the
15 telephone reading to me from his police file. A
16 lot of Crowns wouldn't take all of that time to
17 do that.

18 Q No. And on occasion he would let you have
19 access to his complete file; right?

20 A Right.

21 Q Yes.

22 A As a matter of fact, I thought that's what would
23 happen here. I didn't know he would take a
24 different view here.

25 Q But let's look at the specifics. And if you

1 turn to tab 25 -- excuse me, Mr. Commissioner, I
2 will get my material.

3 And with those general comments that we
4 agreed on as a backdrop, if you look at tab
5 25 --

6 A Yes, I have it page 314.

7 Q -- you will see that Mr. Lawlor writes to you
8 May 21st, 1991 enclosing the attached police
9 reports; right?

10 A Right.

11 Q He has gone to the police and he provides with
12 you a document dated May 19th, '91?

13 A Yes.

14 Q It appears to be authored by Anderson, Paul,
15 with T.A., Tom Anderson's initials above that?

16 A I see that.

17 Q And then you have the supplemental report, two
18 pages of it --

19 A Yes, I see that.

20 Q -- attached to that as well?

21 A Right.

22 Q Again the Crown goes to the police, gets the
23 information from the police and passes it on to
24 you; correct?

25 A Right.

- 1 Q And if you look at tab 19, please?
- 2 A Yes, I see that.
- 3 Q It is a letter, and second page?
- 4 A Yes.
- 5 Q The queries were passed on to the police
6 according to what Mr. Lawlor says in that
7 letter; right?
- 8 A That's right.
- 9 Q Again, the Crown going to the police for
10 information?
- 11 A Right.
- 12 Q Tab 17, it is the same sort of thing.
- 13 A Yes, I see that.
- 14 Q Dated April 26, '91, and Lawlor is writing Staff
15 Sergeant Vandergraaf asking for help in
16 answering your questions 5, 7, 8, 9, 10, 11, 12,
17 16, 19 and 20; right?
- 18 A The answer is yes, and that's the same date as
19 that letter that you earlier referred to.
- 20 Q Right. So the Crown goes to the police, the
21 disclosure comes from the police; correct?
- 22 A Yes.
- 23 Q Now, let me take you, if you would please, to
24 exhibit 21, which is the buff coloured binder,
25 which is filed by Mr. Driskell's counsel?

1 A Right.

2 Q And in particular to tab 8, your affidavit?

3 A Yes.

4 Q Paragraph 9 of the affidavit, are you there?

5 A I am now.

6 Q I am not going to get you to read the whole of

7 paragraph 9, but you indicate that you were not

8 aware, never advised that Zanidean was paid

9 substantial sums of money?

10 A Right.

11 Q I take it you don't know if George Dangerfield

12 knew that either?

13 A I presume, but I don't know.

14 Q You don't know whether he knew that or whether

15 he had been advised of that, do you?

16 A I presume he would have, but I don't know.

17 Q That would be a guess on your part; right?

18 A That's what a presumption is.

19 Q And what about paragraph 10, again, that's a

20 reference to the money Zanidean was paid, you

21 were advised by AIDWYC in 2003. You don't have

22 any personal knowledge and you don't know if

23 Dangerfield knew about that either, do you?

24 A All I can say is I would be surprised if he

25 didn't know, but I don't know that he knew.

1 Q Right. Paragraph 11?

2 A Yes.

3 Q The same thing,

4 "I wanted to know whether Zanidean had been
5 promised he would not be prosecuted for
6 arson."

7 You saw this as a crucial issue and you
8 indicated to AIDWYC that you -- you had been
9 asked by AIDWYC whether you had ever been told
10 that Zanidean's denial was false and authorities
11 have good reason to believe it may be false, and
12 the answer is that I have not. So you wouldn't
13 know whether Dangerfield knew about any deal or
14 not, do you? You have no personal knowledge one
15 way or the other?

16 A I wasn't there when he was told whatever he was
17 told. I wasn't there when he got whatever
18 letter he got, or I wasn't there when he got
19 whatever paper he got. But I would be
20 astounded, knowing Mr. Dangerfield, if material
21 that substantial, that affected the credibility
22 of his key witness in the whole case, wasn't
23 given to him.

24 Q You would be surprised, but you have no idea
25 whether he knew or didn't know?

1 A I said that, yes.

2 Q Right.

3 A Astounded is a better word than surprised.

4 THE COMMISSIONER: That was the word you used.

5 BY MR. PROBER:

6 Q And again with paragraph 12, and Mr. Gumieny --

7 A Right.

8 Q -- being paid substantial amounts of money and
9 being placed in the Witness Protection Program,
10 you wouldn't know whether Dangerfield knew that
11 or not?

12 A That was a real surprise to me about Mr. Gumieny
13 in the Witness Protection Program and being paid
14 money. I mean, I wasn't even writing letters
15 about that, that's completely out of the blue.

16 Q And --

17 A You are right, I didn't see any letter written
18 to Mr. Dangerfield, I didn't see any handwritten
19 note or any correspondence, and I wasn't there
20 when he was told whatever he was told by the
21 police.

22 Q Or not told. Are you aware that it was Miller
23 and Whitley that were dealing with the Witness
24 Protection Program for any of the witnesses?

25 Are you aware that it was their function to do

1 that?

2 A Whitley, no.

3 Q Have you since learned that?

4 A I know that Mr. Miller was, his name seems to be
5 on the documents. But I would assume.

6 Q It is an assumption again.

7 A My assumption is you have to have somebody
8 higher than an on-line Crown to enter into a
9 program that puts a person into another
10 province. I just --

11 Q You are right. You are right. And you wouldn't
12 know what part, if any, Dangerfield took in
13 that, would you?

14 A I don't think -- well, no.

15 Q No. And --

16 A My presumption is that whatever, whoever did, he
17 would be advised, not that he did.

18 Q Whether he should have been advised, or whether
19 you would expect him to be advised is one issue.
20 You don't know whether he was advised or not, do
21 you?

22 A I wasn't there when he had whatever meetings,
23 and I wasn't there when he opened his envelopes.

24 Q All right. Let's go to the trial now, and you
25 cross-examined Zanidean. And I don't need to

1 take you to the actual transcript, but Zanidean,
2 as you know, testified that his motive for the
3 arson was revenge, not money?

4 A Right.

5 Q We know there is no supplemental report on that
6 fact. Again, you wouldn't know whether
7 Dangerfield knew that or not, would you?

8 A We are rehashing the same thing. I wasn't there
9 when he had whatever conversations he had with
10 the police, I wasn't there when he opened his
11 envelopes.

12 Q So you don't know whether Dangerfield knew about
13 the motive or didn't, right? That's all I'm
14 asking, not for you to presume, not what should
15 have been, not what you might expect?

16 A In view of my persistence before the court and
17 in letter form, I assume that he would ask the
18 police -- I wasn't there when he did and I
19 wasn't there when they responded.

20 Q You don't know what response he got. You don't
21 know there was no supplemental on that issue, or
22 do you?

23 A I don't, but I take your word for it. You
24 wouldn't lie to me.

25 Q No. Zanidean testified as well, and again in a

1 nutshell, that he wasn't being paid, that he was
2 losing his house, he lost a fortune?

3 A Yes.

4 Q And again, you weren't aware if any compensation
5 package had been arranged by Zanidean's lawyer?

6 A That's right.

7 Q You don't know who Zanidean's lawyer negotiated
8 with?

9 A Right, I didn't at that time.

10 Q You know now that it was Miller; right?

11 A Yes.

12 Q And again, not what Dangerfield should have been
13 advised or should have known, but you don't know
14 whether he had personal knowledge of that or
15 not, do you?

16 A I wasn't there when he opened his mail, and I
17 wasn't there when he had his phone calls, and I
18 wasn't there when the police met with him, or he
19 met with the police.

20 Q You don't even know if the police ever met with
21 him?

22 A You are right, I don't. And I don't know what
23 use he made of Mr. Lawlor, who was there during
24 the trial, and what he was told or not told.

25 Q Okay.

1 A But it seemed to be -- you have referred me a
2 number of times to correspondence which says
3 that Mr. Lawlor was talking to the police so --

4 Q He was dealing with the police and he was
5 getting disclosure for you from the police,
6 right? We see what disclosure they got?

7 A And my presumption was that if he wrote me a
8 letter and got disclosure from the police, that
9 Mr. Dangerfield would also know, not just me.

10 Q Right. I understand that. But again, there is
11 no supplemental on the issue of the motive for
12 the arson, there is no supplemental on the issue
13 of the compensation package, and there is no
14 supplemental on the issue of immunity, which I
15 will get to now. And this is the third area
16 where Zanidean testifies on the issue of
17 immunity. You ask him something to the effect,
18 did he talk to his lawyer about making a deal to
19 avoid being charged in Swift Current? He says,
20 I didn't talk to the lawyer about that. You
21 recall that. We know that's not accurate,
22 because we know that Kovnats was dealing with
23 immunity and that immunity was the key. You
24 know that now?

25 A I know that now.

1 Q Again, there is no supplemental, we know that,
2 on that issue?

3 A Well, you are telling me.

4 Q Yes. And you wouldn't know what information
5 Dangerfield had about any deal, if there was
6 one, in Swift Current?

7 A You are making it sound like there is two sets
8 of books here.

9 Q Well, there may be. We know, for example,
10 certain items in the police officer's notes
11 didn't make it into supplemental reports?

12 A You know that, but I don't know that.

13 Q Well, I'm telling you that.

14 A I accept it.

15 Q And you know that you would have received the
16 supplemental reports from the Crown. That was
17 part of the disclosure that you received, right?

18 A Right.

19 Q And you know that you didn't receive any
20 supplemental reports on these issues of
21 immunity, of the Swift Current arson and the
22 motive, or any compensation package, you didn't
23 have that information.

24 A I wouldn't keep on asking and writing, give me
25 this, give me this, give me this on Swift

- 1 Current, if I had got it.
- 2 Q They asked the police, and you got what you got.
- 3 The point is, you have no idea what the Crown
- 4 knew or didn't know about these matters, what
- 5 they had been advised?
- 6 A Why would the police lie to the Crown? They
- 7 wouldn't do that.
- 8 Q Who knows? That's what the Commission is going
- 9 to find out hopefully.
- 10 A Okay. I apologize for raising my voice.
- 11 Q You see that's why -- go back to the concept of
- 12 reasonable doubt, and you are concerned that
- 13 somebody should have stood up and said that man
- 14 is lying, but maybe, just maybe, the prosecution
- 15 did not know and didn't have the information to
- 16 know that Zanidean lied; right?
- 17 A I can only repeat, I wasn't there when he opened
- 18 his envelopes, answered his phone or had his
- 19 meetings.
- 20 Q You concluded, by one of your comments,
- 21 something to the effect that maybe they thought
- 22 it was okay because they didn't say anything?
- 23 A Yes.
- 24 Q Right?
- 25 A Yes.

1 Q And again, maybe they didn't have the
2 information that would allow them to correct the
3 situation. That's a possibility, is it not?
4 A Possibility?
5 Q Yes.
6 A I wasn't there when they opened their mail --
7 Q Okay.
8 A Answered the phone.
9 Q Talking about mail, if you look at exhibit 24,
10 I'm not sure if you have it in front of you,
11 that's the letter of commendation, that was
12 written by Dangerfield to the police officers?
13 A Yes.
14 Q Do you have that there?
15 A Yes I do.
16 Q Ms. Carswell referred to that --
17 A Yes.
18 Q -- and referred you to your statement to the
19 inquiry. Do you recall your statement to the
20 inquiry, I think it is at page 6 where you say
21 that -- let me not misquote you. Page 6, go to
22 tab 1, Mr. Brodsky, please?
23 A Sorry, I was just reading letter.
24 Q This relates to the letter.
25 A Okay, tab 1, yes.

1 Q Page 6, tab 1. Not in the buff coloured one but
2 in the bigger volume?

3 A My statement to the Commission?

4 Q Yes, page 6?

5 A Yes, Ray Wyant and Ian Garber.

6 Q Above that?

7 A Yes.

8 Q The first full paragraph?

9 A Yes.

10 Q "Dangerfield and Lawlor would not have
11 wanted to be fooled with in this manner and
12 would be very angry if they had found out."

13 A Right.

14 Q Do you see that?

15 A Yes.

16 Q And you confirmed that with Ms. Carswell. She
17 showed you the letter?

18 A Yes.

19 Q And you agreed with her that they wouldn't be
20 very happy if they had been fooled with?

21 A Right.

22 Q And that letter of commendation would not have
23 been forthcoming?

24 A Right.

25 Q And my suggestion to you is they wouldn't be

1 very happy if they had known they had been
2 fooled with, and maybe they simply didn't know
3 they had been fooled?

4 A I understand that's your suggestion.

5 Q Right. That is also a possibility.

6 A I wasn't there when they opened their mail.

7 Q All right. You agreed with Mr. Wolson that
8 Mr. Dangerfield gave you more fulsome
9 disclosure; right?

10 A I'm looking at this letter of commendation,
11 which I just saw today, by the way.

12 Q Right. Fair enough.

13 A And I don't know about this business that
14 Driskell told several people that Harder had
15 ratted on him and he had to be silenced. We
16 dealt with that at the trial. I specifically
17 said in the pre-trial motions, if you have any
18 information on that, let me have it, produce
19 that. I thought we had dealt with that. I
20 thought that was history.

21 Q That wasn't part of my question. I don't intend
22 to take you there.

23 A Okay.

24 Q But the point is that the letter of commendation
25 wouldn't have been forthcoming had Dangerfield

1 and Lawlor, particularly Dangerfield, been
2 fooled with?

3 A You are right.

4 Q If they had known they had been fooled with?

5 A Right. If they knew they had been fooled with,
6 why would they be writing a letter saying --
7 congratulate the fellows who fooled me?

8 Q And I say maybe they didn't know.

9 A Okay, I understand that.

10 Q And back to what I was talking to you about,
11 that is the fact that you got more fulsome
12 disclosure from Dangerfield; right?

13 A Right.

14 Q You said that to Mr. Wolson, I think?

15 A Yes.

16 Q But you also said there are a lot of things that
17 you would have liked to have known?

18 A Of course, look at my letters.

19 Q I understand that. But the point is, perhaps
20 the Crown didn't know those things either, maybe
21 they weren't told. Again, I know, you weren't
22 there when they opened their mail, when they met
23 with whomever they met, and what they were told?

24 A And they answered the phone, right.

25 Q And again, Dangerfield, had he been blind-sided,

1 would have been upset, I say if he knew he had
2 been blind-sided. And again, you don't know?
3 A But I do know that he would have been upset if
4 he was blind-sided.
5 Q He would have been upset, but you don't know
6 whether Dangerfield had the information?
7 A When I say Dangerfield, you keep saying
8 Dangerfield --
9 Q The Crown?
10 A I think Mr. Lawlor would be in the same position
11 as Mr. Dangerfield.
12 Q Fair enough.
13 A It is not fair that I exclude him.
14 Q He would have been upset if he knew at the time
15 that the police mislead him?
16 A They would have been upset if they knew.
17 Q If they knew, all right. And again, maybe they
18 didn't know that they had been mislead.
19 A I understand that's your suggestion.
20 Q And that's a possibility; right?
21 A I wasn't there when they answered the phone.
22 Q I know, when they opened the mail, or answered
23 the phone. All right.
24 And again, you weren't there if and when
25 Miller met with Dangerfield and/or Lawlor?

1 Because Wolson put to you, you know, is there
2 any doubt in your mind that Miller would have
3 told Dangerfield -- you do not know what Miller
4 told Dangerfield, do you?

5 A No, I just know the people.

6 Q All right. Well, there are a couple of other
7 issues that I would like to talk to you about.
8 If you could go to tab 29, please? There is
9 reference to a pre-trial on May 22nd.

10 A Tab 29, yes.

11 Q Yes.

12 A I have it.

13 Q And you confirm on the very first page that you
14 were told by the Crown, as I understand your
15 memo, in particular Lawlor, that the RCMP chose
16 to do nothing about the arson?

17 A Yes.

18 Q And you deal with that in your statement as
19 well, if you look at your statement, tab 1?

20 A Yes.

21 Q Page 5 at the bottom?

22 A Yes.

23 Q The last full sentence,

24 "As discussed in these memos, Brodsky's
25 impression coming out of the second

1 pre-trial was that the RCMP had simply
2 decided not to pursue Zanidean."

3 A Yes.

4 Q So you knew that. So, in effect, you knew
5 that -- and this is what is troubling me and
6 maybe you can help me out. In effect, you knew
7 that immunity had been granted, albeit de facto,
8 that the police were not going to pursue
9 Zanidean in Swift Current?

10 A Well, they weren't. That's why I called them.

11 Q That's why which?

12 A That's why I called the RCMP, that's why we
13 called them to come take a statement.

14 Q But you said that you would want to know if
15 there was any deal made that Zanidean wasn't
16 going to be prosecuted, but you knew he wasn't
17 going to be prosecuted?

18 A How did I know that?

19 Q It says right here, the RCMP decide not to
20 pursue Zanidean?

21 A Well, that's what the Crown said.

22 Q Yes.

23 A And they said, we can't make them do that, we
24 can't make another province pursue a
25 prosecution, we stick to our own borders.

1 Q The point is, they tell you that they are not,
2 RCMP are not going to pursue him. You confirm
3 that in your statement to the Commission, but
4 you also confirm it at tab 29 in your memo?

5 A Yes.

6 Q So it seems to me that you already know that
7 Zanidean is not going to be prosecuted. My
8 questions are, did you ask the Crown for
9 confirmation of that by letter? Did you --
10 first question?

11 A My letters are, you have seen my letters.

12 Q I couldn't find one asking for that
13 confirmation. Did you ask the Crown and court
14 to stipulate to that in front of the jury --

15 A I did not.

16 Q -- when you were cross-examining Zanidean?

17 A No, I didn't.

18 Q Another area that I wanted to ask you about
19 is -- we already know what Zanidean testified in
20 terms of his motive for the arson, namely
21 revenge; right?

22 A Yes, right.

23 Q And you may agree with this, or I may have to
24 take you through the material, which I can
25 certainly do, but you knew at that point the

1 fact the arson was for profit?

2 A At which point?

3 Q At the trial?

4 A How did I know that?

5 Q Well, I'm going to show you that. If you look
6 at tab 5, I will take you through the documents,
7 tab 5?

8 A Yes.

9 Q The second page, it is a memo dated
10 January 29th, '91?

11 A Yes.

12 Q "Driskell was paid \$900 by Zanidean..."

13 A Yes.

14 Q "...to drive him to Saskatchewan. He
15 didn't want anybody to know he was going to
16 torch his sister's house. We need
17 information as to whether this in fact
18 happened or not and the circumstances
19 surrounding that house."

20 A Right.

21 Q So we know that Driskell is paid \$900?

22 A Yes, he was to be paid \$1,000, he got 900.

23 Q Go to tab 13?

24 A Tab 13, yes.

25 Q Two things, first of all, the first page, a memo

1 dated March 1st, '91, you confirm that you have
2 the transcript of the tapes of the body packs?
3 A Right.
4 Q Right, no issue about that. You had them early
5 on in 1991?
6 A Yes.
7 Q Several months before the trial; correct?
8 A Right.
9 Q Okay. And also the bottom of page, or the page
10 numbers at the bottom, 239, third page in?
11 A Yes.
12 Q Second full paragraph,
13 "Driskell says he and Zanidean went to
14 Swift Current, Saskatchewan to set fire to
15 a house owned by Zanidean's sister."
16 A Right.
17 Q Then it says where the house was located and
18 Zanidean had a key --
19 A Right.
20 Q -- which he obtained from his sister?
21 A Right.
22 Q Home was to be burned, make it look like a B &
23 E, house was burned, and at the bottom of the
24 paragraph, Driskell was paid \$900 for driving
25 Zanidean, he is still owed \$100.

1 A Right.

2 Q And note as well,

3 "Zanidean apparently has a lot of criminal
4 involvement. He can arrange for
5 murders..."

6 A Right.

7 Q As an aside, you didn't put that suggestion to
8 Zanidean in cross-examination, that he can
9 arrange for murders?

10 A The transcript speaks for itself.

11 Q Okay. Now, then if you go to -- well, also when
12 you were examined, if my notes are correct, by
13 Commission Counsel, Mr. Dawe, you confirmed with
14 him that you were interested in the Swift
15 Current arson for three reasons, according to my
16 notes; one, that Zanidean may have asked for and
17 received immunity?

18 A Yes.

19 Q And that's a motive for testifying. Two, the
20 arson was a discreditable act and you could
21 attack his credibility; and three, it was your
22 intention to cross-examine Zanidean at trial,
23 whatever the reason for the arson, and you said
24 whether it was for profit or revenge. Do you
25 recall that answer?

1 A And if he was blamed for the arson, he wouldn't
2 be a credible witness against Mr. Zanidean.

3 Q Right. I took from your answer that you knew at
4 the time of the trial that this was an arson for
5 profit, that they were doing it for the
6 insurance proceeds?

7 A That's what I was trying to get Mr. Zanidean to
8 agree to.

9 Q I will take you to something else, and I'm not
10 so sure that you did -- you say you tried to get
11 Zanidean to agree to that?

12 A When we talked about it at the trial.

13 Q My recollection is that you left it with the
14 revenge motive, that you didn't correct him on
15 that?

16 A Okay, yes.

17 Q Let me take you to tab -- this is exhibit 1,
18 Mr. Commissioner, it is a book of documents that
19 was prepared for Inspector Ross Burton and Staff
20 Sergeant Ron Ferguson. And you may remember
21 this book had two parts with some duplicate tab
22 numbers. So Mr. Brodsky, if you would go,
23 please, to tab -- and it is the second tab 16,
24 which is almost at the back of the book?

25 A I see it. I have it.

1 Q Yes. All right. There is a transcript of the
2 body pack there, do you have that in front of
3 you?
4 A I do.
5 Q And towards, well, just below halfway down,
6 "Driskell: She still never squared away
7 with ya.
8 Nah, she's a crooked heart."
9 A Right.
10 Q "Zanidean: I'm hoping he just leaves it
11 there, like dies quick in a car accident or
12 something. Nobody knows about the money
13 but me. Mind you my sister knows about it
14 and she is a conniver.
15 Driskell: Oh?
16 Zanidean: We found that out.
17 Driskell: Yeah. Yeah. Find out the hard
18 way.
19 Zanidean: Yeah. Cause of one shortage,
20 one for you, seven for me, so I'm short
21 \$800."
22 A Right.
23 Q So you have that, and combined with all of the
24 other information that you had, it appears to me
25 that you knew that the arson -- not that there

1 is anything wrong with that obviously -- you
2 knew that the arson was for profit. And that
3 when Zanidean said it was for revenge, you
4 chose, probably as a matter of strategy, not to
5 attack him on that, not to try and correct him
6 on that. Fair enough?

7 A Well, I couldn't prove it, that's why I called
8 the RCMP.

9 Q That's why which?

10 A We called the RCMP.

11 Q But the point is, you had the transcript
12 available. In fact, it was in court. You used
13 it to cross-examine Zanidean at several points,
14 as I recall?

15 A Yes.

16 Q All right. But you chose not to, as a matter of
17 strategy you chose to leave it with the revenge
18 motive, which may look worse than an arson for
19 profit. I suppose neither one of them is very
20 good, but maybe that's why you left it, or do
21 you know?

22 A No.

23 Q Let me ask, I just have a couple of more areas,
24 about the Kovnats' meeting, and again if you
25 want you can refer to tab 33, it is the June 2nd

1 meeting?

2 A Which memo?

3 Q Do you remember -- I know it is a long time ago,
4 obviously -- do you remember how long the
5 meeting was approximately?

6 A With Mr. Kovnats?

7 Q Yes?

8 A Approximately, I would say about an hour. It
9 says,
10 "It is now 10:18 and I'm on my way home to
11 continue the preparation for tomorrow."
12 So it concluded at 10:18 and it was evening that
13 I went there. I went there on purpose in the
14 evening and it was late, it was dark.

15 Q Now, where are you referring to? You have lost
16 me now.

17 A I'm referring to the second memo.

18 Q The second memo?

19 A Page 403, and I'm referring to the last sentence
20 in the first paragraph.

21 Q And that refers to the same day, June 2nd?

22 A Yes.

23 Q And you say in the next memo that you have just
24 come from Dave Kovnats' house?

25 A Right.

1 Q Okay. In any event, your best recollection is
2 that you were with him for about an hour, right?

3 A 15 years ago --

4 Q I know, I understand that, but --

5 A We did some chit chatting. He was very upset at
6 the beginning, so I had to calm him down before
7 we could talk about anything.

8 Q You discussed the witness protection agreement
9 obviously; right?

10 A In small part.

11 Q Yes?

12 A Obviously I didn't. I thought I was.

13 Q Sorry, you didn't because your memo says,
14 "His client still has not signed the
15 witness protection agreement."

16 A Yes.

17 Q "He promises for it to be delivered by way
18 of signed paper."

19 A Right.

20 Q So you must have discussed the witness
21 protection agreement, or witness protection
22 issues, or am I misreading that?

23 A No, no. We never discussed any detail, not one
24 single detail of the agreement. And I had been
25 told, like I have said before, my impression was

1 that the Witness Protection Program that they
2 were talking about was a surveillance type
3 program, and that he was going to be charged
4 with some kind of an offence if he didn't
5 maintain his story, or if he lied or something.
6 I don't know what Mr. Kovnats was told by the
7 police, but he was concerned. And the witness
8 protection means witness protection.

9 Q But your memo says,

10 "His client has still not signed the
11 witness protection agreement."

12 A Right.

13 Q So my suggestion to you was that you did discuss
14 the witness protection issue and the witness
15 protection agreement. Whether you discussed the
16 details or not, you say not, that's fine, but
17 you must have discussed the witness protection
18 agreement?

19 A Right, the fact of one.

20 Q All right. So you must have known that one was
21 in the works?

22 A Well --

23 Q That he was trying to get one?

24 A His story was, yes, he wanted protection.

25 That's what, in this commendation letter, the

1 case was proceeding on the basis that he needed
2 protection from my horrible client, or his
3 friends.

4 Q Do you remember any of the discussion about the
5 witness protection agreement or witness
6 protection issues arising that evening?

7 A Yes. I remember that he said not one single
8 detail about the witness protection, about what
9 was in the agreement or what --

10 Q All right. But you knew of the fact that he was
11 trying to negotiate an agreement? You knew
12 that?

13 A He was trying to negotiate his client being out
14 of custody, not being taken into custody.

15 Q Well, I think that had already happened back in
16 May when he had the confrontation at the Public
17 Safety Building with Mr. Dangerfield, but leave
18 that for a moment. The question is, your memo
19 refers to the witness protection agreement, and
20 I'm asking you if you recall what discussion you
21 had about the agreement, if any?

22 A Yes, I recall discussion about it, but it was a
23 peripheral, I mean, it took no time, and it was
24 the fact that there was to be an agreement. And
25 he promised to send it to me the next day,

1 whatever the agreement was, if he signed it.

2 Q Okay. You also discuss meeting with Zanidean --

3 A Yes.

4 Q -- and a number of other matters. And the next

5 page you have in your memo,

6 "He wasn't sure that his client would see

7 talking to me as jeopardizing his deal with

8 the Crown."

9 A Right.

10 Q So again, you appear to know that there is a

11 deal with the Crown?

12 A For protection.

13 Q Well, you said you didn't know what it was.

14 A Yes.

15 Q In answer --

16 A I'm telling you what my presumption was.

17 Q What is that?

18 A I'm telling you what my presumption was. He

19 didn't say what the deal was.

20 Q He didn't say what the deal was. Did you ask

21 him what the deal was? Did you ask him whether

22 the deal involved --

23 A He wouldn't tell me.

24 Q -- immunity from the prosecution on the Swift

25 Current matter? Did you ask him? I mean, we

1 already know that you had been advised by the
2 Crown at the pre-trial meeting on May 22nd about
3 the fact --

4 A I did not ask him about immunity from
5 prosecution.

6 Q You didn't?

7 A No.

8 Q Despite the fact that you had been told by the
9 Crown that the RCMP were not going to pursue
10 Zanidean. Did you tell Kovnats that, or do you
11 recall?

12 A What I do recall is what is in these memos. We
13 weren't talking about -- we were talking mainly
14 about -- he was talking mainly about how he was
15 being lied to about this, and how he was being
16 told that, and what the heck am I doing here
17 when Mr. Garber is the lawyer? And that's the
18 main things that we were talking about. And I
19 said, they said they had the confession on tape,
20 I said the tape ran out and the confession came
21 after the tape ran out. And we had a long
22 discussion about --

23 Q Well, it was sufficiently important, at least
24 seems to be sufficiently important, the witness
25 protection agreement and the fact that talking

1 to you might jeopardize the deal, whatever it
2 was, that you put it in a memo?

3 A That speaks for itself, yes.

4 Q Right. I mean, you put it in a memo, and I'm
5 asking you whether you found out any
6 circumstances about the deal with the Crown?

7 A No.

8 Q What deal he was trying to make with the Crown,
9 or whether the deal involved immunity?

10 A I already said, the way Mr. Kovnats was talking
11 was the deal was to avoid going to jail.
12 Apparently he had made some statements, and he
13 didn't want to testify, and he was saying to
14 some police officer or other, or Mr. -- he was
15 saying to somebody that he didn't want to
16 testify, and they were going to take some action
17 against him.

18 Q So he was trying to protect his client from
19 going to jail, what, for the Swift Current arson
20 or for something else?

21 A No, for this case.

22 Q Oh, for this case. All right. In any event,
23 that's what your recollection is of the deal
24 with the Crown?

25 A Yes.

1 Q And --

2 A If it would have been more -- these notes, let
3 me assure you, I did not expect anybody else
4 outside of my office would ever, ever read. So
5 if I would have known more, I would have put it
6 in these notes. You can see I put in silly
7 things like when I stopped working and when I
8 started, and the fact that I'm dictating when
9 I'm driving the car, I have silly things in
10 there. I didn't expect anybody would ever read
11 these.

12 Q That's fair enough, and I'm not hanging my hat
13 on the memo or what is included in the memo or
14 what is not included. I'm trying to find out if
15 you recollect, I know it is a long time ago, but
16 if you recollect what you meant by the witness
17 protection agreement in the memo, or what you
18 meant by the deal?

19 A If he would have said what the Witness
20 Protection Program was, it would have been
21 included in one of the memos. You can see that
22 I have three memos about the one conversation.

23 Q Right?

24 A Because I remembered more, in that drive, I
25 dictated more.

1 Q Okay.

2 A Turned the machine back on.

3 Q Okay.

4 A And it is not that long to get from Eastgate to
5 my house, and here I dictate three memos.

6 Q I'm not asking you how long it took to drive
7 there, I'm just asking if you can help me with
8 what the deal means and what the witness
9 protection agreement means?

10 A No, I can't.

11 Q And you are saying you can't. All right. And
12 the bit at the end, I think I now understand it,
13 about the tape ran out, and what we are talking
14 about here is Zanidean's confession. Is that
15 what we are talking about?

16 A Driskell's confession to Zanidean.

17 Q What tape, help me?

18 A The body pack tape.

19 Q Oh, all right.

20 A And he was told, Mr. Kovnats was told that
21 Driskell had confessed to the killing on that
22 tape, and they had it on tape, and that he
23 shouldn't be saying now that it wasn't so
24 because they had it on tape. And he kept on
25 saying they had it on tape. I told him, they

1 don't have it on tape, the tape ran out, we have
2 to accept Mr. Zanidean's word that Mr. Driskell
3 said that because the tape ran out. And he
4 said, no, no, that's not what the police officer
5 said to him.

6 Q All right. We will leave that area, and I think
7 you covered this, you did not make a blanket
8 request, if I can put it that way, asking for
9 all of the police officers' notes?

10 A Yes, you are right. In retrospect, I should
11 have.

12 Q Pardon me?

13 A In retrospect, I probably should have, even if
14 it wouldn't have been complied with.

15 Q I didn't ask you why, and I didn't ask you
16 whether you should have. I mean, it is easy,
17 20/20 vision in hindsight. But in any event,
18 tab 9, exhibit 21, the buff coloured book of
19 documents.

20 A Yes.

21 Q You were taken to this affidavit, and the
22 affidavit has been filed, so I'm compelled to
23 ask you a few questions about a couple of the
24 paragraphs in that.

25 A All right.

1 Q Paragraph 3,
2 "The applicant's appeal was heard in the
3 Court of Appeal on December 7th, '92.
4 Prior to this I made inquiries of George
5 Dangerfield QC, who had been the senior
6 Crown at trial, and was responding to the
7 applicant's appeal for Manitoba Justice as
8 to the status...",
9 so inquiries I take it,
10 "...as to the status of Mr. Zanidean
11 regarding the arson in Swift Current."
12 A Yes.
13 Q Now, I note that there is no letter or memo or
14 anything of that sort to Dangerfield attached to
15 the affidavit. That's for sure.
16 A Right.
17 Q Can you help me with that? How did you make the
18 inquiries of George Dangerfield?
19 A You saw the letters before the trial and --
20 Q No, no, this is prior to the appeal?
21 A Yes.
22 Q How did you make the inquiries as to the status
23 of Zanidean regarding the arson in Swift
24 Current?
25 THE COMMISSIONER: Mr. Prober.

1 MR. PROBER: Unless I'm misreading that.

2 THE COMMISSIONER: No, I'm lost. It is not your
3 fault, the tab, was it 8 or 9?

4 MR. PROBER: Tab 9.

5 THE COMMISSIONER: And paragraph?

6 MR. PROBER: 3.

7 THE COMMISSIONER: Okay.

8 MR. PROBER: I think I said 9, tab 9, paragraph
9 3.

10 THE COMMISSIONER: I have it.

11 BY MR. PROBER:

12 Q And you will see, Mr. Commissioner, there is no
13 letters attached to the affidavit. Mr. Brodsky,
14 we have already confirmed that. And I'm
15 wondering where we see those inquiries?

16 A That's what I have already said before, when we
17 got what I call the blockage, my term, and
18 everybody, whoever it was that I spoke to -- and
19 I agree that I can't remember who it was that I
20 spoke to -- said go talk to Mr. Dangerfield, go
21 talk to the Crown on the case, and that's what
22 happened.

23 Q Are you saying then that you talked to
24 Mr. Dangerfield about that?

25 A If he knew.

- 1 Q You actually met with him? You see, I can't
2 tell from the affidavit?
- 3 A I don't remember if I met with him or spoke to
4 him on the phone, I don't remember how the -- or
5 where I was or how the conversation --
- 6 Q There are no memos on that, though?
- 7 A No, I already said, the memos seem to have gone
8 some place.
- 9 Q And you say Mr. Dangerfield refused to respond
10 to my inquiries?
- 11 A Yes.
- 12 Q Where do we find that? Is there a letter to
13 that effect? Is there a memo to that effect?
- 14 A No, verbally. He said, I told you already, what
15 do you want from me?
- 16 Q Do you recall when that was or where that was?
- 17 A No, I don't. He took the position that he
18 couldn't tell the RCMP in Swift Current how to
19 do their business, and he got a little upset
20 when I kept asking him about that.
- 21 Q That's what you said, the position you took
22 earlier.
- 23 A He got a little upset when I kept asking him
24 about that.
- 25 Q And I think it has already been established that

1 you knew that it was Dangerfield's style not to
2 interview witnesses himself prior to trial. You
3 knew that --

4 A He did not.

5 Q Not, right.

6 A Mainly he did not, and I assume that is the
7 reason -- well, he mainly did not. I could make
8 a longer answer. And Mr. Lawlor, you could see,
9 was doing a lot of running around here.

10 Q For sure. Finally, you say in your statement to
11 the Commission --

12 A By the way, that's one of the reasons I was
13 surprised when he had this meeting with
14 Mr. Kovnats.

15 Q At the Public Safety Building?

16 A Yes.

17 Q That's a very nice way of putting it is a
18 meeting. And you said, in fact, in your
19 statement to the inquiry, that was going to be
20 my last question, that it is unusual for someone
21 to get into this kind of, well, you said
22 argument in your statement, we will say meeting,
23 with Mr. Dangerfield, because he was regarded as
24 a honourable person who wouldn't threaten
25 anybody with obstruct justice without good

1 reason. Do you remember saying that to the
2 Commission?

3 A Yes, sounds reasonable.

4 MR. PROBER: Thank you. Those are my questions.
5 Thank you, Mr. Commissioner.

6 THE COMMISSIONER: Thank you, Mr. Prober. It is
7 time to take the afternoon recess.

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

10 (Proceedings recessed at 3:19 and
11 reconvened at 3:35 p.m.)

12 THE CLERK: All rise, this Commission of Inquiry
13 is now open.

14 BY MR. ABRA:

15 Q Mr. Brodsky, as you know, I'm representing the
16 late Bruce Miller. Mr. Commissioner, I've filed
17 as an exhibit a book of documents related to the
18 late Bruce Miller. I have provided a copy to
19 Mr. Brodsky. I have also distributed copy to
20 each counsel.

21 THE COMMISSIONER: Perhaps we could mark that as
22 exhibit 26, is it?

23 (EXHIBIT 26: Book of documents for Mr. Abra's
24 cross-examination of Mr. Brodsky)

25

1 BY MR. ABRA:

2 Q Mr. Brodsky, I don't intend on asking you about
3 each of the tabs in the booklet, there is just a
4 couple that you do have -- well, you have
5 personal knowledge of all of them, I'm sure, but
6 I would like to take you firstly to tab number
7 1. And this is actually, for want of a better
8 word, in essence a curriculum vitae for Bruce
9 Miller but was attached as an appendix to his
10 application to the Provincial Court to be
11 appointed as a Provincial Court Judge, as you
12 know he was when he died. I would like to take
13 you specifically to the first reference to the
14 Law Society of Manitoba. Now, you are at
15 present and have been for some years a life
16 bencher of the Law Society of Manitoba; am I
17 correct?

18 A Yes.

19 Q And you became a life bencher as a result of
20 having been elected five times to five terms of
21 two years?

22 A Five consecutive terms.

23 Q For a total of ten years. And subsequent to
24 your becoming a life bencher when it required
25 five years, the Law Society Act was amended in

1 approximately 1990, so that it became, or 1985,
2 so that it became four consecutive terms of two
3 years for a total of eight?

4 A I didn't take that personally.

5 Q We call it the Weinstein rule, Hymie Weinstein
6 decided ten years was too long, eight is better.
7 In any event, you will note that Bruce Miller
8 was elected four consecutive times as a bencher,
9 so in his last term he served as a bencher until
10 such time as he was appointed as a Provincial
11 Court Judge, but at the end of the four terms he
12 would have become a Life Bencher of the Law
13 Society?

14 A Okay.

15 Q I would like to take you to tab number 5, which
16 is a series of newspaper articles, and I would
17 like specifically to take you to the third
18 article that appeared in the Winnipeg Free Press
19 on December 6, 2004, immediately after Bruce
20 Miller's death. And you were contacted by the
21 Free Press and agreed to be interviewed related
22 to your relationship with him and your knowledge
23 of him and so on. And you indicated in the
24 article that over the years that he was a Crown
25 Attorney, you had a number of cases with him; is

1 that right?

2 A That's right.

3 Q Some of them were of a serious nature; there
4 were murder cases, for example?

5 A Yes.

6 Q And in particular the one that you refer to is
7 the burning bed case which went to the Supreme
8 Court of Canada?

9 A Angelic Lynn Lavallee was her name.

10 Q And that was a case where it was in essence a
11 self defence case of a battered wife?

12 A Battered spouse syndrome, yes.

13 Q And you were successful ultimately in getting an
14 acquittal in the Supreme Court of Canada on that
15 case.

16 A Yes.

17 Q And Mr. Miller was the prosecutor of that case?

18 A Yes.

19 Q And that was one that stuck out in your mind,
20 but you did have numerous cases with him over
21 the years.

22 A Actually in the Supreme Court Mr. Dangerfield
23 appeared, but Mr. Miller was involved in that
24 case.

25 Q But you did have numerous cases with Mr. Miller

1 over the years?

2 A Yes.

3 Q And as a judge you appeared before him numerous
4 times in the Provincial Court?

5 A I did.

6 Q Would it be fair for me to say that in your
7 experience in dealing with him, firstly he was
8 very well liked and respected in the profession?

9 A Yes.

10 Q And did he, in your view, did he have a
11 reputation of being ethical, candid and
12 trustworthy?

13 A Yes.

14 Q Would you agree he was a man of integrity?

15 A Yes.

16 Q And did you like him?

17 A Yes.

18 Q And now as a judge, and you have noted in your
19 interview that he was very rarely appealed,
20 because generally it was thought that his
21 judgments were probably correct I think is very
22 close to what you have said in the article. Is
23 it fair to say that he was in your view fair and
24 impartial as a judge?

25 A Yes. If he wasn't I would have appealed him.

1 If he wasn't, I would have appealed.

2 Q And you didn't very often?

3 A No.

4 THE COMMISSIONER: You can't appeal acquittals.

5 THE WITNESS: No, and I can't always have
6 inquiries like this one.

7 BY MR. ABRA:

8 Q I would like to take you to a scenario -- well
9 firstly, if we can go to volume 1 of the book of
10 documents, and you made the point, at page 6 of
11 the book of documents that you have already been
12 asked about by a number of counsel, that
13 Mr. Dangerfield in particular was a hard nosed
14 prosecutor who nobody fooled with; is that fair?

15 A Yes.

16 Q And he was hard working and he didn't like to
17 have any surprises in a case?

18 A Yes.

19 Q And would you agree with me that's a reputation
20 that he had amongst defence counsel generally?

21 A Yes.

22 Q And is it fair to say that for somebody like
23 Bruce Miller who had worked with George for 15
24 or 20 years would be aware of that reputation as
25 well?

1 A Of course.

2 Q As you said, they worked on cases, and Bruce
3 probably knew George's character as well as
4 anyone?

5 A Yes.

6 Q Now, Mr. Dawe yesterday presented to you a
7 scenario where you were asked generally if you
8 have ever been in a situation where the Crown or
9 police do not give information to a witness in
10 order that the witness gives false testimony
11 without effectively knowing that it is false.
12 Now, we have heard evidence -- and your answer
13 was you never encountered a situation like that?

14 A Right.

15 Q We have heard evidence at this inquiry from
16 three police officers who testified that they
17 were aware that Swift Current RCMP had decided
18 not to charge Mr. Zanidean with the Swift
19 Current fire. And that they gave this
20 information to Mr. Miller, and that Mr. Miller
21 counselled them and instructed them not to tell
22 Mr. Zanidean until after Mr. Zanidean had
23 testified. So the effect of it was that when
24 you cross-examined Mr. Zanidean as to whether he
25 had received any immunity on the Swift Current

1 fire, he answered that he had not, when in fact
2 to the knowledge of the police officers he had,
3 and according to them, they had been instructed
4 by Bruce Miller not to tell anyone and not to
5 tell Mr. Zanidean in particular until after he
6 had testified. So the effect of it was that he
7 testified falsely to your question but he didn't
8 know it was false. Do you follow me?

9 A Liars sometimes tell the truth.

10 Q What I'm asking you is, knowing firstly Bruce
11 Miller's reputation for integrity, and secondly
12 that Mr. Dangerfield would not want to be caught
13 off guard by anything, is there any way in the
14 world that you can conceive that Bruce Miller
15 would give an instruction of that nature to
16 those three police officers?

17 A No.

18 Q It is not something that you would expect him to
19 do?

20 A No, it didn't seem to be in his character, not
21 the Bruce Miller that I knew.

22 Q Would not do that?

23 A He wouldn't.

24 Q Now, the last question or area that I wish to go
25 into is did you have any dealings with

- 1 Mr. Miller at all through your preparation for
2 the Driskell trial?
- 3 A Not that I can recollect.
- 4 Q All of your contact was with Mr. Dangerfield and
5 Mr. Lawlor?
- 6 A That's right.
- 7 Q And they were, as you have said, the trial
8 counsel on the matter, and they were the ones
9 that you went to for any information that you
10 required?
- 11 A Except that I think that after the trial I went
12 to somebody, who I can't recall, about why
13 they -- why Staff Sergeant Ferguson wasn't
14 getting anywhere with his investigation.
- 15 Q And you don't know who that was?
- 16 A I don't remember at this point 15 years later
17 who that was.
- 18 Q I understand. But up until that point -- you
19 are saying that was post-trial
- 20 A Right.
- 21 Q Throughout the preparations for the trial and
22 the trial itself, you had no dealings with Bruce
23 Miller at all?
- 24 A No.
- 25 Q Now, you did mention in your memorandum that you

1 had been asked questions about in your meeting
2 with Mr. Kovnats that there was a reference at
3 that meeting to Bruce Miller.

4 A Right.

5 Q As a result of that meeting with Mr. Kovnats,
6 did you either go to Mr. Dangerfield or to
7 Mr. Miller and ask them what have you got to do
8 with this case?

9 A No.

10 MR. ABRA: That's fine, sir, thank you very
11 much. I have no further questions.

12 THE COMMISSIONER: Thank you, Mr. Abra.

13 MR. OLSON: Mr. Commissioner.

14 BY MR. OLSON:

15 Q Mr. Brodsky, we know one another?

16 A For a long time, but be careful, because I seem
17 to know people too long.

18 Q We will try and get you through and off the
19 stand today, sir, depends on how cooperative you
20 are, of course.

21 A All right. Let's try.

22 Q I act for the Attorney General and for
23 Mr. Lawlor in these proceedings, Mr. Brodsky.

24 A All right.

25 Q I have some questions of you.

1 A I have no counsel.

2 Q Mr. Brodsky, several counsel have referred to
3 you being a long time practitioner, as am I, not
4 quite as long as you. You advise witnesses all
5 of the time to be candid and forthright and to
6 stick to what they know when they are giving
7 evidence before courts, don't you?

8 A Yes.

9 Q You likely advise them, as I do, that if
10 witnesses are uncertain they should say so and
11 not to embellish or overstate their knowledge.

12 A I do.

13 Q And not to make assumptions?

14 A Yes.

15 Q Right. Did you give yourself that advice for
16 the purposes of testifying before this
17 commission?

18 A I hope so.

19 Q Isn't it --

20 A It is obvious that when we went through the
21 telephone envelope routine --

22 Q That's one of the many things that I will be
23 putting to you, sir, yes. Isn't that
24 particularly important in a setting such as this
25 is, when people's careers and reputations are at

1 stake?

2 A It is important, yes, yes.

3 Q And I'm not, of course, belittling the interest
4 of the accused or the systemic issues, but when
5 long time practitioner's careers and reputations
6 are at stake, one wants to be careful and fair
7 and balanced; is that fair?

8 A Or if someone is just starting out, we don't
9 want to tarnish a reputation.

10 Q Fair enough. I'm going to suggest to you, Mr.
11 Brodsky, at the outset you haven't been
12 completely compliant with those principles in a
13 number of areas.

14 A You can make that assumption, or that
15 suggestion.

16 Q And I've categorized them into areas; firstly
17 your knowledge of Mr. Lawlor's involvement in
18 the trial and appeal process, and his knowledge
19 of matters from time to time?

20 A Yes.

21 Q Secondly, your knowledge of Mr. Dangerfield's
22 knowledge --

23 A Yes.

24 Q -- from time to time. Thirdly, matters of
25 disclosure, and I don't intend to revisit,

1 except peripherally, many of the issues that
2 other counsel have dwelt on such as the
3 recantation, if we can call it that, of Zanidean
4 that Ms. Carswell and others have spoke of, the
5 insurance fraud issue versus revenge, which Mr.
6 Prober has spoken to, the meeting with Mr.
7 Kovnats which several counsel have referred to
8 and your knowledge there, and also the May 22nd
9 pre-trial, where you noted in one of your memos
10 that the RCMP chose not to pursue Mr. Zanidean,
11 and Mr. Prober essentially put that to you. But
12 those are some of the areas of disclosures that
13 I won't repeat, but they seem to suggest that
14 you had some knowledge greater than that which
15 was referred to in your statement to Commission
16 Counsel, all right?

17 In addition, one area of disclosure which I
18 will come to more specifically is you touched on
19 Mr. Lawlor's affidavit of February 4, I think it
20 was, in support of the expedited trial, and I
21 will deal with that.

22 Another area that I will touch on, sir, is
23 the use of the preferred indictments, that's not
24 so much knowledge, but being balanced in one's
25 approach to the use of preferred indictments.

1 And lastly, but perhaps most importantly,
2 some of your comments with respect to the Crown
3 personnel and the Crown culture, both then, that
4 is at the time of trial and appeal, and
5 persisting up to the present date.

6 So those are the areas, sir, that I wanted
7 to alert you to that I'm going to attempt to
8 address and point out to you where as perhaps
9 you haven't been as completely compliant with
10 the principles that we tell witnesses all of the
11 time to follow when they are giving evidence.
12 All right.

13 A Fine.

14 Q By way of introduction, Mr. Brodsky, you, of
15 course, act for and I think your entire practice
16 has been for a number of years for the
17 criminally accused; is that fair?

18 A Right.

19 Q It is, of course, in your interest and your
20 client's interest to not have any, for instance,
21 direct indictments or to minimize the use of
22 direct indictments?

23 A Yes. It makes the trial fair or not.

24 Q It is also axiomatic, I think, is it not, that
25 criminals and people with records tend to

1 aassociate with other criminals and people with
2 records?

3 A Yes.

4 Q It is also fair I think, Mr. Brodsky, that you
5 would agree that's how we get involved in some
6 of these cases that you do all of the time, in
7 terms of having Crown or police informants and
8 unsavory witnesses?

9 A Right.

10 Q For those witnesses who we have to deal with in
11 the criminal courts that are not in those
12 categories, there still frequently persists
13 concerns on their part with respect to the
14 possibility of repercussions for them giving
15 evidence; isn't that so?

16 A It is.

17 Q And, of course, if one took a one-sided view of
18 the approach to witnesses, unsavory witnesses,
19 jail house informants or other informants, and
20 the necessity to protect witnesses from time to
21 time, and later concerns, if one took a
22 one-sided view you would virtually end up with
23 no witnesses for any criminal trials.

24 A It is an inconvenience.

25 Q Sure. Now, one of the matters that you --

1 A I didn't choose to come, as an example, I didn't
2 choose to come here, I got a subpoena.

3 Q I'm encouraged to hear that, sir. In your
4 summary statement in exhibit 20A, if you have
5 that, sir, at tab 1?

6 A Yes.

7 Q You will see halfway down the page, in the
8 paragraph that starts, "the Crown's offices were
9 all on the 5th floor of the Woodsworth
10 Building," do you see that?

11 A Yes, I do.

12 Q And fifth line in you say about Dangerfield and
13 Lawlor, they had a tight relationship, Lawlor
14 was meticulous about detail and would have known
15 everything that Dangerfield did and more
16 besides?

17 A Yes.

18 Q You don't know that, sir?

19 A No, that's an assumption, you are right.

20 Q Yes?

21 A I knew Mr. Lawlor since he graduated from law
22 school and while he was in law school, and I
23 knew Mr. Dangerfield for many, many years. But
24 it is an assumption, you are right, that
25 Mr. Lawlor would have known everything that

1 Dangerfield did, and more besides. That's my
2 assumption.

3 Q Right.

4 A I meant it as an assumption.

5 Q Fair enough. It doesn't say that, but that's
6 how you meant it, fair enough. Now, we know
7 that, according to the information that you
8 obtained, Zanidean said he gave seven statements
9 to the Winnipeg city police, the first occurring
10 on October 9, 1990 and the last on November 3,
11 1990; do you recall that?

12 A Yes.

13 Q You see that, sir, at tab 13?

14 A I accept that, if you tell me that, I accept it.

15 Q But I don't want you to, sir. You will see it,
16 though, in tab 13 in your investigator's report,
17 page 239, at the bottom, where your investigator
18 says Zanidean gave seven statements to the WCP;
19 do you see that?

20 A At tab which?

21 Q Tab 13, and it is the third page in, but it is
22 the second page of Savage's investigations.

23 A Second page in, 239, yes.

24 Q You see Zanidean gave seven statements to the
25 Winnipeg city police, the first on October 9,

1 and the last on --

2 A Yes, I see that.

3 Q November 3, 1990?

4 A The last paragraph, yes.

5 Q That's the information that you are getting from

6 your own investigator too.

7 A Right.

8 Q And that appears to be consistent with the

9 information that Mr. Lawlor and presumably

10 Mr. Dangerfield had as well; is that your

11 recollection too, sir?

12 A Yes.

13 Q So you have information that indicates there are

14 seven statements and that's the number you got

15 from the Crown, right?

16 A I suppose so.

17 Q I have handed out books of documents, and

18 perhaps that can be marked as the next exhibit?

19 THE COMMISSIONER: Exhibit 27 I think it is.

20 MR. OLSON: Perhaps it can be A,

21 Mr. Commissioner, because I have some loose that

22 I didn't get time to

23 (EXHIBIT 27A: Book of documents for Mr.

24 Olson's examination of Mr. Brodsky)

25

1 BY MR. OLSON:

2 Q If you look at tab 3 -- these are from some of
3 the disclosures that have been made?

4 A Wait, please --

5 Q Sorry, you don't have it.

6 MR. GATES: I can't hear Mr. Brodsky.

7 THE WITNESS: I will speak up. Very rare that
8 people tell me to speak up, but I will. I have
9 the book.

10 BY MR. OLSON:

11 Q Thank you very much. And we are at tab 3, these
12 are some handwritten notes of Mr. Lawlor. You
13 can take that from me, sir. You may recognize
14 his handwriting, in any event.

15 A Okay.

16 Q And these pages all relate, I think, to
17 obtaining particulars which were subsequently
18 given to you, and you will see the first page
19 here, with a number 2 on it, particular
20 statements, the first seven of which are RZ,
21 which I take to be Ray Zanidean. The first
22 being October 9, 1990 and the last being
23 November 2. Now there is a slight discrepancy
24 between what Savage said with November 3, and
25 this one November 2, but assuming that's just a

1 typo on one of their parts, we are at ad idem
2 that there were seven statements and you had
3 them.

4 A It is not a typo, it is a mistake. One is in
5 writing and one is in typing.

6 Q It could be a typo on Savage's report, we don't
7 know, but one of them is a mistake, you are
8 right. And without going through all of these,
9 I take these to be, if you look through on the
10 particular statements, there were some 34
11 statements which Mr. Lawlor, through these
12 notes, indicate have all been given to you at
13 various times?

14 A I don't know what this document is.

15 Q Mr. Lawlor's handwritten notes of the
16 particulars that were given to you, sir. And
17 if --

18 A Okay.

19 Q -- you can take that. And you see starting on
20 the fourth page and so on there are questions
21 that are asked and, as you say, he is a person
22 of detail.

23 A Yes.

24 Q And if you turn to, I think it is the seventh
25 page, particular statements, witnesses, WIT'S,

1 he has got certain numbers down. Then he says
2 given December 27 and he has crossed that out,
3 January 3, all given 1 through 34 as of
4 January 18 and he signed it.

5 A Yes.

6 Q And then 35 and 36, two more added; one given on
7 February 4, one February 8?

8 A Yes, I see that.

9 Q Then if you flip a couple of pages, particulars
10 on identification. These appear to be his notes
11 and you can scan these, sir, but I take them to
12 be all things that you had asked for from time
13 to time, or even if you hadn't asked, were
14 disclosed to you with respect to matters that
15 were coming up during the course of the
16 preparation in advance of trial; is that fair?

17 A By looking at the order of them, they look like
18 they are responses to the questions because
19 they --

20 Q Some of the later ones, I think that's right.
21 And if you will look at the third last page,
22 sir, in that bundle, you will see further
23 particulars to be given.

24 A Yes, I see that.

25 Q Number 1 is forensic, Anderson re firearms,

1 January 18 is his note as to when that was
2 given?

3 A Right, right.

4 Q And so on. And up at the top of the page he has
5 letter copies to WPD, which is the Winnipeg
6 police department, I understand. It appears to
7 be his ongoing notes of what has been requested
8 or what he has given to you, and letter copies
9 going to WPD for their assistance, and that's
10 the type of process that you understood was
11 going on?

12 A Yes.

13 Q Fair enough. Now, we referred to the pre-trial
14 on May 22nd earlier, sir. I gather there was
15 just counsel plus the judge there? There
16 weren't any Winnipeg police officers, or am I
17 incorrect in that?

18 A The pre-trial -- before Chief Justice Hewak?

19 Q No, with --

20 A Justice Morse?

21 Q Yes?

22 A I don't think there was any police officers
23 present.

24 Q Right. And your recording of that is at tab 29,
25 you don't have to go to it unless you wish to,

1 Mr. Prober put that to you, and you have a memo
2 here about how the Crown responded to questions
3 that had been raised with respect to what the
4 RCMP in Swift Current had been notified and so
5 on?

6 A Yes.

7 Q And you assumed that information that the Crown
8 had would come from the police?

9 A Yes.

10 Q Were you aware that what the Crown advised you
11 according to your own memo there is consistent
12 with what the police say they knew at the time?

13 A I don't know what the police say.

14 Q You don't know, thank you. Now there is a
15 dispute between Swift Current and the City of
16 Winnipeg Police as to what perhaps had been
17 discussed between them, but City Winnipeg
18 Police --

19 A I saw that at the time of the bail application.

20 Q It appears to be consistent with what the Crown
21 has been advised and which they communicate to
22 you at the May 22 pre-trial, fair enough?

23 A Yes.

24 Q One of the comments you made earlier of
25 Mr. Dangerfield, is of interest to me. On

1 disclosure matters you said you were not
2 particularly interested in whether
3 Mr. Dangerfield was satisfied with whatever
4 particulars had been furnished by the police to
5 them, you wanted access to the documents and
6 information so that you could satisfy yourself;
7 is that correct?

8 A Yes. And I wanted access to Mr. Zanidean, yes,
9 and things.

10 Q Right. And one of the matters that you gave by
11 way of an example was Sergeant Paul's October 10
12 notes of a discussion with Mr. Zanidean, if you
13 recall?

14 A Yes.

15 Q The October 10 contact with Mr. Zanidean in
16 Sergeant Paul's notes is not reflected in the
17 seven statements that I took you to earlier? It
18 is only October 9 and then later in October?

19 A Yes.

20 Q That would appear to be an example of what
21 perhaps the Crown did not have and which
22 therefore you did not have at that stage; is
23 that fair?

24 A You may be correct, yes.

25 Q You had asked at one point for all contacts, you

1 broadened your language to all contacts between
2 the police and Zanidean; do you recall that?

3 A Yes.

4 Q And in the book that I've put here, and I won't
5 take you to all of these documents, sir, if you
6 turn to tab 9 of 27A?

7 A Yes.

8 Q That was Mr. Lawlor's response to that request,
9 wasn't it?

10 A Yes.

11 Q "Please find enclosed complete records of police
12 contacts with Zanidean?"

13 A Yes.

14 Q What we don't know, because the practice back
15 then was to not to enumerate or list all of the
16 things that you were enclosing, but nonetheless
17 you would expect whatever he sent you there
18 would have been obtained from the police.

19 A Yes.

20 Q Were you aware, Mr. Brodsky, that Lawlor was not
21 involved in meetings or discussions with,
22 according to the evidence before this Commission
23 at least to date, Corporal Orr from D division,
24 which had involvement in the Federal Witness
25 Protection Program?

- 1 A I don't know anything about Corporal Orr.
- 2 Q Thank you. Were you aware that he had, that is
3 Lawlor, had no contact in respect of expenses
4 relating to protection, other than to pass some
5 early inquiries on for some funding through to
6 Bruce Miller or Mr. Whitley, and perhaps on
7 several occasions handing cheques back to the
8 Winnipeg Police to pay for those expenses?
- 9 A No.
- 10 Q Were you aware that Mr. Lawlor --
- 11 A I don't know what he did with cheques.
- 12 Q Sorry?
- 13 A I don't know what he did with the cheques, your
14 statement is correct.
- 15 Q Were you aware that Mr. Lawlor had no
16 discussions or meetings with Anderson or Paul,
17 the two investigating police officers?
- 18 A I don't know that he did or didn't.
- 19 Q Were you aware that Lawlor passed on requests
20 made by you from time to time to the Winnipeg
21 Police service and then sent to you whatever he
22 received by way of response?
- 23 A Could be.
- 24 Q That's what you would expect.
- 25 A Yes.

- 1 Q Are you aware that Mr. Lawlor had no discussions
2 or meetings with Sergeant Vandergraaf?
- 3 A I don't know who he met with.
- 4 Q Are you aware that -- you have commented because
5 you met with Mr. Kovnats, that you are aware of
6 the meeting, you called it most recently, on
7 May 27 at the Public Safety Building between
8 Mr. Dangerfield and Mr. Kovnats and some others;
9 were you aware that Mr. Lawlor was not there?
- 10 A Mr. Kovnats didn't say that Mr. Lawlor was
11 there.
- 12 Q So you had no knowledge that Mr. Lawlor was
13 there, of course?
- 14 A Right, I still don't.
- 15 Q You are aware that there is no evidence before
16 this Commission at least of any discussions
17 between Mr. Lawlor and Mr. Miller with respect
18 to any negotiations that were ongoing.
- 19 A I have no idea what Mr. Miller -- what Judge
20 Miller told Mr. Lawlor.
- 21 Q Were you aware that Mr. Lawlor had no
22 involvement with the material witness warrant in
23 respect to Zanidean's flight to Calgary and his
24 apprehension there and bringing him back?
- 25 A I don't know what his involvement was.

1 Q So when you say, for instance, by way of an
2 assumption in exhibit 20A, tab 1, page 1, that
3 you assumed he would have all of the same
4 knowledge --

5 A Yes.

6 Q -- those are some of the reasons why I'm
7 suggesting to you, sir, that may well be a false
8 assumption?

9 A It is still an assumption, yes.

10 Q Do you recall in the actual operation of the
11 trial, although Mr. Lawlor and Mr. Dangerfield
12 were both acting as counsel, that Mr. Lawlor
13 took some witnesses and Mr. Dangerfield took
14 others?

15 A Yes.

16 Q And it is my understanding that each of them
17 prepared their own witnesses, if they prepared
18 them at all. As you say, Mr. Dangerfield wasn't
19 in a habit of interviewing his witnesses?

20 A It doesn't mean they weren't prepared, and I
21 don't know how --

22 Q You have no knowledge of how that operated.

23 A No.

24 Q Thank you. And you will agree, sir, that your
25 recollection played some tricks on you when you

1 stated positively that Mr. Lawlor was involved
2 in and you had contact with him in the appeal
3 process and that he was sitting at the counsel
4 table in the Court of Appeal?

5 A You are right.

6 Q We can prove it 60 different ways that he wasn't
7 there?

8 A You are right, and I accept that he wasn't
9 there.

10 Q You see, sir, it is a little bit difficult in
11 potentially affecting people's careers and
12 reputations and so on to make assumptions and
13 logical assumptions, or even illogical
14 assumptions, and perhaps our memory plays tricks
15 on us, so we have to be careful, is that fair?

16 A Yes.

17 Q Are you aware that Mr. Lawlor steadfastly
18 maintained that he was not involved in any
19 non-disclosure of police possibly offering
20 immunity either before or after the trial, or
21 their recantation, or the Saskatchewan justice
22 or RCMP advising Manitoba officials, either RCMP
23 or Justice, that there may have been a perjury;
24 are you aware that Mr. Lawlor steadfastly
25 maintained throughout that he had no knowledge

1 or involvement in any of those things?

2 A If you tell me that, I accept it.

3 Q In fact --

4 A I don't challenge that. I haven't spoken to
5 Mr. Lawlor about the matters before this
6 Commission.

7 Q There in fact was an article by the Winnipeg
8 Free Press that contained that inference, sir,
9 following a meeting where the facts were made
10 clear to them that there was a clarification and
11 apology published in the Winnipeg Free Press
12 January 30, 2004 to that effect, that they
13 apologized --

14 A I'm not the only one that made a mistake, the
15 Winnipeg Free Press did too.

16 Q You are in good company then.

17 MR. LOCKYER: My understanding is that was under
18 threat of liable, a liable suit, sir, which
19 might be of some relevance.

20 MR. OLSON: That is very interesting.

21 THE COMMISSIONER: Well, even if it was, it
22 would make no difference.

23 BY MR. OLSON:

24 Q I perhaps will save it for argument, but I do
25 have a retort to Mr. Lockyer. I would assume,

1 that if they had a basis they would not have,
2 because the press --

3 A They didn't disclose that to me. I don't see
4 that as a question to me, I apologize.

5 Q Thank you Mr. Brodsky. Could that be 27B?

6 THE COMMISSIONER: 27B, the copy of the Winnipeg
7 Free Press article.

8 (EXHIBIT 27B: Winnipeg Free Press article)

9 MR. OLSON: It is helpful to have Mr. Lockyer
10 defending the interests of the Winnipeg Free
11 Press, Mr. Commissioner.

12 THE WITNESS: It is helpful to Mr. Driskell too.

13 BY MR. OLSON:

14 Q Practice in Manitoba at the time of the trial, I
15 wanted to dwell on that for a few minutes, Mr.
16 Brodsky, if you can help us. It is my
17 understanding that in 1990 and in that time
18 period, prosecutors handling a major trial
19 would, generally speaking, not be materially
20 involved in the handling of any witnesses who
21 were to be called by a Crown, that is involving
22 the protection issues?

23 A Protection issues?

24 Q Yes?

25 A Yes.

1 Q Can you confirm that was the policy as you
2 understood it?

3 A That the Crowns were not involved in protection
4 issues?

5 Q The Crowns prosecuting a major case would,
6 generally speaking, not be directly involved in
7 the handling of protection issues for witnesses
8 they would be calling?

9 A Yes. That's right, yes, protection issues, yes.
10 We are not talking about immunity.

11 Q We are talking about protection issues.

12 A Yes.

13 Q Also at that time, sir, it is my understanding
14 that --

15 A The police did that.

16 Q Sorry?

17 A The police looked after the protection issues.

18 Q Yes, and was funded by other persons in the
19 Department of Justice, but not the person
20 prosecuting?

21 A He didn't go into his pocket.

22 Q In terms of the organization of the Department
23 of Justice back at that time, Mr. Brodsky, were
24 you aware that Mr. Miller did not have any
25 direct supervisory responsibility over

1 Mr. Dangerfield?

2 A No.

3 Q You weren't aware of that?

4 A I wasn't.

5 THE COMMISSIONER: Sorry, who didn't?

6 BY MR. OLSON:

7 Q Mr. Miller did not have any direct supervisory
8 responsibility over Mr. Dangerfield, and
9 Mr. Dangerfield reported directly to the
10 Assistant Deputy Minister, Stuart Whitley?

11 A I don't know why that would be. Wasn't
12 Mr. Miller the Director of Public Prosecutions?

13 Q He was.

14 A If they had another arrangement, they could
15 have.

16 Q All right. Were you aware that with respect to
17 payments to and matters involving both Zanidean
18 and Gumieny, that there was a separate file
19 maintained by the Winnipeg Police that was not
20 shared with the Crown?

21 A I don't know that.

22 Q You didn't know that?

23 A No.

24 Q Those last three matters, sir, were the subject
25 of a letter November 18, 2004, from Manitoba

1 Justice to the Criminal Convictions Review
2 group. From Finlayson, that's right, Mr.
3 Lockyer.

4 THE COMMISSIONER: Would this be 27C?

5 MR. OLSON: Yes, thank you, and I don't intend
6 to take this witness through them if he wasn't
7 aware of these things.

8 (EXHIBIT 27C: Letter, November 18, 2004, from
9 Manitoba Justice to the Criminal Convictions
10 Review Group)

11 THE WITNESS: I have it.

12 BY MR. OLSON:

13 Q Thank you. Now you commented subsequent to the
14 trial and appeal process, as I recall your
15 evidence, Mr. Brodsky, that you were part of the
16 utterances that caused some media furore to
17 occur trying to develop support for some review
18 of the Crown appeal process, and that was about
19 '93 I think you were saying?

20 A Yes.

21 Q You are aware that in the years to follow that
22 DNA testing was sought on the original court
23 exhibits -- was sought on the original court
24 exhibits?

25 A I'm trying to -- no, how would I know that?

1 Q It was certainly the subject of some of the
2 subsequent reports and submissions, and I
3 believe articles in the newspaper, but you may
4 not be aware.

5 A Okay.

6 Q You weren't aware of that in that the
7 province --

8 A I confess that I don't read every single article
9 in every single newspaper.

10 Q That doesn't surprise me, sir. And you,
11 therefore, weren't aware that the Province of
12 Manitoba arranged for the DNA testing at its
13 expense?

14 A They could have.

15 Q All right. I understand that there was further
16 DNA testing on other items that had not even
17 been tendered at trial and that was arranged for
18 by Manitoba Justice as well at its expense?

19 MR. LOCKYER: Mr. Olson, quite wrong, it was
20 arranged by me.

21 THE WITNESS: I will let the two of you sort
22 that out.

23 MR. LOCKYER: With the agreement of Manitoba
24 Justice.

25 MR. OLSON: At its expense.

1 MR. LOCKYER: It didn't cost a cent. They don't
2 charge anything.

3 MR. OLSON: We have a dispute, but it is
4 probably not relevant to these proceedings.

5 BY MR. OLSON:

6 Q There was also a concern that there should be an
7 independent third party review of what had
8 happened?

9 A A concern by who?

10 Q Well, the media helping -- should be an
11 independent third party review?

12 A Yes.

13 Q You aware that the province as a result of that,
14 or are you aware that they urged that a 696
15 application be made, failing which the province
16 itself would bring one?

17 A No.

18 Q You not aware of that?

19 A No, they didn't tell me that.

20 Q Mr. Lockyer earlier misspoke himself, and then
21 corrected it, in terms of a claim of privilege.
22 There was a meeting in 2003, with full
23 disclosure of all documents at that time. And
24 when the police had not disclosed theirs, are
25 you aware that the province arranged for an

1 independent review by a retired judge, Judge
2 Enns?

3 A I know that Judge Enns conducted a review. I
4 don't know what the province -- the dispute that
5 you just referred to, I accept if you say it. I
6 have no reason not to, but I didn't know about
7 it.

8 Q In fact, two or three matters were eventually
9 put to Judge Enns for his independent review and
10 comment and the reports were made public?

11 A Yes.

12 Q And to ensure independence on the bail
13 application itself external counsel from the
14 department was retained to handle the
15 application before Mr. Justice Scurfield?

16 MR. LOCKYER: Mr. Olson, that's really a bunch
17 of half truths being spoken for the last five or
18 ten minutes. Just take the last one, Manitoba
19 Justice decided that because of their
20 non-disclosure of the correspondence with
21 Saskatchewan Justice in 1992 and 1993, that they
22 had placed themselves in a conflict of interest
23 which made it impossible for them to appear on
24 the bail application, to present it. They asked
25 an independent prosecutor, who was Mr. Olson, to

1 do the bail hearing is really a very strange way
2 of putting it. It would be more accurate to say
3 they felt they were unable to do the bail
4 hearing by reason of a conflict of interest and
5 they put that in writing. Another point that
6 Mr. Olson made, how they voluntarily did DNA
7 testing, it is certainly not my perspective on
8 it. There is all sorts of correspondence about
9 demanding that they do it, asking them, asking
10 them to stop delaying, to get on with the
11 decision, to make a decision, that we wanted it
12 done, and so on and so forth.

13 And I'm just a little concerned that Mr.
14 Olson is presenting that the Government of
15 Manitoba in this squeaky clean way that really
16 doesn't reflect the reality of what happened
17 over the two or three years that it took to
18 secure Mr. Driskell's release on bail.

19 For example, my friend also says that they
20 urged a 696 application be brought, well, they
21 urged it be brought so they could oppose it,
22 which they made clear in their correspondence.
23 So, that's a rather meaningless position that
24 they took to urge something be done so that they
25 could then resist it and say that the

1 application shouldn't be allowed.

2 I'm sitting here, getting a little
3 uncomfortable listening to one proposition after
4 another, which really doesn't reflect the
5 reality of the way that Manitoba Justice
6 resisted at every step of the way Mr. Driskell
7 attempts to have his conviction set aside.

8 THE COMMISSIONER: Okay.

9 MR. LOCKYER: And Mr. Brodsky is not getting the
10 right picture from these questions.

11 THE COMMISSIONER: I suspect that Mr. Brodsky
12 has a general view, not a specific one, about
13 these details. However, I don't want to get
14 into a long discussion about who is a good guy
15 and who is not a good guy. And notwithstanding,
16 I realize Mr. Olson will say that there has been
17 quite a bit of that so far. But I guess if we
18 try to go back and remember that the issue is
19 the disclosure, I guess from 1990 to 2003, is
20 really the principle issue that we are looking
21 at here. So you may continue, Mr. Olson.

22 MR. OLSON: Thank you. And I won't go through
23 the other steps that have been taken. My
24 response would have been as you indicated, so I
25 won't pursue it, Mr. Commissioner. I have

1 handed out, and I hope the witness has it or
2 will have it, a letter. It is not my
3 statements, it is the position of Manitoba
4 Justice through the Deputy Minister as expressed
5 to the Criminal Conviction Review Group,
6 November 25, 2004. There may be some
7 differences between Mr. Lockyer on the one hand
8 and the Deputy Minister of the day at the time,
9 on the other, but we need not pursue that.
10 THE COMMISSIONER: That will be exhibit 27D.

11

12 (EXHIBIT 27D: Letter November 25, 2004 to
13 the Criminal Conviction Review Group)

14 BY MR. OLSON:

15 Q Now, Mr. Brodsky, one of the matters that Mr.
16 Lockyer asked you about was the direct
17 indictment, and you were asked to comment on the
18 exhibit 22, the number of direct indictments,
19 that's the letter from Manitoba Justice pursuant
20 to FIP application to somebody in your office?

21 A Right.

22 Q You do acknowledge, Mr. Brodsky, that there are
23 some circumstances in which a direct indictment
24 is appropriate?

25 A Yes.

1 Q And I believe you used the words, there would
2 have to be an extraordinary reason, you gave as
3 an example, if there is an attempt to kill a
4 witness or something like that?

5 A Yes.

6 Q You are aware, of course, the circumstances of
7 the charge against Mr. Driskell involved a
8 concern that he in fact had done essentially
9 that with respect to Mr. Harder.

10 A He was charged with murder. That's what it
11 means.

12 Q Right. And you would accept that the
13 extraordinary reason, as you say, or the
14 preferred indictment should only be used in
15 exceptional circumstances?

16 A Yes.

17 Q And you would agree with the direct indictment
18 policies that were marked as an exhibit, and I'm
19 sorry I don't have the number that it was
20 ultimately marked as?

21 THE COMMISSIONER: Exhibit 22.

22 THE WITNESS: You are asking if I agree with
23 them? I haven't read them.

24 THE CLERK: Exhibit 23 is the policy statement.

25 THE COMMISSIONER: I think we both, the clerk

1 and I both have 22, I think.

2 MR. OLSON: 22 I thought was the letter.

3 THE COMMISSIONER: Yes.

4 MR. CODE: 23 is the policy.

5 THE COMMISSIONER: Sorry, I thought we were

6 talking about the letter.

7 MR. OLSON: No. All right.

8 BY MR. OLSON:

9 Q And you had said you hadn't seen these before?

10 A Right.

11 Q And just looking at -- do you have 23 there, Mr.

12 Brodsky?

13 A No, I don't. Maybe I, do but I can't find it.

14 You are talking about the policy?

15 Q Yes, I am.

16 A This is a different one than I had before.

17 Q We picked it up over the noon hour. I'm looking

18 at the '96 policy, sir, if you would turn to

19 that?

20 A Right.

21 Q I will wait for the Commissioner.

22 THE COMMISSIONER: That's okay, I recall it

23 reasonably well. I made quite a few notes on

24 it.

25

1 BY MR. OLSON:

2 Q In fact, the policy says they will only be used,
3 and I'm talking about a 577A situation not a
4 577B, all right?

5 A All right.

6 Q 577A where a prelim has not been held, direct
7 indictments will only be used in exceptional
8 circumstances; that's in fact what you were
9 saying?

10 A Yes.

11 Q And A is the type of thing that you were
12 referring to, reasonable basis to believe that
13 life, safety, or security of witnesses and
14 family may be in peril?

15 A Yes.

16 Q Right. You in fact had a meeting with
17 Mr. Lawlor on December 19 of 1990, where you
18 were advised by Mr. Lawlor that he had
19 recommended direct indictment. Do you recall
20 that?

21 A Vaguely, yes, I do. And I think there was some
22 discussion, I said why don't we have a
23 preliminary inquiry.

24 Q And he was saying, no, recommending the direct
25 indictment, that's tab 3 of the --

1 A Yes, I accept that.

2 Q -- 20A in your memo to file dated December 27,
3 sir?

4 A Right.

5 Q And that's in fact when you were advised --
6 that's the second page in, if you have that on
7 tab 3, sir?

8 THE COMMISSIONER: Yes.

9 BY MR. OLSON:

10 Q Do you have that, Mr. Brodsky?

11 A Yes, I enclosed a letter, yes.

12 Q Sorry, it is not a letter, it is the second
13 page, a memo to you --

14 A Yes.

15 Q I think that memorializes your meetings, albeit
16 eight days later, of what you discussed with
17 Mr. Lawlor at that time?

18 A Yes.

19 Q And you were also apprised at that time that
20 Mr. Dangerfield would be the prosecutor with
21 Mr. Lawlor assisting?

22 A Right.

23 Q And in the policy that we see at exhibit 23,
24 sir, there is no recommendation by way of a
25 policy that counsel for the accused be consulted

1 as to whether or not the circumstances warrant a
2 direct indictment?

3 A Yes.

4 Q When Mr. Kennedy was asking you questions about
5 that, sir, he was pointing you to 577B, which is
6 after the prelim, if the application is made for
7 the consideration for a preferred indictment is
8 made at that stage, it is at that stage that
9 consultation may occur under the policy at
10 least; is that fair?

11 A Yes, I told him I didn't know what the policy
12 was.

13 Q And under 577B is not the Driskell case, of
14 course?

15 A Right.

16 Q But even under 577B, the policy was where
17 practical --

18 A Yes.

19 Q -- having regard to such concerns as risk to
20 security of witnesses or evidence or the
21 prospect of the accused fleeing, right?

22 A Yes. Okay.

23 Q You are aware in these circumstances in the
24 Driskell case that the concern was with respect
25 to the security of witnesses?

1 A That's what the initial police version was, yes.

2 THE COMMISSIONER: It has been many, many years

3 since I looked at these sections, in fact, they

4 were probably different sections, but if we look

5 at the front page of 23, right at the top,

6 policy statement, then direct indictments, and

7 then 1 and 2. Is 2 the equivalent of 577B?

8 MR. OLSON: That's what I understand. Mr.

9 Brodsky can confirm that.

10 THE WITNESS: Yes.

11 THE COMMISSIONER: Okay.

12 BY MR. OLSON:

13 Q It is also my understanding, Mr. Brodsky, and

14 I'm looking for confirmation from you, if you

15 can assist me, that even prior to 1996, the

16 general policy in Manitoba followed in respect

17 of direct indictments was similar to what we see

18 here in this document; is that how you

19 understood it?

20 A I didn't know what the policy was then, 1996 or

21 before 1996, nor until today when I was given

22 this document.

23 Q All right. And with respect to your comments --

24 sorry to jump back and forth, but these are the

25 relevant documents on the direct indictment

1 issue -- back to exhibit 22, that letter
2 indicating the number of direct indictments from
3 2001 through to 2006?

4 A Right.

5 Q You are aware, are you not, sir, that organized
6 crime has been a push to address appropriately
7 organized crime, and that started in late 2004,
8 early 2005?

9 A Okay.

10 Q You are aware of that?

11 A I would accept that.

12 Q And that the type of cases that are causing
13 these numbers, I understand to be, sir, are the
14 witness threat cases, not just in murders but
15 also in sexual assaults.

16 A I don't accept that. Because I have been
17 involved in a number of cases that were not
18 involved -- where organized crime has not been
19 the issue. Sexual assaults, I'm not sure, I
20 don't know anything about that.

21 Q That's why I said it is not just organized
22 crimes, sir, it is also sexual assaults or
23 vulnerable witnesses essentially is the common
24 thread between them?

25 A The Attorney General has not consulted with me

1 on this, so I don't know what basis he is using.

2 Q Fair enough. I wanted to address with you, sir,
3 Mr. Lawlor's affidavit that you gave some
4 evidence on as well, and that was at tab 6 of
5 Commission Counsel's bundle of documents marked
6 20A?

7 A Yes, I have it.

8 Q You will recall that --

9 THE COMMISSIONER: I wonder, because I think I'm
10 a little confused here. The date of the
11 preferment or the preferred indictment?

12 MR. OLSON: November 19 of 1990, I think that's
13 the date.

14 THE COMMISSIONER: Is that the date?

15 MR. OLSON: I think so.

16 THE COMMISSIONER: All right. Just bear with me
17 for one second.

18 MR. OLSON: I think the dates are November 19 it
19 gets signed and sent to Mr. Garber, I think, it
20 might have been Mr. Brodsky, was November 27,
21 and if one goes to the documents as the reason
22 for delay, they were putting into place the
23 protection issues for some witnesses.

24 THE COMMISSIONER: Then I guess my question is
25 this, and I'm sorry to interject here --

1 MR. OLSON: No, please do.

2 THE COMMISSIONER: And it goes back to tab 3,
3 the second page -- Mr. Brodsky, can you look at
4 tab 3, the second page, which is your memo?

5 THE WITNESS: Yes.

6 THE COMMISSIONER: This is what I am a bit
7 confused with. This memo would suggest that the
8 witness met with Mr. Lawlor on December 19 and
9 that they discussed preferred indictment, I'm
10 not sure those words are there, but whether
11 there would be a preliminary or not. If I
12 understand then, if I understand the sequence,
13 the preferred indictment had already been
14 concluded?

15 MR. OLSON: It had been recommended. There is
16 no evidence, I don't think, as to whether
17 Mr. Lawlor had it back in hand as signed at that
18 stage. That's the missing link that we have,
19 Mr. Commissioner.

20 THE COMMISSIONER: That's what was confusing me.
21 All right. Bear with me because I have made a
22 note to myself here.

23 MR. OLSON: Yes.

24 MR. OLSON: Mr. Code is right, there is two
25 possibilities, one he may have not had it back

1 yet, or secondly there is evidence to this
2 effect, that they hadn't sent it to defence
3 counsel right away because they were putting
4 into place some facilities to deal with
5 witnesses under protection process.

6 MR. CODE: The safe house arrangements aren't
7 put in place until the first week of December,
8 so Lawlor may be stalling a bit here until he
9 has got the safe house in place, and then he is
10 going to tell Brodsky that.

11 THE COMMISSIONER: Do we not have the original
12 indictment somewhere?

13 MR. CODE: Yes, we do.

14 THE COMMISSIONER: Would it not show on that?

15 MR. CODE: It is dated November 19, it gets
16 preferred the same day that Lawlor --

17 THE COMMISSIONER: So it was preferred on the
18 19th.

19 MR. OLSON: Mr. Commissioner, if I can help,
20 there was a memo from Mr. Dangerfield to
21 Mr. Lawlor handwritten December 19, sorry,
22 November 19, recommending exactly that, a
23 preferred direct indictment and recommending
24 that Lawlor make that submission through to
25 Mr. Whitley. There is a typed memo from Lawlor

1 the same day, November 19 through to
2 Mr. Whitley, essentially incorporating exactly
3 what Mr. Dangerfield has said, and then it
4 appears that it is signed the same day by the
5 Minister of Justice of the day.

6 THE COMMISSIONER: I'm going to have to ask
7 another question. Does the code require the
8 attorney or can the deputy sign it? Just tell
9 me who did sign it?

10 MR. OLSON: The practice at the time was the
11 Minister, but that last changed over the years.

12 THE COMMISSIONER: It has gone back and forth.

13 MR. PROBER: At that time, Mr. Commissioner, the
14 Attorney General had to sign it, now it is
15 either the Deputy or the Attorney General now.

16 THE COMMISSIONER: Thank you, Mr. Prober.

17 MR. OLSON: We seem to be all on the same page.

18 THE COMMISSIONER: In my day the grand jury
19 could do it. Did you ever have a grand jury in
20 Manitoba?

21 MR. ABRA: About 100 years ago.

22 THE COMMISSIONER: That's my day.

23 MR. ABRA: I didn't mean it that way. I know
24 you had them more recently in Ontario.

25 MR. OLSON: Well done, Mr. Abra. Glad we

1 cleared that up, Mr. Commissioner.

2 BY MR. OLSON:

3 Q I was taking you to Mr. Lawlor's affidavit of
4 February 4, 1991, which is at tab 6.

5 A Yes.

6 Q And I think there was some confusion when you
7 were being asked questions by Mr. Lockyer about
8 that. The direct indictment had already been
9 preferred and this was an affidavit in support
10 of an application to secure the expedited trial
11 date?

12 A Right.

13 Q And you were asked to look at specifically 16,
14 21, 24 and 26.

15 A Yes, I recall.

16 Q 16 was about dissuading witnesses from
17 testifying, and 21 was recruiting people to
18 establish an alibi, 24 was the garage fire being
19 treated as an arson, and 26 was more than one
20 material witness that was currently under 24
21 hour police protection, if you recall those?

22 A Right.

23 Q Now at the first return, before Chief Justice
24 Hewak, which is at tab 8, Mr. Dangerfield spoke
25 to these issues, did he not?

1 A Yes.

2 Q And at page -- if you will turn to tab 8, sir.

3 A I have.

4 Q At page 116.

5 A Yes.

6 Q First 13 lines Mr. Dangerfield said, amongst
7 other things,

8 "Now as I said, it is of utmost importance
9 to the prosecution that these witnesses be
10 called upon to give their evidence as soon
11 as possible. It is one thing to say that
12 witnesses' memories fade, it is quite
13 another to have a witness living for months
14 under the fear of death or other
15 interference and expect him to survive, or
16 her to survive that kind of ordeal."

17 A Yes.

18 Q "These people, while their backgrounds may
19 be unsavory, are not themselves accused of
20 murder. They have no reason to suspect
21 that they will be the people who undergo
22 the most trying circumstances, because
23 someone else is accused of murder. They
24 are people who have come forward to give
25 what evidence they can. And I submit, that

1 society is duty bound to see that trials
2 are proceeded with with such dispatch that
3 these people can give their evidence with a
4 minimum of delay, but not with such
5 dispatch that the accused is embarrassed in
6 any fashion."

7 That's the end of the quote. Is that a fair
8 summary? Was that a fair summary of a balanced
9 approach, sir?

10 A Yes.

11 Q Thank you.

12 Q Now, we know at page 114 -- and you will recall,
13 I think, Mr. Prober asked you, or someone asked
14 you questions about this, perhaps it was Mr.
15 Wolson, that you had an opportunity to ask
16 questions about these matters?

17 A Yes.

18 Q And I think you said that you had?

19 A Yes.

20 Q Asked questions about these matters?

21 A Yes.

22 Q At 114 in the transcript of this hearing, we
23 have starting at line 13 through 21 references
24 to the police having obtained information that
25 Driskell has been actively seeking assistance?

1 A Right.

2 Q That's one of those matters?

3 A Yes. Sorry, page 114?

4 Q Line 22 and 23,

5 "In the result, efforts have been made to
6 the police to secure these witnesses as
7 best they can. They are under constant
8 surveillance."

9 It was one of the matters that was put to you?

10 A Right.

11 Q And that at 118, sorry, bottom of 116, at the
12 bottom of the page there is a reference to
13 Mr. Lawlor putting it in clause 29, I believe.
14 And 118, you will see in the middle of the page
15 a reference to clause 24. And that was the
16 other one that was put to you and that related
17 to the garage?

18 A Right.

19 Q And line 16 through 19, Mr. Dangerfield said,
20 "Whether it was vandalized at the request
21 of Mr. Driskell, or whether it was just bad
22 luck, one can immediately see the effect
23 that it would have on a witness who knows
24 that by giving evidence of this sort he has
25 put himself in real risk."

1 So the particular paragraphs that were drawn to
2 your attention in the affidavit, in fact, were
3 commented upon in the course of his submissions
4 to Chief Justice Hewak; is that fair?

5 A Yes, yes.

6 Q What we know from the rest of this transcript,
7 sir, is that with the exception of the
8 protection issue, you don't ask for any of those
9 particulars, nor do you comment on them in any
10 of your argument before Mr. Justice Hewak,
11 although you certainly refer to a number of
12 other issues of disclosure.

13 A If you look at page 134, you would see that I
14 indicate,

15 "...there is no allegation that
16 Mr. Driskell has done anything to these
17 witnesses. Or even what it was that these
18 witnesses had happen to them. Your
19 Lordship does not know of any criminal or
20 immoral, or unethical act, that happened to
21 the witnesses..."

22 And so on and so forth. And I challenge in the
23 next paragraph what he is doing. He is in
24 custody, I say, in the police station, how could
25 he be having surreptitious meetings? And what

1 I'm really saying is if those things are true,
2 where is the evidence?

3 Q But that isn't quite what you said. You said
4 there is no allegation. In fact, there is an
5 allegation in the affidavit that there is such
6 information in the hands of the police because
7 that's what the Crown has been advised?

8 A You are right, I could have been more eloquent
9 in the way I phrased it.

10 Q Not only eloquent, but accurate, Mr. Brodsky,
11 wouldn't that be fair? I'm not being critical,
12 I'm saying that you obviously addressed a number
13 of matters with respect to these things?

14 A Yes.

15 Q And we know, in fact, there is other evidence,
16 if you can be given book 6B, which is from the
17 Anderson, Vandergraaf, Paul volume 2. So 6B is
18 the exhibit, tab 16. This is the application
19 for witness protection, I know you haven't seen
20 it. Look to page 479?

21 A I have it.

22 Q The middle of that page there is a paragraph B
23 starting out,

24 "Ray Zanidean is without a doubt the most
25 important witness in the prosecution of

1 James Driskell."

2 Do you see that?

3 A I do.

4 Q And the sentence after that,

5 "Zanidean's conversation with the accused

6 just prior to his arrest also offer

7 evidence of the accused planning to kill

8 any witnesses that might testify against

9 him at this murder trial. There is no

10 other witness known to investigators who

11 will provide evidence equal to that

12 expected from Ray Zanidean."

13 A Right, I see that.

14 Q Right. So certainly the police position was and

15 is consistent with what Mr. Lawlor put in his

16 affidavit, that there is some concerns that

17 these witnesses were under threat. I'm not

18 saying that's true or not, but that's

19 certainly --

20 A I see the paragraph that you have shown me.

21 Q Thank you. And at tab 17, sir --

22 A Yes.

23 Q -- is the reference to, and this is in a supp of

24 Sergeant Paul referring to the death threat,

25 apparent death threat on Mr. Zanidean?

1 A Yes.

2 Q All right.

3 A Yes.

4 Q And tab 12, sir, Mr. Lockyer when he was
5 examining you, tab 12, Mr. Lockyer was saying
6 are you aware of any 24 hour protection, and you
7 indicated no?

8 A Right.

9 Q You see you have a report from Anderson and Paul
10 to Inspector Randy Bell, November 19, 1990?

11 A Right.

12 Q First paragraph, last line,
13 "Further he has requested that we provide a
14 police guard at his residence 386 Chelsea
15 Avenue on a 24 hour a day basis starting
16 immediately and continuing until the
17 Queen's Bench trial is concluded. The
18 threat to this witness is real. His
19 residence is well known to the associates
20 of the accused. The Crown has applied for
21 a direct indictment."

22 And they go on to describe the 12 hour
23 shifts and how there are going to accomplish
24 that.

25 A I see that. But my client didn't put anything

1 under anybody's windshield wiper blade. He was
2 in custody, he was in jail.

3 Q I didn't say that he did, Mr. Brodsky. I'm
4 simply pointing out to you, because it wasn't
5 asked of the police when they gave evidence in
6 these proceedings whether they had any evidence
7 to back up what Mr. Lawlor's affidavit said, and
8 then there is a suggestion when you come here
9 that Mr. Lawlor is suggesting there is this
10 evidence but nobody has disclosed it to you.
11 And I'm just pointing out to you that there is
12 in fact evidence at the police level that
13 obviously has been told to Mr. Lawlor upon which
14 he has sworn his affidavit.

15 A I see these papers that you have showed me.

16 THE COMMISSIONER: Mr. Olson, are you going to
17 be much longer?

18 MR. OLSON: This is a convenient spot. I will
19 still be half an hour at least.

20 THE COMMISSIONER: Okay.

21 THE WITNESS: Mr. Commissioner, I'm embarrassed,
22 but I have a matter on tomorrow morning, I'm
23 just concerned that I get there.

24 THE COMMISSIONER: All right.

25 THE WITNESS: I'm just trying to figure out how

1 long this will be.

2 MR. CODE: I have a related concern that Chief
3 Ewatski is the next witness and his calendar
4 becomes very bad unless I can complete him
5 tomorrow and Friday. I wonder, we can achieve
6 both goals if we start at 9:00 o'clock and Mr.
7 Olson is finished by 9:30?

8 MR. OLSON: What time is your matter tomorrow,
9 Mr. Brodsky?

10 THE WITNESS: It is at 10:00 in the Court of
11 Queen's Bench before the Chief Justice.

12 THE COMMISSIONER: Madam reporter, could me
13 start at 9:00 o'clock tomorrow? Unless you
14 would prefer to go this evening then -- what is
15 counsel's preference here?

16 MR. CODE: I would certainly prefer that, and
17 force Mr. Olson to focus hard and Mr. Brodsky to
18 be cooperative.

19 MR. OLSON: The problem that I have,
20 Mr. Commissioner, is I did not agree that we
21 should have been getting into things such as the
22 Ostrowski and the Unger case and these other
23 cases, the hair and fiber committee and so on,
24 but I do have to address all of those things
25 with Mr. Brodsky, and I will try and be through

1 in half an hour, unless we call the former
2 Deputy Minister who can address those things in
3 direct evidence, but there is only one witness
4 that I can get this evidence through and that's
5 Mr. Brodsky.

6 THE COMMISSIONER: All right. Maybe you also
7 might speak with Mr. Code this evening and,
8 quite frankly, I mean, I heard all of those
9 names being mentioned today, I know little of
10 them. And perhaps that will be more fully --
11 and I do not use the word fulsome -- examined
12 when we have our panel on the scientific lab in
13 September. But I will let counsel speak on
14 that. But if everyone can and will be here
15 tomorrow morning at 9:00 o'clock -- I know Ms.
16 Carswell, you don't look too thrilled with that
17 announcement, but Ms. Handlin here is very
18 very --

19 MS. CARSELL: You know, sorry, Mr. Commissioner,
20 I have juggled children for a number of years
21 and I will juggle them again. I will be here.

22 THE COMMISSIONER: You make me feel very, very
23 guilty.

24 MS. CARSELL: Just imagine how I feel.

25 MR. CODE: In terms of the systemic issues that

1 Mr. Olson is very concerned about, and he spoke
2 to me after the cross-examinations this morning
3 by Mr. Lockyer and Mr. Kennedy. I know Mr.
4 Kennedy takes the view that the systemic issues
5 will be dealt with principally on a paper record
6 at the end of the hearing during the systemic
7 phase, and he is announcing them with this
8 cross-examination to somebody like Mr. Brodsky,
9 and doing little more than letting everybody
10 know these are the issues he is concerned with.
11 I don't think that anybody is of the view that
12 he has established anything through Mr. Brodsky.
13 It is going to have to be dealt with in a proper
14 way on a proper record. So I think that Mr.
15 Olson can take that as Kennedy's view and my
16 view.

17 MR. OLSON: It isn't Mr. Kennedy's cross that I
18 was concerned with, it was Mr. Lockyer's, who
19 says it is a continuing culture right up to the
20 present date.

21 THE COMMISSIONER: Okay. I will leave it to
22 counsel to sort out. But meanwhile, we will
23 return at 9:00 o'clock tomorrow morning, and
24 that should get you out in time.

25 THE WITNESS: Thank you. I do appreciate that.

1 THE COMMISSIONER: And maybe I was the one who
2 strayed into the area of the direct indictment,
3 and if I was, I may be sorry I did, I'm not
4 sure. It is something that I must say in my own
5 experience it is a very rare circumstance, so
6 you might as well know that, so that's why I
7 asked the question.

8 THE CLERK: All rise. This Commission of
9 Inquiry is now adjourned.

10 (PROCEEDINGS ADJOURNED AT 5:00 P.M.)

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COURT REPORTER'S CERTIFICATE

CECELIA REID and LISA REID, duly appointed
Official Examiners in the Province of Manitoba,
do hereby certify the foregoing pages are a true
and correct transcript of our Stenotype notes as
taken by us at the time and place hereinbefore
stated.

Cecelia Reid
COURT REPORTER

Lisa Reid
COURT REPORTER

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