

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, November 1, 2006

Volume 30

INQUIRY PROCEEDINGS

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Mr. Jay Prober	For George Dangerfield
Mr. D. Abra, Q.C.	For The Estate of Bruce Miller
Mr. R. Tapper, Q.C.	For Mr. Stuart Whitley
Mr. D. Gates, Q.C.	For the RCMP
Ms. K. Carswell	For the Winnipeg Police Services and certain members
Mr. R. Wolson, Q.C.	For the Winnipeg Police Association and certain members
Mr. J. Kennedy, Q.C.	For the Association in Defence of the Wrongly Convicted

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1 Wednesday, November 1, 2006
2 Upon commencing at 9:30 a.m.
3 THE CLERK: All rise. This Commission of
4 Inquiry is now in session. You may be seated.
5 THE COMMISSIONER: Good morning, Mr. Prober.
6 MR. PROBER: Good morning, Mr. Commissioner.
7 THE COMMISSIONER: I thought just before you
8 started, I might make a comment, something I
9 thought about late yesterday afternoon and last
10 evening. So I did just jot out a few notes and
11 they are fairly perfunctory.
12 I wanted to comment on the issue regarding
13 submissions and say to you all that as you know,
14 I had not before conducted nor participated in
15 an inquiry. I did make inquiries of a number of
16 persons who have resided at inquiries as to what
17 procedure I might follow. I received helpful,
18 but far from uniform, suggestions.
19 One of the issues I can list was the role
20 of Commission Counsel at various stages of the
21 process. In particular, I inquired about the
22 submission stage and the report preparation
23 stage. As in other areas, I received varying
24 advice. Some suggested no submissions from
25 Commission Counsel, some suggested full complete

1 submissions, some suggested purely neutral
2 submissions.

3 When I asked about Commission Counsel's
4 involvement in writing a report, I again
5 received a range of answers such as their
6 involvement is extensive, their involvement is
7 restricted to specific areas or their
8 involvement relates only to factual matters.
9 Others suggested their involvement would be like
10 that of a law clerk to a judge. So there was a
11 wide variety of suggestions that I was given.

12 Since there is considerable fact finding in
13 this, and in most inquiries, and probably
14 because of my background as a trial judge, I
15 believed that there was merit in having
16 Commission Counsel make submissions as to what
17 Commission Counsel saw were some of the
18 strengths and weaknesses of the evidence
19 adduced, the areas in which counsel thought I
20 should focus and conclusions he might suggest I
21 could make or not make.

22 In deciding to choose this approach, I
23 asked Mr. Code, without any guidance or
24 direction from me, to make submissions as
25 earlier indicated. Why did I follow this

1 course? The first and most important reason was
2 this: If I followed the no submission approach
3 and if, as many Commissioners do, extensively
4 engage Commission Counsel in preparation of my
5 report, I believe that you, counsel for the
6 parties, could fairly say when you receive the
7 report, I wish I knew that Commission Counsel
8 and the Commissioner were going to focus on this
9 or that area as reflected in the findings, or I
10 think that finding or conclusion was influenced
11 by Commission Counsel and yet I, my client, was
12 not directed to make submissions on that aspect
13 of the evidence.

14 I concluded, maybe incorrectly, that it was
15 better that Commission Counsel has input on the
16 factual determinations to be made in public
17 before each of you so you would know what his
18 recommendations might be. Most importantly, so
19 you would have an opportunity to hear, to
20 respond, to refute, to support, as you see fit,
21 his submissions.

22 I thought this was a more transparent
23 approach and although I realized that this is
24 neither a civil nor a criminal trial nor an
25 adversarial process, it is still more important,

1 I thought, for each of you and each of your
2 clients to know and to be able to respond to the
3 views or suggestions of counsel who I otherwise
4 would probably have involved in a significant
5 fashion in the preparation of my report.

6 I respect Mr. Code's submissions just as I
7 respect the submissions each of you have and
8 will make. They will all be considered when I
9 prepare my report.

10 I don't see this procedure that I chose as
11 necessarily the best procedure but I'm satisfied
12 that it is as open and transparent as I could
13 come up with.

14 Thank you. Mr. Prober.

15 MR. PROBER: Thank you, Mr. Commissioner. I
16 just have one question of you. Is that six
17 minutes out of my time? If you are ready.

18 THE COMMISSIONER: I am.

19 MR. PROBER: I know Mr. Code is waiting for this
20 with anticipation because I told him yesterday
21 that I may be the only one who has anything
22 positive to say about his submission. And I do
23 say that his submission was fair and
24 under-hand -- I mean even-handed.

25 However, I have to say that I do not agree,

1 but seriously, it was fair and even-handed and I
2 do not agree, though, with some of his
3 criticisms with respect to Mr. Dangerfield based
4 on his, Mr. Code's, allegations or suggestions
5 of omissions. It is my respectful submission
6 that some of those criticisms and suggestions
7 are unfair and unreasonable and it's the kind of
8 thing that I am concerned about and it actually
9 occupies the first part of my written outline
10 which you should have before you. And you'll
11 find that at page 2.

12 And I say, if I may be so bold,
13 Mr. Commissioner, that I am concerned that when
14 George Dangerfield's role in this matter comes
15 to be judged, that it may be judged on the basis
16 of hindsight, that is, on the basis of what we
17 know now with the benefit of seeing the whole
18 picture as best we could considering there are
19 missing files, files have been destroyed and so
20 on. And after all, we have had the benefit of
21 hearing from all principle players and the
22 benefit of reviewing more documents than anyone
23 else has.

24 The concern is that George Dangerfield's
25 role will be judged in the light of what we know

1 now and not what was available to him at the
2 time, that it will be judged retrospectively
3 with 20/20 hindsight.

4 And you know, Mr. Commissioner, that it's
5 so easy to point fingers with the benefit of
6 hindsight. It's so easy to judge matters on the
7 basis of hindsight and it's also so easy to ask
8 questions and make suggestions with the benefit
9 of hindsight such as, well, you could have gone
10 to see Miller, you could have looked at the
11 police files, you could have looked at the
12 police notes. But that wasn't the practice, and
13 I'll deal more with that.

14 So I have basically four areas to consider.
15 And I say this caution that I offer respectfully
16 with respect to hindsight would result in a
17 serious injustice if it was applied to three
18 areas in particular, pre-trial disclosure, and
19 you'll see the four areas at page 3 and the
20 trial issues and the post-trial matters. I have
21 a separate heading for what I consider
22 Mr. Brodsky knew prior to the trial and I'll
23 deal with that separately.

24 I say that the danger of 20/20 hindsight in
25 judging on that basis applies to not only

1 pre-trial disclosure and not only to trial
2 issues but also to the post-trial matters.

3 So, first, pre-trial disclosure. I start
4 to deal with that at page 4 and I make the
5 following general comments: Firstly, it's my
6 respectful submission that George Dangerfield
7 never waivered from his duty to make full
8 disclosure in answer to Brodsky's -- and when I
9 use last names only I mean no disrespect to
10 anybody.

11 Dangerfield never derogated from his
12 undertaking from Chief Justice Hewak that full
13 disclosure would be made.

14 He testified before you that day the Crown
15 provided information as best they could. And
16 Dangerfield, with the able assistance of Lawlor,
17 provided information to the best of his ability.
18 He exercised his responsibility, I say to you,
19 Mr. Commissioner, with respect to disclosure
20 consistent with his reputation for fairness and
21 his reputation for disclosing more than was
22 necessary. Brodsky ended up having everything
23 the prosecution had. That is the prosecution
24 referring to Dangerfield and Lawlor.

25 As you heard Mr. Whitley say when he

1 introduced his policy that Mr. Tapper referred
2 to yesterday, prior to Stinchcombe, he met no
3 resistance from Dangerfield because that was his
4 method of disclosure, disclosed more than he had
5 to.

6 However, when it came to the issue of
7 disclosure, it is my respectful submission that
8 Dangerfield and Lawlor faced two principle
9 obstacles, road blocks, if you will, the police
10 and their own department. First, let me deal
11 with the police.

12 And I remember when Mr. Code introduced
13 this area of evidence at the Commission's
14 evidence, the hearing of the evidence. He said
15 we're going to look now at the police officers
16 and we're going to consider what was disclosed
17 to the defence and then what was disclosed to
18 the court and the jury. But I say there was
19 another question that he forgot about and that
20 is what was disclosed to the Crown. And it is
21 clear, in my respectful submission, that the
22 police held back information from the Crown. It
23 is clear the police gave the Crown inaccurate
24 information resulting in less than full, frank
25 and fair disclosure. And it is clear that the

1 police left information, found in their notes,
2 out of supplementals. It's also clear that
3 they, at times, simply didn't prepare
4 supplementals with respect to certain matters.

5 I have, at page 5, paragraph 4, listed what
6 I submit are the most glaring examples of the
7 road block created by the police to full and
8 accurate disclosure. And these include, and
9 some of them you heard about yesterday,
10 Mr. Commissioner, and the day before from
11 Mr. Code as well.

12 Firstly, we know Zanidean's admission on
13 October 10, 1990 to Anderson and Paul that his
14 credibility might be a problem because of his
15 involvement in the Swift Current arson was left
16 out of the supplemental prepared of the meeting.

17 And I don't intend, and I have not made
18 copies of all of these documents. I think he
19 brought in 15 copies of each of them in any
20 event. But the reference is there if you need
21 it later on.

22 Secondly, Zanidean admits to the Swift
23 Current arson, again on October 29, 1990. There
24 is no mention of that in the supplemental
25 prepared on October 30, 1990.

1 Three, the supplemental prepared purporting
2 to set out Zanidean's statements over two days
3 on the trip to Saskatchewan completely omits
4 comments about the Swift Current arson which are
5 found in Anderson's notes. Much of the
6 supplemental, you may recall, was in quotes and
7 purports to be verbatim. And the failure to
8 mention the Swift Current arson in the context
9 of preparing these supplementals outlining
10 Zanidean's verbatim statements is rather
11 artificial.

12 To use your words, Mr. Commissioner, I
13 recall vividly you turning to Mr. Anderson and
14 said, "You know, this is rather artificial. Was
15 he instructed to leave reference of the Swift
16 Current arson out of the statements?" And
17 that's found in the transcript of Anderson's
18 evidence which I have cited at the bottom of
19 page 6. It simply doesn't make sense that
20 Zanidean would leave out mention of the Swift
21 Current arson unless he was told to do so.

22 Four, there was no supplemental or no note
23 of RCMP Constable Burton advising that they
24 would hold off on the prosecution of Zanidean
25 apparently referred to in a telephone

1 conversation between Anderson and Burton on
2 April 27, 1990 and again during a telephone call
3 on April 5, 1991.

4 Five, there was no supplemental or no note
5 of Anderson and Paul being told by Miller that
6 Zanidean would only be advised of his immunity
7 after he testified. The only time we see
8 reference to this of course is in Anderson's
9 memo, if you will, to Inspector Johns on
10 October 8, '91.

11 Six, the supplemental dated April 10, 1991
12 refers to Zanidean being placed under the
13 Witness Protection Program, and we know this is
14 not accurate.

15 Seven, Brodsky requests disclosure of all
16 police contacts with Zanidean, whether by a
17 formal statement or written notification in a
18 police officer's notebook. Lawlor responds, "I
19 am advised that you have all statements,
20 conversations of Zanidean." We now know this
21 response was not true because we know of the
22 admissions of Zanidean in the notebooks of
23 Anderson and Paul.

24 Brodsky asked for disclosure of what the
25 Winnipeg Police have on the fire in Swift

1 Current. I think he refers to two other fires
2 in his letter of April 25th. Lawlor faxes the
3 whole letter to Vandergraaf asking for his help
4 on a number of requests in Brodsky's letter, and
5 in particular, on the above request. And you
6 remember, he refers by number to certain
7 paragraphs. The response to Brodsky is that the
8 Winnipeg Police have nothing on these incidents.

9 We now know, we now know that this is not
10 true because, one, of Zanidean's admissions,
11 two, because of the fact -- that should be fact,
12 not facts -- because of the fact that Sergeant
13 Mann had been sent the arson file, and three,
14 because when Anderson, Vandergraaf and Paul
15 prepared the witness application, which you may
16 recall is at tab 16 of Exhibit 6(B), they
17 referred specifically to the RCMP arson file
18 number. So they must have seen it.

19 Brodsky -- this is the ninth example of the
20 kind of road block Lawlor and Dangerfield faced.
21 Brodsky asked about favourable considerations
22 and motives for assisting the police. There was
23 no response in the April 25th or April 29th
24 letters but the request is repeated. And of
25 course we know, and you heard about it yesterday

1 and you were taken to tab 41 of 6(B). The
2 response is "Protection is the only favourable
3 consideration. There were no other deals." We
4 now know of course that this response was not
5 accurate because there was no mention of the
6 Swift Current RCMP agreeing not to pursue
7 Zanidean as referenced in the October 27th, '90
8 and April 5th, '91 telephone conversations.
9 There was no supplemental that Zanidean took off
10 and a material witness warrant had to be issued.
11 Finally, there was no supplemental prepared when
12 the police received information that Zanidean
13 was questioning the integrity of the statements,
14 suggesting police made alterations and there was
15 no supplemental prepared on the confrontation
16 with Sergeant Paul on June 6th. The
17 confrontation between Kovnats and Sergeant Paul
18 on June 6, '91.

19 So I say to you, in conclusion, that the
20 extent of the police obstacle, as we now see,
21 was major. It constituted a road block of major
22 proportions to full and accurate disclosure. We
23 now know, looking back, about this obstacle the
24 Crown faced. But to suggest, I say
25 respectfully, that a Crown should have been

1 standing over the police's shoulders rummaging
2 through their files and their notebooks is
3 unrealistic and unreasonable. The police gave
4 the prosecution information. The prosecutors,
5 as they both told you, believed it to be true
6 and had no reason to second-guess what the
7 police were doing was other than frank and
8 truthful with them.

9 Dangerfield, in a pointed question from
10 Mr. Gates, was asked, "Did you believe it was
11 your obligation to go through and examine the
12 police file?" And he quite clearly said no.

13 One addition to my concluding remarks in
14 this area is that Schille's evidence supports
15 the proposition that the police constituted a
16 major road block to full and accurate
17 disclosure. And in that regard, I would point
18 you, but we don't need to go there necessarily,
19 I'll summarize what he said. First of all, he
20 said to Mr. Dawe that when he reviewed, and this
21 is at volume 26, page 6008, starting at line 16,
22 The next question was,

23 "Q What was your understanding? Perhaps
24 you can explain?

25 A My understanding, in terms of what was

1 discussed, is that we would provide, with
2 limited exceptions, what was on our file at
3 the time and there were obviously things
4 from my review that were missing from the
5 file."

6 THE COMMISSIONER: Mr. Prober.

7 MR. PROBER: Sorry.

8 "Officer's notes would be a quick example
9 that springs to mind."

10 And I know there was some comment made, I know
11 Sergeant Paul testified that his notes were forwarded
12 to the Crown, but they were never found, at least
13 according to Schille, on the Crown file.

14 Also when Mr. Abra was cross-examining
15 Mr. Schille, and this is found at volume 26
16 again, and it's page 6238 and 6239. Mr. Abra
17 questions him about three matters that had come
18 to his attention as a result of reading the
19 Winnipeg Police Service investigation. One was
20 that Zanidean had contacted Brodsky within days
21 of the trial to recant his testimony. The
22 second was that Zanidean threatened, sometime
23 after the conviction but prior to the appeal, to
24 recant his evidence in the media. And the third
25 one was the Crime Stoppers payments. And

1 Mr. Abra puts this question to Mr. Schille,
2 "Q So these were three items that, from
3 your entire review of the entire Manitoba
4 Justice file, you were not aware of and you
5 didn't become aware of them until you read
6 the Winnipeg Police Service reinvestigation
7 in 2003 when you got it?"

8 And Mr. Schille confirms,

9 "A That's correct.

10 Q So it's fair to say from your review of
11 the entire Manitoba Justice file, you
12 weren't aware of any of these three points
13 and there was no indication of any of these
14 three points anywhere in the Manitoba
15 Justice file?

16 A These three points, correct."

17 Let me, before I leave the issue of this
18 road block that the Crown faced, just comment
19 briefly on Mr. Code's submission. His
20 submission, in this regard, is found at
21 paragraphs, they are points 11, 12 and 13,
22 paragraphs 150, 151 and 152 of his submission.
23 This is not in my written submission but I want
24 to make a comment on this because Mr. Code
25 suggested that Dangerfield and Lawlor must bear

1 some sort of secondary responsibility because
2 they failed to inquire.

3 It is a suggestion, Mr. Commissioner, I say
4 to you, that is based on what we know now. It's
5 based on the 20/20 hindsight I was talking
6 about. It is an unreasonable expectation. It
7 is an unfair criticism, I say to you. And there
8 is no clear and convincing evidence that would
9 support that allegation by Mr. Code.

10 Continuing on with the issue of pre-trial
11 disclosure. There has been some suggestion that
12 somehow the prosecution was advised verbally or
13 orally about some of the disclosure. And I say
14 to you that there is no credible evidence to
15 support that this sort of oral disclosure
16 existed. In fact, I say, the evidence points to
17 exactly the opposite. And I have outlined the
18 facts that Sergeant Anderson testified. He had
19 no significant direct contact with Dangerfield.
20 He had no independent recollection of any
21 specific meetings with Dangerfield. He had no
22 specific or independent recollection of
23 providing any verbal information to Dangerfield,
24 either at the meeting or on the phone. There
25 was written correspondence with Lawlor. He

1 couldn't say what Dangerfield knew or didn't
2 know and he didn't recall any meetings with
3 Dangerfield. And you'll see all that at the
4 evidence of Anderson and the citation there.

5 Sergeant Paul testified, the only contact
6 he had with Dangerfield was to prepare his
7 testimony. He had no specific recollections of
8 meetings with Dangerfield to provide him with
9 any information.

10 On cross-examination by Abra, Sergeant Paul
11 testified he assumed Miller would have told
12 Dangerfield about Zanidean. He told the
13 superiors, he said that Zanidean called Brodsky,
14 he assumed they would tell Miller and he assumed
15 that Miller would tell Dangerfield. Others
16 testified as well that they assumed Miller would
17 tell Dangerfield.

18 And you may hear that from Mr. Wolson that
19 Miller would be expected or it's assumed he
20 would tell Dangerfield. But in the end, all the
21 witnesses agreed they did not know what Miller
22 told Dangerfield. And to suggest that there are
23 specifics of that is mere speculation.

24 But I have to make special mention of
25 Sergeant Vandergraaf's testimony because he

1 purports to tell us that somehow, Dangerfield
2 was informed of the Swift Current matter. He
3 can't say who, he can't say when, and he
4 acknowledges that in 190 pages of Paul and
5 Anderson's notes of Dangerfield or of
6 Dangerfield being advised of anything. So
7 there's no reference to him. There's not even a
8 mention of Dangerfield's name in their notes and
9 Lawlor's name is only mentioned twice. He
10 acknowledges he was not present when Miller
11 advised Dangerfield of anything about Swift
12 Current or present when Anderson advised
13 Dangerfield of anything about Swift Current. He
14 acknowledged he was not present when Paul
15 advised Dangerfield about anything of Swift
16 Current.

17 Now, I think it's important that I deal
18 with the recollection that came to Vandergraaf
19 over the weekend prior to his testifying here.
20 He said that he could recall a meeting. And he
21 only recalled a meeting with Dangerfield on the
22 weekend before coming here. There's no mention
23 of it in the statement. Of course he has no
24 note of the meeting. He couldn't say when the
25 meeting occurred. He couldn't even tell us when

1 the revelation came to him on that weekend,
2 whether it was the Saturday or the Sunday. Yet
3 incredibly he remembers 15 years later, even
4 though he didn't remember it the day -- couldn't
5 remember what was said the day before he
6 testified, and he made no mention of it at all
7 in his summary to Commission Counsel.

8 So I say that in the end, there really is
9 no credible evidence to support the proposition
10 that oral disclosure was used as a means of
11 providing information to the prosecution.

12 The second obstacle to full and fair
13 disclosure was Dangerfield's own department,
14 that is the policy regarding witness protection
15 matters. The justice policy or practice, as we
16 now know, was to keep the line prosecutors
17 separate and apart from the witness protection
18 negotiations. There was a so-called "Chinese
19 Wall" between those in the Justice Department
20 who dealt with witness protection and the line
21 prosecutors which prevented discloseable
22 matters from being disclosed. And we now see
23 it's clearly wrong.

24 And I too wasn't sure what James Lockyer
25 was suggesting when he said "The wall was

1 breached." Maybe what he meant to say was that
2 the wall shouldn't have been there. And I agree
3 with that. That was a mistake. Because it did
4 prevent Dangerfield and Lawlor from knowing some
5 things that they could have disclosed.

6 If matters, witness protection involved
7 immunity and compensation, then Dangerfield and
8 Lawlor would not be involved. Prosecutors and
9 the negotiators for witness protection matters
10 were to be kept separate and apart by the
11 "Chinese Wall," and I refer, of course, to
12 Finlayson's statement.

13 The existence of the "Chinese Wall" and the
14 fact that Dangerfield was kept in the dark about
15 witness protection matters which included
16 discussions about immunity and some compensation
17 is, without question, clearly and convincingly
18 supported by the evidence. So to suggest that
19 they were not kept in the dark really flies in
20 the face of the evidence that we have.

21 And I have outlined nine points that
22 indicate that this "Chinese Wall" existed, and
23 in fact, that Dangerfield and Lawlor were kept
24 in the dark. They shouldn't have been but they
25 were, Mr. Commissioner.

1 There was, first of all, a secret file
2 dealing with the witness protection matters.
3 And you'll see that at tab 59 of Exhibit 30(C).
4 You'll remember the file was marked "Witness
5 Protection, B. Miller, S. Whitley only." It was
6 also marked "strictly confidential" twice and
7 "Public prosecution directors only."
8 Dangerfield of course was not a director and
9 there was no evidence that he actually ever
10 accessed the file at any time.

11 There is no evidence, the second point,
12 that Dangerfield knew about Kovnats' shopping
13 list set out in Kovnats' letter of December 14,
14 1990 or ever saw the letter. There's no
15 evidence that Miller's response to Kovnats
16 December 28th was copied to Dangerfield.

17 And then I detail a number of memos which I
18 took Mr. Whitley through, four, five, six, all
19 dealing with witness protection. None of them
20 were sent or copied to Dangerfield,
21 Mr. Commissioner, none of them.

22 There's no evidence that the retainer
23 letter sent to Kovnats dated June 12th was seen
24 or sent to Dangerfield. Five people were copied
25 but not Dangerfield. That's point 8 at page 15.

1 And there's no evidence that the June 21, 1991
2 letter from Miller to Kovnats referring to the
3 \$20,000 to be paid to Zanidean was ever copied
4 to Dangerfield.

5 And let me take a moment and deal with what
6 Mr. Abra said yesterday. He attempted to join
7 the chorus that Dangerfield knew about the
8 witness protection issues. But when he got to
9 that part of his submission, I noticed that his
10 voice actually was quieter than I had ever seen
11 it. And I think that reflects the strength of
12 the argument as well. Because in his brief and
13 in his argument, Mr. Abra said Dangerfield knew
14 about the \$20,000. And that's correct. But
15 what he didn't say in his brief or in his oral
16 submission is that Dangerfield testified that he
17 knew about it a long time later.

18 When Mr. Abra asked him, and you'll find
19 this in volume 19 at page 4392, starting at line
20 14,

21 "Q All right. Now with respect to
22 Zanidean, though, you ultimately did learn
23 that there had been a payment of \$20,000?

24 A That was a long time later, yeah."
25 Not at the relevant time. So I say let's, if

1 we're making arguments and referring to facts,
2 put them in their relevant temporal context.
3 There's no suggestion that Dangerfield had any
4 knowledge about any of these matters at the time
5 of the trial.

6 The evidence I say, Mr. Commissioner, makes
7 it abundantly clear that Dangerfield was not
8 involved in the correspondence, the discussions
9 or the meetings involving witness protection and
10 the negotiations surrounding that subject
11 matter.

12 He made it very clear in his statement to
13 Commission Counsel that he never received --
14 that he received, rather, instructions from
15 either Whitley or Miller, couldn't say whom,
16 that he was not going to be involved in witness
17 protection issues. And this is clearly
18 supported by the evidence as outlined above.
19 He said that if he knew that Zanidean was
20 seeking immunity, he would have disclosed that.

21 Lawlor, in his statement to the Commission,
22 confirms as well that the practice in the Crown
23 office at the time was for the prosecuting
24 Crowns not to be directly involved in witness
25 protection negotiations and decisions.

1 Before I end this area, I would like again
2 to comment on Mr. Code's submission with respect
3 to this point. He says at point 10 of his
4 argument, which is at paragraph 149 of his
5 brief, at page 131, so point 10, paragraph 149
6 at page 131, he says that Miller, that's the
7 question posed, "Did Miller keep Dangerfield in
8 the dark about negotiations with Kovnats?"
9 Well, it wasn't really Miller. It turned out
10 that Miller was the person but it was the
11 practice, it was the policy that resulted in
12 Dangerfield being kept in the dark. And to
13 suggest that he wasn't being kept in the dark
14 flies in the face of the evidence that I've just
15 gone over.

16 And I know Mr. Code said, well, he must
17 have had some knowledge of witness protection
18 matters because it was relevant to the direct
19 indictment, and relevant to when they disclosed
20 the information about the case to Brodsky. But
21 those are different witness protection matters.
22 Those relate to witnesses whose safety is in
23 question. And Brodsky knows about this,
24 Mr. Commissioner, because he's told at the
25 hearing before Chief Justice Hewak that this is

1 the reason for the direct indictment and it's in
2 Lawlor's affidavit. So Brodsky knows about
3 that.

4 And I can't leave this area without
5 referring, at least briefly, to the
6 confrontation on May 26th between
7 Mr. Dangerfield and Mr. Kovnats at the Public
8 Safety Building. Kovnats of course has said
9 that he, at no time, ever discussed any of
10 Zanidean's demands with Dangerfield.

11 The suggestion by Mr. Code that as a result
12 of this confrontation, Dangerfield should have
13 insisted Miller put it in writing. Well, Miller
14 is his boss. And this kind of omission that
15 Mr. Code attributes to Mr. Dangerfield, this
16 sort of omission is based on hindsight, based on
17 what we know now, because we've seen the
18 demands, Mr. Commissioner. We've seen Kovnats'
19 shopping list, we've heard from Kovnats. So
20 it's so easy to say Dangerfield should have
21 asked about this because we now know about the
22 demands. But to suggest that because
23 Dangerfield didn't, he is to be faulted, as I
24 say, unreasonable. It imposes an unreasonable
25 expectation and it's an unfair criticism.

1 Dangerfield left it in the hands of the
2 individual, in the capable hands of Miller whom
3 he knew was dealing with Kovnats. There's no
4 clear and convincing evidence that Dangerfield
5 failed in his duty in that regard, in my
6 respectful submission.

7 That's the issue of pre-trial disclosure
8 and those are my comments on that issue. Again,
9 two major road blocks, the police and his own
10 department.

11 Now, before I deal with the trial matters,
12 let me briefly take you through what I submit
13 Brodsky knew prior to the trial. And I say that
14 it is relevant for you to consider this,
15 Mr. Commissioner, because in order to properly
16 assess the impact of any failure to disclose
17 matters, in order to properly assess the impact
18 and to properly put Zanidean's cross-examination
19 into perspective, and it's also relevant to the
20 post-trial period, it is important to know what
21 Brodsky knew. Because if he already knew
22 something, I think the impact and the weight of
23 not being advised is significantly reduced.

24 Now, point one, it's clear that he knew
25 about the Swift Current arson as early as

1 January 1991. It's indicated in one of his many
2 memos. He also had this information confirmed
3 by his investigator in the field, Savage, by
4 letter dated April 10th, '91.

5 Secondly, I say Brodsky knew about the real
6 motive for the Swift Current fire, namely it was
7 for money and not revenge. And this is evident
8 from the transcripts of the body pacs which
9 Brodsky received on February 17, '91 and
10 reviewed with Driskell on February 19, '91. And
11 those are memos of his that are recited there.
12 The transcripts of the body pacs recorded in
13 October 1990 indicate that Zanidean refers to
14 his sister as a crooked heart and the fact that
15 nobody knows about the money but him and she's a
16 conniver. It also refers to the fact that he
17 and Driskell had been short-changed \$800. So he
18 knew the motive.

19 Three, Brodsky was also advised that
20 Zanidean probably set the Swift Current fire.
21 This was at the pre-trial of course, on May
22 22nd, the memo is May 23rd. And more
23 importantly, he knew and was advised that the
24 RCMP chose to do nothing about it.

25 And I would note as well here, Brodsky did

1 not request and Mr. Abra made the point
2 yesterday about witness protection matters and
3 payments, he could have asked, Brodsky did not
4 request the Crown put this information in
5 writing. And he did not follow it up on
6 cross-examination, on his cross-examination with
7 Zanidean. Didn't follow it up.

8 Now, four, Brodsky knew that a witness
9 protection agreement was in the works as a
10 result of his meeting with Kovnats on June 2,
11 '91. Probably what's more important is he knew
12 there was some kind of deal, Mr. Commissioner.
13 And you can tell that not only from Brodsky's
14 cross-examination of Zanidean, but also because
15 of the meeting with Kovnats. And another of
16 Brodsky's memos dated June 10th refers to Ian
17 Garber advising Brodsky that Kovnats was in a
18 flap of getting a dressing down from George
19 Dangerfield when Kovnats' client said he wasn't
20 going through with the deal despite the witness
21 protection program. That's a direct quote from
22 Brodsky's memo. The memo goes on to say,
23 "After Dangerfield's harangue, Kovnats said
24 he would tell his client to go through with
25 the deal."

1 The second of Brodsky's memos dated June 10th, '91
2 refers to Kovnats telling Brodsky

3 "he wasn't sure his client would see
4 talking to me as jeopardizing his deal with
5 the Crown."

6 There is no indication that he asked
7 anywhere about the nature of the deal. He
8 didn't ask the Crown, at least there's no
9 evidence of it. He didn't ask Kovnats. And
10 I'll get to Brodsky's address to the jury in a
11 moment, because he deals with this. He tells
12 the jury there was a deal made.

13 Brodsky knew, the next page 18, that
14 Zanidean was making demands as a result of his
15 meeting. As a result of his meeting with
16 Kovnats, Brodsky knew that, that Zanidean was
17 making demands. Brodsky knew Miller was
18 involved as a result of his meeting with
19 Kovnats. Brodsky knew, as a result of his
20 meeting with Kovnats, that Zanidean was afraid
21 of his client Driskell. And also that Kovnats
22 believed that Sergeant Paul had been lying to
23 him. These are all set out in Brodsky's memos.

24 In terms of Zanidean's threat to recant his
25 trial testimony, we know now that Brodsky had

1 this information in the post-trial pre-appeal
2 period when Zanidean called him on June 20, '91.

3 As Mr. Abra said yesterday, Mr. Brodsky
4 could have asked more questions on these
5 particular issues but chose not to.

6 Now, in dealing with the trial issues,
7 which is the last major area in terms of time.
8 I say to you, Mr. Commissioner, that the trial
9 was conducted fairly by Mr. Dangerfield to the
10 best of his ability with the evidence he was
11 given by the police. I say to you as well that
12 he did not know and did not have any reason to
13 believe Zanidean was lying. He simply did not
14 have and was not armed with the information at
15 the time that would have alerted him to the fact
16 that Zanidean was lying. I say keep in mind as
17 well that Brodsky likely knew more about
18 Zanidean's involvement in the case than
19 Dangerfield. He had the same material
20 Dangerfield had. In addition, he had his
21 independent investigator, Savage, in the field.
22 Most importantly, he had met with Kovnats and he
23 had his own client, Driskell, telling him about
24 the Swift Current arson.

25 Now, there are three areas that Mr. Code

1 focused on in his argument in terms of
2 Zanidean's cross-examination and indicated that
3 somehow Dangerfield should have realized
4 something about it and done something about it
5 and realized that Zanidean was lying. And the
6 first area you see is at the bottom of page 19
7 where Zanidean denies talking to his lawyer
8 about a deal to avoid being charged in Swift
9 Current. Mr. Dangerfield testified before you
10 that he had no knowledge of any specific demands
11 made by Zanidean and thought it was all part of
12 the Witness Protection Program in which he was
13 not involved.

14 He also indicated at the top of page 20
15 that he had no knowledge of the negotiations
16 and, therefore, wouldn't have known if Zanidean
17 was telling the truth or not.

18 And I say to you, Mr. Commissioner, most
19 importantly, without the benefit of hindsight,
20 without the benefit of hearing Kovnats'
21 evidence, without the benefit of the nice
22 analysis of all the documents we have analyzed,
23 there was no, as Mr. Dangerfield said, that
24 jumped out of him in the heat of the trial that
25 Zanidean was not being truthful. There was

1 nothing that jumped out at him in the heat of
2 battle that would have caused him to consult
3 with Mr. Miller.

4 Brodsky himself knew there was a deal in
5 the works, and I'll deal with that later.

6 The secondary cross-examination where
7 Zanidean is said to have lied and that
8 Dangerfield should have realized and Dangerfield
9 should have done something about it. Zanidean
10 says his mortgage payments were in arrears and
11 he was on the verge of losing his house and no
12 arrangements had been made and that he denied
13 engaging a lawyer so he can be compensated. It
14 was just to take care of the Witness Protection
15 Program. He denied start-up costs were
16 mentioned. He said he wasn't being paid for
17 moving out of the house, he was only getting
18 paid for his accommodation and expenses.

19 Dangerfield, I say to you, did not know
20 anything contrary to this. He certainly had no
21 knowledge of the \$7,700 paid to Zanidean for the
22 equity in his home. There's no evidence to
23 indicate otherwise that Dangerfield did not know
24 that. And I go back to the evidence we went
25 through that showed that none of the witness

1 protection matters, none of the negotiations in
2 writing or whatever were forwarded to
3 Dangerfield. Again, I say without the benefit
4 of hindsight, without the benefit of hearing all
5 the evidence, Mr. Commissioner, that we have,
6 and without the benefit of reviewing all the
7 documents we have, nothing jumped out at
8 Dangerfield at the trial to indicate that this
9 was probably false, this information that
10 Zanidean was giving, or to prompt him to run to
11 consult with Miller. And he said, when I was
12 examining him, that he did not realize at the
13 time at the trial that Zanidean's evidence was
14 probably false but came to realize this after.

15 This is the third area where Zanidean
16 leaves the impression of cross-examination, that
17 he was getting room and board only for a
18 temporary time. Again, Dangerfield would not
19 have known this at the trial, that this was
20 false. And again, there's nothing in this area
21 of Zanidean's evidence that would have caused
22 him to consult with Miller. And any suggestion
23 that he should have is based, I submit, on
24 hindsight only.

25 He expected, Dangerfield did, that Miller

1 would have alerted him if there were problems
2 with the witness's credibility. He also
3 indicated that if he knew of any deal for
4 immunity, the jury would have been told in his
5 examination of Zanidean.

6 To suggest that George Dangerfield should
7 have taken some corrective action in these
8 circumstances, I submit, is unreasonable and
9 it's an unreasonable expectation. It
10 presupposes that Dangerfield had information
11 that he didn't, and he had been kept in the dark
12 by police in his own department about these
13 matters. The suggestion I say to you,
14 Mr. Commissioner, is based on hindsight.

15 If Zanidean were lying about the motive for
16 the arson, if Zanidean were lying about any of
17 these matters, Brodsky knew and he chose to do
18 nothing about it, nothing to correct it. And I
19 say to put Zanidean's cross-examination into
20 perspective, consider Justice Morse's charge.
21 Justice Morse said to the jury, and I quote,

22 "I would go so far as to say that so far as
23 Zanidean at least is concerned, it would be
24 dangerous to convict the accused on his
25 evidence alone. This does not mean that

1 you cannot accept the evidence of one or
2 all of these witnesses if you believe what
3 they have told you, but you should be
4 careful. As Crown counsel said in opening,
5 quite properly, they may have axes to
6 grind."

7 Mr. Justice Morse, this is probably more important,
8 also told the jury,

9 "Mr. Zanidean admitted that he had a
10 criminal record, that he had lied on a
11 number of occasions, that he had stolen,
12 that he had tried to interest someone he
13 didn't know in becoming involved in a plan
14 to import three-quarters of a million
15 dollars worth of heroin, that he talked
16 jokingly of having people killed and that
17 he had committed arson -- and I am
18 referring, of course, to the burning of his
19 sister's house in Swift Current because he
20 wanted to get back at her for trying to
21 break up the relationship between him and
22 his girlfriend. Mr. Brodsky suggested you
23 should not believe a single word of what
24 Zanidean said, bearing in mind the type of
25 man he was and is, and that Zanidean gave

1 the evidence that he did to get the
2 protection or immunity from being charged
3 with arson for burning down his sister's
4 house."

5 So I say, Mr. Commissioner, when you're
6 considering the cross-examination of Zanidean and its
7 impact and its effect and the issue of whether he
8 lied or not, look at the warning, the clear
9 unequivocal warning that the jury gets from Justice
10 Morse.

11 So I say to you that one should not simply
12 isolate Zanidean's cross-examination but it
13 should be put into perspective by considering
14 what Brodsky knew, the fact he chose nothing to
15 do about it, by considering the whole trial
16 which includes Brodsky's address to the jury.
17 Somebody thinks that Brodsky didn't know, let
18 them read this part of his address to the jury.

19 "Is he being prosecuted for that? Did he
20 have to hire a lawyer to avoid being
21 prosecuted for that? He is not being
22 prosecuted for that. Why not? If some one
23 of you, if your brother burned your house
24 down, whether or not you had insurance,
25 would you not expect to see him in a

1 prisoner's dock? Is there an explanation
2 as to why he is not in the prisoner's dock?
3 Well, of course. He made a deal. He
4 discredited Jim Driskell, the fellow who
5 could put him in prison, and he has made
6 his deal and he tried to sell it to you
7 because he is a good liar. That's the
8 foundation of the Crown's case. It's that
9 kind of witness that the Crown is relying
10 on."

11 Brodsky knew a deal had been made.

12 THE COMMISSIONER: You will recall Mr. Brodsky's
13 evidence, that it's one thing for him to know
14 and it's one thing for him to have the
15 information from his client but he did not have
16 objective evidence.

17 MR. PROBER: You're right and he could have
18 asked, I say to you, for that objective
19 evidence. And I say to you as well,
20 Mr. Commissioner, that Dangerfield did not have
21 that objective evidence. He did not have it
22 because of the police road block and because of
23 his own department's practices, policies road
24 block.

25 And when Mr. Code made his submissions to

1 you on this area, he described it as critically
2 important, as I recall. It's number 16 of his
3 submission, paragraph 155 at page 136. And I
4 believe Mr. Code referred to this as a failure
5 to make inquiries and ask questions on the part
6 of Dangerfield call a halt to the trial perhaps
7 and do something about it. An error I think
8 Mr. Code referred to as being committed in the
9 heat of battle, and based the arguments on
10 paragraph 90 of Mr. Dawe's summary which is
11 found in their submission at page 82.

12 And I would support Mr. Abra's comments
13 yesterday that it would have been nice to have
14 an opportunity to review this analysis of the
15 evidence and we will, at your invitation
16 yesterday, Mr. Commissioner, review it more
17 thoroughly in the next week and send in any
18 comments that we have about it and copies to
19 everybody else, if there are any.

20 One comment I would make on paragraph 90 is
21 it ignores all the examination of Dangerfield
22 except Mr. Code's, all of it. It refers not at
23 all to my examination, which causes me the most
24 concern, but also to the other examinations by
25 other counsel. And I know that when you come to

1 consider the area, you will consider all the
2 evidence of course.

3 And Mr. Code says, you know, you didn't
4 have to know that he was lying. It's sufficient
5 that he may have had concerns to jump into the
6 action. And I say that's the kind of criticism
7 that is based on hindsight. There is no
8 evidence, clear and convincing evidence, that
9 would support the allegation or the suggestion
10 that Dangerfield had concerns or should have had
11 concerns.

12 And I say if somehow you were persuaded
13 that this argument by Mr. Code has merit, I say
14 to you consider what Brodsky knew, consider the
15 charge, consider Brodsky's address, consider the
16 fact that Vandergraaf was in court and did
17 nothing to correct it. And Dangerfield himself
18 as well, consider this, acknowledged that if he
19 had been privy to information that he knew
20 Zanidean was lying, he would have had to do
21 something about it but he simply didn't know.
22 It's unreasonable, unfair to make the suggestion
23 that he should have and there's no clear and
24 convincing evidence to support that proposition.

25 In dealing with post-trial disclosure, it's

1 clear that the materials in the Quinney letter
2 of January 16, '92 that should be, not '91. I
3 thought we had all the typos but that's one,
4 '92. It's clear that it wasn't disclosed when
5 it should have been. There's no question about
6 that. And I submit that Mr. Code was
7 particularly fair in this area when it comes to
8 the assessment of George Dangerfield's role in
9 the time period between post-trial and
10 pre-appeal.

11 And there's no point in my going through
12 all of those memos, you have them. My argument
13 on the points is there in the brief.

14 Mr. Code indicated, and I do concur, that
15 in that particular period, it's not clear and
16 there's some contemporaneous notes to support
17 the fact that Dangerfield may not have received
18 the information. He did of course later come to
19 receive the information. But the absence of
20 documents, any of the documents attached to any
21 of these memos, and this evidence of course is
22 supported by Schille, that he found none of the
23 attachments attached to the memos. The absence
24 of those documents makes it difficult, I submit,
25 to pinpoint responsibility for failure to

1 disclose the Saskatchewan material at all after
2 the appeal and perhaps all three, Miller,
3 Dangerfield, and Whitley bear responsibility for
4 that. But I say to you, as Mr. Abra said to you
5 yesterday, it was unintentional, definitely
6 unintentional. And as Mr. Dangerfield said, if
7 errors were made, they were unintentional.

8 Again, I submit the fact that Brodsky did
9 not receive the Saskatchewan material should be
10 mitigated by the fact that he already knew
11 mostly everything that was set out in the
12 Saskatchewan material.

13 Now, you notice the last page of the
14 outline of argument is blank, but that doesn't
15 mean I haven't got something to say. I hadn't
16 made up my mind about what I would say until
17 last night and this morning. And for a few
18 moments, I would just like to speak to you, if I
19 may, still on the evidence, but more from the
20 heart about George Dangerfield, an analysis of
21 the evidence. And I can say that George
22 Dangerfield and I have crossed swords rather
23 vigorously on occasion many times in court. But
24 let me say about George Dangerfield that we know
25 he's a grandfather. He has eight grandchildren,

1 seven grand-daughters. He's 73. He's retired.
2 He's retired from a distinguished career as a
3 prosecutor. He had a reputation, you heard from
4 all the witnesses, for fairness, honesty,
5 openness and independence. He was an extremely
6 busy prosecutor, some would suggest perhaps part
7 of a battered Crown syndrome. He served his
8 profession as a bencher. I believe he's a life
9 bencher. Mr. Olson, in his examination of
10 Mr. Dangerfield, elicited that information. He
11 served on many committees with Mr. Olson. I
12 know he was in the Federation of Law societies,
13 lectured there with my friend Mr. Richard
14 Wolson.

15 So this is one hell of a way to end your
16 career and start your retirement, having to
17 attend an inquiry where everybody takes pot
18 shots at you. And maybe some of us,
19 Mr. Commissioner, with a little more grey hair
20 than the others, would appreciate the harshness
21 of this. It's especially harsh when you
22 consider that he has been maligned in the media
23 for some years now, not sporadically yes, but
24 severely maligned in the media.

25 As of Monday, you may or may not have seen

1 The National Post.

2 THE COMMISSIONER: I did.

3 MR. PROBER: He was in the front page. And one
4 of Mr. Dangerfield's friends called me
5 yesterday, in tears, you know, upset about the
6 savaging that Mr. Dangerfield had taken in The
7 National Post.

8 While I'm on that, because The National
9 Post article did look at and refer to four
10 disputed convictions, there is a recommendation
11 before you by, I don't know if it's Lockyer,
12 AIDWYC or both, that you recommend an audit of
13 some of Mr. Dangerfield's homicide cases. And I
14 believe the recommendation is referring to
15 Ostrowski and Unger, and maybe others, I'm not
16 sure. But I say that's not part of your
17 mandate, Mr. Commissioner.

18 I have the Order in Council here. I've
19 looked at the mandate and even with trying to
20 stretch the interpretation --

21 THE COMMISSIONER: I read your comments in the
22 paper and then I went to look at the Order in
23 Council.

24 MR. PROBER: All right. In any event, I tried
25 to really like sort of stretch the

1 interpretation of this Order in Council. But I
2 can't find even with a stretched interpretation
3 can come within your mandate.

4 Mr. Dangerfield came here. He gave his
5 evidence in a frank, open and honest manner. I
6 saw him that afternoon, his first afternoon. He
7 seemed very tired, somewhat confused in the
8 afternoon when Mr. Code's cross-examination
9 continued. He did say, as I pointed out, that
10 if there were errors, they were made
11 unintentionally.

12 And in terms of your mandate,
13 Mr. Commissioner, I submit that no further
14 condemnation is required. More importantly,
15 based on the evidence, none is warranted. There
16 is, in my submission, no clear and convincing
17 evidence to indicate any further action or
18 criticism is necessary of Mr. Dangerfield.

19 And I urge you once again, as I know you
20 will, resist the temptation to make findings,
21 criticisms or admonitions based on 20/20
22 hindsight only.

23 That concludes my submission. Let me just
24 say on a personal note, Mr. Commissioner, that
25 it's been a privilege and a pleasure to appear

1 before you. I have appreciated, as I know other
2 counsel have, your courtesy and patience not
3 only with counsel but with the witnesses as
4 well, and certainly enjoyed your sense of
5 humour.

6 I also take the opportunity, I work with
7 most of the counsel here, but especially to the
8 out of town counsel, James Lockyer, David Gates,
9 Jerome Kennedy, Michael Code and Jonathan Dawe,
10 to say what a pleasure it has been working with
11 them. And even though we were opposed in
12 interests on occasion, it never hindered our
13 cooperating and our getting along.

14 And I also want to thank Mr. Giasson and
15 his staff for the assistance they provided me
16 and others, and the court reporters and the
17 clerk and also the sheriff's officers who have
18 been very accommodating and helpful. Thank you.

19 THE COMMISSIONER: Thank you, Mr. Prober. We
20 will adjourn for 15 minutes.

21 THE CLERK: All rise.

22 (Proceedings recessed at 10:35 a.m. and reconvened at
23 10:51 a.m.)

24 THE CLERK: This Commission of Inquiry is now in
25 session. You may be seated.

1 THE COMMISSIONER: Mr. Olson.

2 MR. OLSON: Thank you, Mr. Commissioner. I too
3 would like to join what has become a chorus of
4 appreciation for your handling of this inquiry,
5 Mr. Commissioner, and I share Mr. Prober's views
6 in terms of your fairness with witnesses. It's
7 always a concern whether witnesses feel they had
8 been treated fairly and with the degree of
9 acceptance and understanding and I think every
10 witness that has been called can say so. I also
11 share the chorus of views expressed by many.

12 It's always, and many of us have said this,
13 it's always preferable to have competent counsel
14 and decent people as well on a case, even though
15 you have differing interests, because it makes
16 life so much better and the product is much
17 better at the end of the day I think as well.

18 I have following me Mr. Wolson, I wanted to
19 put on the record that there is no relationship
20 between Wolson and Olson despite the similarity
21 in names. And that will become apparent when
22 you analyze our respective submissions. But I
23 will say that both of us appear to have this
24 bug, that we have a throaty approach to our
25 submissions, but hopefully they will last.

1 Actually, Mr. Wolson's doesn't have to last but
2 mine does.

3 I have two areas to address,
4 Mr. Commissioner, firstly for Mr. Lawlor and
5 then for the Department of Justice and comments
6 on their behalf as well. I hope to still keep
7 it within the one hour 15 minutes but if I go a
8 few minutes over, hopefully you will understand
9 why.

10 THE COMMISSIONER: Yes.

11 MR. OLSON: You will need before you at some
12 point in my submissions Exhibit 27(A) along with
13 the Commission Counsel's submissions to you that
14 has the Summary of Facts because I will be
15 making reference to both of those at some point.

16 THE COMMISSIONER: I have both of those here.

17 MR. OLSON: Thank you. Mr. Commissioner, there
18 is a movement afoot in the medico/legal
19 community which I'm sure you have some
20 familiarity with, if not a detailed one, with
21 respect to increasing concern with finding
22 problems that have occurred in respect of
23 critical incidence and discouraging fault
24 finding in that process because the two are
25 antithetical in many ways. The only way you get

1 people to be candid and come forward and say
2 everything they know and so on in the medical
3 community is if you give them some protection
4 from and assurances that what they say, whether
5 you're a whistle blower or just a witness, will
6 not be used against you in a negligent or
7 tortious arena or even disciplinary sense.

8 I raise this because I think from a
9 societal point of view, it is important to
10 foster these investigations and inquiries from a
11 systemic point of view to find out what went
12 wrong and to try and prevent recurrence. And
13 that's true in the medical community as it is in
14 the legal community, and we're of course
15 concerned with the legal community here.
16 But because of those two opposing forces, one
17 ought to be, and I'm urging you to be, very
18 cautious in ultimately reviewing and making your
19 determinations about any personal misconduct.

20 You all know in court terms error or even
21 negligence is not necessarily or generally
22 professional misconduct, but what you should be
23 doing, in my respectful submission, in reviewing
24 the evidence before you is keeping those broad
25 concepts in mind, applying what many counsel

1 have referred you to as the appropriate
2 standard, which is clear and convincing
3 evidence, and keep in mind the reason for that
4 standard because one does not want to, unless in
5 the most clearest of cases, make findings of
6 fault or potential findings of fault that will,
7 in turn, discourage a frank review after the
8 fact when things go wrong.

9 I will be referring later to a passage from
10 Mr. Whitley's evidence where he talked about the
11 fear he sees now in Crown prosecutors. I happen
12 to think personally that that's a very real
13 concern, that they fear, before they take any
14 steps, that whatever they do is going to be put
15 under a microscope potentially down the road.
16 Somehow we have to find a solution to that for
17 the betterment of the system as a whole.

18 THE COMMISSIONER: I have to tell you that when
19 I think back when I began as a Crown Attorney in
20 1963 and how different it is for Crown Attorney
21 today.

22 MR. OLSON: Right.

23 THE COMMISSIONER: And I always try not to judge
24 them by my experience of more than 40 years ago.

25 MR. OLSON: That is not to say that there

1 weren't errors made in this case. I think there
2 were. And I think there were errors made
3 potentially by a number of individuals.

4 I will be addressing in the materials that
5 you have before you, you should have three
6 documents; one is an outline of points that I
7 intend to make with respect to Mr. Lawlor, some
8 of which I can skip over very quickly because of
9 previous submissions that have been made to you;
10 one with respect to the Department of Justice;
11 and one which is a listing, which is entitled
12 "No notes of a disclosure by the Winnipeg Police
13 Service" and I'll come to that in due course.

14 Before I start with the submissions made
15 specifically on behalf of Mr. Lawlor, I think
16 there is a fundamental point that, with all due
17 respect, my learned friend, Mr. Code, who I have
18 a great deal of respect for, has been missed in
19 his submissions to you, and that is he has made,
20 and Mr. Lockyer made exactly the same mistake,
21 they have made no differentiation between Messrs
22 Dangerfield and Lawlor in their submissions, and
23 in many cases between Lawlor and Bruce Miller,
24 or Lawlor and anyone else. And I say that
25 because it is fundamental to a finding of

1 personal misconduct that you consider what the
2 evidence relating to each individual is.

3 So you will recall Mr. Code said, well,
4 I'll essentially treat Messrs Lawlor and
5 Dangerfield in the same box because they are the
6 two prosecuting attorneys at the trial and then
7 he used evidence about what Mr. Dangerfield knew
8 in his conclusions that there was some
9 responsibility for both Dangerfield and Lawlor.

10 And I don't make these comments to suggest
11 either Mr. Dangerfield or Mr. Miller or anyone
12 else, impliedly or expressly, should have a
13 finding of misconduct against them. My point is
14 simply that you do have to look at each of these
15 individually because of the nature of the
16 potential finding that you're going to be making
17 and potential recommendation.

18 You will recall Mr. Lockyer making his
19 submissions specifically said he was focusing on
20 Mr. Dangerfield but said it applied to Lawlor.
21 And then he just dealt with Dangerfield.

22 Even the Winnipeg Police Service, through
23 Ms. Carswell, made the submissions to you that
24 if Manitoba Justice had the information or the
25 documentation, from their point of view, that

1 was the end of the matter.

2 And so please keep in mind, in my
3 submissions at least, Mr. Commissioner, there
4 are two levels of review on the issues that you
5 are considering. One is the WPS, and I will use
6 these acronyms, Winnipeg Police Service, and
7 Manitoba Justice or the Crown on the other hand.
8 And one can look at that review, as Ms. Carswell
9 has done and others have done, to say did the
10 Winnipeg Police Service give it to the Crown?
11 Or you can say did the Crown have it and
12 therefore the Crown is collectively or jointly
13 responsible?

14 But there's a second level of review that
15 is necessary given what your mandate is, in my
16 respectful submission, and that is to look at
17 the conduct, of Crown counsel on the one hand
18 and individual members of the Police Service on
19 the other hand, to see whether individuals are
20 potentially the subject of a finding of
21 misconduct in any given case.

22 There is some similarity between this
23 submission that I'm making to Mr. Tapper's
24 submission on behalf of Mr. Whitley where he
25 said there's a difference between vicarious

1 liability and personal responsibility. It is
2 much the same concept.

3 Let me come to the first heading which is
4 hindsight. And of course when I drafted these,
5 I did not know that others were going to comment
6 on the same concept and so I don't have to spend
7 much time on it. But there is no question that
8 it is easier to draw inferences than to reach
9 conclusions in hindsight when all of the
10 evidence from all of the sources are known and
11 reviewed at the same time. And there are
12 several concepts in there. It's all of the
13 evidence, all of the sources and at the same
14 time. Because if you have those three
15 components, those three capabilities, then it is
16 much easier to come to some conclusions or
17 judgments as to the appropriateness of the
18 conduct of those who didn't have those
19 advantages. And I think all of us, when we use
20 the word hindsight, are saying the same thing.

21 You'll see cryptically, I have referred to
22 card analogy on the outline that's before you.
23 And by that, I simply mean I tried to bring some
24 of these concepts because I find them helpful,
25 being somewhat obtuse myself, to applying these

1 concepts to real life. And I thought of Texas
2 Showdown or Bridge where you see on the
3 television frequently and increasingly so. And
4 we all sit back, to the extent that we see it at
5 all, we all sit back and say, "Look at the hold
6 cards that fella's got and look at the hold
7 cards over here, boy is he stupid. Look at what
8 he's betting. He folded, how could he do that?"
9 Or if you do it in Bridge, you get it in the
10 paper, you're looking at all four hands and you
11 say, "Well, that's pretty easy how you can solve
12 that." Well, that's not what a prosecutor has
13 before him or her when they are handling a
14 matter. And as Mr. Code referred to it as being
15 in the heat of battle on the firing line much
16 more difficult because you don't have,
17 necessarily, all the same knowledge or all the
18 same sources known to you, nor do you have all
19 of that being reviewed at the same time.
20 Those are judgment calls and that's the next
21 point that I make in the outline and I won't
22 dwell on that.

23 Anyone who has done any litigation, and all
24 of us in this room certainly have and I'm sure
25 your history is such that you have reflected,

1 Mr. Commissioner, on what you did in the matter
2 five, 10, 20 years ago and you're actually
3 almost embarrassed on the judgment call you made
4 back then in those circumstances and you can't
5 remember why the hell did you make that judgment
6 that you did. But you did.

7 Now was it an error or not? Who knows.
8 It's easy to say after the fact it was. But
9 these are judgment calls in large measure and
10 they are done on the spur of the moment.

11 You'll see the next bullet is Chess
12 analogy.

13 THE COMMISSIONER: I think when you're speaking
14 of that analogy of the judgment errors, I think
15 maybe they should appoint you to the Court of
16 Appeal because they certainly reflected on my
17 judgment really, my errors I should say.

18 MR. OLSON: We have a judge in this province,
19 and I won't tell you his name because you
20 probably know him very well, but he has a very
21 good saying, and he's not troubled at all by
22 being a trial judge with the Court of Appeal
23 because he said, "There's no problem with this
24 at all because I'm the pencil and they are the
25 eraser," which I thought was a pretty good

1 analogy.

2 THE COMMISSIONER: Or the WAG trial judge who

3 said, "I don't care if the Court of Appeal

4 upheld me, I still think I was right."

5 MR. OLSON: Right, exactly. So the chess

6 analogy, what I was driving at or thinking when

7 I put that down as a point worthy of making, is

8 if you think of a grand master holding a chess

9 tournament when there are 10 or 20 very

10 competent chess players lined up in a line in an

11 arena with a chess board in front of them and

12 the grand master is walking back and forth down

13 the other side and he or she is playing a move

14 here, comes to the next one, reflects for a

15 couple of minutes and does that move, and by the

16 time they get back to make the next move, the

17 other person on the other side of each board has

18 to have made the next move. Well, that's in

19 part what a prosecutor is doing. He or she is

20 handling a number of cases at the same time.

21 You're not necessarily going to remember all of

22 the details that you completed in that

23 particular match when you were last at that

24 table. And to apply after the fact in a

25 retrospective view all at the same time all of

1 the evidence and say, you know, you should have
2 made a different move, it's a very troubling
3 concept and can result in unfairness.

4 The only other point I've made here is the
5 reference to PRISM which is the system of
6 recording. You'll find that, I won't take you
7 to it, Mr. Commissioner. One of the ways of
8 addressing this problem that I have analogized
9 with the grand master in chess is to give the
10 prosecutor some systems that will assist them in
11 recalling what has been done or what hasn't been
12 done. That system of course wasn't in place in
13 the course or at the time of Mr. Driskell's
14 trial. There's no assurance, of course, that
15 even had it been in place it would have
16 prevented some of what we've seen here but it
17 certainly is a tool that's worthwhile.

18 PRISM, as a descriptive system, you will
19 see at Exhibit 36(B)(f) in the exhibits before
20 you, and that's the system now used in Manitoba
21 to track what has been sent to defence counsel
22 when it was sent and so on.

23 Integrity is the next heading. And by
24 that, I simply mean, Mr. Commissioner, as it
25 applies to Mr. Lawlor and many of the other

1 individuals you've heard evidence of, it's quite
2 hard to believe, given some of the submissions
3 you've heard about deliberate deception and
4 dishonesty, that individuals with this level of
5 integrity would ever stoop to something like
6 that. And I've referenced, there's a 46, that
7 should be exhibit 46, you'll recall that's the
8 binder that Mr. Lawlor put together in respect
9 of the conduct of the Crown back in the 90's,
10 late 90's, and updated it a few years ago, on
11 his own time. Shared it with other prosecutors,
12 junior that were coming to him and asking him
13 some of these questions and, in fact, sent it to
14 some other agencies across Canada for their use
15 if they saw fit. It's hard to believe somebody
16 who has that much concern with professionalism
17 and with the appropriate standards would
18 participate in anything that is suggested by one
19 or more of the submissions before you as
20 delivered for dishonest conduct. And I submit
21 that certainly in Mr. Lawlor's case, he did not.

22 And the other reference is to his evidence,
23 and I won't take you to any of the references
24 here, his evidence, and it can be checked at
25 page 5945, I deliberately put to several of the

1 witnesses, including Mr. Lawlor and I think
2 Mr. Dangerfield and perhaps more, and I put it
3 to them because Mr. Code had asked the question
4 in cross of an early witness whether or not
5 there had been a discussion amongst Crowns
6 during the course of this process. And I think
7 it came up in the post-conviction pre-appeal or
8 perhaps post-appeal period that when the Quinney
9 letters were floating around, was there some
10 general discussion where everybody agreed this
11 would be embarrassing and all this material
12 should just go down a black hole. And they all
13 said no. Not only was there no such discussion
14 but I wouldn't be part of it if anyone was
15 suggesting that. And that's the level of
16 integrity of people that you're dealing with I
17 think in this case on the prosecution side.

18 The next heading, the lack of knowledge and
19 involvement, and I won't take you through all of
20 these. What I have attempted to do for you is
21 to point out to you that in Mr. Lawlor's case,
22 he had a significantly different level of
23 knowledge and involvement in some of the major
24 events that happened in which you have heard
25 about. And that gets passed over by some of the

1 submissions before you that are urging you to
2 make findings against him in this particular
3 inquiry.

4 The first element, certainly there is the
5 position of counsel for the commission and Mr.
6 Driskell is to not make any differentiation
7 between Lawlor's knowledge and involvement with
8 anyone else's as I have already drawn to your
9 attention.

10 The next bullet is Lawlor clearly on the
11 evidence was the junior prosecutor. And I've
12 given you four, five references there. All of
13 them refer to Dangerfield being in charge,
14 Lawlor was the junior counsel. And in fact, the
15 first one, the 30(A) tab 2, page 2, Lawlor's
16 statement that all his experience was as a
17 junior counsel. And so I think that has to be
18 kept in mind.

19 You will know from the evidence that Lawlor
20 never met Kovnats, Burton, Ferguson, Preston or
21 had any discussions with them other than
22 potentially one initial telephone conversation
23 with Kovnats that neither Kovnats nor Lawlor can
24 remember but there's a reference to it.

25 Now there is a repeated theme if you have

1 the summary of evidence in Commission Counsel's
2 submissions before you, I'd like to just draw
3 your attention to several passages. And they
4 are not on this outline because I made a note of
5 them of course while we were listening to
6 submissions. Starting at paragraph 27 at page
7 22. And that refers to the laying of the direct
8 indictment you will recall. And you'll see
9 under that heading in paragraph 27, the fifth
10 line, Dangerfield sent a memo to Lawlor
11 directing him to prepare the memo. I mean that
12 was the relationship. Nothing inappropriate of
13 course, but that was the relationship.

14 And paragraph 31. Again, this is dealing
15 with, in paragraph 31, Miller's discussions or
16 the evidence relating to Miller's discussions
17 with Whitley. And you'll see nine lines into
18 that paragraph, Miller sending a copy of
19 Kovnats' letter to Whitley. Whether he received
20 it or not, that's not my concern in these
21 submissions but with a covering memo in which he
22 suggested that to meet to consider our position
23 regarding this matter at the earliest
24 opportunity perhaps together with the Deputy
25 Minister, Mr. Dangerfield, Q.C. Nobody includes

1 Lawlor in these thought processes or what is
2 going on.

3 Paragraph 33, you will see Dangerfield's
4 evidence is that he is told specifically by
5 Miller and/or Whitley that he and Lawlor were
6 not to know the details of the witness
7 protection arrangements. And so that's
8 paragraph 33 on page 27. So if you accept
9 Mr. Dangerfield's evidence, it is he who
10 receives the specific instructions which then
11 are to apply to Miller or to Lawlor as well.

12 And then at paragraph 34 on the next page.
13 Whitley's evidence, second sentence, it was his
14 expectation that Miller would keep Dangerfield
15 informed of the state of negotiations. Whether
16 he did or not is not my concern here but
17 thinking of all these people was Dangerfield was
18 the man who was running this case. And all of
19 their evidence indicates a constant theme to
20 that effect.

21 You will see in paragraph 45 at page 38,
22 Kovnats' docket indicates he met with Miller and
23 Whitley on March 20. Again, no connection with
24 Lawlor.

25 You will see at page 66, paragraph 72,

1 that's page 66, paragraph 72, Brodsky's file
2 memo at the May 22 pre-trial was Dangerfield
3 advising that he wouldn't provide direct access
4 to the police file, paragraph 72.

5 The various bullets on the balance of this
6 first page will speak for themselves. They come
7 from Lawlor's evidence. It indicates that he
8 had virtually no connections with nor
9 involvement in meetings, the warrant or the
10 Calgary relocation, ultimatums by Kovnats,
11 agreements made or not made by Miller or demands
12 being made.

13 The only other one that I'll draw a
14 specific reference to, you will see the third
15 last bullet on that page. It was Lawlor's
16 evidence at 5556 and again at 5908 that he was
17 not at the PSB, that's Public Safety Building,
18 on May 27, knew nothing about it. And you will
19 see in Commission Counsel's evidence, summary of
20 evidence at paragraph 74 on page 69, the
21 sentence actually starts at the bottom of 68.
22 It was Dangerfield's evidence, the fact that
23 Zanidean was demanding something in exchange for
24 his testimony was relevant to the motivation of
25 credibility and conceded that in hindsight, it

1 was Dangerfield's evidence, now recognizes that
2 he had an obligation after the May 26th, I
3 called it May 27th, I may be in error in that,
4 '91 incident to make inquiries with Miller and
5 ascertained what it was that Zanidean was
6 demanding.

7 So it was the incident at the PSB that
8 brought Dangerfield to some kind of realization
9 that perhaps an inquiry should be made here, but
10 certainly to the realization as to there were
11 some demands being met here.

12 None of that reflects knowledge or
13 involvement of Lawlor, over the next page.
14 These will all speak for themselves. Didn't
15 know the status of the discussions and not aware
16 of anything after trial. Had he no
17 participation after the trial and he wasn't
18 aware of it and that's where you'll find his
19 evidence as to lack of knowledge, after those
20 various bullets. You will see the reference to
21 Anderson, Paul and Vandergraaf. Anderson's
22 evidence was that the only reference to Lawlor
23 in his notes was his advising Kovnats on
24 November 13 that Lawlor was the contact. Other
25 than that, he had no involvement with Lawlor

1 unless it was written.

2 Paul says much the same thing, that
3 initially Lawlor handled some initial requests
4 but that was taken over by Miller. And
5 Vandergraaf is, I think, of concern to you in
6 this respect because one of the issues that I'll
7 be coming to is reliance. But you'll see
8 Vandergraaf's evidence in the summary of
9 evidence of Commission Counsel at paragraph 90,
10 page 82, that's paragraph 90, page 82.

11 THE COMMISSIONER: Yes.

12 MR. OLSON: About six lines down.

13 "Vandergraaf was in court for Zanidean's
14 testimony. Recalls the evidence he gave
15 regarding the house, the duration of the
16 support arrangements and start-up costs.
17 Although he did not know all of the
18 details, he knew that arrangements had in
19 fact been made about the house and that
20 Zanidean would continue to receive
21 financial support for some time after his
22 testimony including the start-up costs in
23 his new location. Nevertheless,
24 Vandergraaf did not raise Zanidean's
25 apparently false evidence on these matters

1 with Dangerfield or Lawlor."

2 You will hear my submissions shortly when
3 we get to reliance. But to have the police
4 investigator who was in charge of the
5 investigation, who was there to assist the Crown
6 present in court who has some of those details
7 that the Crown may not have heard the evidence,
8 conclude that it's false and not say anything is
9 a fundamental problem and certainly could not
10 lead to any criticism of the prosecutors. And
11 in this case, I deal only with Lawlor who had
12 virtually none of that information at hand.
13 Whether he should have made an inquiry, and so
14 on, those are issues that I'll come to, but the
15 evidence is quite clear that he didn't have
16 that.

17 The last bullet in this part,
18 Mr. Commissioner, is page 81 of counsel's
19 submission in the summary of facts, that's page
20 81. Before the various bullets there, the
21 lead-in prepared by Mr. Dawe reads this way:

22 "It is apparent from all the evidence,"
23 there's that "all the evidence" again,
24 that can be very deceptive. That's page 81, four
25 lines just before all the bullets.

1 "It is apparent from all the evidence..."
2 prosecutors don't have that necessarily, that
3 benefit,

4 "...that the Crown and/or the police had a
5 number of pieces of information which was
6 never disclosed to the defence and which
7 would have been of obvious assistance to
8 Brodsky in pursuing this line of
9 cross-examination including the following."

10 And what follows is some eight bullets on that page,
11 fairly critical pieces of evidence.

12 Lawlor knew none of this evidence. And you will
13 see that from his cross-examination and direct
14 examination.

15 And to use that evidence that apparently
16 has been used, because he's lumped in with
17 Dangerfield and Miller and others to say, well,
18 the Crown knew it, therefore Lawlor has done
19 something wrong, you use that evidence in
20 support of a submission made to you that he had
21 a duty which he failed in to make the inquiry of
22 others as to all of this information, I
23 respectfully submit is wrong.

24 Now, we have referred to the practices at
25 the time. By that, I simply mean police notes

1 weren't given unless requested, and on
2 informant's identity, confidentiality was
3 essentially maintained of an informant's
4 identity. That was the practice at the time.
5 And there was also, and this stems from several
6 sources, a separation, if you will, between the
7 prosecutors and any negotiation of witness
8 protection matters. As Mr. Code said, there
9 seems to be a pretty good rationale for that but
10 I merely am drawing your attention that these
11 were the practices at the time which perhaps
12 contributed to, at the end of the day, some
13 particular matters falling between cracks or not
14 getting disclosed, whatever the case may be.

15 The workload and division of responsibility
16 is that Mr. Prober said this morning, at page 4
17 of his submissions, Mr. Dangerfield fulfilled
18 his obligations in respect of disclosure with
19 the able assistance of Mr. Lawlor. I think
20 that's an accurate description of the
21 relationship between the two and the division of
22 responsibilities. I have bulleted the evidence
23 of Mr. Lawlor on his workload in the Court of
24 Appeal and you will recall there is actually a
25 document that reflects that and I won't dwell on

1 that, but obviously busy. He said at 5471 that
2 he and Dangerfield were kept apprised or kept
3 one another apprised in a general sense but
4 there were no regular meetings and he didn't
5 know much about Zanidean.

6 So that's some of the evidence that's
7 potentially helpful in terms of workload,
8 division of responsibilities between them.

9 In communications, it's my respectful
10 submission that it is unrealistic to expect, and
11 this appears to be a fundamental assumption on
12 Mr. Code's part, with all due respect, that
13 whatever Dangerfield knew, Lawlor knew, or
14 whatever Miller knew, Lawlor knew or should have
15 known.

16 The real world doesn't work that way,
17 Mr. Commissioner. It's unrealistic to expect,
18 when you have a lead counsel and junior counsel,
19 that they each have all the material information
20 of the other. They shared responsibility for
21 witnesses. And by that, I mean you'll see from
22 and what you know from the evidence before you
23 that Lawlor took some witnesses and Dangerfield
24 took some witnesses.

25 You'll know from your court room experience

1 that when counsel takes a witness, that counsel
2 prepares that witness in accordance with
3 whatever your practice is. When your co-counsel
4 takes a witness, you are not usually involved in
5 the preparation of that witness because the
6 reason you divided up or shared responsibilities
7 is to share the workload. And so Lawlor takes
8 some and he prepares them, make sure he's up to
9 speed, has all the nuances that he thinks he
10 needs, and Dangerfield takes some. And that's
11 how it works.

12 And when you're listening to the evidence
13 that your co-counsel is adducing in direct or is
14 being crossed by defence counsel of a witness
15 that you didn't have responsibility for in terms
16 of how you divided it up, you just don't listen
17 as carefully. You might take notes but that
18 isn't how the real world works.

19 No two professionals ask questions the same
20 way or ask all the same questions, or
21 necessarily would lay the same emphasis on
22 various parts of the evidence. When you have a
23 responsibility for a witness, you make those
24 calls and the other person essentially remains
25 silent.

1 We know that there is virtually, in terms
2 of communications, no communications or
3 virtually none between Whitley and Miller on the
4 one hand and Dangerfield and Lawlor on the
5 other. Whether there should have been,
6 particularly between Miller and at least one of
7 the prosecutors, appears to be on debate. There
8 clearly should have been more communications at
9 some point in time. And we can argue about what
10 that point is and what should have been
11 disclosed to the prosecutors and who has the
12 primary obligation, whether it be Miller or the
13 prosecutors, to make the inquiry, those are all
14 issues of debate. But there's no question
15 communication was required of some sort and was
16 not done.

17 But that lack of communication is in the
18 context of the belief or practice at the time
19 that the prosecutor should be insulated from the
20 negotiation process. And that any details that
21 might alert defence to the location of a
22 protected witness would obviously be retained
23 and not disclosed.

24 So what fell between the cracks was a
25 report, either elicited or given, on the status

1 of the dealings with Zanidean before he took the
2 stand. That appears clear.

3 Mr. Lawlor acknowledges, in his evidence,
4 that one should put whatever arrangements or
5 deals exist on the record up-front and others
6 have given similar evidence. But Zanidean
7 wasn't his witness. He didn't lead Zanidean, he
8 didn't prepare Zanidean. What Lawlor had at the
9 time was two or three inquiries, or isolated
10 pieces of information, some six to nine months
11 earlier, that there was some discussions being
12 held but there is absolutely no evidence that
13 Lawlor knew that there was a deal pending or
14 concluded in respect of equity in the home or a
15 lump sum payment, that there were any monies
16 other than room and board and moving expenses
17 involved, that there were demands for immunity
18 or that there might have been commitments made
19 not to charge Zanidean or to defer charges. No
20 evidence that he knew any of it.

21 So at the end of the day, you will have to
22 address your mind obviously to a potential
23 obligation on the part of prosecutors to make
24 that inquiry. And as between Lawlor and
25 Dangerfield, if there is that, who it might have

1 fallen on, whether it's joint or one or the
2 other. And you'll also have to determine, if
3 there is such an obligation, what participation
4 it has standing beside Mr. Miller's obligation
5 to advise. And in fact, you may have to make a
6 finding as to whether Miller did advise or not.
7 And those are all issues that are before you.

8 Speaking on behalf of Mr. Lawlor, though,
9 there is no question that whatever involvement
10 he had, despite the fact that it was not his
11 witness and so on, was not a deliberate or
12 conspiratorial failure to make an inquiry on his
13 part.

14 Next heading is disclosure practices in
15 fact followed. And I disagree with Ms. Carswell
16 who made the comment yesterday that trial
17 counsel, meaning I believe prosecution, made no
18 notes other than at the hearing, or she made a
19 comment to that effect. In fact, there are a
20 fair number of notes in fact made by Mr. Lawlor,
21 and that was Exhibit 27(A) and that's what I
22 asked you to have available to you. And I won't
23 take you ad nauseam through this except to ask
24 you to turn to several passages to see what the
25 mind-set was of Mr. Lawlor. And he describes

1 this some five pages of evidence that I've given
2 notes of as well, Mr. Commissioner. But if you
3 turn to tab 1, you'll see the very first page.
4 This is a pre-trial conference form that
5 Mr. Lawlor devised and recorded to try and keep
6 track of obligations and disclosures made and so
7 on. And you'll see his notes on the second
8 page. He's got a big circle "Handwritten notes
9 to Brodsky." Third page, "Agreed yes, copy to
10 Brodsky." Same page, "Finger print exam to
11 Brodsky." And you can go through the entire
12 document, and I won't belabour the point with
13 you, other than to say it's clear that if anyone
14 kept fairly extensive notes of preparations,
15 things that were being given other than letters
16 which you might say that things were being sent,
17 in fact, Lawlor did have an albeit informal and
18 albeit personal system to try and keep track
19 which is, of course, not consistent with the
20 implied suggestion that he or he and Dangerfield
21 might have deliberately or deceptively been
22 hiding evidence that shows that he was trying to
23 fulfil each and every request and provide
24 Mr. Brodsky full disclosure.

25 I've got the heading "Undertakings,"

1 Mr. Commissioner, because there was a suggestion
2 in some of the questioning made by Mr. Code of
3 one or more witnesses that a personal
4 undertaking given by a prosecutor, particularly
5 in this case to the Chief Justice in February of
6 1991, must be fulfilled and that it's a
7 fiduciary duty, and he made references to that
8 sort of thing.

9 First of all, to the extent there was any
10 undertaking given, it was given by
11 Mr. Dangerfield to Chief Justice Hewak. And as
12 I understand and recall the evidence, it was his
13 undertaking to provide Mr. Brodsky with whatever
14 they had or was available. The undertaking was
15 not to go behind the practices at the time, to
16 go over and review all of the police files and
17 satisfy themselves that the police officers had
18 been fair, full and accurate in their
19 disclosures.

20 The undertaking issue ultimately ends up
21 with reliance on others in any event, and let me
22 come to that. Mr. Tapper made some passing
23 reference to reliance on others. I think that's
24 fair. Mr. Prober made reference to reasonable
25 expectations this morning and I think that's

1 fair. These two concepts, in my respectful
2 view, reliance and reasonable expectations are
3 fundamental to the accountability issue that is
4 before you. First of all, I think Mr. Tapper's,
5 this is not on the outline, but Mr. Tapper's
6 reference to the Granger case, I agree with him
7 that one has to put a legal framework to what it
8 is we're looking at in this case, in this
9 inquiry. And in a setting, in that case a
10 hospital setting, and in this case, a court room
11 or a relationship between police and Crowns in a
12 homicide investigation at trial, you have to be
13 able to rely on the other professionals to do
14 their job in accordance to what their
15 obligations may be.

16 In this case, there has to be reliance on
17 the Winnipeg Police Service by the Crown, and I
18 say Crown in the broadest sense, to give
19 supplemental reports that do reflect their
20 notes. And in giving supplemental reports, to
21 answer questions as fully and accurately.

22 Some of the submissions made to you in
23 respect of the bases for a finding of some
24 responsibility on the part of Mr. Lawlor and
25 Dangerfield's part is they ought to have made

1 inquiries or gone and seen the documents
2 themselves. In fact, the system ultimately
3 would break down if it was incumbent upon any
4 professional to check to ensure any other
5 professional that forms part of that overall
6 system has done their job appropriately.

7 I say there was reliance impliedly by the
8 prosecutors on Vandergraaf who was in the court
9 room and knew, apparently, that the evidence of
10 Mr. Zanidean was not accurate. There is
11 evidence of Vandergraaf as well that he knew
12 Lawlor's response to the April 29 letter that
13 the WPS had nothing on the Swift Current arson.
14 Vandergraaf, when he saw Lawlor's response, knew
15 it was wrong. He admitted that. But he didn't
16 say anything.

17 Part of reliance and reasonable
18 expectations are assumptions. Assumptions can
19 be inaccurate. It doesn't make the person who
20 makes a reasonable assumption and holds a
21 reasonable expectation a person who has
22 misconducted themselves. So Lawlor assumes that
23 the WPS would provide all of the information in
24 their notes and that what he does get would be
25 full, fair and accurate. And I say that's a

1 reasonable assumption.

2 When we deal with assumptions and how
3 potentially risky assumptions can be, I referred
4 to the evidence of Brodsky. Now if I were in a
5 tort setting, I might say that Mr. Brodsky held,
6 if not a common law duty, certainly a duty out
7 of fairness and decency to try and ensure as
8 best he could that what he was saying about
9 other professionals in this inquiry was full,
10 fair and accurate. We know that is not the
11 case. That what he said about Lawlor was not
12 full, fair or accurate, because he made
13 assumptions.

14 Brodsky thought he was in contact with
15 Lawlor a lot in preparation for the appeal in
16 the Court of Appeal and that Lawlor did not
17 disclose some of the later events in terms of
18 information that was coming forward because he,
19 Lawlor, was embarrassed. Lawlor had nothing to
20 do with the appeal but that was Brodsky's
21 evidence. Brodsky said Lawlor was at the
22 counsel table at the hearing of the appeal.
23 Dead wrong. There isn't any suggestion that I
24 make that Brodsky's incorrect assumption should
25 result in anything different than Mr. Lawlor's

1 incorrect assumption that the Winnipeg Police
2 Service would disclose everything fully, fairly
3 and accurately to him.

4 Mr. Brodsky testified that he never got
5 disclosure of what was opposed to in the
6 February 4 affidavit of Mr. Lawlor's sworn in
7 support of the application for the expedited
8 trial. If you review the cross-examination of
9 him that I conducted, it's apparent that he had
10 never asked for any disclosure with respect to
11 those matters. He just assumed he had.

12 Brodsky also thought he met with Lawlor
13 after the February 6th, '91 court appearance to
14 discuss disclosure. He testified that he didn't
15 get it from Lawlor so he went back into court
16 the next day and said in front of Lawlor that if
17 there was any basis for the Crown saying these
18 things, then he wanted disclosure.

19 Lawlor wasn't in court on February 8 or
20 February 13. There wasn't any appearance in
21 court on February 8 other than to say he'll be
22 back on February 13th.

23 So assumptions can result in inaccuracies,
24 but that does not equate to misconduct.

25 There is also the possibility that Lawlor

1 and Dangerfield may have been advised orally by
2 the police immediately prior to the pre-trial
3 about the information with respect to the Swift
4 Current arson. And that one or both of them
5 repeated what they had been told in the
6 pre-trial itself. It's true that if they had
7 such a brief, they did not ask for it in writing
8 from the police nor did Brodsky ask them to get
9 that. But we know from the summary of evidence
10 that Mr. Dawe has prepared, is that in fact
11 Lawlor and Dangerfield knew from the body pac
12 evidence that was available, the transcript,
13 prior to the pre-trial, that Zanidean had likely
14 committed the Swift Current arson. And that's
15 what they told Morse at the pre-trial. So that
16 there may or may not have been any briefing by
17 the Winnipeg Police Service but they already
18 knew a source of that information. And even if
19 they had received that, it would have been
20 entirely consistent with what they already knew.

21 The Hall/Ewatski interview, you recall the
22 suggestion was by Chief Ewatski that, first of
23 all, when they interviewed Miller and then later
24 Lawlor and Dangerfield, that they were satisfied
25 that the prosecutors had received all of the

1 information. Just logically, and I won't repeat
2 some of the submissions already made to you by
3 others, logically, that's highly unlikely. How
4 could it be new to Hall and Ewatski after
5 reviewing the entire police files but not new to
6 the prosecution?

7 I submit to you the more likely scenario is
8 that in conducting their interviews of Miller
9 first and then later Lawlor and Dangerfield that
10 the police used a well-known technique used by
11 police officers all the time in questioning
12 witnesses. They don't offer information, they
13 elicit information. And then when they have
14 elicited all the information, they put it
15 together and make conclusions and ultimately the
16 report.

17 It's also much more likely that because
18 they, Hall and Ewatski, were in a process to
19 determine whether or not the police had
20 conducted the investigation appropriately and
21 fulfilled all of their obligations, that they
22 would have made a note of a discussion with
23 either Miller or Lawlor and Dangerfield that we
24 have pointed out to Lawlor and Dangerfield and
25 Miller A B C D E and they are satisfied they

1 knew all of that. They would have done that.
2 They did not. In fact, we had a division
3 between Hall and Ewatski because Hall says, in
4 his summary of evidence, that in hindsight and
5 retrospect, there was some information there
6 that was new to the prosecutors and they likely
7 didn't receive and should have. We didn't get
8 that acknowledgment from Chief Ewatski.

9 At the end of the day, Mr. Lawlor disagrees
10 with Hall's note that Miller, in his interview,
11 said the prosecuting attorneys had been fully
12 advised. And Lawlor also says that if he knew
13 the Crime Stoppers information and the immunity
14 issue and the telephone call to Brodsky on
15 June 19 and the alleged recantation on the 20th
16 and other similar information, he would never
17 have said we have absolutely no complaint. And
18 that was his evidence as noted here, 5949. It
19 just makes no sense that he would say, oh yeah,
20 we knew all that and we've got no complaint.

21 Now, coming to disclosure issues, I can
22 speed this process up, Mr. Commissioner, because
23 I do adopt Messrs Prober's and Abra's
24 submissions to you in respect of the various
25 disclosure and the steps taken. I've got, in

1 this outline for you, references to the evidence
2 that Mr. Lawlor and others that may be of some
3 assistance. I have not had an opportunity to
4 determine whether all of this was also in the
5 summary of Mr. Dawe's. But you will now have
6 two sources at least for the various information
7 on these points.

8 I do, at the end of the day, agree with
9 Mr. Abra that the only reasonable conclusion is
10 that there was a deliberate and intentional
11 manipulation of the evidence by the Winnipeg
12 Police Service. But from my point of view, it's
13 not necessary for me to go that far.

14 I have provided you with a separate list,
15 as I indicated at the outset, Mr. Commissioner,
16 entitled "No notes of or disclosure by the WPS."
17 And all I did there was tried to give you a
18 tool, a handy reference to the various pieces of
19 evidence out of Mr. Dawe's summary. I've given
20 you the page numbers for the various pieces of
21 information and/or supp reports that are either
22 incomplete or not full, fair and accurate or
23 information not provided to the Crown. And I
24 won't go through them all but it's a shopping
25 list. But when you go down item after item and

1 see at the end of the day what the collective
2 effect of all of that is, it is significant.
3 And I've tagged on to the end reference to tab
4 10 of Mr. Abra's materials in his submission
5 yesterday, the application for Witness
6 Protection Program and his submissions of that
7 one and the October '91 Anderson memo to Johns
8 was never provided to the Crown office.

9 So all of that detail I can skip through.

10 The last bullet you will see there, just to
11 make sure you understand what the reference was,
12 Mr. Commissioner, it's kind of cryptic, Exhibit
13 27(A) tab 3. That's the other document you have
14 there, I won't take you to it. But there is a
15 reference in tab 3 in Mr. Lawlor's notes, letter
16 copies to WPD and he also testified about that
17 at 5940. That meant he was sending copies of
18 the letters that he was getting from Brodsky
19 through to the Winnipeg Police Department.

20 Under the heading of false responses or
21 alleged false responses, more properly,
22 resulting from a failure to make inquiries, I
23 fall back on the fact that I submit to you,
24 Mr. Commissioner, is irrefutable that Mr. Lawlor
25 was not aware of much of what was going on and

1 to suggest that he sat idly by and permitted
2 either Mr. Dangerfield or somebody else in the
3 course of the trial to make a false response
4 without he, Lawlor, making inquiries would be
5 unfair in the extreme to Mr. Lawlor. Again, he
6 is entitled to place reliance on others, as I
7 have already submitted.

8 The issue of Zanidean's evidence at trial,
9 again I submit that for the reasons that I had
10 referred you to earlier, in part, there should
11 be no criticism of Mr. Lawlor here. Zanidean
12 was not Lawlor's witness. In fact, the evidence
13 is Lawlor had never met Zanidean nor was he a
14 participant in the material witness warrant in
15 the PSB incident dealings with Kovnats, et
16 cetera.

17 So the issue ultimately becomes whether
18 Lawlor, based on what he personally knew at the
19 time and what he had by way of personal
20 responsibilities in the course of that trial,
21 knew or had reasonable belief or should have had
22 a reasonable belief that there was false or
23 misleading evidence being given, I submit that's
24 the issue before you. And having various
25 snippets of information is not sufficient to

1 found any basis of misconduct against Mr. Lawlor
2 in that respect.

3 What Mr. Lawlor did know is referred to,
4 and I won't take you to it, but in exhibit 38,
5 tab 2 which is his summary statement. He
6 indicates there what he did know and what he did
7 not know, pages 10 and 11. So you'll have that
8 reference.

9 And I have bulleted at the bottom of that
10 page, Mr. Commissioner, to ensure that you
11 picked up the point when I lead it in evidence,
12 the November 4, 1990 document was the report
13 that had both short-term and long-term witness
14 protection considerations drawn up by the
15 Winnipeg Police Service, and Mr. Code had put to
16 Mr. Lawlor. Well, you had that document and
17 that talks about long-term witness protection
18 issues and, therefore, surely you knew. But in
19 cross, I pointed out to Mr. Lawlor and he
20 accepted that under long-term, the reference is
21 that those considerations "will not endure
22 beyond trial." That's what that document said.
23 That's what Lawlor had in his possession.

24 You know as well that he had never heard
25 about immunity, and so on. I've made the rest

1 of those points and I'll leave that with you.

2 As to concealment from Zanidean, no one has
3 suggested that Mr. Lawlor was a participant in
4 any arrangements made to protect Mr. Zanidean or
5 any discussions with the Winnipeg Police Service
6 or Mr. Miller about when Mr. Zanidean should be
7 told about any such arrangements and, therefore,
8 I think that does not go anywhere as against
9 Mr. Lawlor.

10 The '95 response is the last point with
11 respect to Mr. Lawlor. And there has been some
12 suggestion that it was inaccurate information
13 provided by Mr. Lawlor in response to
14 Mr. Miller's inquiry that caused or was a
15 causative factor in Mr. Finlayson responding
16 inaccurately to Janie Duncan that the answer to
17 her questions about whether a deal was made will
18 be found in the trial transcript.

19 You will recall Mr. Lawlor's evidence, and
20 I've given you the reference, both in his
21 summary and in his evidence, that he saw the
22 question differently. He believed the question
23 was whether the witness protection negotiations
24 were fully disclosed at trial and not one of
25 what are all the deals that were made. And

1 recalling that Zanidean was not his witness,
2 recalling that this is four and a half years
3 after the fact that he is asked this by
4 Mr. Miller, recalling that Mr. Lawlor's position
5 on what one should do with any deal that is made
6 is put them on the record up-front. And
7 recalling that the transcripts were in fact
8 missing, he answered, "I'm sure that's correct
9 but the transcripts are missing." He didn't
10 know, he didn't until this inquiry and
11 preparation for it, about the subsequent deal,
12 the equity, the \$20,000, et cetera, et cetera.
13 So he responded in accordance with what he had
14 believed the practice to be and would have been
15 in the event there were deals. He was in error.
16 But an error, as I submitted at the outset, does
17 not misconduct make in all cases and in my
18 respectful submission, certainly not in this
19 case.

20 So in conclusion, I am like Mr. Prober, I
21 didn't bother to put in what I was going to tell
22 you by way of conclusion, but I will keep it
23 short. I believe that the submissions made
24 contrary to Mr. Lawlor's interest by Messrs Code
25 and Lockyer have five fundamentals failings.

1 Firstly, they have not looked individually at
2 Mr. Lawlor. Secondly, had they done so, there
3 is a significant and material different level of
4 knowledge and participation and responsibility.
5 Thirdly, they had not, in my respectful
6 submission, adequately taken into account
7 hindsight and those concepts that I have
8 addressed with you. Fourthly, that in any
9 event, they have not applied properly or at all
10 a clear and convincing standard to what evidence
11 there is. And the expectation inherent in their
12 submissions to you to be placed upon a
13 prosecuting attorney I say is not consistent
14 with reality. There has to be a better way of
15 improving through systems and cultural change
16 than to find fault after the fact.

17 That completes my submissions with
18 Mr. Lawlor. Unless you have some questions, I
19 see it's twelve o'clock, I have about 15 minutes
20 on the Department of Justice and I can proceed
21 to just run right on.

22 THE COMMISSIONER: No, I don't think I have any.

23 MR. OLSON: Okay. You also have in front of you
24 then, Mr. Commissioner, the Department of
25 Justice summary and this truly is cryptic,

1 single page. Point number 1, the structure and
2 breakdown of communications emanates from your
3 comment at the end of the evidence,
4 Mr. Commissioner, where you asked me to consider
5 and perhaps make submissions with respect to
6 whether the structure in any way was a
7 contributing factor, to break down in this case.
8 I point out in passing that the Order in Council
9 is, in my respectful submission, fairly narrowly
10 focused, as I think Mr. Lockyer or somebody else
11 made the submission to you as well, in that it
12 focuses in on the conduct of Crown counsel or
13 members of the Winnipeg Police Service as well
14 as systemic issues as opposed to looking at
15 somehow a departmental responsibility that has
16 somehow been failed. So I do think that there
17 is some difficulty with the Order in Council
18 being broad enough to give any consideration to
19 a departmental failing other than of a systemic
20 nature.

21 Inherent in the words supervision and
22 management, those are the implied or actual
23 parts of a structure and potential
24 communications issued. I agree with some of
25 Mr. Tapper's comments in that regard that the

1 Department of Justice, as an entity and
2 individual defendant does not, per se, supervise
3 or manage anyone. These are senior prosecutors
4 who are given a task to do. They are given
5 tools to achieve it by, they are given training,
6 they have experience, there are protocols, there
7 are guidelines, there are policies and there are
8 accountabilities.

9 So within the Department of Justice, it's
10 fair to say that Mr. Whitley had certain
11 responsibilities and he was accountable to the
12 Deputy Minister. Messrs Miller and others in
13 the directors positions had certain
14 responsibilities and were accountable to
15 Whitley. Senior prosecutors had
16 responsibilities on a case-by-case basis and
17 they were accountable to either Miller or
18 Whitley.

19 Now, on the issue of is there some
20 confusion between Miller on the one hand and
21 Whitley on the other in terms of
22 Mr. Dangerfield, for instance, and I'm speaking
23 from a departmental point of view. There is
24 some evidence before you that, generally
25 speaking, he would report to Whitley and not to

1 Miller. But Dangerfield's evidence, as I have a
2 note of it in this particular case, is that he
3 in fact had been told to report to Miller in
4 this case. And so whether that reporting
5 mechanism that there seemed to be an exception
6 or a difference for Dangerfield in reporting
7 directly to Whitley in some of the cases, that
8 doesn't appear to apply in this particular case
9 or be a contributing factor at all because of
10 that difference.

11 I pointed out in the list of issues that I
12 wanted to touch on, the issue of reliance again
13 is number 7. And again, that's the Granger,
14 that's the concept we had already talked about.
15 There has to be, and I won't use the person's
16 names but there has to be an ability on the
17 people in an organization to rely on those who
18 report to them to do their job and to do the job
19 in accordance with policy and practice and so
20 on.

21 As Mr. Whitley said and Mr. Tapper
22 emphasized, that doesn't mean that the buck
23 doesn't stop up at the top. But that's a
24 different issue. But that's how Departments of
25 Justice are structured, too. It is management's

1 function to provide the necessary tools to get a
2 sense of culture to ensure policies and
3 practices are consistent or ahead of practices
4 elsewhere. And Manitoba has a relatively good
5 record in that regard, particularly in recent
6 years.

7 But to consider it in terms of the
8 definition of misconduct, which I have here as
9 number 9, I think the definition of misconduct
10 that is being suggested to you is the definition
11 that came out of the tainted blood case. The
12 tainted blood case of course was a federal
13 inquiry. And I've given you in the outline the
14 inquiries at section 6 that applied to that,
15 specifically that commissioner was appointed to
16 investigate and report on the state management
17 of the business or any part of the business of
18 the department, and then also on the conduct of
19 any person in it. And so there is a specific
20 mandate under the legislation which, I
21 respectfully submit, differs somewhat from the
22 current circumstance. And so when one comes
23 back to misconduct, I think it would be
24 inappropriate to use the definition of
25 misconduct insofar as it refers to bad

1 management to apply it to the department.

2 THE COMMISSIONER: I agree.

3 MR. OLSON: I have acknowledged there is an
4 apparent breakdown of communications and I won't
5 dwell on that. But everyone agrees or appears
6 to agree as to what the appropriate practices
7 and the disclosure obligations are and were at
8 the time. There is no material difference in my
9 respectful submission.

10 And so even if there were some departmental
11 concerns that otherwise could be looked at, the
12 issue is not what the obligations were or what
13 the practices were. To the extent that there is
14 any concerns on some of these issues, they
15 ultimately become individual in nature and not
16 organizational or not, accordingly, a structural
17 issue in my respectful submission. That goes to
18 whether it was disclosure or whether it was
19 practices that were being followed and so on.

20 The agreements not to charge or the
21 arrangements not to charge Zanidean or promises
22 of immunity, everybody agrees what you should do
23 if they exist. Everybody agrees that the
24 substance of the witness protection
25 arrangements, whatever they are, again should be

1 disclosed without identifying the location.

2 On the arrangements that Zanidean not be
3 told, there is a denial of course by and on
4 behalf of Mr. Miller that it was his proposal
5 Zanidean not be told. But again, what we're
6 talking about is not the proper procedure
7 because everyone, unfortunately Mr. Miller is
8 isn't here to respond for himself, but everybody
9 agrees that's not how you would do it. So
10 again, not a structural or departmental issue.

11 The Quinney letters in respect to the first
12 one, Mr. Commissioner, Dangerfield says he
13 didn't receive it. I leave aside whether he did
14 or didn't. That's something for you to
15 determine and consider. But if you had a
16 different structure and you reported to somebody
17 else or somebody else sent him the memo,
18 presumably his answer will still be the same. I
19 didn't receive again. So again, it's not an
20 organizational or accountability or reporting
21 mechanism. There is a different breakdown here
22 if there was a breakdown.

23 I have referenced the Crown Attorney's Act,
24 Mr. Commissioner, only to point out to you, as
25 you well know, Crown Attorneys are agents of the

1 Attorney General appointed under that Act, and
2 have the independence as agents and authority of
3 the Attorney General in conducting these cases.
4 But having said that, they are not free of
5 course to conduct themselves in law,
6 irrespective of whatever the law practice or
7 general guidelines or policies may be. So it
8 again cannot be a structural or departmental
9 issue if one or more of them have failed to
10 comply with practices or guidelines and you make
11 such a finding.

12 And ultimately, of course, there is an
13 accountability up through the various
14 individuals to the Attorney General and there's
15 no disputing that.

16 I want to spend just a couple of minutes on
17 culture and accountability which has been
18 referenced by Mr. Lockyer principally. I
19 earlier referred to Mr. Whitley making reference
20 to the fear that he sees in prosecutors. The
21 page reference for that in Whitley's evidence,
22 you don't have to go to it, Mr. Commissioner, is
23 4694 through 4696.

24 And with that as a backdrop, you should
25 consider the various submissions made by

1 Mr. Lockyer as to the necessity for a culture
2 change or some fundamental breakdown in the
3 culture of the department that persists up to
4 the current date, which is essentially his
5 submission to you. There is no suggestion, as
6 he suggested to you, that some six Crowns failed
7 to fulfil their job responsibilities lasting up
8 to several years ago. Just inappropriate and
9 unfair to put people who have more recent
10 connection or in the case of one who barely
11 touched the paper and did exactly what he should
12 have done into that category and make those
13 submissions in support of a cultural problem.

14 Dealing with Mr. Schille, Mr. Lockyer tried
15 to make a big point about Mr. Schille's evidence
16 to the extent that he had done his review
17 without talking to people, investigating people
18 and how that was somehow reflective of a
19 culture. One has to be fair about this,
20 Mr. Commissioner.

21 What he was asked to do was do what we call
22 a paper review, a file review. And that's what
23 he did. We can argue in retrospect that
24 something different should have been done but it
25 is not reflective in any way of any cultural

1 issue to say that Mr. Schille should have done
2 something different than what he was asked to
3 do.

4 Mr. Lockyer also suggested that there must
5 have been a decision made to not disclose
6 letters at the highest level. That's that black
7 hole concept that I referred to earlier.
8 There's absolutely no basis for that suggestion,
9 Mr. Commissioner, in my respectful submission.
10 If there is a problem, and there certainly is in
11 some respects, it was a failure to communicate
12 or individual breakdown. But no one can
13 seriously believe that everybody back in the
14 year 1990 through '93 got together and conspired
15 to not make disclosures or to conduct themselves
16 in the way they did and form a common bond to
17 thereby prevent Mr. Driskell in getting full
18 disclosure. And to take that through and say
19 and it's still here 13 years later is to ignore
20 the evidence of Mr. Whitley, who is independent
21 from Manitoba on these points, despite the fact
22 that Mr. Lockyer relies on Mr. Whitley for other
23 purposes, look at Mr. Whitley's evidence.

24 He didn't suggest that the fear of
25 prosecutors applied to Manitoba. That's at

1 4696. Look at his evidence at 4782 to 84 of his
2 evidence, 4792, 4794 and 4796, and you will get
3 the clear and accurate perception of the only
4 evidence before you which is Manitoba is doing
5 exactly what, in Whitley's view, should be done
6 to ensure, as best a department can, that the
7 culture is appropriate and in fact Whitley used
8 words such as envious and so on.

9 That's the evidence before you. And in my
10 respectful submissions, the Department of
11 Justice has fulfilled its responsibilities in
12 this matter. Unless you have any questions,
13 those are my submissions.

14 THE COMMISSIONER: No, I do not. Thank you very
15 much.

16 MR. WOLSON: I know there's seven minutes left
17 but I'll reserve, if you'll allow me, until two
18 o'clock.

19 THE COMMISSIONER: Just remember, Mr. Wolson,
20 the biblical expression that "The last shall be
21 first and the first shall be last." We will
22 adjourn.

23

24 (Proceedings recessed at 12:16 p.m. and reconvened at
25 2:00 p.m.)

1 THE CLERK: All rise. This Commission of
2 inquiry is now in session. You may be seated.

3 THE COMMISSIONER: Mr. Wolson.

4 MR. WOLSON: I am the last man standing.

5 THE COMMISSIONER: Oh, yes, you are.

6 MR. WOLSON: I have a document book which I have
7 submitted to you.

8 THE COMMISSIONER: I have it here.

9 MR. WOLSON: They are documents that you are
10 well familiar with. They can be found in a
11 variety of places throughout the books that you
12 have. But when you consider my submission,
13 you'll have them available to you in a neat
14 package, at least.

15 THE COMMISSIONER: Thank you.

16 MR. WOLSON: By way of some very brief
17 introductory remarks, the public inquiry
18 process, Mr. Commissioner, is a very Canadian
19 process. And there is none more important
20 inquiry than one that looks into the fairness of
21 the trial process. It's paramount that
22 Mr. Driskell received a fair trial.

23 The process, if it's to work, needs at
24 least three ingredients. One, Commission
25 Counsel who is able and with a very strong work

1 ethic. And in that regard, with your two
2 counsel, you've been very well served.

3 It requires counsel, the rest of us, to
4 make sure that we use the time appropriately and
5 deal with the issues succinctly and wisely. And
6 I think all counsel have done that in this
7 group, and I've enjoyed working with them.

8 The joke, of course, is that when there is
9 seven minutes left you call on Wolson, but
10 that's a proper use of time. And at the end of
11 the day, I think it can be said that we've used
12 time wisely in this case.

13 And lastly, and most importantly, sir, it
14 requires a commissioner like yourself who
15 instills in the public a level of confidence by
16 the approach that you've adopted, fair, firm and
17 with a human touch. It's a pleasure to have
18 appeared before you over the last number of
19 weeks. I know it's late in our respective
20 careers, but I hope that I have the opportunity
21 again in the near future.

22 On a personal note, sir, I am indebted to
23 my colleague, Miss Wolson, for her great efforts
24 and assistance. She has provided me with her
25 time and her dedication and it's been

1 invaluable. On a professional note, I couldn't
2 have done this without her. But on a personal
3 level, the pride that I have, and I know that it
4 is shared with my colleague of a similar name,
5 Mr. Olson, the pride that we both have in
6 working with our respective colleagues is
7 immense.

8 This inquiry is hindered by the passage of
9 time. A decade and a half time has eroded
10 memories, understandably so. And we have lost
11 an important person in this inquiry, in this
12 investigation, that is we've lost Mr. Bruce
13 Miller. I can say of Bruce Miller, he was
14 admired by all, certainly by me. I knew him
15 very well as a person, as a prosecutor and as a
16 judge. And I'm sure if he were here today, he
17 would do the right thing, as he always did.

18 I have no doubt, and I'll make this
19 submission to you this afternoon, that he was
20 well aware of the circumstances of Swift
21 Current. I think the documents tell us that.
22 But I know, as well, that he would have done the
23 right thing and ensured that all that was known
24 to him was passed on to Mr. Dangerfield. And I
25 can demonstrate that in my submission to you.

1 While fairness to Mr. Driskell is of
2 paramount concern, there are a number of
3 witnesses here who have come before you, all
4 with sterling reputations, all solid people.
5 And I know that it's not easy to -- it's not an
6 easy task at all to make findings that affect
7 the reputations of good people, of solid people.
8 My concern, of course, is for Tom Anderson and
9 Al Paul. They have taken a number of unfair --
10 or they have been the subject of a number of
11 unfair shots, unjustifiably so, and I hope to
12 set the record straight in my submission to you.

13 I'm reminded of the submission of
14 Miss Carswell when she urged you in assessing
15 the circumstances of 15 years ago that you do
16 not apply today's standards, but those that
17 existed at the time. And what did we know at
18 that time? We knew that Stinchcombe had just
19 been pronounced. And there was resistance to it
20 from some prosecutors. Mr. Whitley told us
21 that.

22 We know, as well, and Mr. Whitley alluded
23 to this, that there was a problem, a perception
24 that the Crown and the police were too close.
25 And that's of critical importance to you in

1 assessing the conduct of the police officers
2 here involved. There was a trust, a trust
3 between Tom Anderson and Al Paul, Bruce Miller.
4 They didn't have to write down the results of
5 discussions that they had with their trusted
6 colleague. Mr. Abra has criticized the fact
7 that there have been no notes by Tom Anderson as
8 to his dealings with Bruce Miller. I wouldn't
9 expect that there would be at that time. You
10 know, those days, in many respects, were much
11 better days. Now we are always looking over our
12 shoulder. We put everything down in writing.
13 It's a practice of law today that so is so much
14 different than it was in those days.

15 And the third factor that you must consider
16 is that witness protection issues and the
17 Witness Protection Program was a new issue for
18 those involved in this case. Tom Anderson had
19 not dealt with it before. They did not have the
20 benefit of precedent.

21 Well, one of the central issues in this
22 inquiry, sir, is whether Sergeants Paul and
23 Anderson withheld evidence from the Crown by
24 failing to keep adequate notes and produce
25 reports for the Crown. You will recall on

1 October 10, 1990, the second meeting with
2 Zanidean, Anderson and Paul:

3 "Zanidean spontaneously uttered a remark
4 that he may have credibility issues and
5 that he had committed an arson in Swift
6 Current with Driskell."

7 You will see that in the notes of Al Paul contained
8 in tab 1 of the book of authorities. And I don't
9 know if it's been marked as an exhibit.

10 THE COMMISSIONER: No.

11 MR. WOLSON: Perhaps it should be marked, in
12 terms of an exhibit on submissions, simply so
13 that the record will demonstrate that a book was
14 filed?

15 THE COMMISSIONER: I have not filed as exhibits
16 or have not had any of the other submissions
17 noted or marked as exhibits.

18 MR. WOLSON: All right.

19 THE COMMISSIONER: So we won't mark it, but the
20 record will show that you have tendered one.
21 And this document you refer to is, of course, an
22 exhibit.

23 MR. WOLSON: Zanidean had indicated that there
24 could be a problem, as I noted, with his
25 credibility in court.

1 THE COMMISSIONER: Perhaps I just -- perhaps I
2 may not have expressed that appropriately. But
3 what you have contained in your submission, each
4 of those tabs represents something that has been
5 filed as an exhibit?

6 MR. WOLSON: That is so.

7 THE COMMISSIONER: Right.

8 MR. WOLSON: "Zanidean stated on that
9 October 10th date that there could be a
10 problem with his credibility in that Jim
11 and he got involved in something this past
12 summer in Saskatchewan. We blew up a house
13 in Swift Current, a relative's place."

14 And then there was a little more conversation. And
15 at this time Sergeant Paul informs Zanidean that
16 they, the police, will make inquiries in
17 Saskatchewan, contained in Al Paul's notes, and told
18 him not to discuss the matter further, read him his
19 rights and told him that he may be charged. That's
20 the first utterance by Zanidean regarding the Swift
21 Current arson.

22 Then on the 29th of October, in Anderson's
23 notebook, tab 2, after Anderson had attempted to
24 reach Swift Current, Saskatchewan, you will
25 recall that he phoned Swift Current. He found

1 out that Burton was the officer in charge of the
2 investigation, but couldn't speak to Burton. In
3 an interview with Zanidean, he asked Zanidean:
4 What was behind the Swift Current arson?
5 Zanidean replied: Revenge, as he thought that
6 his sister did not have insurance. Anderson
7 told Zanidean that the Winnipeg Police Services
8 had notified Swift Current they are
9 investigating. We can't help you. Zanidean
10 said: I will just have to suffer the
11 consequences, at which point Tom Anderson told
12 him: That's right, you will.

13 While these notes are in the notebooks, the
14 10th of October's admission in Al Paul's, the
15 29th in Tom Anderson's, there are no
16 corresponding supplementals. Detective Anderson
17 testified, corroborated by Al Paul, that they
18 intended to prepare a report to an outside
19 agency. But as the matter unfolded, regarding
20 the phone calls to Swift Current and Burton,
21 that became unnecessary.

22 But I submit to you, the fact that there
23 are no supplementals is not determinative of
24 disclosure to the Crown. It's clear that there
25 was disclosure from Anderson and Paul to

1 Vandergraaf, acknowledged by Vandergraaf; to
2 Randy Bell, who was not called as a witness; and
3 to Bruce Miller, who sadly, as I've noted,
4 passed away at a very young age. There was
5 reference made by Vandergraaf and others that at
6 that time verbal communications were often
7 resorted to, verbal disclosures.

8 Before I review with you the evidence at
9 this inquiry that the Crown was clearly aware of
10 these utterances by Zanidean, there is an issue
11 that must be addressed. You must ask yourself,
12 I submit to you, why would Tom Anderson, Al
13 Paul, why would they withhold information from
14 the Crown? You recall my friend, Mr. Abra,
15 urged that you so find. What motive could they
16 have for doing that?

17 Let's examine the circumstances that
18 existed to see whether or not there would be
19 some kind of reason or motive to withhold this
20 information from the Crown. These comments were
21 put in the notes: October 10th, Al Paul's,
22 October 29th, Anderson's.

23 Secondly, Paul and Anderson were both
24 subpoenaed. You will recall, although only Paul
25 testified, they both thought they were going to

1 be witnesses. Paul, when he was subpoenaed,
2 produced his notes for the Crown. The Crown had
3 his notes after the 17th of May, which was his
4 final note. When Paul testified, he put his
5 notes up on the dais. While he only testified
6 to distances, his notes were there.

7 Mr. Brodsky could have asked him anything
8 about his evidence. He could have viewed his
9 notes. The point being, when you are going to
10 be a witness, and you have in your notes matters
11 that are discloseable, you disclose them.
12 Because, otherwise, Mr. Brodsky may have found
13 them. By rummaging through the notes, he may
14 have found them. These officers are intelligent
15 people. They told Vandergraaf, Bell and Miller.
16 Miller, obviously, knew about Swift Current
17 because he was ultimately dealing with Kovnats.

18 The Winnipeg Police Service put details of
19 Swift Current in the witness protection
20 application, Tab 3, before you. They actually
21 put the disclosure:

22 "In the course of interviewing Zanidean
23 regarding his knowledge of this murder, he
24 informed us that he and Driskell had
25 travelled to Swift Current to burn his

1 sister's home."

2 If you are going to hide that from the prosecution,
3 you are not going to be putting it in an application,
4 an application that Orr, Sergeant Orr, would have
5 seen. And you will recall that Orr was in close
6 contact with Bruce Miller.

7 "Anderson phoned Swift Current to advise
8 them of the revelations."

9 If you are attempting to conceal matters from the
10 Crown, you don't put them in your notes and in a
11 witness protection form application. You don't phone
12 Swift Current.

13 Now, it was obvious, at a point, that Greg
14 Brodsky was in the most informed position
15 regarding Swift Current and the arson because he
16 had his client to brief him. And you will
17 recall the evidence of Anderson. At one point,
18 it was clear to Anderson that Mr. Brodsky's
19 private investigator, Savage -- you will find
20 that in volume 11, page 2364, that:

21 "Savage was in Swift Current investigating
22 the arson for Mr. Brodsky."

23 Anderson testified in the same volume, volume 11,
24 just a little bit further down on that page, that he
25 expected Greg Brodsky to raise Swift Current in the

1 cross-examination of Zanidean. So in this situation,
2 utterances were made. You have put them in your
3 notes. You have put them in a witness protection
4 application. You've told a number of people. And
5 you know that Mr. Brodsky is aware of the Swift
6 Current incident, and you know that Brodsky is going
7 to cross-examine on it. So why would you try to hide
8 this from the Crown? It's going to come out. It can
9 only have a harmful effect on the prosecution. There
10 is no upside. It would be, without question, a
11 greater problem to withhold it from the Crown than to
12 disclose it. It would be potentially to sabotage the
13 case.

14 Now, before I review the evidence tending
15 to demonstrate the Crown's knowledge through
16 disclosure from Anderson and Paul, I would like
17 to deal with first the October and then the
18 April phone calls between Anderson and Burton
19 and then later the July phone call.

20 I turn to the phone call between Anderson
21 and Burton, the October phone call. There is a
22 dispute as to the outcome of the call. Now, I
23 recall, quite vividly, when I was
24 cross-examining Burton, and I must tell you that
25 it was a very difficult task. This is a man

1 that was in stone. I remember saying to him at
2 one point, after a lengthy series of questions,
3 I said: Well, but your brother RCMP officers,
4 and his response was: But I don't have any
5 brothers. And it just struck me that this was a
6 man that was going to give you nothing.

7 Now, I remember you sort of nudged me along
8 as I was cross-examining Mr. Burton. And at one
9 point you said: I don't know, you know, how
10 much will turn on the exact -- the nuances of
11 their discussions. And I think Mr. Code has
12 made a similar submission to you, in his very
13 fair submission, that he did make the other day,
14 but I think it goes a little further than that.
15 And my good friend, Mr. Gates, hit the nail on
16 the head in his submission to you when he says
17 it's about credibility. And I think he is
18 right, it is about credibility. Because right
19 off the bat, there are credibility issues
20 between Burton and Tom Anderson.

21 And I submit, as strongly as I can to you,
22 that Tom Anderson was being truthful in every
23 regard. Now, Anderson's version of events is
24 set out at tab 4, his memo to Johns. Now,
25 that's back in 1991, absolutely made not in

1 anticipation of an inquiry, made because of an
2 allegation by Swift Current that Anderson wasn't
3 being cooperative in the investigation.
4 Anderson phoned Burton. Anderson says that
5 Burton volunteered to withdraw the prosecution
6 of Zanidean or the pursuit of Zanidean until
7 after Zanidean testified at the trial. Burton's
8 response, you'll remember, no such thing. He
9 never volunteered that, did not withdraw the
10 prosecution of Zanidean at that time.

11 And you'll find at tab 5, and tab 5 is the
12 document prepared -- the memo prepared by
13 Officer Burton. This is Burton's recollection
14 of it, or recount of it, at page 2 of tab 5.
15 And he is commenting on Anderson's phone call
16 where Anderson says that Burton volunteered to
17 withdraw the pursuit until after -- after
18 Zanidean testified. This is his note:

19 "As a matter of logical deduction, one
20 would have to wonder why I would offer to
21 delay our pursuit of Zanidean on the arson?
22 I had no knowledge of the circumstances of
23 the murder, would have no idea that
24 pursuing him would jeopardize their murder
25 prosecution."

1 So that's his position. Let's take a look
2 at that from the point of view of credibility.
3 And Burton, in his statement to your counsel --
4 I didn't put that in my book of materials, but
5 in his statement to Mr. Code said that it was
6 Anderson that asked if Swift Current would
7 withdraw the prosecution or the pursuit of
8 Zanidean. And he said that, of course, he would
9 have to run that up the chain of command.

10 So Anderson's position is clear, Burton
11 volunteered to withdraw pursuit of Zanidean
12 until after his testimony. Burton, no such
13 thing. He would take Anderson's request to his
14 superiors. And Burton tells Commission Counsel,
15 in the statement that he gave to him, that that
16 call, the October call, immediately aroused
17 Burton's suspicions of Anderson. Now, that's
18 important when you look at all of the facts. In
19 other words, they have a difference. There is a
20 difference. And Burton is immediately
21 suspicious of Anderson.

22 Now, as to the outcome of the call and the
23 credibility issue, your counsel has fairly said
24 that you can accept Anderson's position. And I
25 don't have to repeat what he said, except that I

1 go a little further. Mr. Code pointed out to
2 you the Hall and Ewatski report, tab 6 of my
3 materials. If you take a look at tab 6,
4 Mr. Commissioner, an excerpt from Hall and
5 Ewatski, the bottom of page 76. When Hall and
6 Ewatski go to Swift Current, they have more of
7 the file than we have. According to the RCMP
8 file, on 90/10/27:

9 "Anderson spoke with Burton, advising him
10 that Zanidean had admitted to the arson.
11 He was also advised that Zanidean was a
12 witness in the execution of Harder and was
13 asked if the RCMP would keep this
14 information confidential and hold off their
15 pursuit of Zanidean, as it would endanger
16 the Driskell prosecution."

17 Now, if you wouldn't mind highlighting the next
18 sentence:

19 "It is indicated that Burton would agree to
20 this, but that he would proceed against
21 Zanidean when the murder trial was
22 concluded."

23 And then if you take a look, if you cross-reference
24 that, if you keep your finger on that and just go
25 back to page or to tab 5, what he says is -- he says

1 in tab 5 exactly what Hall and Ewatski have, but he
2 leaves out -- he leaves out that last line of the
3 Hall and Ewatski. He leaves out, at page 77, line 2:
4 "It is indicated Burton agreed to this but
5 that he would proceed against Zanidean when
6 the murder trial was concluded."

7 So there is a deliberate effort here to withhold
8 information from a report that Burton made. So much
9 for Burton stating to Commission Counsel that he did
10 not agree to withdraw the pursuit of Zanidean, that
11 he was suspicious of Anderson from the outset. This
12 was an intentional act of Burton to leave out a
13 critical point. He, obviously, had to run it up the
14 chain of command, and he didn't. He, obviously,
15 agreed to withhold the pursuit of Zanidean, and he
16 shouldn't have.

17 Now, the RCMP file is no longer in
18 existence. But it was in existence when Burton
19 wrote his tab 5 report. It's obvious that the
20 October 27th note of Hall and Ewatski was
21 totally ignored, the note that they saw in '93,
22 the note that was in existence when Burton wrote
23 his notes. It was intentionally left off. And
24 you must ask yourself the question: Why would
25 he do that? The question as to why he would do

1 that, in my view, it's an act of dishonesty. It
2 puts a shadow of darkness over his evidence. In
3 my view, he should not be believed on issues of
4 credibility throughout.

5 Now, the second call, the April 5th call,
6 there is not a great difference of accounts of
7 Anderson and Burton. Except that Burton said he
8 would have to run it up his chain of command,
9 which, in my view, he didn't do again, because
10 you'll recall the tab 4 account of Anderson.
11 And, by the way, the tab 4 account of Anderson
12 and the April 5th call is a very similar account
13 to Orr's parallel approach. You will recall
14 the -- at tab 4, this is the Johns material. At
15 tab 4, page 2, Tom Anderson puts forth his
16 account of the April 5th call. In the third
17 paragraph, in the middle:

18 "I explained the dilemma."

19 "The dilemma", of course, being that Tom Anderson was
20 told, he says -- and I'll deal with that in a
21 minute -- that you couldn't get into the Witness
22 Protection Program if you had an outstanding
23 allegation or an outstanding investigation. So he
24 says:

25 "I explained the dilemma."

1 And that was the dilemma.

2 "And I believe we had already talked to
3 Corporal Orr. In any case, he had given
4 the matter some thought, and he offered to
5 withdraw their pursuit from Zanidean
6 entirely."

7 He didn't run it up the chain of command, as he told
8 you in this inquiry that he would have to do, if you
9 accept the position of Tom Anderson. As I recall,
10 your counsel does, in his submission to you. And if
11 you accept that, he didn't do it again, that is he
12 didn't run it up the chain of command.

13 And you'll recall the parallel approach
14 where Tom Anderson testified before you that he
15 wanted Orr to contact Swift Current as well.
16 You will recall him saying that it was one thing
17 for the City of Winnipeg Police to deal with
18 Swift Current, but it was a better route if RCMP
19 would deal with RCMP. So you recall that he
20 asked Orr to call Swift Current as well. And
21 you'll recall that Orr did call Swift Current.
22 The excerpt can be found at tab 7 of my
23 materials. 91/04/12, at 10:55 the note was
24 made. And I know that Mr. Code was critical of
25 Mr. Orr's note-taking. And I agree with

1 Mr. Gates that it would be nice to have more,
2 but at least Orr was making notes on a
3 contemporaneous basis.

4 "I called Swift Current detachment.

5 Further to my call on the 4th of April..."

6 So he called on the 4th of April, the day before Tom
7 Anderson called, and spoke with Burton.

8 "At that time, I spoke to second-in-command
9 Upton and explained the situation regarding
10 Zanidean as per part 7."

11 I have discussed Part 7 with you already.

12 "Zanidean and Driskell were probably
13 responsible for burning of Zanidean's
14 sister's garage. Upton explained he would
15 have Burton, who was the file investigator,
16 call me."

17 So what must have happened is that Upton, after
18 talking to Orr, talked to Burton and apprised him of
19 the fact that he got a call from Orr. Orr says:

20 "As there was no call, I would call back."

21 Now, this is on the 12th:

22 "I talked to Upton again."

23 So Upton, by this time, had obviously talked to
24 Orr -- obviously talked to Burton, I should say.

25 "Swift Current would be concluding their

1 file and Ray Zanidean is no longer wanted
2 for questioning."

3 So that's the parallel approach that we know
4 corroborates the version of events of Tom Anderson.
5 And while the accounts are similar, Burton's and
6 Anderson's, Anderson now twice has not run the matter
7 up his chain of command, as he would have to do. And
8 that, in my view, plays well into the July phone
9 calls.

10 Now, there is an issue about the Witness
11 Protection Program and whether or not it's a bar
12 or a problem to get into the program if there is
13 an outstanding allegation. Now, you have heard
14 the evidence of Tom Anderson where he said that
15 he was told by Orr that it was a bar. Thus the
16 dilemma, thus the explanation to Burton when he
17 called him on the 5th of April.

18 But I would ask you to look at some of the
19 other witnesses, at what they had to say. David
20 Kovnats, in my cross-examination of Kovnats,
21 Kovnats said he was told by Orr that an
22 outstanding charge would not allow Zanidean to
23 get into the Witness Protection Program. So Orr
24 has told that to Kovnats.

25 You recall the evidence of Staff Ferguson,

1 who said he was of the view -- he doesn't know
2 who told him that, but he was of the view that
3 an outstanding charge would be a bar.
4 Vandergraaf told you that. Al Paul told you
5 that. Chief Ewatski told that you. So there
6 are a number of people who support the
7 proposition. Not all heard it from Orr, but at
8 least two did. At least we know that Tom
9 Anderson heard it from Orr and David Kovnats,
10 that this was the dilemma that caused the
11 April 5th call.

12 So you have the October and April calls.
13 The October call, it's clear the pursuit of
14 Zanidean would be withdrawn until after the
15 trial. It's clear that Burton had, in my view,
16 falsified a report. And the April 5th call that
17 the pursuit would be entirely abandoned of
18 Zanidean, as confirmed by Anderson, Orr and
19 their parallel approaches.

20
21 In determination of these issues, I think
22 the tab 4 document of Tom Anderson is very
23 helpful. Now, keep in mind, as I've said
24 before, that the tab 4 memo to Johns was not
25 about disclosure, that wasn't the issue. The

1 issue was an alleged lack of cooperation from
2 Anderson to Swift Current in their pursuit of
3 Zanidean, that was the issue. Now, we don't
4 have the document of complaint, but clearly
5 Swift Current didn't care about disclosure to
6 the Crown in Winnipeg. That clearly wasn't
7 their matter to consider and not, certainly,
8 within their jurisdiction at all. It's written,
9 in October of '91:

10

11 The first page of that document, paragraph
12 4, Anderson talks about the October 10th
13 revelation by Zanidean.

14 "On the second day of our involvement with
15 Zanidean, 10 October '90, he revealed to us
16 that he felt his credibility as a witness
17 may present a problem, as he had committed
18 arson in Swift Current with the assistance
19 of James Driskell. He indicated that this
20 was revenge against his sister. Sergeant
21 Paul read him his rights, cautioned.
22 Zanidean declined to discuss the matter
23 further. Although he never requested
24 immunity, it was explained to him that he
25 could not expect assistance from us with

1 respect to the matter. We also advised him
2 that we intended to notify Swift Current."

3 But this is the critical part now:

4 "Sergeant Paul and I immediately notified
5 23 Division, Inspector Randy Bell, the
6 officer in charge of the investigation,
7 Staff Sergeant Vandergraaf and later Crown
8 Attorney Bruce Miller."

9 Well, why would Anderson say that in 1991 if it
10 weren't true? You know, Johns could have gone to
11 Miller and said to Miller: You know, I've got this
12 memo from Anderson. This is what he says. You would
13 be a fool to falsify something. Anderson's no fool.
14 Now, if this document had been prepared on the eve of
15 an inquiry, you may be suspicious of it. But this is
16 a '91 document.

17 Keep in mind Mr. Miller's position when he
18 met with Hall and Ewatski, tab 8, page 81 of the
19 homicide report.

20 "Miller told us he was satisfied that he
21 and his prosecuting attorneys had been
22 fully advised of all aspects of what
23 Zanidean had told police investigators
24 during their investigation, including his
25 involvement in the arson."

1 That's very specific. Well, the only things that
2 Zanidean told the investigators about the arson were
3 the October 10th revelation and that on the 29th.
4 And it's obvious from this that that was passed on to
5 the prosecuting attorney, George Dangerfield.

6 "Miller told us he was satisfied that he
7 and his prosecuting attorneys..."

8 No inference is needed. That's out of the mouth of
9 Bruce Miller. And as I commenced my submission to
10 you, he would do the right thing. He would pass it
11 on.

12 Recall the evidence of Chief Ewatski, as he
13 testified before you, sir, volume 15, page 3490,
14 when he said:

15 "I certainly have a strong sense that
16 Mr. Miller was certainly aware of all of
17 the details of the Swift Current file."

18 Now, I know that Mr. Olson submitted to you this
19 morning that you have to be a little careful about
20 this internal investigation of Ewatski's because he
21 is dealing with members of his own force. Now,
22 you'll recall my cross-examination of Jack Ewatski.
23 I started by saying, sir:

24 "We're often on opposite ends of an issue",
25 and we are. One thing Jack Ewatski can say from his

1 record, and he said it in this inquiry, is that he
2 demands accountability of his members. Myself acting
3 for members, we are often at odds, Chief Ewatski and
4 myself. And, remember, Chief Ewatski is the one that
5 conducted or had an inquiry conducted into the
6 Sophonow matter and declared that his members, not
7 the ones involved in this case, but his members had
8 made critical errors and were at fault in the
9 wrongful conviction of Thomas Sophonow. So the man
10 has a record, Chief Ewatski does. And I'm not in his
11 corner very often. I'm not in his corner today. But
12 I do point out to you that he has testified. And he
13 has a record of two things, wanting his members to be
14 accountable and transparency. So when he conducts an
15 internal review, as he did here, I expect that if he
16 found matters untoward, the chips would fall as they
17 may.

18 You'll recall the basis for the review, the
19 inquiry. Hall and Ewatski wanted to see -- they
20 were commissioned to see whether or not members
21 of the Winnipeg Police Service withheld evidence
22 from the prosecution. Further, when he, Miller,
23 had talked about he and his prosecuting
24 attorneys had been advised of the arson
25 admissions of Zanidean, you'll recall Ewatski

1 noted that he, in his later interview with
2 Dangerfield, said that he believed that he and
3 Lawlor were aware of all aspects of the
4 investigation.

5 Now, we know about Mr. Dangerfield's
6 knowledge of Swift Current. We know that
7 because of the pre-trial. Mr. Olson submitted
8 to you earlier today that it may well be that
9 the knowledge of Swift Current came from the
10 body tapes, the body pack tapes that were worn.
11 But if you look at the language used in the
12 pre-trial, it's clear that it didn't come from
13 that source.

14 In Brodsky's memo:

15 "They advised that Zanidean probably set
16 this fire. Crown makes the point that RCMP
17 in Swift Current were notified of the
18 involvement of Zanidean."

19 Well, where would that come from? It had to come
20 from one of two sources. It had to come from the
21 Winnipeg Police, Vandergraaf or Tom Anderson, or it
22 had to come from Miller. But in either instance, you
23 would find that the Crown has been informed. Because
24 that's exactly what happened on the 10th of October,
25 the Winnipeg Police officers, Anderson and Paul, said

1 they would notify Swift Current. And that's when
2 Dangerfield or Lawlor, in Dangerfield's presence, was
3 saying at the pre-trial.

4 So when you look at what was known by the
5 parties involved or known about the oral
6 admission of Zanidean from Part 7 of the witness
7 protection application, Vandergraaf knew. Bell
8 knew. Miller knew, by his own admission to Hall
9 and Ewatski. Dangerfield knows. You see that
10 from the pre-trial before Justice Morse. All
11 well before the trial.

12 Now, it would be much better if there had
13 been a supplemental prepared. And I remember
14 the words of Tom Anderson, and I'm paraphrasing
15 now, he said: Had I not been so naive at the
16 time, I didn't expect Bruce Miller to pass away.
17 I didn't expect these issues to arise. He was a
18 fairly young detective. It would have been a
19 lot better if it was put in document form. But
20 it's clear that those that had to know knew.
21 It's absolutely clear.

22 And there's more. I go back to tab 4 for a
23 few minutes. Page 2 of tab 4, in the third
24 paragraph when the April 5th call is discussed,
25 at the bottom of that paragraph:

1 "It's clear that following the
2 conversation, Paul and I..."
3 meaning Anderson,
4 "...and I notified Inspector D. Johnson..."
5 that's D.K. Johnson, who wasn't called,
6 "...Staff Sergeant Vandergraaf and Attorney
7 Bruce Miller."
8 Now, again, why would that be in there if it weren't
9 true? It is made at a time when, if it were given to
10 Miller, he could say: It's not true, if it weren't
11 true. It's made at a time when there was no reason
12 for Tom Anderson to say this if it weren't so. And
13 the words should always be present in your mind when
14 you consider the disclosure, the words uttered by Mr.
15 Miller by Hall and Ewatski that he and his
16 prosecuting attorneys had been fully advised. So all
17 of the key players know about the oral statements of
18 Zanidean to Paul and Anderson and the October and
19 April calls between Anderson and Burton.
20 If you look at the pre-trial memo of
21 Mr. Brodsky, April -- the May 24th memo, the
22 third paragraph:
23 "They are not prepared to involve
24 themselves in Swift Current fire. That's
25 another police force."

1 Now, just -- and I'll come back to this. But on one
2 of the disclosure issues, Mr. Commissioner, you'll
3 recall there was a comment that the Winnipeg Police
4 Force had nothing on Swift Current. Well, this is
5 evidence to the contrary that Mr. Dangerfield and
6 Mr. Lawlor know and that Mr. Brodsky knows, because
7 it says:

8 "They are not prepared to involve
9 themselves in the Swift Current fire. It's
10 another police force. The RCMP were
11 advised, according to Dangerfield and
12 Lawlor, by Lawlor, in Dangerfield's
13 presence, in the office of Mr. Justice
14 Morse, that Zanidean probably set this
15 fire. The RCMP chose to do nothing about
16 it."

17 And then you have the next memo a little further on
18 in that tab, Brodsky's May 27, '91 memo. The second
19 paragraph, first page of that May 27th:

20 "The Crown makes the point that the RCMP in
21 Swift Current were notified of the
22 involvement of Zanidean, and it's up to
23 them to pursue or not pursue the
24 investigation."

25 It's pretty clear that the Crown knows that the

1 Winnipeg Police have something on the arson and that
2 they were notified, Swift Current was. It is pretty
3 clear.

4 It's interesting that when Staff Sergeant
5 Vandergraaf testified under questioning by your
6 counsel, he describes the April 5th call this
7 way:

8 "Certainly it wasn't an immunity agreement,
9 but it was their choice to pursue this
10 situation or not."

11 And then he went on to say:

12 "I would have had discussions with
13 Mr. Dangerfield about this. As soon as I
14 was made aware of it, the trial was coming
15 up."

16 If you look at the pre-trial language that was used
17 by the Crown in these two documents at tab --

18 THE COMMISSIONER: 9.

19 MR. WOLSON: Tab 9, the language was the same as
20 Vandergraaf's language.

21 "They were told of it. It is up to them to
22 pursue it or not."

23 It's obvious, from the letters between Kovnats and
24 Miller, found at tab 10, that Mr. Miller was well
25 informed of the demands of Zanidean, including Swift

1 Current and his request for immunity. You will see
2 in that document Kovnats refers to:

3 "...outstanding matters against Ray in this
4 or another province."

5 And then I want to take you, if I can, to tab 11,
6 sir, because this deals with this so-called wall
7 between the Crowns, which I submit is silly. It's
8 nonsense and it didn't exist. Here is a memo from
9 Miller to Whitley, where Miller is saying:

10 "I am providing you with another copy of
11 this document. The matter takes on greater
12 urgency, given the facts that statements of
13 witnesses have now been disclosed to the
14 defence."

15 What there is, in my view, is a -- I see that almost
16 all of us have this bug.

17 THE COMMISSIONER: I don't know what we would do
18 without Miss Carswell. Do you get paid as a
19 paramedic as well?

20 MS. CARSWELL: Well, I feel badly. I have been
21 coughing and now I am interrupting Mr. Wolson
22 again.

23 MR. WOLSON: More importantly, she chose to
24 medicate me as well, but I chose to try to be at
25 my best when I make my submission to you.

1 THE COMMISSIONER: Well, you are.

2 MR. WOLSON: But in any event, when I look at
3 this document, it is apparent that Mr. Miller
4 knows what's happening on the file. He knows
5 that disclosure is about to be made. There is a
6 free flow of information, as I see it, between
7 Miller and Dangerfield when they had to.

8 THE COMMISSIONER: That's between Miller and
9 Whitley? I'm just --

10 MR. WOLSON: It's a memo from Miller to Whitley.
11 But, obviously, Miller knows, if you look at the
12 last couple of lines, that disclosure is being
13 made. And, obviously, disclosure is going to
14 come from Dangerfield. He is the prosecuting
15 attorney. So the point I make is that it's not
16 as if they are two distinct camps. There's a
17 flow of information.

18 Now I come, sir, to the note at tab 14.
19 Now, tab 14 is the notes -- these are the notes
20 of Sergeant Orr. And this is the so-called
21 ultimatum note that we've talked about many
22 times. And, in essence, what it is, is that
23 Kovnats has given an ultimatum to Bruce Miller
24 that unless his demands are met on behalf of
25 Zanidean, there was going to be some difficulty

1 or some problem. And the importance of that, if
2 you look on the first page of that tab, where he
3 says:

4 "Mr. Miller and I discussed a number of
5 points, including the aspect of a single
6 pay-out. I advised I would check with
7 Swift Current to see what the standing
8 was."

9 So here it is, you have Mr. Miller calling Orr
10 telling him that he was in a bit of a bind in that
11 there was this ultimatum that had been issued. Orr
12 says to Miller: I'll call Swift Current and find out
13 where it's at. Now, you would expect there are times
14 when you have to draw inferences, sir. And when Orr
15 was questioned, he concluded that he would likely
16 have told Miller the outcome of his call to Swift
17 Current because he was calling on Miller's behalf.
18 If you look at page 2 of that tab, 91/05.30 at 11:00
19 he received a call from Ross Burton.

20 "Swift Current, who advised there would be
21 no proceedings against Zanidean, either as
22 a witness or as an accused, if he is
23 accepted into the Witness Protection
24 Program."

25 It just says:

1 "...accepted into the program. At the
2 present time, they have an admission from
3 Driskell that Zanidean's sister set up the
4 arson by providing a key and suggesting the
5 B & E. She had also cleaned out the
6 valuables. This information is coming from
7 Savage, who is looking for Zanidean for
8 Driskell's lawyer. Constable Burton
9 requests the information on charges not
10 being laid against Zanidean be withheld
11 from everybody..."

12 And I question whether that's the genesis for the
13 decision not to tell Zanidean until after he
14 testifies.

15 "Constable Burton requests that the
16 information on charges not being laid be
17 withheld from everyone else, as they would
18 really like to obtain a statement from
19 Driskell and nail the sister."

20 He would have told Mr. Miller that, that's the clear
21 inference. Because he is calling Swift Current, on
22 Miller's behalf, to respond to this ultimatum.

23 There is no question that an arrangement of
24 a wall between Miller, the head Crown, and
25 Dangerfield, the prosecuting attorney, is not

1 viable at all. It can't work. It could only
2 cause injustice. And it's clear from their
3 evidence that you would expect, as Anderson,
4 Paul and Vandergraaf testified, that if they
5 told Miller information, they would obviously
6 expect that it would go to the prosecuting
7 attorneys. That's not a quantum leap. You are
8 telling the head of the department. You are not
9 telling some junior working out in Beausejour.
10 You are telling someone who is the head of the
11 department, who works in the office on the same
12 floor as the prosecuting attorney. It is clear,
13 from Mr. Whitley's evidence, that you would
14 never have an arrangement whereby the
15 prosecuting attorney would be kept in the dark.

16 Again, I recall the comments to Hall and
17 Ewatski on May 13th by Mr. Miller that he and
18 his prosecuting attorneys were fully advised
19 regarding what Zanidean told the police and that
20 there were no complaints made about disclosure.
21 Keep in mind the timing of Miller's meeting with
22 the review team, the 13th of May, just nine days
23 earlier, he had received the April Quinney
24 letter. You will remember it was an April
25 letter that he received on the 4th of May, the

1 stamp indicates.

2 Miller obviously dealt with Zanidean's
3 demands, including immunity, and the 29th of May
4 ultimatum. He dealt with Orr in terms of the
5 briefing from -- between the call between Orr
6 and Burton. And he had frequent visits from
7 Anderson, according to his own memo, tab 12.
8 And according to the evidence of Gregg Lawlor,
9 who testified that he was advised that Anderson
10 and Bruce Miller frequently met.

11 Now, before I deal with the Quinney
12 letters, because I think the Quinney letters
13 shed a lot of light on the knowledge that the
14 Crown must have had, irrefutably so, I would
15 like just to spend a minute on the July call
16 between Anderson and Burton. If you would
17 access, please, sir, tab 4.

18 THE COMMISSIONER: Tab 4 of?

19 MR. WOLSON: Tab 4 of my materials.

20 THE COMMISSIONER: Of your materials.

21 MR. WOLSON: I keep coming back to the Anderson
22 position, as set out in this memo to Inspector
23 Johns. Now, Mr. Code, while he said you could
24 accept Anderson's version of events with the two
25 calls October and April between he and Burton,

1 he said you should accept Burton's recollection
2 of the call in July. And I say of Burton, you
3 can't accept anything the man said, particularly
4 when you know that he falsified a report.

5 But I refer to this for another reason,
6 because I think that it goes to the issue of
7 disclosure as well. If you would turn to page 3
8 of tab 4, please, sir.

9 THE COMMISSIONER: I have it.

10 MR. WOLSON: In the third paragraph, Tom
11 Anderson talks of this phone call that he gets
12 from Burton on the 16th of July 1991. And the
13 upshot of the call was that, in the middle of
14 that paragraph, his superiors in Regina had
15 overruled Burton or had overruled Swift Current
16 officers and they had decided to charge
17 Zanidean.

18 It's interesting to note that the decision
19 where we know from Preston some time in April or
20 May was: We will wait and see what happens
21 before we do anything regarding Zanidean. And
22 you'll recall Burton has already committed in
23 his April -- I'm sorry, in his October phone
24 call that they withhold pursuit of Zanidean
25 until after the trial. And in his April call

1 that they will not pursue him at all. And he
2 has already told Orr, on the 30th of May, that
3 they are not pursuing Zanidean if he gets into
4 the Witness Protection Program.

5 But all of a sudden there is this
6 about-face. My suspicion is that Burton has
7 overstepped his boundaries. He has to do a mea
8 culpa. He has to somehow right his wrong. And
9 there is this phone call, and Anderson expresses
10 his dissatisfaction with it. But more
11 importantly, I look at it from a disclosure
12 position. If you look at the fourth paragraph
13 on that page.

14 THE COMMISSIONER: Yes.

15 MR. WOLSON: The third or the second sentence:

16 "I express my dissatisfaction with the turn
17 of events."

18 This is Anderson talking now. "The turn of events",
19 being now that Burton said they are going to charge
20 Zanidean.

21 "Constable Burton suggested we leave
22 further discussions regarding the issue to
23 the Justice Department of Saskatchewan and
24 Manitoba. He provided me with the name of
25 Richard Quinney of Saskatchewan, and I

1 agreed."

2 Well, why in the world would Tom Anderson agree if
3 he -- if, in fact, Anderson had withheld information
4 from the Crown, why would he agree to take this issue
5 up to Miller in Manitoba to deal with Quinney? He is
6 not a fool. If he had withheld information, the last
7 thing he is going to do is now disclose it to Miller.

8 There is a second call, you will see at
9 page 4 of the second tab, last paragraph:

10 "On the 18th..."

11 Or second last paragraph:

12 "On the 18th of July I telephoned Burton."

13 There was a discussion. And then you see again:

14 "The matter would be left to Saskatchewan
15 and Manitoba Justice."

16 The last couple of lines of the penultimate
17 paragraph.

18 "I agreed and the conversation ended."

19 So, basically, Tom Anderson has nothing to hide. He
20 has been upfront with Miller. He is now going to
21 bump this whole thing from Miller to deal with
22 Quinney. And it goes further than that. It goes on
23 further, the last paragraph on that page:

24 "On the 18th of July '91 Sergeant Paul and
25 I briefed Inspector D.K. Johnson and he

1 instructed us to contact the Crown's
2 office."

3 Page 5:

4 "On the 24th of July '91, Paul and I met
5 with Senior Crown Attorney, Bruce Miller.
6 We briefed him completely and provided him
7 the name of his Saskatchewan counterpart,
8 Richard Quinney. He agreed to contact
9 Quinney."

10 So they have been, all along, upfront with Bruce
11 Miller. Now that the matter has a glitch to it, they
12 go back to Mr. Miller and they suggest he contact
13 Quinney. They are not hiding anything. And we know
14 that then we have a series of Quinney-Miller
15 interactions. If you are hiding things from the
16 Crown, you don't then go to the head Crown with this
17 problem. Heads would roll.

18 Now, I've put into my book of materials the
19 Quinney letters. And they start at tab 15. In
20 an effort to conserve time, let me -- and I know
21 that you will read these letters very carefully.
22 But let me deal with some of the issues in the
23 first Quinney letter, that's the one at tab 15,
24 July 16, 1992.

25 THE COMMISSIONER: January 16th?

1 MR. WOLSON: I'm sorry, January 16, 1992. In
2 the first page of that letter Quinney tells
3 Miller that:

4 "There had been a trip to Swift Current by
5 Zanidean to burn down his sister's home.
6 He testified as to the motive."

7 And in the third paragraph, Quinney says:

8 "Saskatchewan investigation reveals the
9 motive was reward as opposed to revenge."

10 The second page, second paragraph, Quinney advises
11 Mr. Miller:

12 "If charged with arson, Zanidean, in
13 effect, will recant. He will tell the
14 media, tell the police -- that he told the
15 police what they wanted to hear."

16 In the third paragraph, you will see that there had
17 been discussions between Quinney and Miller
18 because -- oh, I think it's a couple of sentences
19 before the end of the third paragraph where Quinney
20 says "as discussed", so there, obviously, had been
21 some phone interaction between Mr. Miller and
22 Mr. Quinney.

23 And in the fourth paragraph:

24 "With respect to the arson in this
25 province, it seems clear that Zanidean is

1 of the view that he was granted immunity
2 from prosecution, no matter exactly how
3 this came about."

4 The bells would be ringing loudly if that was the
5 first time Miller heard about that. He would be on
6 his phone to Dangerfield. He would be calling the
7 officers involved. There would be an inquiry. None
8 of that happened.

9 Tab 17 is a response, on April 16, '93,
10 from Mr. Miller to Mr. Quinney. And he doesn't,
11 in the response, take issue with what he was
12 told in the first letter. He doesn't say: You
13 know, hold off here. None of these things
14 happened. What he says was -- or what he said
15 is that there is no immunity agreement,
16 province-to-province immunity. He says
17 something strange, but I put nothing in this, he
18 says that Zanidean was in the witness protection
19 program under the coordination of the RCMP. We
20 know that's not so. And he may have been
21 referring to some time that Zanidean spent in
22 Alberta where he was under the guidance of the
23 RCMP. But he said in the second paragraph:
24 "Zanidean was himself investigated by the
25 RCMP in Saskatchewan for arson-related

1 offences. A decision was made by your
2 department not to prosecute him."

3 He seems to know all about this.

4 But I think that the key letter is the
5 letter found at tab 18, the April 28, '93
6 letter, received May 4, '93, nine days before
7 Mr. Miller meets with Hall and Ewatski. The
8 timing of it is particularly critical. In this
9 letter, received May 4, 1993, in it Quinney
10 says:

11 "In effect, there was no formal agreement,
12 you are quite right."

13 And we know there was no formal agreement. But what
14 he does say, in the third paragraph:

15 "With respect to Zanidean's involvement in
16 this matter, it was brought to our
17 attention through the materials compiled by
18 the RCM Police that Zanidean did testify at
19 Driskell's murder trial and assisted in the
20 conviction for first degree murder. The
21 materials disclose a considerable amount of
22 confusion as to whether or not Zanidean was
23 told by the City Police, prior to
24 testifying or after testifying, that the
25 police in Swift Current were now going to

1 grant him immunity with respect to the
2 arson in Swift Current."

3 If Mr. Miller had not heard about any kind of
4 immunity discussions, or de facto immunity, or a
5 discretion by the Crown or the police in Saskatchewan
6 that they weren't going to charge Zanidean, if he
7 hadn't known about that, then here it is front and
8 center. It's a repetition of the '92 letter, but
9 it's front and center nine days before he sees Hall
10 and Ewatski.

11 "Because of the..."
12 reading on, sir, on the first page, about five lines
13 from the bottom:

14 "Because of the resulting confusion, an
15 internal investigation was done by the City
16 of Winnipeg Police Force. And their
17 apparent version of the circumstances was
18 that the original investigator in Swift
19 Current, with respect to the arson, had
20 agreed to immunity for Zanidean..."

21 There it is again.

22 "...but under pressure from his superiors
23 had reneged. The Winnipeg City Police
24 investigator still maintained he did not
25 tell Zanidean about immunity until after he

1 testified."

2 So it's absolutely upfront, out there. If Mr. Miller
3 hadn't known about these things when he met with Hall
4 and Ewatski, he wouldn't have said that he was
5 satisfied that he and his prosecuting attorneys had
6 been given full disclosure. He would have been
7 absolutely irate on a number of points. One, that
8 they had not told him about the so-called de facto
9 immunity discussions. And, two, about the issue that
10 Zanidean was told after he testified that he wouldn't
11 be charged. It would cause an absolute tumultuous
12 scene. Nothing like that happened. To the contrary.
13 When Hall and Ewatski stated that they had the
14 impression that Miller knew all about Swift Current,
15 they were obviously correct.

16 You will recall the evidence of
17 Dangerfield, when I cross-examined him, I said:
18 If Mr. Miller had been unaware of, A, this
19 agreement to tell Zanidean after he testified,
20 he would raise it without question. He would
21 run to Dangerfield and say: What about this?
22 He would go to the police and ask them about it.
23 That was the same evidence that Whitley gave
24 when I asked him those questions as well. If
25 there were things in the Quinney letter that

1 Mr. Miller was unaware of, he would have raised
2 them with Vandergraaf, Anderson, Paul and
3 Ewatski, as sure as I'm standing here. Included
4 in that category would be the obvious statement
5 made by Quinney that Anderson told Zanidean
6 after he testified that he wouldn't be charged.

7 You will recall the evidence was that
8 Anderson, Paul and Vandergraaf all sought
9 guidance from Bruce Miller as to what they
10 should do regarding telling Zanidean about Swift
11 Current not pursuing him, whether they should
12 tell him before or after he testified. And
13 you've heard a number of witnesses at this
14 inquiry, and I think common sense tells us it is
15 not the right thing to do, but it appears that's
16 what was done. I don't know why that advice
17 would be given by Mr. Miller, but I can tell you
18 that if he didn't give that advice and he
19 learned about it from Mr. Quinney, there would
20 have been hell to pay.

21 Ewatski testified that he raised with
22 Miller all that they had learned that was not in
23 the supplementals, and Miller was totally
24 satisfied. So it's clear that Mr. Miller had
25 been briefed by Anderson, Paul, Vandergraaf,

1 Orr. He had had discussions with Kovnats.
2 There had been discussions with Sid Lerner about
3 this proposed deal. And there are the Quinney
4 letters. There was no withholding of disclosure
5 from the Crown. The problem was it didn't fully
6 get to the defence.

7 Now, Mr. Commissioner, I have about four
8 more pages, and I'm cognizant of the time.

9 THE COMMISSIONER: No, go ahead.

10 MR. WOLSON: Thank you, sir.

11 THE COMMISSIONER: Madam Reporter, are you okay
12 for a few minutes?

13 THE REPORTER: I am fine, thank you.

14 THE COMMISSIONER: Okay then.

15 MR. WOLSON: In about ten minutes I will fall
16 over I'm sure.

17 I want next to talk about Mr. Dangerfield.
18 I am not concerned about Gregg Lawlor. He was
19 clearly the junior. It wasn't his case.
20 Zanidean wasn't his witness. What does
21 Dangerfield know? In the pre-trial you knew
22 that he said, or was present when it was said,
23 that Zanidean probably set the fire and that the
24 RCMP had been notified. Wouldn't you expect the
25 lead prosecutor to ask questions if he wasn't

1 fully advised?

2 Just a few days later, to compound things,
3 there was a blow-up at the safety building.
4 Kovnats said to Dangerfield: Either his clients
5 gets his demands met or you are going to have a
6 problem with him. Wouldn't you expect the
7 senior prosecutor at that point to ask some
8 questions and not turn a blind eye?

9 Greg Brodsky cross-examined on Swift
10 Current in a comprehensive way. Dangerfield
11 didn't ask for a recess. He didn't approach
12 Vandergraaf, Anderson or Paul to ask questions,
13 either then or after the fact. And Dangerfield
14 got a copy of the Quinney letter. We know that.
15 You will see at tab 19 of my materials, there is
16 a reference to the fact that there is a memo
17 from Miller to Whitley. And in there, there is
18 a comment that:

19 "Dangerfield has now seen the material.
20 And he agrees that something should be sent
21 to Brodsky with an accompanying
22 explanation. And at my request, George has
23 agreed to draft the letter."

24 He sees Hall and Ewatski on August of '93, this
25 ordinarily hard-nosed prosecutor. Ewatski and Hall

1 are there to see whether the Crown was apprised of
2 disclosure because that was their mandate. And they
3 explained that to Dangerfield. Ewatski said at this
4 inquiry, at page 3562:

5 "I can't remember the exact conversation,
6 but it certainly was -- we formed the
7 opinion that Dangerfield was aware of all
8 aspects surrounding this investigation."

9 He told Hall and Ewatski he was happy with the
10 information the police had provided. He had no
11 complaints. No complaints? As a matter of fact, he
12 put in a commendation for Tom Anderson. The fact
13 that Dangerfield said at this inquiry that he was
14 talking about disclosure at the time of the trial
15 rings hollow, in light of Hall and Ewatski's mandate,
16 and the mandate that Dangerfield was apprised of,
17 particularly when Dangerfield had, before that
18 interview, had the opportunity of reading the Quinney
19 letter, the '92 Quinney letter where this deal was
20 talked about. And you recall what Mr. Whitley said
21 about Dangerfield:

22 "If Dangerfield felt that he was being left
23 in the dark, he would go ballistic."

24 I have already covered the issue of telling Zanidean
25 after he testified. We know it's not the right thing

1 to do. And I don't know why Mr. Miller would have
2 given that advice. Consider Anderson at the time was
3 a junior detective. He didn't work in a unit where
4 he had the authority to make the call himself. And
5 consider Vandergraaf's evidence that they were
6 concerned that they wanted to have a pristine
7 witness. They didn't want to -- and it's wrong. I
8 tell you, without question, it's wrong. They didn't
9 want to have him testify with a promise of some
10 advantage.

11 Briefly, sir, the blow-up at the hotel
12 which has caused some issue at this inquiry, it
13 occurs on the 20th of June. Al Paul is, in
14 effect, baby-sitting Zanidean. Zanidean
15 threatens to recant. He phones Greg Brodsky.
16 And this, in effect, causes the witness or the
17 Winnipeg Police to withdraw its protection of
18 Zanidean. Paul reports it, he tells you, to his
19 supervisor D.K. Johnson. A decision was made,
20 not by Paul, because he didn't have the
21 authority, but by his superiors to discontinue
22 the protection. Hall is advised by Johnson that
23 Johnson will call Miller. Now, was Miller told
24 of that, even though there is no supplemental?
25 Keep in mind what occurred. What occurred at

1 the Crown's end demonstrates that they were told
2 of this incident. Immediately a letter went out
3 to Kovnats to confirm a deal to pay out \$20,000
4 to Zanidean. That letter is found in my
5 materials near the end of the book, sir.

6 THE COMMISSIONER: Yes, tab 20.

7 MR. WOLSON: Recall my questioning of Whitley.
8 I said to Whitley: If something happened to
9 Zanidean after the police withdrew protection,
10 before a settlement had been reached, if
11 something were to happen, the police would have
12 a big problem on their hand, and he agreed.

13 A letter went out on the 21st of June with
14 a \$20,000 agreement, without the deputy's
15 approval, contrary to the provincial
16 legislation, in Whitley's opinion. Obviously,
17 that was done because of what happened on the
18 20th of June in the hotel room and, obviously,
19 the Crown knew about it.

20 The fact that Zanidean went on the lam in
21 Alberta, and had to be brought back to custody
22 subject to a material witness warrant, all
23 discloseable facts, all known to both Crown,
24 Miller and Dangerfield, because they are at the
25 safety building. While there is no

1 supplemental, it was known to both Crown and not
2 disclosed.

3 Anderson's position is there was never any
4 deal for Zanidean's testimony. The so-called
5 discussion of the 5th of April, an arrangement
6 not to pursue Zanidean, was not about buying
7 Zanidean. It was all about Zanidean being
8 eligible for the witness protection program.
9 Because Tom Anderson said that if he was told
10 that Zanidean had a pending matter, he would not
11 get into the program. And recall that while
12 negotiations with Zanidean broke down, Anderson
13 was far removed at that point. The negotiations
14 were between Zanidean, Orr and Miller. As
15 Vandergraaf stated, the police were out of the
16 loop. For Anderson and Paul, sir, it was always
17 about protection. Their first meeting with
18 Zanidean they realized they were going to have
19 to protect this fellow. They met with Orr,
20 witness protection. They met with his lawyer,
21 Kovnats.

22 Now, when I stress to you there was never a
23 deal for his testimony, I want you to recall, if
24 you will, and it's in the note of Kovnats at tab
25 21. And it's interesting, whenever there's a

1 note, it always seems to confirm what Tom
2 Anderson said. If you look at tab 21, the
3 second page of tab 21, these are notes that
4 Mr. Kovnats found at a very late hour. I think
5 he was either on the stand or he was about to be
6 on the stand.

7 THE COMMISSIONER: Yes.

8 MR. WOLSON: If you look at page 2. Page 1 of
9 that note discusses a meeting that Kovnats had
10 with Zanidean. And then some discussions
11 between Kovnats and Zanidean. But page 2,
12 that's where there is a meeting between Kovnats
13 and Zanidean and Anderson. What does it say?

14 "Anderson promised protection only."

15 That's always what Tom Anderson promised. They had
16 to protect Zanidean because if they were right that
17 Driskell had killed Harder, he was killing somebody
18 who was going to testify against him. If Zanidean
19 were going to testify against him, he would be in the
20 same peril. Protection only, it's always about
21 protection.

22 Just very briefly, the disclosure request
23 of Brodsky, asked of Swift Current, and the
24 request: What do the Winnipeg Police have on --
25 there were three fires, one of them being Swift

1 Current. Tom Anderson's evidence is he never
2 got -- he never made that response. It never
3 came to him. And, obviously, that response is
4 inaccurate. And it would have been inaccurate
5 and known to Mr. Dangerfield at the pre-trial
6 and known to Mr. Brodsky at the pre-trial. But
7 Anderson's position is that it never came to
8 him. He never made that response. And it's
9 clear that it doesn't come from him.

10 As to the contacts that the Winnipeg
11 Police, either formal or informal, wanting
12 notebooks, Tom Anderson's position is that he
13 thought his notebook went to the Crown. And
14 certainly we know that Paul's notebook went to
15 the Crown. He says, too: I never got that
16 request. It never came to me. And it's clear
17 that that document never came to Tom Anderson.
18 That is that request never was made of Tom
19 Anderson. There is no document that indicates
20 that.

21 But there is a document. And it is very
22 close to my final comment. There is a document.
23 That is the document set out at the last tab,
24 the favourable considerations. And I know that
25 that's been a source of some angst. Now, some

1 have said that it has been very carefully
2 written. But when you look at it from Tom
3 Anderson's perspective, that protection was the
4 only thing he ever promised this witness. He
5 never promised him immunity if he testified. He
6 never promised him a deal. He promised that he
7 would protect the man. And that's what he says
8 in that answer.

9 "With respect to the second part of the
10 question, we are not aware of a single
11 criminal charge outstanding against a
12 single subpoenaed witness at the time of
13 the deceased's disappearance. Protection
14 is the only favourable consideration given
15 to any witness. We are not aware of any
16 stayed charges or other deals with any
17 witness in exchange for his testimony."

18 The two key factors here are protection and in
19 exchange for his testimony. This witness was not
20 bought by Tom Anderson.

21 In closing, and I know I've gone -- I am
22 making up for all of those seven minutes that
23 you asked me to fill in. But in closing, sir, I
24 simply say to you that Tom Anderson was
25 characterized by Vandergraaf and by the Chief of

1 Police as being a man of great integrity and
2 honesty. It's inconceivable that he and Al
3 Paul, who was similarly characterized, that he
4 and Al Paul would withhold evidence from the
5 Crown which would only have the effect of
6 possibly sabotaging the case for the
7 prosecution. For the reasons stated, in my
8 view, Tom Anderson does not have a diabolical
9 mind, that he intentionally withheld evidence
10 from those that needed to know. They knew. It
11 didn't get to the defence, but the Crown
12 certainly knew. I say to you that his
13 reputation as an honest police officer with
14 integrity, that his actions did not cause an
15 injustice here, not the injustice that you've
16 heard about over the course of this inquiry.

17 So subject to any questions that you have,
18 I thank you for listening to me and for
19 providing me with a few extra minutes.

20 THE COMMISSIONER: I have no questions. And
21 thank you, Mr. Wolson.

22 MR. WOLSON: Thank you, sir.

23 THE COMMISSIONER: Well, ladies and gentlemen,
24 this seems to bring to a close the hearing
25 portions, submission portions of the inquiry.

1 I know that some of you, I was told by
2 Mr. Code, that some of you were interested in a
3 possible or an idea as to when the report might
4 be out. I was asked in the Order-in-Council to
5 report to the government by December 31st of
6 this year. I am reasonably optimistic that I
7 can do that. That view may change in another
8 few weeks if I find that I am making much slower
9 progress than I hoped that I might. If I do
10 determine, probably it would be the end of this
11 month before I would make that determination,
12 i.e. a determination that I couldn't have it
13 concluded by the end of the year, I will write
14 to the Minister or the Deputy Minister, whoever
15 I've been dealing with, I'm not sure, advising
16 that I would require an extension of perhaps a
17 month. But at the moment, I'm moderately
18 optimistic that I will have it concluded by
19 December 31st. But when I say concluded, I mean
20 by that that I will have it written. It then
21 will go, as I understand it, to the printers.
22 And that I'm told would probably take about
23 three weeks.

24 So that gives you some rough idea as to
25 when I might send the printed version to the

1 Minister of Justice, the Attorney General, maybe
2 on or about the third week of January. It may
3 well be, and I haven't really decided this, that
4 since I am reporting to the government, the
5 government are the ones who struck this
6 committee, I might send them a copy of the
7 document that I will be sending to the printers
8 so that they might have it two or three weeks
9 early. However, when I send the finished
10 product, the bound version to them, it is up to
11 them to determine when they will publicly
12 release it. I have simply indicated to them
13 that if they wish, and if there is going to be a
14 public release of the document, that I would be
15 back for that; otherwise, there would be no
16 need, no reason for me to come back vis-a-vis
17 this matter. So that's about the best I can
18 tell you at this stage.

19 I suppose the only other thing that could
20 slow it down, and I have asked Mr. Dawe and
21 Mr. Code to do a lot of the groundwork on the
22 systemic issues aspect of it. But I would
23 expect that they can do that as I'm working on
24 the main part of the report. And they will
25 simply give me some ideas. The end result will,

1 of course, be mine.

2 Unless there are any other specific issues
3 that need to be commented on, I want to, as I
4 have indirectly, said before, on more than one
5 occasion, is to thank everyone for your
6 participation, for your courtesy, for your great
7 advocacy, and for the pleasure of putting up
8 with me for this past several months during this
9 inquiry. It has been certainly an interesting
10 and a learning experience for me. I have
11 enjoyed it immensely. And I have enjoyed your
12 city, notwithstanding that snow is a little
13 earlier than I'm used to. But notwithstanding,
14 I was warned by Mr. Libman that there would be
15 snow when I came back for the submissions.

16 Each of you has exhibited not only an
17 admirable degree of professionalism, but an
18 admirable degree of skill. The fact that this
19 hearing, this inquiry, has come to a conclusion
20 within the broad time limits we had set at the
21 beginning is a credit to those of you who, A,
22 originally set those guidelines, made that
23 estimate, but most importantly, then were able
24 to meet that estimate.

25 A great deal of credit also goes to

1 everyone here in the courtroom, the clerk, the
2 three clerks I've had during the period of the
3 time.

4 The court reporters who have really
5 performed an outstanding service. There have
6 been a few of the counsel whose eloquence is
7 rapid. And they have, without complaint or
8 comment, managed to keep up with the oral
9 advocacy, but have done it in such a courteous
10 and polite way.

11 The punctuality of everyone has been most
12 important. And as I've always believed it is
13 important to an efficient disposition of any
14 hearing.

15 The patience of the cameraman who has been
16 here. And he promised me that he is going to
17 touch everything up before he sends it out or at
18 least when he was filming the Commissioner.

19 And the sheriff's officers who have shown
20 me such courtesy, who have been so diligent and
21 so pleasant in performing their task,
22 notwithstanding one minor interruption, it
23 really has been a very uneventful hearing. I
24 want to thank everyone who has been here.

25 And the staff of the Commission office that

1 has been mentioned before, the remarkable
2 contribution and the remarkable effort that has
3 been made by Mr. Giasson and his staff, Wendy
4 Bergman and Nancy Peltier and Kathy. My
5 eyesight is not good enough to see who the other
6 person is. It might be David. I'm not sure.

7 The fact that we really didn't have any
8 holdup because of lack of material having been
9 provided and distributed is, to a very great
10 extent, the result of the superb administrative
11 organization that Mr. Giasson and his staff have
12 exhibited throughout this matter. And I think
13 you have heard me say before that there have
14 been a few occasions when I had left the office
15 at 7:00 or 8:00 or 9:00, or maybe as late as
16 10:00 o'clock at night and returned maybe as
17 early as 6:30 or 7:00, and that was the
18 exception, I didn't do that very often. But
19 people were there when I left in the evening
20 working away, preparing material to be
21 distributed the next day or the day after, and
22 they were there when I returned in the morning.
23 That was quite a remarkable effort.

24 So it's been a privilege and a pleasure. I
25 want to thank each and every one of you for

1 contributing to that satisfactory, informative,
2 pleasurable experience that I have had here in
3 this inquiry. Thank you.

4 THE CLERK: All rise. This commission of
5 inquiry is now closed.

6 (Proceedings concluded at 3:43 p.m.)

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COURT REPORTER'S CERTIFICATE

DEBRA KOT 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.

Debra Kot
COURT REPORTER

Lisa Reid
COURT REPORTER

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