

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
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INQUIRY PROCEEDINGS

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1 MONDAY, OCTOBER 30, 2006

2 UPON COMMENCING AT 9:30 A.M.

3

4 THE CLERK: All rise. This Commission of
5 Inquiry is now in session. You may be seated.

6 THE COMMISSIONER: Good morning everyone. It is
7 nice to be back in Winnipeg at the end of
8 October and no snow, at least until the noon
9 recess.

10 I should tell you that Mr. Code will be
11 making his comments to begin this morning. Just
12 for your information, I don't know that you will
13 get any consolation in this or not, but I have
14 not seen them nor has he discussed them with me
15 other than in a very broad general sense at the
16 beginning when -- I say at the beginning --
17 after the evidence had been completed,
18 indicating what he had planned to do as far as
19 the format of his comments. I, as I say, have
20 not seen them. And I don't want you to think
21 that they reflect my views, in part because I
22 haven't seen them. So, I just wanted you all to
23 know that. Mr. Code.

24 MR. CODE: Thank you, Mr. Commissioner. Indeed
25 nobody could have seen them, even myself,

1 because we were still working on them late last
2 night, and I'm very appreciative to Mr. Giasson
3 as always for coming in early this morning to
4 print them up and have them available. I should
5 say at the beginning that they look somewhat
6 intimidating in their size, but let me assure
7 you that the submissions begin at page 124 and
8 they are 18 pages. So I will be working from
9 the last 18 pages where 23 points are set out.
10 Those are my submissions. The first 123 pages
11 could just as well have been an appendix or
12 could have been filed as a separate document.
13 It is simply an evidence summary that Mr. Dawe
14 has prepared, and I'm very grateful to him, so
15 that we don't have to be pulling out exhibit
16 books to slow things down. I simply asked him
17 to distill the key points of evidence into a
18 summary, and it came out at 123 pages because
19 Mr. Dawe, as we all know, is fairly thorough.
20 But the submissions are page 124 to page 142.
21 And, as I said, they would be simply a series of
22 bullet points and I will be working from those
23 pages.

24 Now, in terms of the 23 points that I've
25 identified that I want to deal with in

1 submissions, what I tried to do was to distill
2 what seemed to be the areas of contention, the
3 areas where there were factual disputes in the
4 evidence or where there were issues that had
5 arisen that were likely to be an issue of
6 dispute between the parties, and to focus on
7 addressing those 23 issues as the ones that seem
8 to me to be the more important ones. There are
9 plenty of other issues, and it is just a
10 question of where you draw the line at how
11 significant they are, but that these were the
12 ones that occurred to me to be the most
13 important. So I'm going to go through each one
14 of them. I calculate that I have about seven
15 minutes or each of them on average, so I'm not
16 going to be long on any one point. Some of them
17 are more difficult than others and I may take a
18 little longer with some than with others.

19 So if I could ask you, Mr. Commissioner, to
20 turn to page 124, and what I intend to do rather
21 than reading out the submission, is just allow
22 yourself and the parties to read the submission
23 to yourself at the outset, and then I will try
24 and synthesize a couple of key points out of it.

25 So if I could ask you to read paragraph

1 140, which is the first submission, and this
2 deals with the issue of whether there should
3 have been police reports prepared of Zanidean's
4 two admissions to the Swift Current arson on
5 October 10 and October 29th.

6 THE COMMISSIONER: Okay.

7 MR. CODE: Thank you. If I could make three
8 points about this particular submission. First
9 of all, it is important to note that, as I read
10 the evidence, nobody seriously disputes that
11 there should have been a police report prepared
12 about these admissions. Sergeant Anderson
13 himself, if you look at paragraph 15 of
14 Mr. Dawe's evidence summary, concedes that it
15 was his intention to prepare a report because
16 the evidence was obviously important and needed
17 to be recorded and reported. And he just had
18 this -- or his evidence is that his idea was to
19 prepare a report and put it in a separate file
20 and cross reference it. So there is no dispute
21 on the essential point here that a report should
22 have been prepared of this potentially important
23 evidence, and written up in the ordinary way in
24 order to preserve it and communicate it.

25 The second point that I want to make is

1 that although there was some speculation in the
2 evidence about whether a report possibly was
3 prepared and was lost, the best evidence appears
4 to be that there is no such report, no report
5 was prepared. Clearly the decision not to put a
6 report of these two admissions into the Driskell
7 homicide file, which is where they needed to be,
8 was a deliberate decision, and it appears that
9 that decision was never reversed at any point.
10 And it is important to bear in mind that that
11 decision must rest collectively with the three
12 officers, because Vandergraaf was clearly aware
13 of the fact of these two admissions. There is
14 no question that Anderson and Paul reported the
15 two admissions to Vandergraaf, and he would have
16 reviewed the reports and been aware that these
17 two important pieces of evidence had been
18 omitted from the police reports. So in my
19 submission the three homicide officers bear
20 primary responsibility for the failure to
21 properly record this evidence and to report it
22 in the ordinary way.

23 However, having said that, the third and
24 last point to note here is that there must be
25 some secondary responsibility on Dangerfield and

1 Lawlor in relation to this incident, because
2 there is no question that at some point they get
3 briefed about these admissions. And all you
4 have to do is look to paragraph 69 to see that,
5 the two Brodsky memos from the May 23 pre-trial
6 before Justice Morse. Paragraph 69 is at page
7 63 of Mr. Dawe's evidence summary. And you see
8 in both of those file memos, both accounts that
9 Brodsky gives of the pre-trial, there is a
10 reference to what appears to be the admissions.
11 The RCMP were advised that Zanidean probably set
12 this fire. Swift Current were notified of the
13 involvement of Zanidean. So at some point
14 Lawlor and Dangerfield become aware of the fact
15 that there must be some kind of an admission
16 from Zanidean to his complicity in the Swift
17 Current arson, and yet at no point do they ask
18 for a properly documented report of the
19 admission. So they too bear some responsibility
20 in relation to this issue, in my submission.

21 That's the first submission.

22 Turning then to the second submission,
23 Mr. Commissioner, at paragraph 141, how should
24 the dispute between Anderson and Burton be
25 resolved concerning their telephone conversation

1 in late October 1990? And you will recall this
2 is the first communication between Anderson and
3 Burton. Perhaps if I could ask you again to
4 just read the submission to yourself and then I
5 will distill a couple of key points I want to
6 emphasize.

7 Again, let me make three points about this
8 particular submission, Mr. Commissioner. First
9 of all, the emergence of this problem or this
10 issue of the Swift Current arson when Zanidean
11 admits to it on the second day that he is in
12 seeing the officers, and then admits to it again
13 a couple of weeks later, there is no doubt that
14 this constituted a problem for the Winnipeg
15 Police Service, and they describe it in those
16 terms. The most helpful description is in
17 Anderson's phone call with Hall during the Hall
18 and Ewatski process in 1993. We are now a
19 couple of years further on, but in what appears
20 to be a relatively unguarded conversation
21 between Anderson and Hall, you will find this,
22 if you could turn up paragraph 23 of Mr. Dawe's
23 evidence summary. Paragraph 23 is at page 18.
24 At the bottom of that page, Mr. Dawe has
25 excerpted the key part of the telephone

1 conversation where Hall and Anderson are
2 describing the dealings with Zanidean as being
3 relatively smooth except for one problem. You
4 see the quote at the bottom of page 18,
5 "As far as Zanidean, as far as the evidence
6 and everything always went smooth, Anderson
7 says. Except that little hurdle, of
8 course, when he drops it on and says he's
9 blown up a house. Other than that,
10 everything went smooth. It wasn't, it was
11 the only uh, time he used uh, uh, or caused
12 trouble was with the uh, that, you know,
13 when it had to do with his negotiations
14 with the Justice Department. And of course
15 he did that even after his testimony."
16 So, the description of the only real
17 problem they had with Zanidean, the only hurdle
18 was when he drops this little literally bomb on
19 them that he has blown up the house in Swift
20 Current, and then that leads to the negotiations
21 with the Justice Department.
22 So the context for this call is that
23 Anderson has got a problem. He has run into a
24 hurdle, as he describes it. And accordingly,
25 when he phones up Burton, the likely inference

1 is that he was phoning with a purpose, namely to
2 try to solve his problem.

3 The second point I want to make is that
4 there is a lot of struggle between Burton and
5 Anderson as to who first suggested the idea of
6 delaying the RCMP's pursuit of Zanidean.
7 Anderson is adamant that it was Burton who
8 suggested it, and Burton is adamant that it was
9 Anderson who suggested it. And again it seems
10 to me that this doesn't particularly matter,
11 because as Staff Sergeant Vandergraaf conceded,
12 in a very pragmatic way, it wouldn't take a
13 genius to figure out that this was a good idea
14 that would help the Winnipeg Police Service. If
15 you look at Mr. Dawe's summary of Vandergraaf's
16 evidence on this point at paragraph 21, page 16.
17 This is about five, six lines down on page 16 of
18 Mr. Dawe's summary.

19 "Vandergraaf agrees that in the
20 circumstances it would have been obvious to
21 Burton that postponing his investigation of
22 Zanidean would assist the Winnipeg police,
23 whether or not Anderson made a specific
24 request."

25 So the implication of the call, and

1 Anderson has to explain his problem to Burton so
2 that Burton will know what they are talking
3 about, that he has got an admission from a very
4 important witness and it raises witness
5 protection issues for him, the message would
6 have been communicated one way or the other that
7 it would be helpful to the Winnipeg Police if
8 the investigation could be delayed until after
9 the trial.

10 It has to be remembered that at this point
11 the trial is anticipated to be an early trial.
12 They are going to try to expedite the date.
13 They are going to prefer a direct indictment.
14 It would only involve a few months delay of the
15 Swift Current investigation. And it seems to me
16 there is nothing improper whatsoever in one
17 police officer in one police force phoning up
18 another police officer in another police force,
19 and telling him we have got this problem, can
20 you assist. And the problem here, of course, is
21 the lack of transparency. It is not that there
22 was anything improper in making this kind of an
23 approach.

24 And then the third and last point I want to
25 address is the outcome of the phone call, and

1 again you will recall there is a dispute between
2 Anderson and Burton as to what the outcome of
3 the phone call was. Anderson is adamant that
4 there was in essence a stand still agreement
5 that the RCMP would put off their pursuit of
6 Zanidean until after the trial was over. Burton
7 won't agree to this. But the reason Burton
8 won't agree to it, it seems to me from my
9 reading of his evidence, is because he doesn't
10 have a record of it.

11 You remember of all of the phone calls,
12 this is one where Burton's records are in the
13 worst shape. He doesn't have his original
14 report. All he has is these subsequent after
15 the fact reports, and they have been edited. So
16 Burton, who was a witness who would essentially
17 not agree to anything unless it was in writing,
18 Burton is adamant that this part of Anderson's
19 evidence is inaccurate simply because it is not
20 in his notes. But in my submission, Anderson's
21 account is the more reliable one on this point.
22 And this is because there are two subsequent
23 documents that clearly support Anderson's
24 version that there was this temporary stand
25 still agreement in place. And the two

1 subsequent documents are both referred to in
2 that last bullet point on page 125. But there
3 is a typo there, Mr. Commissioner, could I ask
4 you to correct the reference. You see the
5 reference three lines up at the end of the
6 submission to paragraphs 23 and 42, that should
7 be paragraphs 22 and 42. So that 23 is a typo.
8 If you have that reference, page 125 of the
9 submissions, the last bullet point of the second
10 submission.

11 THE COMMISSIONER: It should be what, sorry?

12 MR. CODE: Should be paragraphs 22 and 42, the
13 42 is correct, but the 23 should be a 22.

14 If I could take you to those two documents,
15 which in my submission support Anderson's
16 account on this point. Paragraph 22 is the Hall
17 and Ewatski report, and it is paragraph 22, page
18 18 that we have the Hall/Ewatski report quote
19 set out there at the end of the paragraph. And
20 you will recall that Hall and Ewatski are in
21 Swift Current in 1993, in the spring of '93, and
22 they have access to the complete file. At this
23 point the documents that Burton no longer has
24 access to were available. And you see the quote
25 from the -- it appears to be a direct quote from

1 an October 27th document about the call on that
2 date. And the first two sentences, according to
3 the RCMP file, Anderson spoke with Burton
4 advising him that Zanidean had admitted to the
5 arson. He also advised that Zanidean was a
6 witness in the execution of Harder, and was
7 asked if the RCMP would keep this information
8 confidential and hold off their pursuit of
9 Zanidean, as it would endanger the prosecution
10 of Driskell. Those two sentences are exactly
11 consistent with the excerpt that we have from
12 Burton. If you go to the top of page 18 and the
13 bottom of page 17 we have Burton's edited
14 version of the report which mirrors those two
15 sentences essentially. But then the last
16 sentence that Hall and Ewatski lift out and
17 excerpt, "It is indicated Burton agreed to this
18 but that he would proceed against Zanidean when
19 the murder trial was concluded." That appears
20 to be the sentence that's been edited out of
21 Burton's excerpted version of the document. And
22 it is clearly consistent with Anderson's account
23 that there was a stand still agreement that came
24 out of that phone call.

25 Similarly, if you look at the other

1 document that supports Anderson's account, it is
2 the witness protection application at paragraph
3 42. You will recall this is the document that
4 was prepared by the Winnipeg homicide officers,
5 but that was going to the RCMP. So page 36,
6 paragraph 42, and it is hard to believe that the
7 Winnipeg officers would include an assertion
8 that was false in this document, knowing that it
9 was going to the RCMP and that the RCMP would
10 correct anything that they had falsely asserted,
11 that the RCMP could disprove. And you see the
12 paragraph there in the middle of page 36
13 excerpted from the witness protection
14 application. The middle sentence clearly says
15 "Burton has agreed not to pursue Zanidean at
16 this time but will continue investigation once
17 our trial is concluded."

18 So in my respectful submission the best
19 inference, the most reliable inference from this
20 early telephone conversation between Burton and
21 Anderson is that a stand still agreement emerges
22 out of it to hold off on pursuing Zanidean. And
23 much of Burton's subsequent conduct is
24 consistent with that, as he doesn't press Mann
25 to get on with the interview of Zanidean, and he

1 asks for a lengthy file extension. So that's
2 the second submission, Mr. Commissioner.

3 The third submission, then we move to the
4 next Burton/Anderson call, the one in early
5 April, April 5th, 1991, paragraph 142 of the
6 submission. If I could ask you to again just
7 read that and I will then distill a couple of
8 points from it.

9 Now, this is a relatively simple issue, in
10 my respectful submission, because Burton and
11 Anderson's accounts are generally consistent
12 with each other on the essential points here.
13 And in relation to this phone call, Burton's
14 records are starting to become a little bit
15 better as we move deeper into the file. There
16 is a dispute between Burton and Anderson as to
17 who is the moving party, very much like with the
18 October phone call, Anderson is at pains to
19 insist that it was Burton who volunteered the
20 decision not to charge Zanidean at all, and
21 Burton on the other hand suggests that Anderson
22 was more of the moving party. And, again, in my
23 submission, not much turns on those kinds of
24 points.

25 It seems probable that obviously once again

1 Anderson was the moving party, because he is the
2 one who has got the problem, and he is the one
3 who is making the phone call, and even in his
4 own account concedes that he presented Burton
5 with what he describes as a dilemma. He wants
6 to get Zanidean into the witness protection
7 program, and Orr is telling him he can't get in
8 unless we get rid of the Swift Current charge.
9 So Anderson is the one who presents Burton with
10 the problem, and whether he expressly asked him
11 for help or whether it was simply implicit,
12 again Vandergraaf's pragmatic approach to this
13 seems to me to be the sensible one; that Burton
14 would have understood that the Winnipeg Police
15 Service were asking for help. They had a
16 serious homicide case and they needed help with
17 it and they had a serious problem.

18 Again I don't suggest there is anything
19 wrong with one police force approaching another
20 police force and seeking help when they have got
21 a major case and a major witness, and
22 difficulties are emerging that they need
23 assistance with. The problem here again is the
24 lack of transparency. It is not that this
25 conversation was taking place. It is an

1 appropriate conversation, in my submission, as
2 long as it is properly recorded and properly
3 disclosed.

4 In any event, leaving aside this dispute
5 over who the moving party is, what matters about
6 this phone call is the substance of what
7 emerges. And Burton and Anderson are agreed
8 that what emerges is now much more than a stand
9 still agreement. It is an agreement not to
10 charge him in order to facilitate his entry into
11 the witness protection program. In other words,
12 it is a decision that will have permanent
13 consequences. Once Zanidean is into the witness
14 protection program, he is not going to be
15 charged at all. And secondly there is an
16 agreement between Burton and Anderson that their
17 understanding was to be run up the chain through
18 the superior officers.

19 So you have got the two accounts set out
20 for you conveniently in Mr. Dawe's evidence
21 summary at paragraphs 48 and 49, and I won't go
22 through them with you. I think you are very
23 familiar with these. Anderson's version of the
24 call is at paragraph 48 and Burton's version is
25 at paragraph 49. And in both cases the witness

1 protection dilemma is presented and the solution
2 is not to charge him, subject to superior
3 officers reviewing the matter.

4 So it appears to me we come out of April
5 with a relatively clear understanding between
6 the two police forces, that they are going to
7 try to facilitate Zanidean's entry into the
8 witness protection program by not charging him
9 on the Swift Current arson.

10 That's the third submission.

11 The fourth submission at paragraph 143,
12 Mr. Commissioner, in that we now move to
13 Corporal Orr's role in the piece and the dispute
14 between Anderson and Orr as to whether Orr
15 advised that the Swift Current arson
16 investigation was a complete bar, or merely a
17 problem or an impediment that they had to work
18 with. And again if I could ask you to read that
19 submission and then I will come back and make a
20 couple of points.

21 Again, in my submission, this is not a
22 particularly difficult issue that ought to
23 trouble you in any degree. The question of
24 whether it was a complete bar to entry into the
25 witness protection program or whether it was

1 simply a hurdle or a problem they had to
2 overcome, really doesn't matter at the end of
3 the day in that this could simply have been
4 miscommunication or a difference in emphasis or
5 misunderstanding. What matters is that
6 everybody agrees in both police forces, the RCMP
7 and the Winnipeg Police Service, that charging
8 Zanidean, if he was in the witness protection
9 program, would have been unwise and impractical.
10 And I think Ferguson put this best, that you
11 first of all have practical problems of trying
12 to find him, if the witness protection program
13 had changed his identity and was hiding him
14 somewhere, you will have serious problems
15 finding him. But on more a principled policy
16 basis, as Ferguson conceded, you can't have one
17 branch of the RCMP trying to secret a witness
18 and hide him away, while another branch of the
19 RCMP is yanking him out into the limelight and
20 charging him in a courtroom with a serious
21 crime. The two pursuits are fundamentally
22 inconsistent. So on a very practical level,
23 everybody agreed, it appears, that it didn't
24 make sense to charge Zanidean if he was going
25 into the witness protection program. So, I

1 would suggest that there is no great gain to
2 wrestle with this problem of whether Orr
3 overstated it or not. I think their positions
4 have somewhat hardened over time on that one and
5 it doesn't need to be resolved.

6 Turning then to the fifth submission, the
7 top of page 127, Mr. Commissioner, and this
8 comes back to Anderson and Burton, and the whole
9 question of whether there was a second phone
10 call in which Burton advised that his superiors
11 had supported and approved his decision or his
12 recommendation not to charge Zanidean. And
13 again if I could ask you to read that and I will
14 come back and make a few points.

15 THE COMMISSIONER: Okay.

16 MR. CODE: Now, this is a slightly more
17 difficult issue because the dispute between
18 Anderson and Burton is fairly serious on this
19 point. Anderson asserts that there was clearly
20 a second call in which Burton told him that his
21 superiors had signed off on the no charging
22 decision, and you will recall this leads into
23 the subsequent series of phone calls in July,
24 where Anderson asserts that Burton then reversed
25 fields, and said that his superior officers had

1 now changed their minds and now were going to
2 charge Zanidean. There is clearly no suggestion
3 in any of Burton's records of any such second
4 call where he made any such representation. And
5 we know from the internal RCMP documents that
6 what the RCMP superior officers had agreed to
7 was not a categorical decision that Zanidean
8 would not be charged, but rather that assuming
9 his entry into the source witness protection
10 program, it would be unwise and impractical to
11 charge him. So the resolution of this issue may
12 well be that the de facto position that was
13 being communicated was that it was likely that
14 Zanidean would not be charged, assuming
15 everything went smoothly with the witness
16 protection program, and that again what we have
17 here are miscommunications or differences in
18 emphasis.

19 There is also a somewhat troubling sub
20 issue here, and that is whether Orr was
21 communicating frankly with the people involved
22 as to Zanidean's prospects for entry into the
23 witness protection program. If you look at the
24 RCMP documents at the time, and I will give you
25 a couple of quick references here, you see the

1 second bullet, there is five paragraph
2 references there. It appears from the RCMP
3 documents that on occasion they, the senior
4 officers, had been lead to believe that Zanidean
5 was already in the witness protection program,
6 or that the decision was imminent. So if you
7 look at paragraph 50, for example, at page 44,
8 this is Inspector Preston's memo to Ferguson
9 after he has talked to Orr, and Orr appears to
10 be the source of these various overstatements or
11 misstatements. You see the quote there in
12 paragraph 50,

13 "I spoke with Corporal Orr. Ray Zanidean
14 is now under 'witness protection' and out
15 of province. He will remain so until
16 trial, in June/91, then it is their
17 intention to relocate him permanently. It
18 would seem the only course of action open
19 to you now is to await the trial outcome
20 and evaluate the situation then."

21 That note of Preston's seems to indicate
22 that he is already in some form of witness
23 protection program and that the decision has
24 already been made to relocate him permanently
25 after trial, whereas, of course, what we know

1 from Corporal Orr's records is that the RCMP
2 were adamant, indeed they were going to great
3 lengths to distance themselves from Zanidean and
4 say that his little sojourn in Calgary had
5 nothing to do with them, it was purely a
6 Winnipeg police program, and he was not in
7 witness protection. And indeed by the end of
8 April when he comes back it is quite clear that
9 he is a disastrous candidate for witness
10 protection.

11 So it appears that Orr may have overstated
12 things to Preston, according to Preston's note,
13 and you see this kind of misapprehension theme
14 continuing in the subsequent documents. If you
15 go to paragraph 53, you get Burton's record of a
16 subsequent call he has with Anderson where they
17 are discussing what Orr and Upton had said back
18 in April. You see at page 47, paragraph 53,
19 page 47, the quote, and this is referring to
20 what Upton had understood from Orr in April:

21 "At the time that Corporal Orr contacted
22 Sergeant Upton he advised that Zanidean was
23 already under the witness protection
24 program."

25 Somewhat consistent with Preston's memo,

1 Upton appears to have understood from Orr that
2 Zanidean indeed was already in the witness
3 protection program.

4 Similarly paragraph 54, we have Orr's note
5 of his discussions with Preston in April. It is
6 the very next paragraph, 54, at the top of page
7 48.

8 "I discussed the matter with Inspector
9 Preston and explained our situation to him,
10 including the Winnipeg Police Service's
11 desire to keep a happy witness. Included
12 was the problem of interviewing Zanidean
13 once he became involved in the protection
14 program."

15 So again you see Orr appears to be
16 communicating to Preston the likelihood that
17 Zanidean is going into the program in somewhat
18 certain terms, whereas in fact we know from the
19 internal documents it was far from a likelihood
20 at all. Indeed, he was a huge problem by all
21 accounts.

22 And finally paragraph 65, similar kind of
23 misapprehension in Ferguson's documents. You
24 see Ferguson, this is a report Ferguson writes
25 the next month in May. And if you turn over the

1 page to page 60, the quote is set out there by
2 Mr. Dawe, the top of page 60 from Ferguson's
3 May 28th report, where they are talking about
4 whether to give immunity to Zanidean and
5 Driskell. And Ferguson says,

6 "It may not be necessary to extend this
7 consideration to Zanidean as he is to be
8 relocated under the witness protection
9 plan."

10 Again expressed as a certainty that this is
11 definitely going to happen. So Ferguson,
12 Preston, Upton and Anderson, if his account to
13 Burton is -- or Burton's record of what Anderson
14 said about what he understood from Upton is
15 reliable, all seem to think that it is a virtual
16 certainty that Zanidean is going into witness
17 protection, if he is not already in it. And
18 this misapprehension appears to flow from Orr.
19 Orr appears to be the person who is somewhat
20 overstating what the true facts are about the
21 likelihood of this ever happening. And this may
22 explain why Bruce Miller some time later, when
23 this whole thing unravels after the trial,
24 Miller appears to be upset with Orr. If you
25 look at paragraph 112, Mr. Dawe again has set

1 out the note. This is Miller communicating with
2 Inspector Wass in Regina when they are trying to
3 sort out whether Zanidean did or didn't have
4 immunity, and what Miller says to Wass is that,
5 you see the quote at bottom of page 102.

6 "Miller seemed to feel that Corporal Tom
7 Orr, our witness protection coordinator in
8 D division, caused a great deal of the
9 problem that developed."

10 And I can understand why Miller might have
11 felt that way if in fact Orr was communicating
12 that Zanidean was already in the witness
13 protection program or would for certain be in
14 it, and as a result of that, the senior officers
15 in the RCMP reached the obvious pragmatic
16 decision that they couldn't charge him when, in
17 fact, we know there was no little or no
18 likelihood of Zanidean entering the program.
19 Indeed Zanidean himself had not even made the
20 decision he wanted into the program.

21 So to come back then to our issue number 5,
22 and Anderson's apparent belief that the senior
23 RCMP officers had agreed not to charge Zanidean,
24 one can understand how Anderson, and indeed
25 Burton, may well have had that state of mind,

1 given what is reflected in these RCMP documents,
2 which appears to be a kind of de facto
3 acceptance that Zanidean was going into witness
4 protection, and, therefore, would not be
5 charged.

6 So, again what looks like a fairly sharp
7 dispute between Burton and Anderson, in my
8 submission, this may well be little more than a
9 matter of emphasis or miscommunication or
10 misunderstanding again. And, again, the problem
11 here is not that these decisions were made, it
12 is the lack of transparency about not properly
13 documenting and disclosing them.

14 That's the fifth submission,
15 Mr. Commissioner.

16 Turning over to page 128, the sixth
17 submission. The dispute between Anderson,
18 Vandergraaf and Orr as to whether the various
19 calls were part of a coordinated effort, and
20 whether Orr properly recorded and reported his
21 calls. This you will recall is the dispute
22 where Vandergraaf and Anderson are both very
23 clear that the phone calls that they were
24 placing to Swift Current were part of a
25 coordinated effort with Orr, whereas Orr denies

1 any such cooperation or coordination with the
2 Winnipeg officers. So, again, if I could ask
3 you to read that and I will come back to it.

4 Again, there is a small typo there,
5 Mr. Commissioner, in the last bullet. The five
6 paragraphs cited there, 50, 53, 54 and it should
7 be 65 and 78 is the last one. So if you could
8 add a five to the six there and make it 65.

9 Again, the dispute over whether these
10 efforts were being coordinated as between Orr on
11 the one hand and Anderson and Vandergraaf on the
12 other hand, again, in my submission, I don't
13 think a great deal turns on this. There is a
14 natural inference consistent with Anderson and
15 Vandergraaf's evidence that this was a
16 coordinated effort. There is no doubt that
17 Anderson is placing his calls at exactly the
18 same time as Orr is placing his calls, and there
19 is a similar theme to them. It is all tied up
20 with this concern about getting Zanidean into
21 witness protection, and the difficulties or
22 impediments that the Swift Current investigation
23 represents for those efforts. If it was
24 necessary to resolve this, it seems to me that
25 Anderson and Vandergraaf's account makes sense,

1 that there was some coordination going on here.
2 And again I don't think there is anything wrong
3 with the coordinated effort to try to get a
4 witness into witness protection. And if that
5 involves giving him some favorable consideration
6 on other charges, these kind of pragmatic
7 decisions have to be made, and they simply need
8 to be recorded transparently and disclosed
9 properly.

10 What is interesting as well, of course, is
11 that Orr's calls and Anderson's calls yield
12 largely similar results in both cases. What
13 emerges is this pragmatic common sense decision
14 that they can't go putting the witness into
15 witness protection and at the same time charging
16 him. But what is troubling here is Orr's
17 notetaking, and in particular the note he makes
18 of his April 12th call to Sergeant Upton. And
19 you will recall this, if I could ask you to turn
20 it up in Mr. Dawe's summary, again without going
21 to the exhibit books, I think if everyone is
22 content to use Mr. Dawe's summary it will save
23 us a lot of time.

24 Paragraph 52 of Mr. Dawe's summary, he has
25 excerpted the note helpfully, and you will find

1 it at the top of page 46 of Mr. Dawe's summary.
2 You see the April 12th call to Upton. He has
3 been trying to reach Burton --

4 THE COMMISSIONER: Sorry.

5 MR. CODE: Page 46, paragraph 52, is the note of
6 Orr's call to Upton.

7 THE COMMISSIONER: Just a moment. Yes.

8 MR. CODE: "As there was no call from Burton,"
9 it is the quote at the top.

10 "I talked to Sergeant Upton again. Swift
11 Current will be concluding their file and
12 Ray Zanidean is NO LONGER WANTED for
13 questioning..."

14 And the ellipses there is in Orr's
15 notebook. And Orr concedes that his note is
16 fairly cryptic, and he agrees that the ellipsis
17 could very well have intended to signify that
18 there was more to the conversation than what was
19 recorded there. What is curious about this note
20 is that all of the other RCMP documents, the
21 ones that are referred to in the last bullet
22 point, paragraphs 50, 53, 54, 65 and 78, when
23 you look at the whole picture of what is going
24 on here, it is quite clear that this decision
25 not to charge Zanidean is all tied up with entry

1 into the witness protection program. Whereas
2 what Orr records here in this curious note with
3 the ellipsis is what appears to be a categorical
4 decision that he is not going to be charged in
5 any circumstances. It looks like they are just
6 closing their file. He is no longer wanted for
7 questioning, without any context or
8 qualification at all. And given that Orr is the
9 one person, more than any others, who knows that
10 this decision is being driven by the
11 representations he has been making about the
12 witness protection program and whether this is
13 or isn't an impediment, and given that Orr is
14 the one person who knows more than any others
15 that Zanidean is a very poor candidate for
16 witness protection. And indeed he has just had
17 this meeting with Kovnats where Kovnats has
18 exploded because he is so upset at what Orr is
19 holding out to him in the witness protection
20 program, it is so different from what Kovnats
21 and Zanidean had in mind. So this kind of
22 obviously incomplete note is troubling indeed,
23 given that Orr appears to be at the centre of a
24 certain amount of misinformation that's
25 circulating about the witness protection program

1 and Zanidean's likeliness of entering into it.

2 So I simply ask you to note that Orr's note
3 is the one that doesn't fit with the rest of the
4 RCMP documentation which tends to set out the
5 fuller context here, and query Orr's
6 professionalism and practices in this regard.

7 The seventh submission, at the bottom of
8 page 128, Mr. Commissioner; should Anderson,
9 Paul and Vandergraaf have prepared written
10 contemporaneous police reports of the
11 arrangement that emerged out of their decisions
12 with the RCMP, including any decision to conceal
13 this arrangement from Zanidean until after he
14 testified. Again, if I could ask you to read
15 the submission, and I will come back and make a
16 number of points.

17 Now, the simple point here is should there
18 have been a record kept, a properly documented
19 police report of the arrangement that emerged
20 out of these telephone calls, and in my
21 respectful submission there can only be one
22 answer to that. What had happened as a result
23 of the first six issues we have just gone
24 through was what appears to be a fairly clear
25 agreement between the RCMP and the Winnipeg

1 Police Service that Zanidean would not be
2 charged, assuming entry into the witness
3 protection program, and it appears that the RCMP
4 were being told that was either already in place
5 or was a virtual certainty. That kind of a
6 development in a case where a key witness has
7 been demanding this very thing, he has been
8 demanding immunity from the start, and indeed
9 Anderson says the one big problem with Zanidean
10 is that he wanted iron clad guarantees, and what
11 they had put in place was simply a police to
12 police agreement based on entry into the witness
13 protection program. But it is a key
14 development, a significant development.

15 We see the RCMP repeatedly documenting
16 these matters and we see the Winnipeg Police
17 Service repeatedly not documenting them.

18 The second bullet at the top of page 129
19 says there is not a single contemporaneous
20 Winnipeg Police Service note or report; that's
21 slightly overstated. There is in fact Sergeant
22 Anderson's note of the October 30th call, very
23 brief note, but the note that Anderson makes
24 does not record the stand still agreement. So
25 the critical thing that comes out of that phone

1 call, the stand still agreement, although
2 Anderson makes a note of the phone call, he
3 doesn't include any reference to the stand still
4 agreement in his note. So that's why we assert
5 there is not a single contemporaneous Winnipeg
6 Police Service note or report about these
7 discussions. In my respectful submission, that
8 is not acceptable police professional practice.

9 If we look at how Anderson and Vandergraaf
10 regarded this development, this is nicely
11 summarized by Mr. Dawe at paragraph 55, and
12 again without going to the transcripts where
13 this evidence was given, if you turn up
14 paragraph 55 of Mr. Dawe's summary, you see in
15 the very first line Anderson describes it as a
16 block buster development for the Harder homicide
17 investigators. And if you drop down about ten
18 or twelve lines, Vandergraaf saw this as a very
19 significant development in that it removed a
20 serious impediment to Zanidean's admission to
21 the witness protection program, but also went
22 some distance towards satisfying one of Kovnats'
23 outstanding demands.

24 So this very significant block buster
25 development is not documented in any way in any

1 kind of a transparent form that could then be
2 used for disclosure purposes. In my submission,
3 this is simply not consistent with proper
4 professional police practices.

5 That's the seventh submission,
6 Mr. Commissioner.

7 If I could turn to the eighth submission.
8 Did Anderson, Paul and Vandergraaf orally brief
9 Miller and Dangerfield about the arrangement
10 reached with the RCMP, including any decision to
11 conceal it from Zanidean until after he had
12 testified? Now this turns to the very difficult
13 issue of given that there was no written
14 documentary record, no police report for
15 disclosure purposes of this block buster
16 development, was there an oral briefing on it?
17 And, of course, this is what the police relied
18 on in their testimony. So again if I could ask
19 you to read that submission and I will come back
20 and address it.

21 Now, this is undoubtedly one of the most
22 difficult issues that you face in this inquiry.
23 And given the absence of any documentation,
24 either on the police side or on the Crown side,
25 Mr. Miller's record keeping practices are no

1 better, as we know, there is no documentation of
2 any significance from Mr. Miller about the
3 discussions he was having, and clearly he was
4 having discussions regularly with the police and
5 with Kovnats. So you have no reliable
6 contemporaneous records to resolve this issue.
7 And as a result, it turns entirely on
8 credibility.

9 As always with issues of credibility, the
10 best way to resolve them and, of course, you are
11 very experienced in this, is to ask does the
12 story make sense? Does it fit in with what
13 seems logical or probable from the known facts?
14 And the logic of the submission that we have set
15 out here at paragraph 147 essentially turns on
16 two key premises. And the first premise is that
17 this kind of arrangement -- and we know from
18 reliable records that the police, the two Police
19 forces have arrived at an arrangement. Burton
20 and Anderson agree on that, and the senior RCMP
21 officers' records support it, that there was an
22 arrangement in place that Zanidean would not be
23 charged assuming entry into the witness
24 protection program. And the further aspect then
25 that develops with the Winnipeg Police officers,

1 according to Anderson and Paul and Vandergraaf
2 accounts, is that they decide to keep the
3 arrangement secret from Zanidean. They don't
4 say they keep it secret from the Crowns; their
5 position is that they briefed Miller and briefed
6 Dangerfield, but they do decide they are going
7 to keep it secret from Zanidean, and that is
8 based on legal advice that they receive from the
9 Crowns, especially from Miller.

10 So the first premise on which the logic of
11 our submission turns is that such an arrangement
12 would be highly unusual and highly dangerous.
13 Having made the arrangement with the police
14 force in the first place, I say there is nothing
15 wrong with the arrangement they reached with the
16 police force, with the RCMP, but where they
17 start getting into very dangerous and risky
18 territory is as soon as they start making these
19 kinds of decisions to conceal it from the
20 witness and to set up a de facto misleading of
21 the jury, so that the jury will think that
22 nothing is being done for Zanidean, he is doing
23 all of this out of the goodness of his heart,
24 and that in fact no benefits are going to flow
25 his way as a result of this, when in fact the

1 exact opposite is the truth.

2 That kind of high risk tactic, in my
3 submission, if you were a police officer engaged
4 in that kind of conduct and you had got a Crown,
5 a senior Crown, to sign off on it and say this
6 is okay, this is the way we are going to do it,
7 when everybody agrees this is not the normal way
8 this gets done, you would expect police officers
9 to document that. They would want the comfort
10 and the protection of knowing that Bruce Miller
11 had signed off on something that some people
12 would see as akin to obstructing justice. So it
13 does not make sense, in my submission, that
14 senior officers like these would fail to
15 document Bruce Miller's approval, and indeed his
16 initiative in advising them to take this very
17 controversial course of action. And similarly
18 you would expect Miller to document the fact
19 that he had gotten Whitley or Dangerfield to
20 sign off on it. Miller would not want to be out
21 on a limb doing something as risky as this on
22 his own with the police officers. He would
23 confer with Whitley, he would confer with
24 Dangerfield, and he would document their
25 concurrence. This is the kind of activity that

1 causes careers to fail. And as we submit, it
2 would be akin to professional suicide for Miller
3 to do something like this without seeking and
4 documenting the support and approval of
5 Dangerfield and Whitley, who were intimately
6 involved in the matter.

7 So that's the first premise of our
8 submission, is that it seems unlikely that
9 something like this would be undertaken without
10 it being documented by the parties.

11 The second premise of our submission is
12 that when you look at what Dangerfield and
13 Lawlor said to Justice Morse at the May 22nd
14 pre-trial, it becomes very hard to believe that
15 they are privy to this secret arrangement with
16 the RCMP that is being concealed from Zanidean.
17 And again if we use Mr. Dawe's summary at
18 paragraph 69 of the pre-trial memos, of Mr.
19 Brodsky's pre-trial memos, you see in both
20 memos -- the first memo the reference that is
21 telling on this point is that Dangerfield and
22 Lawlor tell Justice Morse, "The RCMP chose to do
23 nothing about it," which is completely false on
24 the known facts. It wasn't that the RCMP chose
25 to do nothing about it, the RCMP were helping

1 out the Winnipeg Police Service who had a
2 serious problem and were extending assistance to
3 colleagues in another jurisdiction who needed
4 their help. And the second memo goes even
5 further, you see the last two lines, the last
6 two sentences in the second memo, this is again
7 still at paragraph 69,

8 "The Winnipeg Police can only make
9 agreements with respect to the area they
10 are responsible for, the area of Manitoba.
11 They are not able to make agreements with
12 respect to what some other police force,
13 particularly the RCMP, will do and they did
14 not."

15 And again, that's clearly false if
16 Dangerfield and Lawlor had known about the
17 arrangement with the RCMP that had been
18 initiated through these phone calls, and that
19 was clearly being done for the purpose of
20 facilitating Zanidean's entry into the witness
21 protection program, that is to assist the
22 Winnipeg Police. So again if Dangerfield and
23 Miller had been briefed on this arrangement that
24 was in place and on a decision to conceal it
25 from Zanidean until after he had testified,

1 their representations at that May 22nd pre-trial
2 to Justice Morse and to Mr. Brodsky would be
3 tantamount to compounding the obstruction of
4 justice by deliberately deceiving the court and
5 deliberately deceiving Brodsky as to what was in
6 place.

7 So based on those two premises, we submit,
8 in the last bullet at the end of paragraph 8,
9 the end of the eighth issue, that the more
10 probable inference, the more likely inference,
11 is that the arrangement with the RCMP was being
12 used by the homicide officers as a tool or a
13 device to try to rein in an extremely difficult
14 witness. That the prospect of future assistance
15 from the Winnipeg Police in relation to
16 Zanidean's outstanding jeopardy in Saskatchewan,
17 which we know Zanidean was very, very concerned
18 about, that this was the one lever that the
19 police had available to them to try to keep
20 control over a witness who was constantly in
21 danger of breaking loose. There is no reliable
22 basis for you to conclude that this plan to
23 conceal it all was something that was conceived
24 with the concurrence of Miller and Dangerfield.
25 Now, I concede that's a difficult area for you

1 and it does involve issues of credibility, and
2 that is as much assistance as I can be on that
3 point.

4 The ninth submission, Mr. Commissioner, did
5 the police and the Crown make oral promises to
6 Kovnats of immunity for Zanidean on the Swift
7 Current arson? Again if I could ask you to read
8 this and I will come back.

9 And, again, you will recall Kovnats'
10 evidence is that he is adamant that he had these
11 promises of what he calls immunity from the
12 start, he just didn't have them in writing. But
13 again we have to remember that Kovnats was not
14 an experienced criminal lawyer, indeed he wasn't
15 a criminal lawyer at all, and the distinctions
16 between police to police charging discretion,
17 which is really all that Anderson and Burton had
18 put in place was a police discretion not to
19 charge, there was no suggestion of immunity here
20 by Justice Department to Justice Department. I
21 don't think that that is the kind of a nuance
22 that would be clear to Kovnats and there may
23 well be some miscommunication and
24 misunderstanding on this point. But what is
25 clear is that Kovnats wanted what he called a

1 guarantee, and he wanted it in writing. And
2 that's where the dispute between Zanidean and
3 Kovnats on the one hand and Anderson and Miller
4 on the other hand appears to have broken down.

5 And again Anderson's telephone conversation
6 with Hall is quite helpful on this point. If
7 again I could ask you to turn to Mr. Dawe's
8 summary at paragraph 23, he excerpts the phone
9 call between Anderson and Hall. Again it
10 appears to be relatively unguarded. I have read
11 you already the excerpt at the bottom of page
12 18. If you could turn over to the top of page
13 19, the second excerpt from the phone call, and
14 this is a couple of pages further on in the
15 phone call. Mr. Dawe has done some editing
16 here, but the second excerpt is just as
17 important as the first one. And what Anderson
18 turns to at this point in the conversation is he
19 starts talking about Kovnats. He calls him,
20 "that horrible lawyer of his. What was his name
21 again? You know who I mean, Zanidean's lawyer."
22 And then here is the critical statement.

23 "One of the things he would have told you
24 is that one of the stumbling blocks all
25 along was that they wanted an ironclad

1 guarantee that he wouldn't be uh charged.
2 And Miller wouldn't give it to him and I
3 wouldn't give it to him, and nobody would
4 give it to him."

5 So the stumbling block is not that they are
6 not willing to help Zanidean, the stumbling
7 block is over an ironclad in advance guarantee.
8 Because you remember Kovnats wants this in
9 writing prior to Zanidean getting into the
10 witness box. And clearly the police plan, or
11 the most probable inference is that they weren't
12 willing to give him anything until he testified.

13 So once again, in my respectful submission,
14 the most probable inference here on this ninth
15 issue, consistent with the probable inference on
16 the eighth issue, is that the police and the
17 Crown never did give Kovnats an ironclad
18 guarantee in advance, as Anderson puts it, and
19 that Kovnats has misunderstood what was being
20 held out to him, if he thought that he had any
21 kind of a promise of immunity, certainly not in
22 writing or orally, it appears as I read that
23 phone call with Anderson that that was exactly
24 what the police and the Crown would not give
25 him. And there is certainly no indication that

1 Miller is ever willing to give Kovnats this in
2 advance promise of immunity that he is
3 repeatedly seeking. Indeed, as we say at the
4 end of this submission, at the top of page 131,
5 that's the major reason why these acrimonious
6 negotiations are still going on on the eve of
7 trial is because they are not willing to give
8 him this promise of immunity in advance.

9 So again the natural inference here is that
10 they are holding out to him the prospect that
11 they will help and we know that they already
12 have been helping. Indeed, they have helped
13 substantially. And they have got an arrangement
14 in place with the RCMP, but they are not willing
15 to put it in writing to Kovnats as an ironclad
16 guarantee. They have got the agreement in
17 place. It would have been quite easy for them
18 to simply write Kovnats a letter and say we have
19 this arrangement with the RCMP, he is not going
20 to be charged, assuming he gets into the witness
21 protection program, it would have been the
22 easiest thing in the world, but at that point
23 they would lose control of their witness. And
24 it is quite clear, again, I can't do any better
25 than to quote Anderson's own words, that they

1 weren't willing to give him that kind of an
2 ironclad guarantee.

3 THE COMMISSIONER: Is this convenient?

4 MR. CODE: This is a perfect place to break.

5 THE COMMISSIONER: Okay. 15 minutes.

6 THE CLERK: Order. All rise. This court is
7 recessed for 15 minutes.

8 (Proceedings recessed at 10:47

9 and reconvened at 11:05)

10 THE CLERK: All rise. This Commission of
11 Inquiry is in session.

12 MR. CODE: So, we are up to number 10. I'm
13 going to have to move a little more quickly
14 through these, but they become a little easier
15 as we get deeper into the story, so I will be
16 able to leave more of it in writing.

17 Issue number 10, at the top of page 131, is
18 the important issue of whether Miller kept
19 Dangerfield and Lawlor in the dark about the
20 negotiations with Kovnats. If I could ask you
21 to read that, and I will come back.

22 There is really two distinct points made
23 here in this submission. The first deals with
24 Miller and the second deals with Dangerfield and
25 Lawlor. In terms of Miller's responsibilities,

1 which are dealt with in the first two bullets,
2 the important point to remember here is that the
3 whole rationale, and it is a good rationale, for
4 separating out this function of negotiating
5 these kinds of arrangements with critical
6 witnesses, is that you may become a witness.
7 You don't want the Crown counsel who is
8 prosecuting the case in court to be conducting
9 these negotiations, because it is a relevant
10 issue, it is a discloseable issue, and you may
11 become a witness, depending on what the evidence
12 is that comes out about any deals or
13 arrangements or demands that have been made. So
14 it was a sensible structure within the
15 department to have Miller negotiating these
16 matters and keeping Dangerfield and Lawlor out
17 of the negotiations.

18 But what that meant is that Miller was a
19 potential witness and he had to document his
20 evidence, he had to preserve his evidence.
21 Every time Zanidean or Kovnats went off the dial
22 with another demand, that was a discloseable
23 fact. That was evidence. It was relevant
24 evidence. It went to the motivation and demands
25 and interests of the critical witness in the

1 case, and Miller had to take responsibility for
2 the fact that he was a potential critical
3 witness in this case, and preserve and document
4 his evidence. And from the record we have,
5 there is nothing to indicate that Bruce Miller
6 ever kept a proper record, as one would expect,
7 of an important witness of the evidence that he
8 could potentially give in this case and to
9 record it in a discloseable form so that it
10 could be given to Mr. Brodsky.

11 At some point Miller had to sit down and
12 write a comprehensive memo setting out the
13 course of the negotiations, referring to the
14 letters that went back and forth, referring to
15 his position and his letters that went back and
16 forth, and probably appending them to the memo.
17 And recognizing the fact that this was all
18 discloseable and had to be preserved, and it was
19 his duty to record it in a discloseable form.
20 So it would be unfair to criticize Vandergraaf
21 and Anderson and any of the police officers for
22 failing to properly document what they were
23 doing without at the same time being evenhanded
24 and making the very same criticism of Miller.
25 That's the first submission here.

1 But the second submission is that it
2 appears that Dangerfield and Lawlor were not in
3 the dark in any real sense. And the next three
4 bullets set out there under paragraph 149
5 summarize the evidence which tends to indicate
6 that Lawlor and Dangerfield had substantial
7 knowledge about the witness protection matters,
8 indeed they needed to know about them, so that
9 that they could make decisions about the direct
10 indictment, about the expedited trial motion,
11 about the timing of disclosure, decisions on
12 disclosure that were constantly coming in. They
13 needed to know about these matters and there was
14 nothing in the policy of separating the two
15 roles that requires the left hand to keep the
16 right hand in the dark. And it appears they
17 were not kept in the dark, that they knew all
18 about these negotiations that were going on
19 between Miller and Kovnats.

20 If you look, for example, at Mr. Dawe's
21 summary at paragraphs 59 and 61, he nicely
22 summarizes some of Lawlor's evidence on this
23 point. At paragraph 59 you see Lawlor's
24 acknowledgment that he was aware that Zanidean
25 was concerned about a criminal investigation in

1 Saskatchewan. And at paragraph 61, Mr. Dawe
2 excerpts Lawlor's evidence to the effect that he
3 was aware of Miller's negotiations -- the Swift
4 Current arson was an issue in Miller's
5 negotiations with Zanidean and assumed that
6 Miller knew more about the matter than he did.

7 So they are not being kept in the dark
8 about the fact of these negotiations, and it was
9 obviously open to them, when faced with
10 Brodsky's disclosure requests, to make the
11 appropriate inquiries and to tell Miller to put
12 it in writing. If Miller was failing in his
13 duty to properly document and record these
14 matters, Dangerfield and Lawlor were equally
15 failing in their duty to insist that Miller
16 report to them on the results of what his
17 negotiations were.

18 And perhaps the starkest illustration of
19 this comes on the eve of trial of May 26 when
20 this extraordinary incident at the Public Safety
21 Building takes place. And if Dangerfield didn't
22 know before then that there were intense
23 negotiations going on between Kovnats and
24 Miller, he sure knew it by May 26 when this
25 explosion happens at the Public Safety Building.

1 And at that point he had an absolute duty to
2 turn to Miller and say, Bruce, I need a full
3 report on this, I want to know exactly what has
4 been going on, what is it that Zanidean and
5 Kovnats are demanding? What have you offered
6 them? What is the deal? Is there a deal? And
7 document it for me.

8 So in my respectful submission, every
9 single witness in this case has come forward and
10 acknowledged that these were all discloseable
11 facts about Kovnats' and Zanidean's demands and
12 the negotiations. Nobody has a shadow of doubt
13 this was all discloseable and relevant. And yet
14 neither side, neither Miller on the one hand nor
15 Dangerfield and Lawlor on the other hand took
16 the bare minimum steps of recording this
17 relevant information and disclosing it and
18 insisting it be recorded. So in my respectful
19 submission all three bear collective
20 responsibility for the failure to document,
21 preserve and disclose this very important
22 information about Zanidean's motivation.

23 Now the next three issues, number 11, 12
24 and 13 are very specific and they deal with
25 Brodsky's three disclosure requests. And I

1 think you are well familiar with these, but if I
2 could quickly go through them. Number 11, at
3 paragraph 150 is Brodsky's first disclosure
4 letter, the February 7th letter, if I could just
5 ask you to quickly read that.

6 Now there is two disclosure requests that
7 need to be addressed here in relation to this
8 letter. And the first one is the request for
9 the witness protection details. Dangerfield has
10 disclosed the fact that witnesses are under
11 protection before Chief Justice Hewak. He has
12 made broad undertakings to make full disclosure
13 and Chief Justice Hewak clearly expects that of
14 him. And yet when this request for disclosure
15 of the witness protection details is made to
16 him, he makes an overly broad response that it
17 would give away the witnesses if he was to make
18 this disclosure. And once again everybody
19 concedes now that that response was erroneous,
20 it was overly broad, and that there is much that
21 could have been disclosed that would not have
22 given the witness away. So in my submission
23 Dangerfield must bear responsibility for that
24 clearly erroneous response to Brodsky's request.

25 The second area are the paragraph 22 and

1 paragraph 23 requests, where Brodsky
2 specifically asks about the motivations of the
3 witnesses and asks for information relevant to
4 their motivation. And this, of course, is where
5 the negotiations going on between Miller and
6 Kovnats were critical, and both Lawlor and
7 Dangerfield were aware of those negotiations.
8 And so the response to these two questions, in
9 my submission, is completely unacceptable. And
10 remember, Lawlor pencils in his recommendations
11 on the Brodsky letter. Lawlor is the one who
12 has been dealing with disclosure and appears to
13 be the one who knows the file. And he writes in
14 the proposed responses by hand, and Dangerfield
15 quickly sends off a response the next day,
16 because they are trying to get the motion on for
17 the expedited trial. And it is quite clear that
18 they have made no effort whatsoever to inquire
19 of Miller or of the police officers to make
20 relevant inquiries responsive to Brodsky's
21 questions about the motivation of witnesses.

22 Experienced criminal lawyers, experienced
23 criminal litigators like Dangerfield and Lawlor
24 know that these kinds of witnesses generally
25 don't come forward out of the goodness of their

1 hearts, they usually want something. And they
2 knew that one witness in particular had taken
3 the very unusual step of hiring a lawyer, and
4 they both agreed that was not normal.

5 And finally they knew and it is in Lawlor's
6 preferred indictment memo, that Kovnats had said
7 his client was very demanding. So at a minimum,
8 before they could properly reply to those
9 requests, they had to make appropriate
10 inquiries, particularly given the undertakings
11 they had made, that had been made to Chief
12 Justice Hewak, they had a duty to make proper
13 inquiries and not just send back this blanket
14 refusal to say there is nothing, there is
15 nothing about witness motivation.

16 And Lawlor concedes, Mr. Dawe has
17 summarized the evidence on this point at
18 paragraph 37 of his statements, both of them
19 concede that they made no inquiries of their
20 own. Lawlor simply reviewed the police reports
21 that he had available. That's all summarized at
22 paragraph 37 of Mr. Dawe's evidence summary.

23 That's the eleventh submission.

24 The twelfth submission, Mr. Commissioner,
25 is the second disclosure request, April 25th

1 disclosure request. Again there is two areas of
2 disclosure here that are of concern. If I could
3 ask you to read that.

4 THE COMMISSIONER: Yes.

5 MR. CODE: The two areas in this letter, that
6 are of concern is, first of all, Lawlor responds
7 to an earlier request of Brodsky's "for all
8 notebook references to statements of Zanidean,
9 statements or conversations of Zanidean." He
10 says I have got the formal statements, but I
11 want you to, in essence, check the notebooks and
12 see if there are any other contacts with the
13 police, conversations, not referred to in the
14 statements. And, of course, it is a very astute
15 question by Mr. Brodsky, because we know that's
16 exactly the problem here. He has put his finger
17 on exactly what Anderson and Vandergraaf and
18 Paul have done, is they have lifted certain
19 conversations out of the police reports, and so
20 his question requires a check of the notebooks.
21 And, of course, Dangerfield and Lawlor appear
22 not to have the notebooks at this stage, and so
23 they rely on the police to do a review of the
24 notebooks and Lawlor's response, "I am advised"
25 suggests that the response here, that you have

1 all statements and conversations, which we know
2 to be patently incorrect, comes from the police.
3 So the police must bear primary responsibility
4 for this false response to Brodsky's important
5 request here.

6 And at the same time, again it is my
7 submission that Dangerfield and Lawlor have to
8 share some of the responsibility, because
9 clearly by the time of the pre-trial, they have
10 been told about these admissions. And I have
11 gone through this with you already, the
12 paragraph 69 reference, to Mr. Brodsky's
13 pre-trial memos, makes it clear that the police
14 have told Dangerfield and Lawlor about the
15 admissions in some way or another. And
16 Dangerfield and Lawlor simply failed to make the
17 appropriate follow-up inquiry to say, give me a
18 properly prepared police report about those
19 admissions so I can disclose it to Brodsky. He
20 has asked for it, we have given him a false
21 response, and it was less than a month ago,
22 remember Lawlor's letter goes out April 26 with
23 the false response, "I'm advised that you have
24 all statements and conversations with Zanidean."

25 By May 22, less than a month later, they

1 know that there are these additional admissions
2 that are not found in any of the police reports,
3 and yet they take no steps to correct the false
4 letter that had been sent out on April 26. So
5 in my respectful submission, there is joint
6 responsibility here for the fact that Brodsky
7 was not given proper disclosure on this point.

8 The secondary of disclosure in this letter
9 that concerns us is the request for information
10 in the police files about the Swift Current
11 arson. And again it is quite clear that this
12 request, you see it is in the third to last
13 bullet at the bottom of page 133, "What do the
14 Winnipeg Police Service police have on the fire
15 in Swift Current," and the response is they have
16 nothing. It is quite clear that that response
17 came from the police, because we have Lawlor's
18 fax to Vandergraaf where he refers this question
19 on to the Winnipeg homicide officers.

20 It is equally clear the response is false,
21 and so the police must bear primary
22 responsibility for Brodsky being given improper
23 disclosure on the point.

24 But once again, by the time of the May 22nd
25 pre-trial, Dangerfield and Lawlor have clearly

1 been briefed in some fashion by the officers
2 about the Swift Current arson. They know of
3 Zanidean's admissions, they know the admissions
4 have been passed on to the RCMP, they know the
5 RCMP have chosen to do nothing, as the memo
6 states. They had a duty to find out what it was
7 that the Winnipeg Police had on this arson, what
8 they knew about the arson and to insist on
9 proper reporting in the form of discloseable
10 police reports. Those are my submissions on the
11 twelfth issue.

12 The thirteenth issue is the last one of
13 Brodsky's three major disclosure requests, and
14 this is the pre-trial questions memo. And again
15 there is two areas of non-disclosure here that
16 are of concern. If I could ask you to read
17 that, paragraph 152.

18 THE COMMISSIONER: Yes.

19 MR. CODE: Here again, another two areas of
20 disclosure, and what bears noting through all
21 three of these disclosure requests, and the six
22 areas of non-disclosure, two from each that we
23 have focused on, is that Mr. Brodsky is
24 consistently asking the right questions. He is
25 asking questions that get at the heart of what

1 we now know was not disclosed to him. So, there
2 is not a lot of wriggle room here in terms of
3 Brodsky having failed to ask for things. He is
4 clearly, consistently asking the right questions
5 in my submission.

6 The two areas of non-disclosure are, first
7 of all, favourable considerations in relation to
8 witnesses motivations, and secondly about
9 Zanidean having been an informant, whether he
10 has a history of being an informant with the
11 Winnipeg Police. Both of these requests are
12 clearly passed on to the police and both of the
13 requests are responded to by Anderson in a
14 written police report, so at least here we do
15 have a properly documented police response to
16 the disclosure request. And in both cases I've
17 set out Anderson's responses here in some
18 detail, so I don't need to go over it again.

19 I think the best that can be said about
20 Anderson's responses on both of these points is
21 that they are very carefully worded. If you
22 read his response to the first request about
23 favorable consideration to the witness, he puts
24 the stress on any other deals made with any
25 witness in exchange for testimony, and stresses

1 that the deal that he had wasn't with the
2 witness, it was with the RCMP, and it wasn't in
3 exchange for his testimony, it was in order to
4 get him into the witness protection program.

5 And that kind of very careful parsing of
6 the language, in my respectful submission, is
7 not the proper approach to be taken to
8 disclosure when you have got a homicide trial
9 going on, and the liberty of the subject with
10 life imprisonment is at stake, clearly the kind
11 of carefully choosing your words in order to
12 avoid a more generous response is not the proper
13 approach to disclosure.

14 What Brodsky had made was a very broad
15 request for any other matters that would
16 influence witnesses to testify in a particular
17 fashion. And the fact that Zanidean had been
18 demanding immunity on Swift Current and that
19 steps had been taken to put a police force to
20 police force arrangement in place, and
21 substantial negotiations were going on in
22 relation to his future care and well-being are
23 all matters that would have been responsive to
24 those requests.

25 Similarly the request as to whether he had

1 been an informant, what Anderson does in
2 response to that as set out at the top of page
3 135, is he simply reframes the question.
4 Brodsky asks had Zanidean ever been an informant
5 for the police, Winnipeg Police, a broad
6 request. And Anderson narrows the question to
7 say had he been an informant prior to his
8 involvement with Driskell. That's not the
9 question that Brodsky asked. And by narrowing
10 the question in that way, of course, Anderson's
11 answer could omit any reference to the fact that
12 he had been the informant on the chop shop
13 charges. So again not a very impressive
14 response or the kind of response one would
15 expect in a homicide case where full disclosure
16 had been promised.

17 The fourteenth submission, middle of page
18 135, paragraph 153, and we are now up to the
19 events at the Public Safety Building on the
20 night of May 26th, and whether everything
21 surrounding that event was itself a discloseable
22 fact. If I could ask you to read that brief
23 submission.

24 THE COMMISSIONER: Yes, I have read it.

25 MR. CODE: And there is little I can add to what

1 is set out there in writing. Everybody again
2 appears to agree that this kind of brinkmanship
3 that Zanidean and Kovnats were playing, of
4 leaving the jurisdiction, coming back and
5 refusing to cooperate, making demands and
6 insisting that everything be put in writing
7 before he testified, all of that was
8 discloseable. And Dangerfield had direct
9 personal knowledge of these matters now, and
10 there is no possible excuse for his failing to
11 disclose what happened on the night of May 26.
12 And then, of course, more importantly to make
13 inquiries and to get himself properly briefed on
14 what lay behind this, what were the Miller/
15 Kovnats negotiations that appeared to be
16 breaking down, what were Zanidean and Kovnats'
17 demands.

18 The fifteenth submission, the bottom of
19 page 135, and this is a small point about the
20 June 4th meeting between Kovnats and Miller
21 where the trial is already underway at this
22 point and suddenly this issue of the accuracy of
23 Zanidean's statements surfaces, and Kovnats says
24 he has a meeting with Miller about it. If I
25 could ask you to briefly read that.

1 THE COMMISSIONER: I have read it.
2 MR. CODE: And again there is little that I can
3 say on this beyond what is set out here in
4 writing. It is a simple submission that
5 obviously these were discloseable facts, and if
6 this was brought to Miller's attention he had an
7 obvious duty to record it and ensure that it was
8 preserved and disclosed. But the concluding
9 submission that I make to you on this point is
10 that although Kovnats does have a
11 contemporaneous file memo on this point, and so
12 it is somewhat more reliable than some of the
13 other parts of Kovnats' evidence, we don't have
14 anything resembling a response from Miller to
15 this. There is simply nothing in any of the
16 various interviews with Miller over the years on
17 this issue, there is no documentation of
18 Miller's that bears on this issue, and it
19 appears as I read Zanidean's annotated
20 statements, which Kovnats was eventually able to
21 find and produce, the discrepancies appear to be
22 relatively minor.

23 And so I would submit to you,
24 Mr. Commissioner, that this may be an issue that
25 can be allowed to fall by the way side, if I can

1 put it that way. I felt I should raise it and
2 mention it because any time a witness starts
3 talking about their statements having been
4 doctored, it obviously on its face is
5 potentially serious. But given the lack of any
6 response from Miller to this allegation and
7 given that the discrepancies don't appear to be
8 all that serious, I submit that you could quite
9 properly decide not to deal with this issue.

10 The sixteenth issue; did Dangerfield and
11 Lawlor have a duty to correct misleading or
12 inaccurate evidence given by Zanidean at the
13 trial? This is obviously a critical important
14 submission and a very, very important issue in
15 this case. If I could ask you to read that
16 submission.

17 THE COMMISSIONER: I have read it. But there
18 was something that you said, your last
19 submission, and I think you are probably correct
20 that it doesn't need to be determined about the
21 differences in the Zanidean statements. But
22 there is one sort of curious thing, and that is
23 in Dangerfield's re-examination of Zanidean, he
24 goes to a question about, and I have forgotten
25 now what it is, I don't want you to look at it,

1 but the re-examination about something that
2 Zanidean had not covered in chief about whether
3 it was to kill him -- I shouldn't be --

4 MR. CODE: Which is one of the issues where
5 Zanidean says this was a misstatement.

6 THE COMMISSIONER: Yes, yes. Sort of at the
7 bottom of his statement. And then
8 Mr. Dangerfield re-examined him on it. I'm not
9 even sure how he got to re-examining on it, but
10 he did.

11 MR. CODE: I will look that up on the lunch
12 recess and see if there is anything that I can
13 assist on that.

14 THE COMMISSIONER: It's okay, I will maybe look
15 it up and ask further inquiries later. Okay.
16 All right.

17 MR. CODE: You have read the sixteenth
18 submission?

19 First of all, the point of law raised here
20 of is there a duty on Crown counsel to correct
21 knowingly false evidence that the Crown has
22 elicited from one of its witnesses or one of its
23 witnesses has been heard to give, everybody
24 agrees that there is an obvious duty on the
25 Crown to take corrective steps. There is

1 different ways in which it can be done. We all
2 remember the famous story, at least when I was a
3 young counsel, with Frank Armstrong standing up
4 in front of the jury and saying that's false,
5 when one of his witnesses told a lie that he
6 knew to be false, which is perhaps the most
7 blunt and direct way in which to do it, but
8 there are other ways in which it can be done
9 more subtly by going back into chambers or by
10 simply making disclosure to your opponent so
11 that your opponent can bring out the falsehood.
12 One way or the other it has to be done, and I
13 don't take anyone to be putting that in issue.

14 So the real issues become as set out in the
15 second bullet, whether Zanidean's evidence was
16 in fact false or misleading and whether the
17 Crown knew it was false or misleading. In
18 relation to the first issue, was Zanidean's
19 evidence false or misleading, I can't do any
20 better than Mr. Dawe's summary, which in my
21 submission is an excellent summary, and so I
22 have simply adopted it as my own. It is at
23 paragraph 89 of Mr. Dawe's summary of the
24 evidence, and I won't go through it with you.
25 It is lengthy and detailed. Pages 79, 80 and 81

1 he sets out a number of bullet points that
2 nicely summarize the numerous areas in which
3 Zanidean was giving clearly incorrect evidence
4 in my submission.

5 And leaving aside the details of any
6 particular little point as to whether he was
7 being full, fair and accurate, when you step
8 back and look at the forest but not the trees,
9 what is clear is that the overall picture that
10 he was creating was one of tremendous hardship
11 where little or nothing was being done for him,
12 and he was a person of virtually heroic stature
13 who was going to be thrown to the wolves the
14 minute his evidence was completed. That nothing
15 further was going to be done for him by way of
16 financial support. And the overall impression
17 that was left was clearly false, in addition to
18 the individual items that were false, in my
19 submission.

20 So the real issue here becomes whether the
21 Crown knew it was false, and the last two
22 bullets make the submission that obviously the
23 way in which you determine issue number 10 will
24 be very important, and will bear on this,
25 because issue number 10, of course, is the

1 question of did Miller keep Dangerfield and
2 Lawlor in the dark. If Dangerfield and Lawlor
3 were generally apprised of what was going on in
4 the witness protection negotiations, even though
5 they didn't have a detailed report as they
6 should have had from Miller, then clearly that
7 will go some distance towards suggesting that
8 they knew or ought to have known that much of
9 this evidence was false.

10 But the more important submission I want to
11 make to you here is that there is a middle
12 ground somewhere between knowing for sure that
13 evidence is false. The Frank Armstrong example,
14 where he gets up on his feet immediately in
15 front of the jury and declares that the evidence
16 is so false, he is so confident it is obviously
17 false, it is a categorical black and white
18 matter, and being in a position where you are
19 concerned, where red flags have been raised,
20 that you feel there is more to the story than
21 what the witness is telling, and you have a duty
22 to make inquiries and to ask questions.

23 The way this came out in my examination of
24 Dangerfield and Lawlor is they both agreed
25 obviously that it would be wrong to keep

1 yourself in the dark, that once you had been put
2 on notice that there was an issue and that the
3 full story might not be coming out, you had a
4 duty to make inquiries. It is a species of
5 willful blindness to not make inquiries in an
6 area where you fear that a witness is getting
7 into trouble.

8 So again if I could read you Mr. Dawe's
9 summary of that evidence. There is a great deal
10 of cross-examination along these lines of
11 Dangerfield and Lawlor. If you could just turn
12 to paragraph 90 where Mr. Dawe has tried to
13 summarize it, the testimony of the key witnesses
14 on this point. And if I could just read some of
15 the summary to make the point. The middle of
16 paragraph 90, page 82, you see a sentence
17 starting "in his testimony, Dangerfield agreed."

18 "In his testimony, Dangerfield agreed that
19 when the Swift Current matter was raised by
20 Brodsky in cross-examination, he had an
21 obligation to make inquiries with Miller
22 and ascertain the true facts, but did not
23 do so. Although Dangerfield did not know
24 the precise details of the witness
25 protection arrangements, he knew from

1 Anderson's November 4, 1990 report that
2 these arrangements would include selling
3 Zanidean's house, and that Zanidean would
4 continue to be supported for some period
5 after the trial."

6 And indeed I would submit that's just
7 common sense. That's the whole essence of the
8 witness protection is to settle up post-trial
9 plans for the witness.

10 "Dangerfield agreed that he must have known
11 at the time that Zanidean's testimony on
12 these matters was inaccurate, and he cannot
13 explain why he took no corrective action
14 and why he did not go to Miller and
15 ascertain the true facts, which he expects
16 he could have done quite easily. Lawlor
17 also cannot explain why he did not go to
18 Miller and request all of the true facts
19 regarding the Swift Current arson once
20 Brodsky pressed the point in
21 cross-examination of Zanidean. He agrees
22 that in hindsight Zanidean's claim that no
23 arrangements had been made with respect to
24 his house, and his assertion that his
25 financial support would end as soon as he

1 finished testifying and that there had been
2 no discussion of startup costs were
3 contrary to common sense. Lawlor cannot
4 explain why this did not occur to him at
5 the time, or why he did not approach Miller
6 to learn what witness protection
7 arrangements had actually been made for
8 Zanidean."

9 So the submission that I would make is that
10 it is not necessary that Dangerfield and Lawlor
11 must have known that this evidence was false, it
12 is sufficient to say that they knew or they must
13 have had concerns about the evidence and they
14 had a duty to make inquiries from the parties
15 who knew these facts, and to correct the record
16 after making proper inquiry. That's the
17 sixteenth submission, Mr. Commissioner, and an
18 important one obviously.

19 Submission number 17; should Sergeant Paul
20 have made a contemporaneous police report of the
21 events of June 20 and 21? If I could ask you to
22 read that, and I will be very brief with this.

23 Again there is little that I can say to add
24 to what is set out here in writing. But the
25 important point about the utterance, the threat

1 to go to the press to say his testimony had all
2 been lies, is the context in which it takes
3 place. Zanidean is in intensive negotiations to
4 try to settle the arrangements that have been
5 made for him, and he is clearly unhappy with
6 them. He is angry with the police. He thinks
7 the police are sabotaging the deal that he hopes
8 for, and as part of that he threatens to say
9 that his testimony had all been lies. So the
10 inference that emerges from this event is that
11 Zanidean had a hope or an expectation of future
12 benefits. He was expecting a quid pro quo. And
13 this again is tied up with what Richard Quinney
14 ultimately decides, is that however it came
15 about, Zanidean expected certain benefits to
16 flow to him as a result of his testimony. And
17 that, of course, is highly, highly, relevant to
18 his motivation and his credibility. And that's
19 why it is such an important event to properly
20 record and preserve and disclose. It is not
21 whether it is true or not that his testimony had
22 been lies or whether this is just a threat, it
23 is what it says about Zanidean's motivation and
24 his expectations of all of this deal making,
25 that this was something that was connected to

1 his evidence. That he had delivered his
2 evidence and expected this benefits package,
3 whatever it was that he was demanding, and when
4 he didn't get it, he withdrew, he was going to
5 withdraw the quid pro quo, he was going to
6 withdraw his testimony. That's at least
7 certainly the way Greg Brodsky would have used
8 this in the Court of Appeal.

9 That's the seventeenth submission, that
10 there was obviously a duty to record this. And
11 of course when Hall and Ewatski stumble upon
12 this during their review in 1993, and they do
13 stumble upon it because it comes out because of
14 the tape recording of the phone call, and when
15 they learn that Sergeant Paul can prove that it
16 was Zanidean who placed the anonymous call. But
17 the important part about these events is not
18 that it allows Brodsky to prove who the
19 anonymous caller is, that's an incidental
20 benefit that also flows from preparing a proper
21 report, but its main relevance and significance,
22 in my submission, is what it says about
23 Zanidean's expectations and motivations.

24 The eighteenth submission, it concerns the
25 dispute between Anderson and Burton about the

1 July 16th phone calls and the 18th phone calls.

2 This is a little more complicated point. If I
3 could ask you to read the written submission.

4 THE COMMISSIONER: Yes.

5 MR. CODE: Now these phone calls in July,
6 although they occur post trial and conviction
7 and after Zanidean's evidence is complete, they
8 are of some significance because again, like the
9 June 21st incident, June 20th incident, they
10 tend to throw light back on what Zanidean's
11 expectations were and whether he had a
12 subjective hope of future benefits in return for
13 his testimony.

14 There is a clear conflict between Burton's
15 account and Anderson's account, and again
16 Mr. Dawe has set them out fully at paragraphs
17 103 to 105, so you have them there to refer to
18 when you are considering this submission. But
19 this perhaps is one of the easiest disputes to
20 resolve as between Burton and Anderson, in that
21 this is the one occasion where we have Burton's
22 best records. We have the contemporaneous
23 record that he makes of these phone calls
24 intact, without editing, it has been preserved
25 fully. So Burton has a very good record of

1 these calls and Anderson, of course, as is the
2 norm, has no contemporaneous record. He has his
3 after the fact report prepared a number of
4 months later when he is responding to what he
5 believes is a RCMP complaint.

6 So in addition to Burton's record being
7 particularly good of this phone call, the
8 substantive difficulty for Anderson's account is
9 that it is perhaps the most implausible of all
10 of Anderson's accounts. Everything that
11 Anderson has said up until now in his story,
12 much of it fits with known facts, and indeed I'm
13 inclined to regard much of Anderson's account as
14 being quite reliable.

15 But this is the one part of his story that
16 really doesn't hold up, in my submission, this
17 idea that Burton got on the phone and told him
18 that there had been an about face, that the
19 superiors in Regina had decided to charge
20 Zanidean and then proceeded to disparage his
21 superior officers for having a lack of
22 investigative experience and making ridiculous
23 decisions. We know from the RCMP file, and this
24 is all quite well documented at this time, the
25 July records are quite well reserved, that none

1 of this is true. That you have to believe that
2 what Burton was doing here, if Anderson's
3 account is reliable, is he is telling him a pack
4 of lies.

5 These could only be outright falsehoods,
6 because as Mr. Dawe has summarized nicely at
7 paragraphs 104, and I have again simply adopted
8 Mr. Dawe's summary of the evidence here, we know
9 that the superior officers have made no such
10 decision. There has not been a decision to
11 charge Zanidean. Quite the opposite, the
12 superior officers have said let's finish the
13 investigation. Similarly they haven't overruled
14 Burton, because indeed Burton is himself
15 recommending that charges be laid.

16 And finally they certainly don't lack
17 investigative experience. And it doesn't appear
18 from any of the records and from the evidence
19 that Burton had any disrespect for his superior
20 officers. So for Burton to get on the phone and
21 tell a patently false story like this to
22 Anderson seems implausible, when his own records
23 would contradict it, and particularly when Orr
24 was still very much involved in the piece. We
25 know that Orr is actively liaising with these

1 Regina officers and Orr would be able to find
2 out in a second, as did he in his conversations,
3 that there was no decision yet to charge
4 Zanidean. What had happened, the true facts
5 here is that the RCMP had now learned that
6 Zanidean wasn't in the witness protection
7 program at all. What had happened is that the
8 misapprehension or the misunderstanding or the
9 belief that he was going into witness
10 protection, suddenly they found out that it
11 wasn't true, that he wasn't in witness
12 protection at all, that he had been kicked out
13 and was on his own.

14 And so the whole premise for not charging
15 him had been removed. And that's a completely
16 understandable, straightforward story which is
17 reflected in the RCMP documents, so it makes no
18 sense that Burton would tell complete untruths,
19 knowing that the untruths could be rapidly
20 discovered by Orr in one of his phone calls to
21 Regina. And remember Orr is liaising with
22 Miller at the same time. I make a note in the
23 second to last bullet that what Burton records
24 Anderson saying is that Anderson is going to go
25 to Miller, and Burton makes a note of that. And

1 sure enough, the very next day, we have got
2 Miller calling Orr to get to the bottom of this
3 and to find out what is going on. So the idea
4 that Burton would lie to Anderson about the true
5 set of the facts here, knowing that Anderson is
6 going to go straight to Miller and Miller is
7 going to go straight to Orr, at least being a
8 reasonably possible scenario, is hardly likely.
9 It also makes little sense that Burton would
10 disparage his superior officers to a member of
11 another police force, particularly one that he
12 had come to mistrust.

13 In my submission, the more reliable account
14 in this one instance of the conversations
15 between Burton and Anderson is Burton's account.
16 And it is not surprising that Richard Quinney
17 laid considerable stress on this particular
18 conversation in making his decision that
19 Zanidean appeared to have had a subjective
20 belief in immunity, based on the representations
21 that had been made to him. This was the future
22 quid pro quo, or the future benefit that he was
23 hoping for in return for his testimony.

24 The nineteenth submission; should the RCMP
25 have preserved all of their relevant records

1 relating to the Swift Current arson, if I could
2 ask you to quickly review that.

3 Now this is a simple point but an important
4 one. That the failure to preserve the RCMP
5 records, all of them, obviously has caused
6 considerable difficulty in trying to get to the
7 bottom of the whole Zanidean matter. And given
8 that Burton realized the importance of these
9 files, both Burton and Ferguson were attuned to
10 the fact that their decisions in relation to
11 Zanidean impacted on the integrity of Driskell's
12 conviction. They both said as much in their
13 testimony and in their documents, and so steps
14 were taken to preserve those files. And it is
15 not just the steps that they took, it is that it
16 became a media cause in the spring of 1993 and
17 the RCMP were drawn back into the case in the
18 spring of 1993 through the media coverage in
19 which Ferguson was interviewed, and through the
20 Hall/Ewatski report in which Hall and Ewatski
21 come out in May and further interview Burton and
22 review the file.

23 So in all of those circumstances the RCMP
24 were clearly on notice that this was an
25 important relevant file to a possible

1 miscarriage of justice in Manitoba, and they
2 ought to have taken steps to properly preserve
3 their file.

4 Now the next two submissions are very
5 important, and these are the submissions about
6 the Quinney materials. And I have separated it
7 out into two separate submissions, one is the
8 non-disclosure prior to the appeal, that's
9 number 20, and number 21 is the non-disclosure
10 after the appeal. Could I ask you to briefly
11 read the 20th submission there at paragraph 159.

12 THE COMMISSIONER: Okay, I have read it.

13 MR. CODE: Now in my submission the pre-appeal
14 situation clearly rests responsibility on
15 Miller. He had definitely received the
16 material, he had definitely reviewed it. He had
17 been told by a very senior Crown official in
18 Saskatchewan, Mr. Quinney, that it was
19 discloseable, and in all of those circumstances
20 he bore primary responsibility for making
21 disclosure.

22 He can't be criticized for passing it on to
23 Dangerfield, as Dangerfield was the one who had
24 carriage of the appeal. But he had a duty to
25 follow up with Dangerfield and to make sure that

1 the disclosure had been made. This was very
2 much his baby. He had been dealing with the
3 Zanidean negotiations, he had been dealing with
4 Quinney, it was his responsibility, if not to
5 make disclosure, to at least follow-up with
6 Dangerfield and ensure that Dangerfield had
7 addressed his mind to this and had made a
8 decision. All of the evidence is that
9 Dangerfield was an extremely busy trial lawyer,
10 and if he had failed to take steps, it was
11 Miller's duty to follow-up with him.

12 In relation to this pre-appeal period, I
13 don't believe there is sufficient evidence for
14 you to reach a conclusion one way or the other
15 as to whether Dangerfield ever received this
16 material. There appears to be contemporaneous
17 records saying that he had not received it. And
18 he has given sworn testimony to that effect.
19 And there is nothing in the documentary record
20 to clearly contradict that. It is hard to
21 believe that Miller and Dangerfield wouldn't
22 have had a chat about it at some point, given
23 that their offices are right next door to each
24 other. It is hard to believe that Miller
25 wouldn't have followed up at some point and said

1 what do you think of that Quinney material,
2 George, that I just sent over to you; that some
3 kind of conversation would have likely occurred.
4 But in my submission the record is not
5 sufficiently clear for you to make findings on
6 that obviously, particularly the fact that we
7 don't have Mr. Miller here makes it difficult to
8 make definitive findings on that issue.

9 In my respectful submission, the primary
10 responsibility for the pre-appeal non-disclosure
11 must rest with Mr. Miller.

12 The post appeal situation is different, and
13 could I ask you to read the 21st submission at
14 paragraph 160.

15 Now, at the post appeal stage the materials
16 clearly can be put in Dangerfield's hands.
17 There is no question that he receives them by
18 late March, and there is no question that by
19 this point not only Miller and Dangerfield, but
20 also Sid Lerner, who appears to have been the
21 acting director for a brief period and got
22 involved, all three of them have reached the
23 settled conclusion that these materials should
24 be disclosed, consistent with Quinney's advice.

25 And the important context here, in my

1 respectful submission, in determining Whitley's
2 responsibility, and that's really the key issue
3 here at the post appeal stage, is Mr, Whitley's
4 responsibility. The key context here, in my
5 submission, there are a number of important
6 contextual facts to bear in mind. First of all,
7 there had been a monumental departmental failure
8 here. This material had been sent by Quinney
9 early in the previous year, well in advance of
10 the appeal, and it had fallen between Miller and
11 Dangerfield. It had fallen between the cracks.
12 And the appeal had now been dismissed and these
13 two very senior Crown officials, Miller and
14 Dangerfield, were responsible. One way or
15 another, between the two of them they had failed
16 to make disclosure to Brodsky and the appeal had
17 been dismissed.

18 Secondly the matter had blown up in the
19 media and the media were clearly on to this
20 issue of whether Zanidean had a deal with Swift
21 Current. And the materials bore on that issue.
22 Quinney clearly had reached the conclusion that
23 Zanidean had a basis for expecting immunity, he
24 subjectively believed that he had it, and had
25 some basis for it such that it would be an abuse

1 of process to prosecute. There had been
2 miscommunication or non-communication between
3 the two justice departments and the two police
4 forces. And most importantly there was an issue
5 of perjury in these materials as well.

6 So, a media crisis, the minister is on the
7 ropes in the house, he is being asked questions
8 about the matter, there is suggestions of
9 perjury, there is suggestions of deals having
10 been made and non-disclosure of the deals, all
11 of it is borne on by the Quinney materials.
12 Quinney recommended disclosure of it. The
13 senior officials who report to Whitley had
14 failed to disclose it, and in all of those
15 circumstances it is entirely logical that the
16 matter would get bumped up on to Mr, Whitley's
17 desk, and Mr. Whitley himself concedes that that
18 is entirely logical. These are all of the kinds
19 of matters that he would be expected to deal
20 with. This is the ADM's job, is to step in when
21 there is a failure by the troops and to protect
22 his minister and support his minister and brief
23 his minister on matters in the criminal
24 division, especially when those matters look
25 like they are about to become a political

1 football.

2 So in all of those circumstances, in my
3 submission, it is simply not credible to believe
4 that Mr, Whitley would be kept in the dark on
5 this matter. And indeed, Miller's memo, whether
6 Whitley received that memo or not, Miller's memo
7 expressly says that he had discussed the matter
8 with Whitley on a couple of occasions. He goes
9 on in the following month in April, long after
10 Mr, Whitley had his brief hospitalization, to
11 get a further letter from Quinney on April 28
12 that goes into even more detail about these
13 matters. And Miller is explicit when he writes
14 Quinney that the purpose of getting this further
15 material from Quinney is for ministerial
16 briefings.

17 So again the idea that these ongoing
18 ministerial briefings would not have been
19 brought to Mr. Whitley's attention, in my
20 respectful submission, is simply not rational.

21 The important point here as well is that
22 the minister had announced a review of the case
23 in March when the media stories came out. He
24 had said that there was going to be a full
25 review of the case. So again, the Quinney

1 materials would have been front and centre in
2 any such review, and whether there had been
3 misconduct or failings by the departmental
4 staff.

5 So those are my submissions on the 21st
6 point and clearly it is my submission that
7 Whitley, Miller and Dangerfield must all
8 collectively bear responsibility for the failure
9 to make disclosure in 1993 at the post appeal
10 stage.

11 One final point I would like to make on
12 this is that in many ways this is one of the
13 most egregious events to emerge out of this
14 inquiry, in my submission, because prosecutors
15 make mistakes in the heat of battle, and the
16 trial process is an adversarial process, and the
17 prosecutors, it is very easy to second guess
18 prosecutors for decisions they make in the
19 course of a trial. But when a matter is two
20 years removed from the trial and it has been
21 bumped up to the most senior levels of the
22 department, it is no longer an adversarial
23 battle and the justice system depends on senior
24 officials in Crown attorney departments and the
25 Ministry of the Attorney General in this country

1 to be dispassionate, and to make decisions one
2 removed from trial counsel that are in the best
3 interests of the administration of justice. And
4 there was clearly a failure in the senior levels
5 of the Ministry of the Attorney General here in
6 Manitoba to properly address these matters when
7 the minister had announced to the public that
8 there would be a full review of this matter.

9 Finally the last two submissions -- I have
10 got six minutes left I think, and I should be
11 able to finish on time.

12 Number 22, was there any new factual
13 information uncovered in the Hall and Ewatski
14 review that should have been documented in a
15 police report and provided to the Crown. If I
16 could ask you to read that, Mr. Commissioner.

17 This is another one of the submissions
18 where there is a bit of a point of law at the
19 heart of it, and again I submit that it is not a
20 seriously contentious point of law, and that is
21 do the police have an ongoing duty to provide
22 relevant investigative information to the Crown
23 about prosecutions before the court, whether
24 they are concluded prosecutions that are under a
25 cloud or they are ongoing prosecutions. In my

1 submission there can be no doubt from any
2 routine review of police statutory and common
3 law duties, that one of their core duties is to
4 assist in prosecutions, and indeed the duty to
5 enforce the law implies that the police will
6 cooperate with Crown officials, with
7 prosecutors, in ensuring that all relevant
8 evidence is brought to the attention of the
9 Crown so that justice can be done. The Martin
10 report is very clear about this, that the police
11 have a duty to disclose all information to the
12 Crown, and indeed the Crown can't carry out its
13 disclosure obligations unless the police
14 disclose to the Crown.

15 So assuming that legal duty exists, the
16 only question here is a factual question, did
17 the Hall and Ewatski review uncover new
18 information previously unknown to the Crown.
19 And I have tried to summarize in the third
20 bullet there some of the matters that came to
21 the attention of Hall and Ewatski that clearly
22 was new and important, such as the Crime
23 Stoppers payments, Sergeant Paul's revelations
24 about what had happened on June 20th and
25 June 21st, which would lead to identifying the

1 anonymous caller. They had learned about the
2 anonymous caller from Brodsky, and now Paul's
3 information allowed that caller to be positively
4 identified, which Brodsky was never able to do.
5 Gumieny's post conviction threats to recant are
6 obviously new evidence. And the substantial
7 RCMP documentation, when Hall and Ewatski get
8 into Corporal Orr's files here in Winnipeg, and
9 then also get into Burton's files in Swift
10 Current, they discovered a veritable treasure
11 trove. There is no question that Miller knew a
12 great deal about what was going on with Swift
13 Current, or at least he knew a certain amount,
14 and similarly Dangerfield and Lawlor knew a
15 certain amount. But none of them had ever seen
16 the RCMP documents which painted a very vivid
17 picture of what had been going on between the
18 two police forces in relation to Zanidean's
19 immunity.

20 There can be no suggestion that any of that
21 RCMP documentation had ever been in the hands of
22 Crown counsel, and the inferences that arose
23 from that documentation.

24 The fact that Sergeant Mann had been out
25 looking for Zanidean in Winnipeg prior to

1 Zanidean becoming a Crown witness, that emerged
2 from the RCMP files. There is no suggestion
3 that Crown counsel had ever been aware of that,
4 and yet that could have become the linch pin for
5 Mr. Brodsky's theory of Zanidean's motive.

6 So these were all new facts that emerged
7 out of the Hall and Ewatski report and, in my
8 respectful submission, there clearly was a duty
9 to record them in a thorough police report, in a
10 proper form for transmission to the Crown and
11 disclosure to the defence.

12 Lastly, the Janie Duncan letters in 1995;
13 this is a final sorry little chapter. It is a
14 small point, but it again shows ongoing release
15 of misleading information. These are just like
16 the inaccurate letters that were sent to Mr.
17 Brodsky when he was requesting disclosure. Here
18 is Janie Duncan, four years after, again still
19 asking the right question about was there a deal
20 with Zanidean. Ms. Duncan asked lots of wrong
21 questions as well and had lots of theories that
22 were outlandish, but she was on to the right
23 issue here. And the letters she got back were
24 patently inaccurate. And the responsibility for
25 the inaccuracies in those letters must rest

1 primarily with Mr. Lawlor and Mr. Miller.
2 Miller sends a note to Lawlor, and Finlayson
3 sends it on to Lawlor expressly asking whether
4 all of the witness protection deals or
5 arrangements had been lead in evidence. And all
6 of the evidence from all of the Crowns is that
7 was the normal way in which these deals were
8 disclosed.

9 And this little note from Miller, although
10 it is late in the day in January of 1995, tends
11 to infer that he had told Lawlor and Dangerfield
12 something about the deal making and the
13 negotiations, because he certainly anticipated
14 that it could and should have been lead in
15 evidence. Of course, he wasn't in court to know
16 whether it was. But this note tends again to be
17 relevant to point number 10, as to whether
18 Miller had kept Dangerfield and Lawlor in the
19 dark.

20 But, in any event, Lawlor's response, he
21 says "I'm sure this is accurate," is totally
22 incorrect and was made without any attempt to
23 review the transcripts. Transcripts were
24 obviously retrievable from the Court of Appeal
25 with very little effort, and yet a false letter

1 goes out continuing this sophistry that there
2 was never any kind of arrangement with Zanidean.

3 So for year and years the Ministry
4 continues to send out false information on this
5 issue. In my respectful submission, that again
6 is a failing that must be laid primarily at
7 Lawlor's feet at this stage, as he was being
8 relied on for historical memory.

9 But there is also misleading by Miller
10 here, and you see Finlayson, who is the new
11 director who has been brought in to stand in
12 Miller's shoes, Finlayson does what one would
13 expect him to do, he interviews Miller, and he
14 keeps a proper memo to file of what Miller told
15 him.

16 If you go back to Mr. Dawe's summary of
17 paragraphs 133 to 136, which is where this is
18 all summarized, you see paragraph 134, after he
19 gets one of Duncan's requests in January, he
20 discusses the matter with Miller, and then he
21 writes a memo to file of his conversation with
22 Miller, which is exactly what you would expect a
23 thorough, professional file keeper to do, and
24 what Miller tells him is that the Saskatchewan
25 prosecutors didn't proceed against Zanidean

1 because of lack of evidence, which again is
2 clearly inaccurate. It had nothing to do with
3 lack of evidence in the decision, as I read it,
4 it was purely a decision based on an abusive
5 process analysis, that Zanidean had a subjective
6 expectation of immunity and there was some
7 reasonable basis for it.

8 So the fact that Finlayson continues to
9 send inaccurate letters to Duncan, to the
10 representative of Mr. Driskell, many years
11 later, is due to this ongoing pattern of a lack
12 of transparency of the inaccurate information
13 being communicated by the responsible Crown
14 officials. Those are my submissions.

15 THE COMMISSIONER: Thank you, Mr. Code.

16 MR. CODE: I went three minutes over, four
17 minutes over.

18 THE COMMISSIONER: Mr. Prober, I will dig out
19 that reference that I was referring to in the
20 statement.

21 MR. PROBER: I think we know what it is but we
22 will confirm it as well, Mr. Commissioner.

23 THE COMMISSIONER: I began to think of it -- at
24 the end of the day I'm not sure it is relevant
25 to anything, other than I am not sure how it got

1 into re-examination.

2 MR. PROBER: Mr. King reminded me that Brodsky
3 was going to ask Zanidean about something, or
4 Zanidean wanted to say something but didn't get
5 the opportunity, then I think Dangerfield gave
6 him the opportunity perhaps. But we will double
7 check that as well.

8 THE COMMISSIONER: Thank you.

9 THE CLERK: All rise. This Commission of
10 Inquiry is adjourned until 2:00 p.m.

11 (Proceedings recessed at 12:20

12 and reconvened at 2:00 p.m.)

13

14 THE CLERK: All rise. This Commission of
15 Inquiry is now in session. You may be seated.

16 THE COMMISSIONER: Mr. Lockyer.

17 MR. LOCKYER: Good afternoon, Mr. Commissioner.
18 First of all, Mr. Commissioner, if I may
19 apologize publicly on behalf of Jerome Kennedy,
20 that he's unable to be here for this last part
21 of the oral hearings of the inquiry. It's
22 medical reasons, he's not allowed to fly. As
23 you know, he's also running for elected office
24 as of Wednesday of this week. But knowing
25 Mr. Kennedy as well as I do, I don't think that

1 would put him off being here if he was able to
2 come but for health reasons.

3 I hope you don't take a poll on the next
4 thing I'm going to say because I think I'd lose,
5 talking of elections. In light of that fact, I
6 will in essence be covering the submissions both
7 for Mr. Driskell himself and also for AIDWYC.
8 And I would ask to be allowed to not take all of
9 the time that Mr. Kennedy would have had but at
10 least take some of it up and therefore go longer
11 than my allotted 75 minutes, if I may.

12 I have a number of documents,
13 Mr. Commissioner, that I want to file. First of
14 all, if I could file documents that relate to
15 the submissions I'm going to make. They look a
16 little daunting. They are not as daunting, it's
17 not unlike Mr. Code how he began his
18 submissions. It's eight volumes which I have in
19 my hand here. They are with the clerk. I don't
20 know if I make them an exhibit or not. I'm
21 happy to.

22 THE COMMISSIONER: I don't know. Mr. Code, what
23 do you say? I don't think it's necessary.

24 MR. LOCKYER: All right. And you'll see,
25 Mr. Commissioner, and everyone has a copy that

1 each front cover is a question. And then the
2 contents of each book is a series of extracts
3 from the record, most of them being extracts
4 from the evidence given before you, but not only
5 that, but hopefully relate to that question
6 that's being asked. I will refer to perhaps one
7 or two of each of the tabs in the course of my
8 oral argument but will certainly not refer to
9 the vast majority of them. But I thought it
10 might be useful to have some of the evidence
11 pulled together from different people under the
12 one question so to speak.

13 The next document or two documents that I
14 have is I have a hard copy of the systemic
15 submissions that we're presenting on behalf of
16 Mr. Driskell and AIDWYC. If they could be
17 passed to you.

18 THE COMMISSIONER: Yes.

19 MR. LOCKYER: There was an e-mail that went out
20 at five o'clock on Friday to everyone except, I
21 apologize, Mr. Gates. We spelled David wrong so
22 it didn't get to him. I shall tell everyone
23 that we're re-emailing because there were a
24 couple of typographical errors of what went out
25 Friday and this then is the precise version of

1 what I am holding now before me.

2 However having said that, it's just been
3 pointed out to me, and it's kind of ironic given
4 what's in the media today that at page 16, if
5 you will pull on the second tab, the second of
6 these and go to page 16, you'll see
7 recommendation 2-4, "Audit of George
8 Dangerfield's Homicide Prosecutions." The last
9 tab is supposed to be all of the recommendations
10 that we're submitting you should consider in the
11 form of an appendix. And we managed to leave
12 2-4 out of the appendix. So we'll send in an
13 amended version of the appendix in the next
14 couple of days, if that's all right.

15 THE COMMISSIONER: Okay.

16 MR. LOCKYER: As well to file with that, we have
17 a book of documents that accompany it. It's
18 fairly thin, if we could present that to you.
19 It's some of the perhaps more obscure documents
20 that you might not have readily to hand that we
21 refer to in the course of our submissions. And
22 I'd like you to know, Mr. Commissioner,
23 Mr. Kennedy played a big role in the
24 preparations of these submissions. I think he'd
25 like you to know that, as would I.

1 THE COMMISSIONER: Okay.

2 MR. LOCKYER: And finally, and I haven't given
3 this to everyone else, but I am going to give it
4 to commission counsel and to you,
5 Mr. Commissioner. One of our submissions is
6 with respect to, as you'll see right at the end
7 of our submission, section 696.1 of the Criminal
8 Code and whether the system of review should be
9 changed, the system in effect under which
10 Mr. Driskell's case was reviewed. And I'm
11 simply filing with you, and I'll e-mail it to
12 everyone else and I've given a copy to
13 commission counsel. It's a brief that was
14 written by AIDWYC back in 1998 with respect to
15 reforming the previous section 690. It's a
16 little out of date but with respect, the
17 submissions today is the same as 696.1 and I
18 thought they might be helpful for you to see.

19 Finally, Mr. Commissioner, I thought I
20 should raise this now. Throughout this inquiry,
21 I have been essentially volunteering as much as
22 anything to go first immediately after
23 commission counsel, that's sort of where I
24 prefer to go, and that includes the submissions
25 that I've just presented to you on systemic

1 issues. I would ask, though, if the Commission
2 would give myself and AIDWYC a right of reply to
3 any submissions that are filed by the other
4 parties in a systemic context. We have no idea,
5 well I suppose we have some idea, it's wrong to
6 say we have no idea, but we really don't have
7 any good idea of the positions that may be
8 taken, particularly I think by Manitoba Justice
9 through Mr. Olson on the kind of systemic
10 submissions that we've submitted or are
11 submitting should be considered by the
12 Commissioner, by yourself. So we would request
13 if the Commission would grant a right to reply
14 in writing after the submissions of other
15 counsel within say 10 days of those submissions
16 being filed. I don't know if anyone would like
17 to speak to that?

18 THE COMMISSIONER: Does anyone have any comment
19 on that? Carry on.

20 MR. LOCKYER: Thank you. A final point,
21 Mr. Commissioner, before I get going, is that I
22 have advised commission counsel and some of the
23 counsel here that, for personal reasons, I have
24 to leave after today, or tonight in fact I have
25 to leave. And I wouldn't want either you,

1 Mr. Commissioner, or Commission Counsel or
2 indeed any counsel to think that that's a
3 comment on anything. It's personal reasons I
4 simply can't avoid. I very much wish I could be
5 here the next two days.

6 THE COMMISSIONER: I accept that and there
7 certainly will be no adverse view drawn from
8 that.

9 MR. LOCKYER: I'm going to be saying I think
10 this Commission has really done a magnificent
11 job, if I may be so bold, and the last thing I
12 want to do is leave for any of it.

13 THE COMMISSIONER: Well, it particularly won't
14 be adverse after that comment.

15 MR. LOCKYER: That's good. Mr. Commissioner, as
16 you know, this is or will be, when you write
17 your report, the fifth report on a public
18 inquiry into a wrongful conviction in Canada.
19 In order of appearance, so to speak, the first
20 one is the report of the three commissions into
21 the Donald Marshall Inquiry released in 1982, a
22 report that had an extraordinary effect on the
23 criminal justice system. If nothing else, it
24 lead to the decision of the Supreme Court of
25 Canada in Stinchcombe. It was an inquiry that

1 would always be remembered for issues of
2 disclosure and for issues of tunnel vision on
3 the part of a particular police officer who was
4 really Mr. Donald Marshall's nemesis for so many
5 years.

6 The second one was the inquiry into the
7 wrongful conviction of Guy Paul Morin, a report
8 written by Mr. Justice Kaufman and released in
9 1998 which was also a seminal moment in Canadian
10 jurisprudence in criminal justice. That inquiry
11 will be remembered for many things, but in
12 particular for its approach to forensic science
13 issues and the consequent reforms of the Centre
14 of Forensic Sciences in Toronto which went from
15 being under a cloud of suspicion to being an
16 institution now I think respected worldwide,
17 really as a result of the recommendations of
18 Justice Kaufman. An inquiry we remembered for
19 the justice system finally taking a view that
20 jailhouse informants give evidence that is not
21 the kind of evidence that's desirable in the
22 criminal justice system and an inquiry as well
23 that looked at the use and abuse of evidence
24 that used to be known as consciousness of guilt
25 evidence.

1 The third inquiry came out of this
2 province, the inquiry into Thomas Sophanow's
3 wrongful conviction. We actually have
4 Commission Counsel who has been here throughout
5 this inquiry as well at the Driskell Inquiry.

6 Mr. Sophanow's inquiry will be remembered
7 again for disclosure issues or non-disclosure
8 issues, perhaps a better way of putting it.
9 Again, the use of jailhouse informants and
10 perhaps more than anything, the dangers inherent
11 in eye witness identification and how that can
12 lead to wrongful convictions.

13 Those three inquiries have had a tremendous
14 impact on the Canadian criminal justice system
15 right across the country, not just within the
16 borders of the three provinces in which they
17 were held.

18 The fourth inquiry I hope will have the
19 same impact although it hasn't yet had the same
20 opportunity, the Lamer Inquiry into three
21 wrongful convictions in Newfoundland, those of
22 Greg Parsons, Randy Druken and Ronald Dalton, an
23 inquiry that I think will likely be remembered
24 for problems in policing in that province and
25 also problems of Crown culture in that province,

1 but the kind of problems that spread and apply
2 across the country, not just in the Province of
3 Newfoundland.

4 There is an inquiry that's continuing for
5 which we're waiting for the results, the David
6 Milgaard Inquiry, the most notorious wrongful
7 conviction to date in this country and I choose
8 not to comment on that inquiry. As well, we've
9 recently had Mr. Justice O'Connor's release of
10 the Arar report or the report into Maher Arar's
11 inquiry. A case that's pretty close to the kind
12 of thing we're talking about in Mr. Driskell's
13 case and the other wrongful conviction
14 inquiries, Mr. Arar's wrongful arrest and
15 wrongful deportation or wrongful rendition of
16 course and we all know what that lead to. And
17 it was an inquiry that dealt with police and
18 security service accountability.

19 This inquiry, in my submission, has some
20 unique features to it in its terms of reference.
21 It is perhaps the most particularized of the
22 wrongful conviction inquiries to date, urging
23 you, Mr. Commissioner, to have a focus on police
24 conduct, on Crown conduct, on RCMP lab conduct,
25 on systemic issues, and in particular, the use

1 of the stay of proceedings in wrongful
2 conviction cases which has been broadened by
3 Commission Counsel into looking at the whole
4 concept of the creation potentially of what one
5 might call an innocence commission. And an
6 issue that is both personal to this inquiry and
7 also very much a systemic issue, the issue of
8 accountability, accountability of individuals
9 and the accountability of institutions.
10 Something that in the previous terms of
11 reference of previous inquiries has not, it's
12 not a word that has appeared either in substance
13 or in form.

14 Mr. Libman and I have been here primarily
15 to represent the interests of Mr. Driskell, a
16 person we submit was the wrong person in this
17 inquiry. Mr. Driskell of course wants to know
18 what happened in his case and he wants
19 accountability but he also wants his case used
20 for broader purposes, to minimize future
21 wrongful convictions in our criminal justice
22 system and also to enable us to better identify
23 ones that have already happened in the past that
24 have not yet been exposed.

25 Mr. Driskell knows that this is not a

1 retrial, it has not been a retrial of his case.
2 We sought this on his behalf from the province
3 to explore his case in that manner but we were
4 unsuccessful in that regard. Mr. Driskell
5 understands the limitations on your mandate,
6 that this is indeed, by title, a commission of
7 inquiry into certain aspects of the trial and
8 conviction of James Driskell. And that's how
9 it's been conducted and that's of course how it
10 should have been conducted. We've learned a
11 great deal in our appearances before you,
12 Mr. Commissioner, about what happened in
13 Mr. Driskell's case both at the factual level
14 and also not just what happened but how it
15 happened and why it happened.

16 There's been a lot of finger pointing at
17 this inquiry with the police blaming the Crowns
18 and the Crowns blaming the police and indeed,
19 perhaps not surprisingly, maybe that's being a
20 little cynical, Mr. Miller has become a
21 particularly practised target. But a point that
22 I submit has existed throughout this inquiry and
23 to many throughout this case, an overwhelming
24 theme of the conduct of the authorities in this
25 case is their decision that Mr. Driskell was the

1 culprit leading to further decisions that, in
2 effect, we are going to convict him and we
3 really don't care how we're going to convict
4 him. And then once convicted, we are going to
5 sustain his conviction and we really don't care
6 how we're going to sustain his conviction.

7 In our systemic submissions, we refer to
8 the phrase invented or conjured up first by the
9 chief of constabulary in the U.K. when
10 reflecting on some of the cases in the U.K. Sir
11 John Woodcock the phrase "Noble cause
12 corruption," which is in a motive and
13 self-explanatory phrase.

14 The accountability of this inquiry in my
15 submission has begun. For Detective
16 Vandergraaf, Detective Anderson, Detective Paul,
17 from Mr. Dangerfield to Mr. Lawlor, from
18 Mr. Christianson and the RCMP laboratory, from
19 Mr Whitley, Chief Ewatski and Mr. Schille. And
20 almost all of those people held high positions.
21 And if they didn't in 1990, they eventually did
22 or indeed do now. Except perhaps in the case of
23 Mr. Schille, they weren't what we call line
24 police or line crowns, they were senior police
25 officers, senior crowns.

1 And indeed I think it's fair to say that
2 now in 2006 when he testified, Mr. Schille
3 himself would fit in that category. And they
4 have all been called to account in their
5 testimony to explain themselves as best they can
6 and their conduct as best they can. Where it
7 goes, Mr. Commissioner, from there is up to you
8 and not something that I feel or indeed AIDWYC
9 feels it's appropriate for us to make
10 submissions as such. It's very much within your
11 province as required by the terms of reference.

12 It's a point worth making, in my
13 submission, that all those who came to this case
14 from outside government commencing in 1993 or in
15 the case of the first person commencing a little
16 earlier than that, a year or so, that all the
17 people who came to this case from outside
18 government knew something was wrong.
19 Mr. Brodsky was never happy with this case.
20 Janie Duncan, referred to by my friend, strove
21 to do something about the case. The Winnipeg
22 Sun that looked at the case in 1993 didn't like
23 the look of it. The Winnipeg Free Press,
24 through a series of editorials that began in
25 2003, one after another, has made it clear that

1 this case has left a public perception that is
2 not good for the justice system in Manitoba.
3 The innocence project briefly came to the case
4 they knew something was wrong. And when Alan
5 Libman came to this case on behalf of AIDWYC, he
6 knew something was wrong as well.

7 And it's worth noting that even within
8 government, so to speak, there was some who saw
9 things were wrong. PC Burton, as he then was,
10 and Sergeant Ferguson, as he then was, from some
11 distance away from afar, they also knew
12 something was wrong perhaps earliest of all the
13 people who have ever touched on this case.

14 In all those years, it was pretty well
15 always someone advocating on Mr. Driskell's
16 behalf. And he himself never relented in his
17 demands for justice from the prison in which he
18 was residing since he lost his appeal in
19 December of 1992.

20 But talking at the most general level, none
21 of those people, be they individuals, media, or
22 whatever they were, whatever their roles were,
23 they could not permeate the walls of Manitoba
24 Justice. Manitoba Justice did not live up, in
25 my submission, to the second word in its name.

1 It did not live up to its second word in its
2 name for year after year after year. And the
3 views of those people in those institutions who
4 saw something wrong in this case could not
5 permeate even the highest echelon of the
6 Winnipeg police force either.

7 The Perry Dean Harder review was, in many
8 ways, a very interesting document. It was a
9 document that went beyond what one might have
10 expected of the authors of the document given
11 that they would seem to have had a vested
12 interest in sustaining Mr. Driskell's
13 conviction. But they made a number of findings
14 of credibility, even against their own officers,
15 and they certainly made a number of findings or
16 suggested a number of findings of fact that were
17 really very significant to Mr. Driskell and his
18 efforts to establish his innocence.

19 I'll always remember when we first got the
20 Perry Dean Harder homicide review in September
21 of 2003. It was an exciting document to read
22 for its revelations. And it was only after a
23 bit more thought that one reflected on what a
24 disaster it was that neither the Winnipeg Police
25 Service, through a number of its chiefs, one

1 after another, nor Manitoba Justice did
2 anything. Indeed they did absolutely nothing
3 about it for some 11 years.

4 Mr. Driskell spent 11 years in prison that
5 that one document could have saved.

6 And all they can do, particularly within
7 Manitoba Justice, is regurgitate again and again
8 the same kind of memos which, in essence,
9 translated said he did it and that's good enough
10 for us. We think he did it, that's the end of
11 it.

12 There's no doubt, in my submission, that
13 the Minister, for all those years, was getting
14 bad advice from the people below him. But the
15 Deputy Minister, Mr. MacFarlane as well was
16 getting bad advice from the people below him.

17 And in many ways, the calling of this
18 inquiry, in my submission, might be seen, I
19 can't speak for them, but it's my guess in some
20 ways that the calling of this inquiry was not
21 just a reaction to the comments of the Minister
22 Irwin Cotler when he issued the press release
23 along with the order he issued on March 3, 2005,
24 a press release that any province would have to
25 stand up and take notice of but was perhaps also

1 their way of atoning for the fact that in their
2 capacity as Minister and Deputy Minister, they
3 had allowed the affairs to proceed the way they
4 had for so many years for Mr. Driskell.

5 One of the benefits certainly from Mr.
6 Driskell's perspective at this inquiry and
7 indeed from AIDWYC's perspective as well is the
8 apologies that we've heard. Some would question
9 whether they really were apologies but we don't.
10 And we accept those apologies, and I say this on
11 behalf of Mr. Driskell from Mr. Dangerfield, Mr.
12 Whitley, Mr. Lawlor, Chief Ewatski and of course
13 Irwin Cotler, although he scarcely needed to
14 apologize.

15 Mr. Driskell, after 16 years of living this
16 every single day and he still lives it every
17 single day, of course wants this behind him.
18 And this inquiry is getting him very close to
19 that day in his life when he can say it's behind
20 him. The one thing he does hope in particular
21 that he could obtain when this inquiry is over
22 is an apology from the Minister.

23 If I can now address the particulars, so to
24 speak, the factual particulars of this inquiry
25 and hopefully provide some assistance to you,

1 Mr. Commissioner, as to how to approach the
2 facts as you've heard them over the several
3 weeks of evidence. And the way I have done this
4 is by addressing a series of what might be
5 considered reasonably fundamental questions that
6 may be helpful to you to look at and consider in
7 deciding the facts of the case so to speak. And
8 I'm going to go through them one by one.
9 Hopefully they are before you in order. And I
10 take you, Mr. Commissioner, to question one.
11 And you will see it on the cover of the first
12 volume. I don't like you starting at the bottom
13 of the pile I must say.

14 THE COMMISSIONER: I moved them.

15 MR. LOCKYER: You shuffled them.

16 THE COMMISSIONER: I shuffled them, exactly.

17 MR. LOCKYER: Question one, and I'll read it out
18 if I may.

19 "Before he testified at Mr. Driskell's
20 trial, was Mr. Zanidean given immunity from
21 prosecution for the Swift Current arson by
22 Saskatchewan Justice, the Winnipeg Police
23 Department and/or Manitoba Justice?"

24 There's sort of three questions within one. The
25 first one is really, in my submission, not hard

1 to answer. "Did Saskatchewan Justice give
2 Mr. Zanidean immunity from prosecution for the
3 Swift Current arson?" In my submission, the
4 answer is a most decisive no.

5 In essence, what we have here is a matching of
6 the credibility of PC Burton and Staff Sergeant
7 Ferguson, Detective Burton by the time he
8 testified before us as I recall. Two men who
9 made notes as the case proceeded whose testimony
10 stands in sharp contrast to the testimony of
11 three police officers from the Winnipeg Police
12 Service, Vandergraaf, Detective Anderson and
13 Detective Paul who committed nothing to writing.

14
15 One of the less compelling answers given at this
16 inquiry in my submission was that given by
17 Detective Anderson by way of explanation for not
18 doing notes. It's at tab 6 of question 1, of
19 page 2130 of his evidence commencing at line 12
20 when he was asked,

21 "The first time you ever came to record any
22 of these conversations..."

23 meaning with the Swift Current Police,

24 "...was a year after the first one, in
25 October of 1991?"

1 A Yes, sir, I was a little more naive in
2 those days than I am today. I expected an
3 RCMP officer to keep his word and not lie.

4 Q I see. Because that really has to be
5 your ultimate, since you raise it, really
6 has to be your ultimate position with
7 Inspector Burton, doesn't it?

8 A It doesn't have to be, it just is, sir."

9 And by that, Detective Anderson purports to explain
10 why he committed nothing to writing in all of
11 the dealings that he had with Inspector Burton
12 during the period October '90 or November '90
13 right through to June, July of 1991.

14 The Winnipeg Police Department, did they
15 give Mr. Zanidean immunity from prosecution? In
16 my submission, the answer on the evidence is,
17 yes, they did. They did it of course without
18 the authority of the Saskatchewan Police. They
19 did it because, and I think it was Corporal Orr
20 who first introduced this notion, they did it
21 because they wanted a happy witness. They
22 thought in essence that ultimately the Swift
23 Current Police, particularly since they were
24 dealing with a junior officer in the form of PC
25 Burton, they thought they could really play

1 Burton however they wanted at the end of the day
2 if they ran into trouble.

3 Going back to tab 6 at page 2144, Detective
4 Anderson's evidence, this very suggestion was
5 put to you. This is at line 17 of 2144.

6 "Q I'm going to suggest to you, sir, that
7 all of these contradictions and
8 difficulties and the like come from the
9 following scenario. That you and Paul
10 decided that you wanted, to use a term that
11 we have heard from another witness, you
12 wanted a happy witness in Zanidean, sir.
13 That in order to ensure that you had a
14 happy witness, you took a simple route and
15 you simply told him, of your own accord,
16 that he wouldn't be, he didn't have to
17 worry about any arson charge in Swift
18 Current. But having told him that, you
19 made it clear to him that you couldn't let
20 it out that this was the case, because you
21 knew only too well you had no authority to
22 make that kind of promise to him; isn't
23 that right, sir? A No, that's not right.
24 Q Doesn't that explain all this confusion
25 with everyone contradicting each other

1 about what happened during this period of
2 time?

3 A No, it doesn't at all.

4 Q And that in creating your stories to try
5 and justify a position that didn't in fact
6 happen, that's why you are running into all
7 of these difficulties; isn't that right?

8 A No, sir, that's not the case at all."

9 Even the homicide review, if you can turn to the
10 next tab, tab 7 of the same book. Even the
11 authors of the homicide review all but
12 acknowledged what I am submitting to you,
13 Mr. Commissioner. At page 79 of the homicide
14 review, the second to last paragraph of that
15 page, they came to the conclusion.

16 "Nevertheless, after reviewing this aspect
17 of the investigation it is evident an issue
18 can be made as to how the Winnipeg Police
19 Department dealt with Ray Zanidean. A
20 strong suggestion may be made that some
21 sort of a deal was struck with him in which
22 he would be granted immunity from
23 prosecution for the Swift Current arsons if
24 he testified against Driskell."

25 The best I can say to that, Mr. Commissioner, is here

1 here except that strong a suggestion should now,
2 in my submission, be viewed as a reasonable
3 finding of fact on the evidence that you've
4 heard.

5 The third part of the question, did
6 Manitoba Justice give Mr. Zanidean immunity from
7 prosecution? There's probably insufficient
8 evidence that they did. It's likely that they
9 did. Mr. Miller certainly could easily have
10 told Mr. Kovnants that his client had nothing
11 to worry about. But I'm not prepared to submit
12 that the evidence necessarily can take you that
13 far in terms of clear and convincing, which of
14 course is the test that is on you for findings
15 of fact. You have to find that evidence is
16 clear and convincing before you can act on it as
17 a fact.

18 That brings me to the second question,
19 which is really, I'm not quite sure if it's
20 different from the first question but I'm going
21 to treat it as such. So Question 2, the second
22 volume of materials. The question,

23 "Was Mr. Zanidean told before he testified
24 that he would not be prosecuted for the
25 Swift Current arson?"

1 If I could ask you, Mr. Commissioner, to turn to tab
2 7 at page 2453. You're looking at an extract
3 from the evidence of Mr. Kovnants, his
4 examination as I recall by Commission Counsel,
5 yes. Where at line 6, Mr. Kovnants says in the
6 middle of an answer,

7 "But to the best of my ability, my
8 understanding, at the end of that
9 meeting..."

10 and that meeting being the November 13, 1990 meeting
11 with the police,

12 "...was that my client had been promised
13 immunity on all issues. My client had been
14 promised that the police would make him
15 whole, and by that I mean they would help
16 him in a Witness Protection Program that
17 would move him from Winnipeg to somewhere
18 in British Columbia and that he would be in
19 the same kind of position in British
20 Columbia as he was in Winnipeg. And the
21 details of that, if I remember correctly,
22 the police were going to have me negotiate
23 the details of that sort of agreement in
24 principle with the Crown." Mr. Kovnants
25 never got it in writing is easy to

1 comprehend. Because the people who were
2 dealing with him knew that they didn't have
3 the authority to give immunity to
4 Mr. Zanidean on the charges in Swift
5 Current. Said they would only give verbal
6 assurances.

7 If we go back to tab 1 of this book, we see how,
8 now Inspector Burton, then PC Burton,
9 comparatively inexperienced officer, well I
10 forget how many years he had been an officer as
11 of 1990 but it can't have been that long, how
12 quickly he picked up on what the Winnipeg Police
13 Department officers that he was dealing with,
14 how quickly Burton picked up on what they really
15 wanted. If you look at the first page of his
16 memo here of January 9th of 1992, he says under
17 heading 2 --

18 THE COMMISSIONER: What tab?

19 MR. LOCKYER: First page of tab 1. He says
20 under heading 2 of the first page.

21 "Sergeant Anderson has two interests. His
22 first interest was to convict Driskell of
23 the murder. His other interest is to
24 prevent the RCMP from charging Zanidean for
25 the arson in Swift Current as this would

1 have hindered the prosecution of Driskell
2 and at this time would result in a
3 successful appeal of the conviction. The
4 RCMP has one interest. That is the laying
5 of charges against Zanidean and others
6 believed responsible for the arson. Since
7 last year I have submitted numerous
8 investigative reports and spoken at several
9 meetings in which I have related
10 circumstances which have led me to believe
11 that Sergeant Anderson has been deceitful
12 and dishonest in his dealings with us in
13 regard to this matter. Sergeant Anderson's
14 behaviour has no doubt been motivated by
15 the divergent nature of our interests."

16 In my submission, well said and how true.

17 Constable Burton, as he then was, had it exactly
18 right in my respectful submission.

19 And then at tab 3, we've got an interesting
20 answer from Detective Vandergraaf in the midst
21 of his evidence, at page 1431, second page of
22 the tab, where much the same suggestion is made
23 to him.

24 THE COMMISSIONER: Sorry?

25 MR. LOCKYER: Page 1431 of tab 3, the same book.

1 THE COMMISSIONER: I don't think I have that.
2 Tab 3 is the Ferguson memo.

3 MR. LOCKYER: Is tab 4 Vandergraaf by any chance
4 in yours, Mr. Commissioner?

5 THE COMMISSIONER: No.

6 MR. LOCKYER: What volume are you in?

7 THE COMMISSIONER: Maybe I am in the wrong
8 volume.

9 MR. LOCKYER: Should be in volume 2, tab 3 at
10 page 1431.

11 THE COMMISSIONER: Yes.

12 MR. LOCKYER: Where Detective Vandergraaf was
13 asked a question not unlike that asked of
14 Anderson which I have already read. Line 13.

15 "Q I am going to suggest to you, sir, that
16 really there was a charade here around the
17 charge in Swift Current. You wanted a
18 happy witness and you got it, by telling
19 him don't worry about Swift Current. And
20 you have got credibility because the jury
21 never found out about the fact..."

22 meaning you got credibility for Zanidean.

23 "... that Zanidean believed he was safe
24 from being charged in Swift Current. You
25 ended up with the best of both worlds.

1 A Well, that was the tact that we took..."
2 says Detective Vandergraaf,
3 "...and that was the tact that was
4 discussed with Mr. Miller and, hey, we
5 expect good direction from Manitoba
6 Justice. Certainly they could have gotten
7 ahold of any one of us at any time to
8 enlighten them further if they wished."
9 Moving on, Mr. Commissioner, to question 3, the
10 next book. Question 3,
11 "Is the claim that Mr. Zanidean was not
12 told he had immunity from prosecution until
13 after he testified credible?"
14 And in my submission, the answer to this question is
15 a mixture of a yes and a no. It's a half yes
16 and a half no. The claim itself was first
17 recorded in Detective Anderson's October 8, 1991
18 memo that was written in response to what he
19 understood to be a complaint about his conduct
20 from the RCMP some months after Mr. Driskell's
21 conviction. Interestingly enough, it was not a
22 claim that Detective Anderson passed on to PC
23 Burton when he and Burton spoke on July 18th of
24 1991, more than a month after Mr. Driskell's
25 conviction and, according to Anderson, more than

1 a month after he told Zanidean of the deal
2 immediately after he walked out of court having
3 given his evidence.

4 A number of witnesses have in a sense
5 expressed horror in one way or another as to
6 this kind of idea that a benefit can be withheld
7 from a witness. Mr. Dangerfield, at tab 10 of
8 this volume, at page 4091 gave his opinion of it
9 when he said at line 3 in the middle of an
10 answer, sorry, this is the middle of the
11 question at line 3 of 4091,

12 "And the agreement is they will keep it
13 secret from Zanidean. And then only after
14 Zanidean testifies does he tell him about
15 it, and then after his testimony..."
16 he being Anderson of course, does Anderson tell him
17 about it. And then after Zanidean's testimony,
18 "...it becomes part of the agreement. And
19 what I want to ask you about this kind of a
20 deal that Anderson is describing, or this
21 kind of an arrangement, as he calls it..."

22 And the question carries on in the same vein. And
23 Mr. Dangerfield's answer.

24 "I should have been kept advised of these
25 negotiations and the direction they were

1 being aimed, and that is an immunity
2 agreement. Because I would have wanted
3 that immunity agreement in place before I
4 ever put Zanidean in the witness box."

5 Lawlor expressed consternation at it, although I
6 must say less so than some of the others.

7 Mr. Abra, on behalf of his client, Mr. Miller,
8 frequently expressed astonishment at the idea.
9 In cross-examining Mr. Lawlor, for example, at
10 tab 12 of the same book, Mr. Abra at line 16,
11 sorry at page 5450, at line 16 put to
12 Mr. Lawlor --

13 THE COMMISSIONER: Sorry, page?

14 MR. LOCKYER: 5850. At line 15 or line 16, put
15 to Mr. Lawlor.

16 "Q At least Anderson and Paul and
17 Vandergraaf has admitted to us that he was
18 aware of the arrangement as well with the
19 Swift Current RCMP. So the essence of what
20 they are testifying to is that Bruce Miller
21 effectively counseled obstruction of
22 justice by permitting a witness to testify
23 to something that was false, that they knew
24 was false but the witness didn't.

25 MR. LAWLOR: Well, is that counselling to

1 obstruct justice?

2 MR. ABRA: Well, whether it is or isn't, I
3 suggest to you, it is not right.

4 A Probably not.

5 Q It is not, it is not ethical, surely you
6 agree with that?

7 A Yes.

8 Q I suggest to you that the Bruce Miller
9 that you knew and I knew would never give
10 advice of that nature?

11 A I agree.

12 Q He was honest, he was ethical and he was
13 forthright?

14 A Yes.

15 Q You liked him?

16 A Yes."

17 Mr. Whitley at tab 11 put it best in my
18 submission. At tab 11 of the same book at page
19 4570, Mr. Whitley endured questioning by
20 Commission Counsel around line 20, in other
21 words at the bottom of 4570, Mr. Whitley was
22 asked by Commission Counsel to elaborate on why
23 he thought this kind of an arrangement was
24 improper. He answered,

25 "It's an artifice. It is a way of a

1 witness being, strictly speaking, literally
2 honest when they testify, but in the
3 background is this understood arrangement
4 that no, things are going to be just fine,
5 that's implicit in this deal. It doesn't
6 pass the smell test, never mind any
7 question of ethical propriety. That's -- I
8 mean, these are the kinds of things that
9 our policy directions were trying to get
10 at. You don't make these kinds of deals.
11 You don't not share these kinds of
12 arrangements with the defence counsel. How
13 could they possibly address the issues
14 around credibility of a witness without
15 knowing that?"

16 THE COMMISSIONER: I thought I could catch up
17 with you here.

18 MR. LOCKYER: I'm sorry.

19 THE COMMISSIONER: You're going to have to go
20 back to this last tab and page.

21 MR. LOCKYER: Tab 11, page 4570. It's the first
22 page of the transcript at the bottom of 4570.
23 Answer from Mr. Whitley.

24 THE COMMISSIONER: Okay. Just bear with me for
25 a moment.

1 MR. LOCKYER: I just read that answer.

2 THE COMMISSIONER: Yes, now I see it. Okay.

3 MR. LOCKYER: And in my submission, when I say
4 yes and no as an answer to this question, it's
5 my submission that Mr. Whitley, in that answer,
6 gives us why I would say it's a yes and a no
7 because it's a sham. Mr. Zanidean is assured
8 that he will not be prosecuted but he's told at
9 the same time that that won't be official in
10 effect. Well, that isn't official yet but it
11 will be made official later.

12 So on the one hand, Mr. Zanidean can give
13 the evidence with the security that he hasn't
14 got a deal because, in a sense, he hasn't. And
15 the authorities can take comfort in the fact
16 that they haven't actually finally told him he's
17 got a deal until after he's testified. That in
18 essence you've got the sham that Mr. Whitley
19 spoke about so effectively given and so
20 effectively avoiding the jury at Mr. Driskell's
21 trial knowing what was really going on with
22 respect to Mr. Zanidean's motives for testifying
23 on behalf of the Crown.

24 And circumstantial evidence, in my
25 submission, that supports the notion that this

1 sham was presented as such, there was nothing
2 genuine about it for a moment, is what happened,
3 in my submission, in Mr. Ostrowski's case, that
4 it gives credibility to the use of this kind of
5 sham by officials at Manitoba Justice and in the
6 police department as well. That Zanidean knew,
7 just as Mr. Lovelace would have known in the
8 Ostrowski case, that he was secure from
9 prosecution but would also know that he didn't
10 actually have to say that and indeed shouldn't
11 say that when he testified, should in fact say
12 to the contrary because he also knew at the same
13 time that it wasn't yet official or a sham in
14 some way presented in that manner to the witness
15 concerned.

16 In my submission, the horror expressed at
17 this arrangement by some of the people who
18 expressed that horror, perhaps Mr. Dangerfield
19 in particular, doesn't ring very true when, lo
20 and behold, we now hear that it happened in two
21 cases that he prosecuted, not just
22 Mr. Driskell's case.

23 That brings me to question 4. Question 4
24 is,

25 "Did the trial crowns and Mr. Miller know

1 what was going on?"

2 And in my submission, the answer is a most decided
3 yes. And I'm going to focus more on
4 Mr. Dangerfield in this regard than anyone else.
5 Because if he knew, then surely Mr. Miller and
6 Mr. Lawlor knew.

7 Everyone who testified here who knew, who
8 should have known, said that Mr. Dangerfield
9 controlled his own cases and he expected to be
10 told and indeed to know everything about it. We
11 heard that from detective Vandergraaf, Detective
12 Anderson, Detective Paul, Mr. Lawlor and
13 Mr. Whitley.

14 If you look for a moment at the way
15 Mr. Whitley put it, it's at tab 10 of this
16 volume, at page 4519 of his evidence. At line
17 15 of page 4519, Mr. Whitley was being asked
18 about Mr. Dangerfield. And he was asked if he,
19 meaning Mr. Dangerfield, was negotiating in
20 immunity -- I'm sorry, the he is not the he, the
21 he is Mr. Miller.

22 "Q If Mr. Miller was negotiating an
23 immunity for a key Crown witness, as we
24 know he was in this case, and it is a case
25 being prosecuted by George Dangerfield, as

1 we know this one was, knowing their two
2 personalities, can you imagine Mr. Miller
3 keeping Dangerfield in the dark?

4 A No.

5 Q Would there be any good reason to keep
6 him in the dark?

7 A Well, I have seen some of the material.
8 I can't imagine why he would be kept in the
9 dark, no. I don't have anything to offer
10 on that.

11 Q Was Dangerfield the kind of prosecutor
12 who would tolerate a manager keeping him in
13 the dark on decisions about one of his key
14 witnesses?

15 A George had a temper. He would, as we
16 say, he would go ballistic. If he knew he
17 was kept in the dark, he would be very
18 angry about that.

19 Q Was Mr. Miller aware of that temper, to
20 your knowledge?

21 A Yes."

22 And he elaborates on that answer.

23 Mr. Dangerfield, by his own admission, knew that
24 Mr. Kovnants and Mr. Miller were engaged in
25 negotiations for some six months. Mr. Lawlor

1 knew that as well. He knew obviously that
2 Mr. Brodsky was extremely interested in what
3 those negotiations were leading to. Which, as
4 commission counsel submitted to you this
5 morning, surely place an onus on Mr. Dangerfield
6 if he didn't already know to find out everything
7 that was going on in the negotiations. He knew
8 that Mr. Zanidean, by his own admission, was
9 being extremely demanding, something the jury
10 was surely entitled to know. He knew that on
11 May 26th of 1991, negotiations were at a crisis
12 as he was down at the police station when we had
13 the extraordinary picture that I'm sure we'll
14 all vividly recall of Mr. Kovnants describing to
15 us how he was so concerned about his own welfare
16 and safety that he put a table up against the
17 door so that no one could break into the
18 interview room that he had, in essence,
19 imprisoned himself into to avoid the danger that
20 he felt he was in.

21 That, in my submission, helps us understand the
22 atmosphere that Mr. Dangerfield was prepared to
23 prosecute a case under with threats of
24 obstruction of justice and the intimidation of a
25 counsel for a witness there doing his best to

1 represent the witness's interests.

2 Mr. Dangerfield as well knew really in much
3 the same vein that Mr. Zanidean was not
4 satisfied his demands were being met,
5 particularly when they came to money, and that
6 he was forever, through Mr. Kovnants, presenting
7 one ultimatum after another.

8 And perhaps circumstantially, one of the
9 most important features of the evidence which
10 tells us that Mr. Dangerfield knew what was
11 going on is that Mr. Zanidean was called as, in
12 effect, the last witness in the Crown's case.
13 And we can see how the negotiations between
14 Mr. Kovnants, Mr. Miller and the others, we can
15 see how they come to a head just 24 hours before
16 Mr. Zanidean is called to the stand by
17 Mr. Dangerfield.

18 Are we really expected to believe that
19 Mr. Dangerfield, as the trial proceeded, wasn't
20 worried about when he could call his last
21 witness and wasn't seeking each day, if not each
22 hour, or certainly each recess in my submission,
23 the state of affairs in terms of his ability to
24 call Mr. Zanidean.

25 I want to address one point that wasn't

1 really presented vigorously to you at this
2 inquiry by counsel on behalf of Mr. Dangerfield
3 but is a point that I think is worth addressing.
4 If you go to tab 1 of question 4, you will see
5 the submissions made by AIDWYC on Mr. Driskell's
6 behalf in response to the investigative summary
7 released by Mr. McNairn on behalf of the
8 Department of Justice. So we're now in the year
9 of 2004, some time after Mr. Driskell had been
10 released on bail.

11 At page 3 of that submission, paragraph 3,
12 a submission was made on Mr. Driskell's behalf
13 as follows. So we're at tab 1, paragraph 3,

14 "Like much of the undisclosed materials,
15 this previously unknown payment..."

16 to Mr. Zanidean,

17 "...not only further demonstrates that
18 Mr. Zanidean was untruthful in his trial
19 testimony, but also calls into question the
20 integrity of the prosecution as a whole.
21 The documents that are now in the
22 Applicant's possession establish beyond
23 doubt that officials in Manitoba Justice,
24 and the two Crown Attorneys who prosecuted
25 the Applicant, Mr. Dangerfield and

1 Mr. Lawlor, knew that Mr. Zanidean was
2 being untruthful in much of his testimony
3 but deliberately chose not to disclose
4 their knowledge to Mr. Driskell's defence."

5 And then a footnote was put to that. If the trial
6 Crowns did not know about Manitoba Justice's
7 dealings with Mr. Zanidean, it could only be
8 explained by the senior officials in Manitoba
9 Justice creating a veil of deniability by design
10 between them and the trial Crowns.

11 That submission was responded to in tab 2 by
12 Mr. Finlayson in the next tab, who was then the
13 Assistant Deputy Minister. In his letter of
14 November 19, 2004 to Mr. McNairn, he took great
15 umbrage throughout this document, a three-page
16 letter, of what he perceived is the adversarial
17 aggressive attitude of the submissions made on
18 Mr. Driskell's behalf in response to the
19 investigative summary.

20 At Paragraph 2, Mr. Finlayson wrote as follows,
21 page 1 of tab 2:

22 At page 124 of your investigative summary,
23 you note that the purpose of the
24 investigation is not to find fault with any
25 individual, but rather to ascertain the

1 facts upon which the Minister can render a
2 decision. Despite that, there appears to
3 be a concerted effort on the part of
4 Mr. Driskell's counsel et al to attribute
5 "fault" to not only staff involved at the
6 time of the Driskell trial but against
7 current staff. There are repeated
8 references to a continuing cover-up up to
9 the present time and it is those
10 submissions to which we wish to respond.

11 First, it is always difficult to comment
12 retrospectively on what was done many years
13 earlier, given the evolution of the legal
14 principles since that earlier date.

15 Generally speaking, however, it would not
16 be unreasonable in Manitoba at the time of
17 the original trial to develop an informal
18 "Chinese Wall" whereby prosecutors --

19 I'm not sure I like that expression, I'll call it a
20 wall,

21 -- whereby prosecutors handling the trial
22 would not be materially involved in the
23 handling of any witnesses who were to be
24 called on behalf of the Crown.

25 Furthermore, the practice at the time,

1 pre-Stinchcombe, was to not make disclosure
2 of all information related to informants or
3 witnesses in the Witness Protection Program
4 insofar as any payments to them may be
5 concerned.

6 Now that was written, Mr. Commissioner, just three to
7 four months before the Minister's ultimate
8 decision in March of 2005. It, in a sense,
9 adopts, you might say, for the first time, this
10 is the first time this notion has appeared
11 anywhere in any documentation in this case.
12 It's sort of an adoption of the footnote that I
13 had read to you in the previous document to
14 which this is responding. But I have to make
15 the point that the Assistant Deputy Minister, as
16 Mr. Finlayson then was, perhaps chooses his
17 words very carefully. He doesn't say there was
18 an informal wall, he says it would not be
19 unreasonable in Manitoba to develop a wall. He
20 never actually says there was one. And then
21 purports to carry on his justification on behalf
22 of Manitoba Justice for its practices by
23 suggesting that this is really perhaps a
24 pre-Stinchcombe issue. Bearing in mind that for
25 the 10 years subsequent to Mr. Driskell's

1 conviction, all 10 years being post-Stinchcombe,
2 Mr. Finlayson had been very much a part of those
3 who had ensured that Mr. Driskell did not
4 receive the information to which he was entitled
5 as a matter of law in those intervening 10
6 years.

7 There is also a question when one reads
8 what Mr. Finlayson says there as to where would
9 he have got the information that there may have
10 been, there may have been such a wall.
11 Certainly he didn't get it from Mr. Dangerfield
12 because Mr. Dangerfield's evidence was that no
13 one discussed this case with him really after
14 the year of 1993.

15 In my submission, this notion of a wall,
16 which has been hinted at at times in this
17 testimony, is an unacceptable notion. That the
18 evidence that's been presented at this inquiry
19 has bridged that wall to the extent that it no
20 longer exists.

21 THE COMMISSIONER: I'm not sure I know what you
22 mean by that.

23 MR. LOCKYER: What I mean by that is that there
24 was no such wall, Mr. Dangerfield most certainly
25 knew at the time of trial about the negotiations

1 of Mr. Zanidean, if not the actual payments, the
2 essence of the payments and of course the
3 immunity issue and what had been done with that
4 as well.

5 And finally, Mr. Dangerfield's failure to
6 do anything when he heard Mr. Zanidean lying to
7 the jury in my submission is of course
8 inexcusable. He acknowledged that he knew that
9 when he was being questioned by Commission
10 Counsel and he acknowledged it because
11 Commission Counsel's questioning had, in my
12 submission, taken him inexorably to that
13 conclusion. By the time Commission Counsel got
14 to that stage in his examination,
15 Mr. Dangerfield had no choice but to acknowledge
16 the inevitable. He would not have looked
17 truthful had he done anything else.

18 And then we were treated to what, in my
19 submission, was a rather sad sight, and I say
20 that on behalf of Mr. Dangerfield in the sense,
21 when there was an attempted rehabilitation of
22 his evidence by his own counsel some two days
23 later.

24 So the answer to question 4 in my
25 submission, did the trial counsel and Mr. Miller

1 know what was going on? The answer in my
2 submission is a most decided yes.

3 Question five.

4 "Was the disclosure provided to Mr. Brodsky
5 designed to deceive?"

6 Once again, in my submission, the answer to that
7 question is yes. And Commission Counsel alluded
8 to the most telling document in the course of
9 his submissions to you this morning. I thought
10 I'd read to you Detective Anderson's response or
11 best explanation for how he could have responded
12 to the particular requests that Mr. Brodsky made
13 in the police occurrence. And I am sure,
14 Mr. Commissioner, you know what document I'm
15 talking about. It's at tab 4, page 1834 where
16 Detective Anderson has asked at line 23,

17 "Q So you took a very narrow, strict
18 construction of Mr. Brodsky's question and
19 interpreted it as asking you only whether
20 there was a quid pro quo with Zanidean that
21 he was aware of?

22 A Well, you could characterize it that
23 today. I certainly didn't think of it that
24 way when I wrote it.

25 Q You weren't troubled with that, here I

1 am sitting on this information of this deal
2 that I've made with Swift Current that is
3 exactly what the witness has been seeking,
4 repeatedly. And Brodsky is trying to get
5 at that, he just hasn't quite framed the
6 question right, but I am not going to
7 answer anything more than the narrow
8 question he has asked. Is that your view
9 of it?

10 A Well, I wasn't troubled by it at all
11 until I had an interview with you and you
12 pointed it out to me. I've never -- and I
13 might add that this paragraph that I write
14 characterizes a situation known by all of
15 my superiors and the Crown. And there was
16 not one of them that came to me and said,
17 Tom, I think this is a little inaccurate.
18 I didn't see it as inaccurate when I wrote
19 it. And I didn't see it as -- and I didn't
20 imagine anyone else seeing it as inaccurate
21 until I had my meeting with you and you
22 interviewed me.

23 Q You see, that would be a very good
24 response, Sergeant Anderson, if we had a
25 memo showing that you had clearly reported

1 the deal them."

2 Meaning to the others of whom you speak.

3 "A To who?

4 Q And then it would be up to them.

5 A To who?

6 Q To any of your superiors and, in
7 particular, to the Crown. You can pass the
8 blame on to the Crowns if they are fixed
9 with knowledge of this. But you don't have
10 a single piece of paper that fixes the
11 Crown with knowledge of this April deal
12 that you say you made. You are trying to
13 shift the blame to somebody that you
14 haven't got a report to.

15 A I am not trying to shift the blame to
16 anybody. I am trying to answer your
17 questions. What I'm telling you is that I
18 saw zero wrong with the characterizing the
19 situation in that paragraph, nothing."

20 In my submission, Mr. Commissioner, the only
21 reasonable interpretation of the non-disclosure
22 given to Mr. Brodsky was that it was designed to
23 deceive him. There was no desire to disclose
24 information to him about Mr. Zanidean that could
25 undermine their key witness, neither, as it

1 turned out, before the trial nor as it happened
2 after the trial.

3 In fact, in my submission, we can take 11,
4 12 years of experience that happened in this
5 case and say, regrettably, that there was in
6 fact an intention to suppress information from
7 Mr. Brodsky and from Mr. Driskell that can
8 undermine their witness Zanidean.

9 Question 6 deals with the issue of post
10 conviction disclosure obligation. Question,
11 "Did the Crown fulfil its post-conviction
12 disclosure obligations before and after his
13 appeal?"

14 This perhaps is best looked at in light of what
15 my friend Mr. Code, on behalf of the Commission,
16 talked about this morning the most egregious
17 example of Crown misconduct in this case, the
18 failure to disclose the Saskatchewan letters, or
19 at least the content of those letters.

20 But Mr. Schille, he was taken through it
21 several times in the course of his questioning
22 how he was the sixth of a long line of Crowns
23 that we know about for sure. Heavens knows if
24 there were others, there probably were, none of
25 whom, including Mr. Schille, fulfilled their

1 jobs. All of whom seem to assume that the other
2 had already done what they knew they were
3 supposed to do. Mr. Dangerfield number one,
4 Mr. Miller number two, Mr. Whitley number three,
5 Mr. Lerner number four, Mr. Finlayson number
6 five, and Mr. Schille number six. And these
7 aren't junior Crown Attorneys we're talking
8 about, these aren't people who have just joined
9 the club, so to speak, these are serious
10 long-standing Crowns. Mr. Schille less so than
11 the other five, one of whom or two of whom shall
12 I say achieved the rank of Assistant Deputy
13 Minister. And I'm trying to remember Mr. Miller
14 achieved the position, I believe I'm right in
15 saying Director of Public Prosecutions.

16 In my submission, it really is stretching
17 credulity to breaking point to assume that each
18 of these six men acting in good faith, each
19 failed in good faith to disclose the
20 Saskatchewan material.

21 In my submission, the only reasonable
22 conclusion to be drawn with respect to the
23 Saskatchewan materials and thereby, through
24 circumstantial evidence, all post-conviction
25 disclosure materials, the only reasonable

1 conclusion is that these materials were
2 suppressed.

3 MR. OLSON: Mr. Commissioner, I rise because I
4 speak on behalf of Mr. Lerner who was not given
5 the opportunity to appear before you. If my
6 learned friend is going to criticize Mr. Lerner
7 for failing to satisfy his obligations,
8 Mr. Lerner wants an opportunity to address that
9 because there is no such hint in any of the
10 materials before you.

11 THE COMMISSIONER: What would you like me to do?

12 MR. OLSON: Well, Mr. Lerner is very concerned
13 because the same point was made earlier by my
14 learned friend and he's taking a licence with
15 the evidence before you. If he's going to
16 pursue that and if that's going to be considered
17 in any way, then we do seek to reopen the
18 inquiry and have Mr. Lerner have an opportunity
19 to address the matter.

20 I remind you, Mr. Commissioner, the
21 evidence was that he was filling in for someone,
22 he read something, he concluded that there
23 should have been disclosure and he sent it to
24 Mr. Miller whose obligation it was to address
25 those issues and that was it.

1 MR. LOCKYER: May I help, Mr. Commissioner? I
2 will concede that you can't make a finding of
3 fault on the part of Mr. Lerner.

4 THE COMMISSIONER: I clearly cannot.

5 MR. LOCKYER: I'll concede that. But I'm
6 looking at it from Mr. Driskell's point of view.
7 Here was another Crown, one of six, who had the
8 opportunity to disclose something that he would
9 dearly liked to have had while he sat in prison.
10 That's the simplicity of my submission.

11 If I can take you, Mr. Commissioner, to tab
12 6 of what is now question 6. And you are
13 looking at an extract from Mr. Schille's
14 evidence. I take you to page 6114. It's the
15 third page of that tab, where Mr. Schille gives
16 his explanation. If you'll perhaps go down to
17 the previous page 6113 at line 21 where he's
18 asked -- he's being asked about disclosure
19 letters coming in on Mr. Driskell's behalf from
20 AIDWYC in the 2003 period. And he's asked at
21 line 20,

22 "Q And this, sir, this letter didn't twig
23 you to the Saskatchewan correspondence
24 issue? It's pretty direct. It's right on
25 you might say.

1 A Well, my answer would be the same as I
2 have indicated before. This is October of
3 '03. At the time, I didn't appreciate the
4 import of that letter and the fact that
5 it..."

6 meaning Saskatchewan materials,

7 "...hadn't been disclosed. And we're now
8 almost three years from the time that I did
9 my review. So could I have made the
10 connection? Yes, I could have. Did I?
11 No."

12 And the this is the point I'm trying to make here,
13 Mr. Commissioner.

14 "Q But surely now, you are taking the file
15 very seriously at Manitoba Justice. You
16 have had an organization involved in the
17 case, if I can preface the question with
18 this, for two years plus. You have got
19 correspondence almost coming out of your
20 ears from the organization. You have got
21 the DNA testing and results which have cost
22 a substantial amount of money for Manitoba
23 Justice. You have got the Minister
24 directly involved as well. Surely in this
25 six month period, shall we say between

1 March, when you met Mr. Libman, and
2 October, now, you had gone back over that
3 file and addressed it very seriously in
4 your mind; had you not?

5 A No.

6 Q You hadn't, all right.

7 A Well, I think I should indicate to you,
8 Mr. Lockyer, I'm not sure what your
9 commitments were at the time but I think
10 the documentation that's in the file makes
11 it clear that this is something I was doing
12 in addition to my regular duties. And I
13 think not to belabour the point, but my
14 regular duties constitute a full-time job
15 away from this. So to go back and review
16 it in the manner that you're suggesting
17 would have been a significant undertaking.
18 I didn't do that."

19 In my submission, a remarkable answer. For a
20 witness in October of 2003, given the state that
21 this file is now at, to be saying I really
22 didn't have time, I had too many other things to
23 do to really put my attention to this file, it
24 displays in my submission, Mr. Commissioner,
25 just at the systemic level, and I'm not really

1 addressing those issues now, but the systemic
2 level, an extraordinary attitude in Manitoba
3 Justice both on the part of Mr. Schille and on
4 behalf of the organization as a whole. An
5 attitude, the only word that I can think of that
6 fits, an attitude of entitlement. Don't really
7 care two hoots that Mr. Driskell has been
8 sitting in jail year after year with all sorts
9 of people taking up his cause, we haven't got
10 time to look at this file properly.

11 And at some point, and perhaps this came
12 out best in Mr. Whitley's evidence, the idea in
13 Mr. Whitley's case that he really wasn't aware
14 of the Saskatchewan material simply becomes
15 unbelievable. In my submission, it really is
16 impossible to accept anything other than that --
17 this issue of the letters coming in from
18 Saskatchewan must have been something that was
19 discussed, at the very least, at the Deputy
20 Ministerial level and indeed we know -- or the
21 Assistant Deputy Ministerial level shall we say.
22 And we know it was through the correspondence
23 involving Mr. Whitley and that that means that,
24 in effect, there was a decision not to disclose
25 this material to Mr. Driskell. Why? Because we

1 know, at that time, that this case is already
2 potentially becoming scandalous for Manitoba
3 Justice as a result of the concomitant articles
4 that are appearing or the contemporary articles
5 that are appearing in The Winnipeg Sun at the
6 time that these letters reappear to the
7 attention of officials in Manitoba Justice in
8 March, April of 1993.

9 In effect, in my submission, that shows us
10 that Manitoba Justice was more than content to
11 suppress potent information that was potentially
12 stunning in its effect from Mr. Driskell and
13 those who were trying to help him.

14 And certainly, in my submission as well,
15 it's of significance, that even when AIDWYC
16 became involved in this case in September of
17 2001, as you may recall from the correspondence,
18 the DNA testing was approved by Manitoba Justice
19 but with an important precondition. And that
20 precondition was that Mr. Driskell's advisers
21 back off demanding any further post-trial
22 disclosure during the time of the DNA testing
23 being done.

24 That, in my submission, is in itself
25 telling, one wonders why the two things couldn't

1 happen at the same time? But when one is
2 seeking justice for someone in Mr. Driskell's
3 position, all too often the person who is doing
4 the seeking, at least until we can deal with the
5 systemic issues of what's required of justice
6 departments in post-conviction applications, at
7 least until then, those advocating on behalf of
8 people in the position of Mr. Driskell know that
9 they have to tread carefully and gingerly if
10 they are going to get what they want from the
11 Justice Department with whom they are dealing
12 with.

13 Is this a good time to break,
14 Mr. Commissioner?

15 THE COMMISSIONER: Yes, it is.

16 THE CLERK: All rise. This Commission of
17 Inquiry will take a 15 minute recess.

18

19 (Proceedings recessed at 3:15 p.m. and reconvened at
20 3:30 p.m.)

21

22 THE CLERK: All rise. This Commission of
23 Inquiry is now in session. You may be seated.

24 THE COMMISSIONER: Something I intended to ask
25 you, Mr. Lockyer. What is Mr. Driskell's date

1 of birth, do you know that?

2 MR. LOCKYER: June 28, 1958, which means he's
3 48.

4 Question seven, Mr. Commissioner, the next
5 book in other words.

6 "Is there a reasonable explanation for the
7 failure to disclose the Perry Dean Harder
8 homicide review or its contents until
9 September of 2003?"

10 If I may just say, one thing I remember my
11 friend, Commission Counsel Mr. Code, said was
12 that he never thought there was an obligation to
13 disclose the review itself but only its
14 contents. I must take issue with that.
15 Certainly, in my submission, it would be almost
16 impossible to disclose that document through a
17 summary of its contents. The only real way to
18 disclose that document ever was through
19 disclosure of the review itself. And in my
20 submission, the non-disclosure of the Perry Dean
21 Harder homicide review or the review is really
22 completely inexcusable.

23 At tab 2, and perhaps the best way of
24 putting it was the police and the Crowns must
25 come to realize that they can't do things in

1 secret that can affect a person's liberty in a
2 criminal case and keep those things secret.

3 At tab 2, we have Chief Ewatski's
4 explanation or attempted explanation for why he
5 did not disclose or give a copy, I'm not sure I
6 should use the word "disclose," he didn't give a
7 copy of the review to Manitoba Justice who had
8 supposedly done a review of their own as a
9 result of the very same Winnipeg Sun articles
10 that had lead to the homicide review conducted
11 by the police.

12 And at page 3618 of tab 2, Chief Ewatski is
13 asked at a time that, in my submission, was a
14 significant moment in this inquiry, he was asked
15 at line 1 of 3618,

16 "Q And so you presumably came to believe
17 that this information was not going to be
18 passed on to Mr. Brodsky or Mr. Driskell,
19 is that right?

20 A No. We formed the opinion that both
21 Mr. Miller and Mr. Dangerfield were fully
22 aware of the issues surrounding the
23 possible perjury by Mr. Zanidean, that was
24 certainly clear in our minds, that the
25 Crown or prosecution was certainly aware of

1 that issue.

2 Q But you had no reason to think that the
3 information had been passed on to
4 Mr. Driskell? A I had no information to
5 tell me whether it had been passed on or
6 not passed on, sir."

7 A telling answer in my submission. In other words,
8 Chief Ewatski was operating in a vacuum of
9 knowledge knowing that he was operating in a
10 vacuum of knowledge.

11 "Q Did you ever make inquiries in that
12 regard, sir, in the ensuing ten years?

13 A I don't believe so, sir.

14 Q Did you care?

15 A Did I care?

16 Q Yes?

17 A I don't think it was part of my
18 responsibility to ensure whether it was
19 passed on or not, sir."

20 I think it might be fair to say,
21 Mr. Commissioner, that when Chief Ewatski came
22 back one or two months later to continue his
23 evidence, I can't help thinking that if those
24 questions and answers were read to him again,
25 even he would have been ashamed of them.

1 Because when he came back for the second
2 occasion, there's certainly no doubt, in my
3 submission, that his attitude to the case seemed
4 to have changed. That he seemed to be much more
5 ready to acknowledge that his own conduct, as
6 well as the conduct of others in this case, had
7 left a great deal to be desired and that he
8 wouldn't like to see this happen again. And I
9 accept that he wouldn't like to see this happen
10 again.

11 But to lay the blame solely on Chief
12 Ewatski and his predecessor chiefs for the
13 non-disclosure of the homicide review, in my
14 submission, would be a mistake. It wasn't just
15 his tort, if that's the right word to use, his
16 wrongdoing that caused this non-disclosure,
17 Manitoba Justice, in my submission, shares an
18 equal if not greater responsibility for the
19 non-disclosure of the review. Manitoba Justice
20 should have seen itself as obliged in 1993 as a
21 matter of legal obligation to demand that the
22 Chief, the then Chief Henry, provide them with a
23 copy of the review so that they could determine
24 whether or not it contained material that might
25 tend to support Mr. Driskell's claims of

1 innocence.

2 In my submission, the sense of entitlement
3 continued. We have Mr. Driskell convicted of
4 the murder of Mr. Harder, as far as we're
5 concerned, he did it, and there's nothing that
6 we're going to do to upset that particular apple
7 core.

8 At tab 6 of the same volume, you have
9 Mr. Schille's evidence. At page 6199, which is
10 the third page of Mr. Schille's evidence in this
11 tab, Mr. Schille has already acknowledged that
12 his supposed requests in 2003 after the DNA
13 results, when one would surely think that
14 Manitoba Justice would see it as being of the
15 utmost priority.

16 THE COMMISSIONER: I'm sorry, page number?

17 MR. LOCKYER: Tab 6, 6199. I said the third
18 page, I should have said the fourth page, my
19 mistake.

20 THE COMMISSIONER: Yes, okay.

21 MR. LOCKYER: Actually, I'm going to take you
22 back to 6194. May I do that, sorry, third page.
23 In my submission, at this point in 2003, we have
24 the DNA results that Manitoba Justice and anyone
25 involved in this case would, at this point,

1 surely have viewed themselves as having an
2 obligation to get a copy of that review
3 forthwith to examine and disclose to Mr.
4 Driskell's counsel. Instead, we seem to have
5 sort of a half-hearted attempt to get it.
6 Mr. Schille sort of assumed that Mr. Finlayson,
7 who was, once a month, meeting with Mr. Ewatski
8 to discuss mutual concerns, sort of an
9 assumption that Mr. Finlayson would have asked
10 for it.

11 And at 6194, line 11, it's put to
12 Mr. Schille,

13 "Q Mr. Schille, it all sounds very good.
14 But I'm simply suggesting to you at the
15 moment that we don't even have, coming out
16 of Manitoba Justice, a pointed letter to
17 the Winnipeg Police Service saying: Kindly
18 give us this material forthwith pursuant to
19 your legal obligations. There is no such
20 document and I can't understand why there
21 isn't.

22 A Well, and there is no such document.

23 Q Right.

24 A I think I would be the person to write
25 that letter to the Chief of Police, but

1 there is certainly no such document.

2 Q Well, and I suggest, sir, that the
3 absence of such a document, which seems
4 such an obvious thing to me, anyway, to do,
5 suggests really a lack of interest on the
6 part of Manitoba Justice to get the
7 documents from the Winnipeg Police Service?

8 A Again, we part company because I
9 disagree with that."

10 At 6199 at line 11, question of Mr. Schille.

11 "Q The system we have is the police do the
12 investigation. Then it comes to the Crown,
13 who decide whether or not the police
14 investigation merits whatever it is the
15 police suggested happened next, right?

16 A I agree with that, yes.

17 Q But here we have a circumstance that has
18 really gone on for ten years, but really
19 gets particularly crystallized in late
20 2002, where the police are just saying to
21 Manitoba Justice: We're not going to let
22 you do it in this case, right, because we
23 are not going to let you see what we've
24 got."

25 Do it, meaning disclosed.

1 "A That's correct.

2 Q And this is in a case, sir, where there
3 has been -- and I hate to keep saying this,
4 but I think it's worth making the point
5 again, where there have been cries from
6 Mr. Driskell for many, many years, ten
7 years, eleven years, cries from the media,
8 and cries from people on behalf of
9 Mr. Driskell, claiming that he is the
10 victim of a miscarriage of justice. That's
11 the context in which this has happened?

12 A That's the context, yes.

13 Q And leaving aside who's at fault or who
14 tried, who didn't try hard enough, who did
15 try hard enough, back in the Driskell time,
16 sir, in 2003, just move us into 2006, would
17 you agree with me that what happened then
18 was unacceptable, and would be unacceptable
19 for it to happen again today?

20 A Well, in light of what we now know, that
21 there was disclosure issues, that there was
22 material in there that should have been
23 disclosed, it was unacceptable that that
24 wasn't forwarded pursuant to requests, in
25 my view.

1 Q Have there been, that you are aware of,
2 Mr. Schille, any changes in policy in terms
3 of Manitoba Justice's relations with the
4 Winnipeg Police Service? And one would
5 imagine the police services across the
6 province, in terms of preventing a police
7 service from saying, no, you can't have
8 what we've got?

9 A Again, I'm not aware of any. But I am
10 probably not the best person to ask because
11 I don't set the policies in relation to
12 that."

13 And needless to say, Mr. Commissioner, on behalf
14 of both Mr. Driskell and AIDWYC, we make a
15 number of systemic recommendations arising out
16 of those series of questions and answers as
17 well.

18 THE COMMISSIONER: But I'm not sure that I
19 really -- Manitoba Justice never asked for it.

20 MR. LOCKYER: Mr. Schille testified that he
21 assumed that Mr. Finlayson was asking for it
22 because Mr. Finlayson and Chief Ewatski were
23 meeting once a month to discuss mutual issues of
24 concern between their two departments.

25 THE COMMISSIONER: And I may be wrong in that

1 recollection of the testimony but I don't recall
2 any direct testimony that Justice asked Winnipeg
3 for it. They asked obliquely when they asked if
4 it would be released to you or to someone
5 representing Mr. Driskell, but they didn't ask
6 for it to be presented to them that I recall.
7 THE COMMISSIONER: No direct evidence in that
8 regard. There was a letter from Mr. Schille to
9 AIDWYC at one point where he purported to say
10 that the police refused to release it to
11 Manitoba Justice and therefore they couldn't
12 pass it on.
13 THE COMMISSIONER: Yes, that's true. And I must
14 say when I read that, I was sort of under the
15 impression that the request had been in the
16 context will you, WPS, give us the report so we
17 can give it to Lockyer?
18 MR. LOCKYER: Which was really Chief Ewatski's
19 position as they weren't prepared to allow the
20 Crown to be a conduit for their report to
21 Mr. Driskell's counsel. So really that's the
22 basis of my submission, that whilst I certainly
23 don't want to take away from the responsibility
24 of Chief Ewatski and his predecessors for not
25 disclosing this report at an earlier date, that

1 the fault also lies very strongly with Manitoba
2 Justice who ultimately it's their responsibility
3 to provide disclosure to the defence. And
4 therefore, their responsibility to get it in the
5 first place in order to disclose it to the
6 defendant. And in our --

7 THE COMMISSIONER: I don't want to divert you
8 here, but supposing, and I'm thinking only
9 systemic now, supposing Justice had requested it
10 of WPS, and WPS, as I understood, said, well, if
11 they had asked in essence for themselves, we
12 would have given it to them. And had they given
13 it to Justice and then Justice had done nothing
14 with it, what, if any, obligation is there on
15 the police at that point? And it's nothing to
16 do with the facts at this case but on a systemic
17 issue.

18 MR. LOCKYER: Well, it's not so far from this
19 case if you consider the Swift Current police
20 dealings with the Winnipeg Police Service where
21 the Swift Current police, in effect, know that,
22 remember Burton talked about this, that they
23 have information that they realize is
24 significant for Mr. Driskell's counsel. And
25 they know very well it hasn't been disclosed.

1 And I believe someone, if it wasn't me, asked
2 Inspector Burton some questions in that regard.

3 I would think, in those circumstances, that
4 the Winnipeg Police Services or the police
5 force's responsibility wouldn't be alleviated if
6 they know that that information still isn't
7 being passed along. They would have to know
8 that prima facie they would have fulfilled their
9 task or their responsibility, should I say, by
10 disclosing the information to the Crown's
11 office. But if they then become aware that that
12 information hasn't been passed on as it should
13 have been by the Crown, then their ethical
14 obligations, in my submission, would continue.
15 THE COMMISSIONER: Staff Sergeant Ferguson in
16 fact got in trouble for indirectly doing that.
17 I don't think he intended to do it.

18 MR. LOCKYER: Yes. I actually thought of
19 mentioning that, that the only person who got
20 into any trouble, at least until this inquiry,
21 for what happened in terms of the dealings
22 between the Swift Current and Winnipeg Police
23 about Mr. Zanidean's status was the one person
24 who sort of let the horse out of the stable, was
25 Staff Sergeant Ferguson who spoke to the

1 Winnipeg Sun reporter. And the next thing he
2 finds is he's actually having to apologize for
3 actually being the only person who did the right
4 thing. There is a certain irony to that which
5 had certainly occurred to me.

6 MR. CODE: Just if I can just briefly respond to
7 your question, Mr. Commissioner, about did
8 Justice expressly ask the Winnipeg Police
9 Service for the file? Mr. Lockyer has read you
10 the passage dealing with there being no formal
11 letter asking for it but I think there is clear
12 evidence that Schille asks McCorrister who is
13 the chief's designator.

14 MR. LOCKYER: That's right.

15 MR. CODE: And McCorrister says no.

16 MR. LOCKYER: Schille testified that he did,
17 yes.

18 THE COMMISSIONER: I forgot about McCorrister.

19 MR. LOCKYER: Apparently it's in the extract of
20 evidence of Mr. Schille that I've just been
21 reading to you, if you read the rest of the
22 extract, his evidence that he verbally asked
23 Mr. McCorrister.

24 The final question, Mr. Commissioner, is to do
25 with Mr. Christianson.

1 "What approach should be taken to
2 Mr. Christianson's testimony?"

3 In my submission, Mr. Christianson's testimony
4 was, and what happened during the course of his
5 testimony was perhaps, at least for me, the most
6 unexpected event of this inquiry. The last
7 thing you would have expected from a person
8 qualified as a DNA expert, the last thing you
9 would have expected from the director of the
10 RCMP laboratory who is, himself, qualified as an
11 expert in DNA is for them to come here and, in
12 effect, say how do we know that the
13 mitochondrial results are right and our hair
14 microscopy was wrong?

15 But Mr. Christianson, by doing that, by hiding
16 behind the coat tails of mitochondrial DNA
17 testing came here with a plan whereby he can
18 maintain his microscopy results, he can maintain
19 the over-reaching testimony he gave at
20 Mr. Driskell's trial, by not conceding the DNA
21 results claiming he knew nothing about them,
22 knew nothing about the expertise, even though he
23 conceded them at a previous trial, the Zurowski
24 trial and that was put to him and indeed also
25 put to Mr. Schille. And that the lab supported

1 him and indeed an inference might be drawn that
2 that's why he took the position he did at the
3 encouragement of the lab itself.

4 If I can take you, Mr. Commissioner, to tab
5 2 of this book and look at some of the questions
6 asked of Mr. Schille. At 6149, line 10, tab 2,
7 this is Mr. Schille speaking.

8 "Q I want to talk for a moment, sir, about
9 the DNA testing and its impact, if any, at
10 Manitoba Justice within the corridors of
11 power, so to speak. First of all, sir, did
12 it ever occur to Manitoba Justice, after
13 the DNA results came in, that their
14 validity could be challenged?

15 A Sorry, could you repeat that?

16 Q I am not surprised. Did it ever occur
17 to Manitoba Justice, sir, to challenge the
18 validity of the DNA results?

19 A No.

20 Q Not even for an instant?

21 A No."

22 At line 7 of the next page.

23 "Q So Manitoba Justice acted on a premise,
24 an absolute premise, commencing December 2,
25 2002 that the DNA results proved that those

1 weren't Perry Dean Harder's hair?

2 A Correct."

3 And that, for all intents and purposes, was
4 where everyone was from December 2nd of 2002
5 right through to December 27th of 2006 or
6 perhaps one might say when Mr. Gates wrote his
7 letter of August 14th of 2006 advising
8 commission counsel that his client, being the
9 RCMP laboratory, in the way he wrote the letter
10 were not prepared to concede that the mtDNA
11 results proved that the hair microscopy was
12 wrong.

13 For the first time then in four years,
14 almost four years, we heard evidence challenging
15 those results, a challenge which has since been
16 abandoned by the RCMP lab. I don't know if,
17 Mr. Commissioner, are you aware of the latest
18 letter in this regard? Maybe I should take you
19 to it then. Sorry, it's taking me a bit off
20 course but I think I should take you to it. The
21 materials filed in support of the systemic
22 submissions.

23 If you look at tab 6, Mr. Commissioner, you
24 will see at page, yes, page 50 and 51, there is
25 a letter that Mr. Gates wrote to myself and

1 copied Commission Counsel. And I want to stress
2 that this is, my submissions are focused at the
3 lab, they are not focused at Mr. Gates.

4 At page 51, you will see that, the second
5 paragraph, well perhaps the first paragraph, at
6 top of page 2,

7 "Dr. Burn responded quickly and cautiously on
8 September 18th." This is when, remember,
9 Mr. Gates, I asked him to concede.

10 THE COMMISSIONER: Yes, I recall.

11 MR. LOCKYER: They weren't Perry Dean Harder's
12 hairs. And he went back and spoke to Mr. Burn
13 and returned to where I'm now standing and said
14 no, they weren't prepared to.

15 Dr. Burn responded quickly, meaning to me
16 when I went and spoke to him, and cautiously on
17 September 18th to a somewhat unexpected question
18 couched in terms of absolutes, most definitely
19 and without qualification. Upon reflection, Dr.
20 Burn welcomes the opportunity to offer a more
21 considered response to an obviously important
22 question. As such, he advises me that the
23 position of the forensic laboratory services is
24 that the mtDNA evidence is correct and that the
25 three hairs came from someone other than Perry

1 Harder.

2 Now whilst on the one hand that's a most
3 welcome, I won't call it a concession because I
4 don't view it a concession, but welcome
5 admission perhaps is the best way of putting it.

6 THE COMMISSIONER: Acknowledgment.

7 MR. LOCKYER: Acknowledgment is a good way of
8 putting it. First of all, I noticed that
9 Mr. Christianson hasn't himself given that
10 acknowledgment. In terms of the lab itself, the
11 institution's credibility is very much at issue
12 here in this inquiry through its director who is
13 present at this inquiry. And in my submission,
14 both the position of the lab and the position of
15 Mr. Christianson is, to use a word that the
16 Attorney General of this province used many
17 times in commenting on the DNA results
18 themselves, that the positions taken by
19 Mr. Christianson and Dr. Burn are unsettling,
20 was a favourite word of Minister Mackintosh when
21 describing his view of the impact of those DNA
22 results on Mr. Driskell's conviction.
23 Unsettling, troubling, whatever way you want to
24 put it.

25 In my submission, Mr. Christianson must

1 have known, and indeed acknowledged, that he
2 knew that the statistics that he could have got
3 it so wrong are overwhelming and indefensible if
4 he was to acknowledge that those mitochondrial
5 results were right. They were, ironically, so
6 overwhelming that they bring to mind the kind of
7 statistics that one gets from an inclusion when
8 one is considering nuclear DNA testing which you
9 might almost call the ultimate irony.

10 Even on his own assessment of his
11 expertise, Mr. Christianson failed miserably in
12 my submission. For the first time in 15 years,
13 when he is interviewed by commission counsel, we
14 hear for the first time that there was nothing
15 particularly notable about the characteristics
16 of the three hairs that he testified in effect
17 almost certainly came from Mr. Harder.

18 Go to tab 1, if you would, of question 8
19 which is an extract from Mr. Christianson's
20 evidence, at page 5118, which is several pages
21 into the tab, actually 5117 at line 22.

22 "Q As I understand it, sir, in this case,
23 you, insofar as you purported to find the
24 three hairs from the van to fall within the
25 normal variation of Mr. Harder's hairs, you

1 said that in the context of there being
2 nothing particularly distinctive about any
3 of the hairs. Is that right, sir?

4 A Well, I don't remember putting it quite
5 that way. Is there a reference to that?

6 Q Can you remember that?

7 A No, I can't.

8 Q You can't. Well, that's what you told
9 Commission Counsel, sir, page 15?

10 'There was nothing particularly
11 distinctive about the known hairs in
12 this case, and Christianson considered
13 the three comparisons referred to in
14 his report to be 'positive' comparisons
15 but not 'strong positive'
16 comparisons...'

17 within the meaning of the guidelines. Is
18 that true, sir?

19 A Yes.

20 Q You didn't tell the jury that in
21 Mr. Driskell's case, did you?

22 A I don't recall exactly what --

23 Q I can assure you that you didn't. Why
24 not? A Well, the hairs are still a match,
25 and it's like a threshold, and the match,

1 or the consistent conclusion does not rely
2 on there being some kind of distinctive
3 individualizing features.

4 Q Don't you think, sir, that the jury
5 trying Mr. Driskell for first degree murder
6 was entitled to know there was nothing
7 particularly distinctive about the three
8 hairs in the van, so the three comparisons
9 were only positive, rather than strong
10 positive, in your own discipline. Don't
11 you think they were entitled to know that?

12 A Well, I worded my conclusion in a way,
13 in this term, or this guideline, I worded
14 my conclusion as a positive. So I did
15 indicate that to them.

16 Q You worded your conclusion in terms of
17 "exactly" is a word you used, do you
18 remember that? I'm going to take you
19 through these words?

20 A Yes, I understand.

21 Q Those kinds of words. There is a very
22 small chance that it wasn't Mr. Harder's
23 hairs. Do you remember that?

24 A Yes.

25 Q You never said to the jury, though, that

1 unlike some cases, all I have here is
2 positive comparison because there's nothing
3 particularly distinctive about the hairs?

4 A No, I didn't say that.

5 Q You never gave a hint of that in your
6 evidence, did you, sir?

7 A No."

8 Now, AIDWYC and Mr. Driskell have made a number
9 of submissions at the systemic level as to how
10 you, Mr. Commissioner, should react to the way
11 the RCMP laboratory services reacted at this
12 inquiry, and Mr. Christianson as well.

13 Ultimately, it was really Dr. Burn's reaction
14 that was more important perhaps for future
15 purposes than that of Mr. Christianson.

16 But in the context of Mr. Christianson's
17 evidence, if I can ask a rhetorical question.
18 Is there anyone really in this room who, if
19 their freedom was hanging in the balance on
20 Mr. Christianson's work in the RCMP laboratory
21 services, that they would feel comfortable and
22 confident in him having their fate in his
23 balance? Does anyone think of Mr. Christianson
24 in the kind of terms of the English Court of
25 appeal in the Judith Ward case talked of what we

1 like to think of the neutral scientist in the
2 white coat working diligently to find out the
3 truth in his pristine lab. And by pristine lab,
4 I mean not his clean lab, I mean in his lab
5 uninfluenced by outside forces. And in my
6 submission, those rhetorical questions bring to
7 the fore that Mr. Christianson, besides owing an
8 enormous apology to Mr. Driskell both personally
9 and indeed on behalf of the lab as well,
10 particularly for reviving, in the course of his
11 evidence, a claim that the hairs that were found
12 in the van may have come from Mr. Harder. Which
13 was, in effect, Mr. Christianson reviving a
14 theory of guilt on the part of Mr. Driskell.
15 Because that is the only interpretation that can
16 be drawn if those hairs were indeed Perry Dean
17 Harder's.

18 Beyond that, in my submission,
19 Mr. Commissioner, you should look at his
20 evidence very carefully and consider very much a
21 question of accountability in regard to
22 Mr. Christianson himself.

23 Those, Mr. Commissioner, are essentially my
24 submissions to you on behalf of both the
25 Association and on behalf of Mr. Driskell.

1 THE COMMISSIONER: Thank you, Mr. Lockyer.

2 MR. LOCKYER: Close enough. This, in my
3 submission, Mr. Commissioner, is an important
4 inquiry, not just for this province but for
5 Canada as well, as have been previous inquiries.

6 Public inquiries into wrongful convictions
7 are very much a Canadian thing. And their
8 conclusions have reverberated in a remarkable
9 way not just in Canada but beyond our borders as
10 well.

11 I can tell the Commission as a fact that
12 organizations like the Innocence Project from
13 whom you heard from one of their directors,
14 Mr. Neufeld, and organizations like Centurion
15 Ministries which provided Jim McCloskey for
16 Mr. Driskell's benefit while he was trying to
17 set aside his conviction, who did such sterling
18 work on his behalf, all pay a great deal of
19 attention and make great use of the results of
20 these inquiries.

21 The Morin Inquiry report could be said to
22 have contributed to the saving of more than 300
23 lives in the State of Illinois. Because when
24 Governor Ryan did his report that lead to the
25 commutation of the sentences of more than 300

1 people on death row in that province. The Ryan
2 report, as it's called, which lead to those
3 commutations by the Governor relied extensively
4 on the report of Justice Kaufman from the Morin
5 Inquiry.

6 Mr. Driskell then is pleased to leave his
7 case, so to speak, in your hands,
8 Mr. Commissioner. And we thank you. I thank
9 you on his behalf for the way that you have
10 conducted this inquiry since when it began.
11 Thank you. Those are my submissions.

12 THE COMMISSIONER: Thank you, Mr. Lockyer.

13 MR. CODE: Mr. Commissioner, could I just
14 briefly comment on Mr. Lockyer's question 8
15 dealing with Mr. Christianson's evidence. I
16 thought I should state on the record that the
17 reason that Mr. Dawe and I did not refer to the
18 issue of Mr. Christianson's evidence in our
19 submissions is not because we don't think it's a
20 very important issue but simply because we had
21 taken the position that we would only make
22 submissions on issues of adjudicate of fact.

23 And the question of accountability for
24 Mr. Christianson that Mr. Lockyer has raised,
25 Mr. Dawe and I saw it as being inextricably tied

1 up with the systemic issue because the big issue
2 in relation to Mr. Christianson is was his
3 testimony in accord with contemporary standards
4 at the time he gave that evidence. And to
5 evaluate that issue, you really have to look at
6 Dr. Lucas's report and you have to look at what
7 the panel on systemic issues had to say.

8 So we intend to deal with the whole
9 question of Mr. Christianson's accountability
10 and conduct in the context of the systemic
11 issues. I didn't want to leave the impression
12 that we were somehow ignoring that issue. We
13 will deal with it.

14 THE COMMISSIONER: Thank you. Now, you will all
15 recall that there was a question posed by
16 Mr. Lockyer at the beginning of this afternoon's
17 submissions as to whether or not the rest of you
18 would permit him to go into Mr. Kennedy's time.
19 So I will now ask you if you will permit him.

20 MR. ABRA: He's already done it.

21 THE COMMISSIONER: I look over to Mr. Wolson and
22 I see it's 4:04. I'm almost tempted to say it's
23 your turn.

24 MR. WOLSON: I thought you would.

25 MR. LOCKYER: I thought I was going to make

1 Mr. Kennedy's submissions now.
2 THE COMMISSIONER: Thank you. And tomorrow
3 morning at 9:30 I guess it is.
4 THE CLERK: All rise.
5 (Proceedings adjourned at 4:05 p.m.)
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CECELIA REID and DEBRA KOT, duly appointed Official
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certify the foregoing pages are a true and
correct transcript of our Stenotype notes as
taken by us at the time and place hereinbefore
stated.

Cecelia Reid
COURT REPORTER

Debra Kot
COURT REPORTER

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