

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

The Honourable Patrick LeSage, Q.C. Commissioner

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

Tuesday, October 31, 2006

Volume 29

INQUIRY PROCEEDINGS

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Ms. K. Carswell	For the Winnipeg Police Services and certain members
Mr. R. Wolson, Q.C.	For the Winnipeg Police Association and certain members
Mr. J. Kennedy, Q.C.	For the Association in Defence of the Wrongly Convicted

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1 TUESDAY, OCTOBER 31, 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: Morning, Mr. Gates.

7 MR. GATES: Morning, Mr. Commissioner. Sir, I
8 have filed and provided to my friends a copy of
9 some of the materials that I will be briefly
10 making reference to this morning, sir. And
11 madam clerk has just put the document on your
12 desk.

13 THE COMMISSIONER: Thank you.

14 MR. GATES: May I also in advance, sir, invite
15 you to pull out three of the books that are
16 behind you. The one relating to Inspector
17 Burton, Staff Sergeant Ferguson.

18 THE COMMISSIONER: Yes.

19 MR. GATES: The one relating to Sergeant Tom
20 Orr.

21 THE COMMISSIONER: Okay.

22 MR. GATES: And, finally, Mr. Christianson's
23 book.

24 THE COMMISSIONER: They are Exhibits 1, 3 and
25 38A, I believe.

1 MR. GATES: Thank you, sir. At the beginning,
2 may I take a few moments, sir, to offer some
3 thoughts on this process. And I begin by
4 wishing to express my appreciation to the
5 various individuals that I have had the
6 privilege to work with over the course of the
7 past few months in relation to this inquiry.

8 To you, sir, I want to acknowledge your
9 grace and very careful attention to all that has
10 been brought before you at each and every aspect
11 of the inquiry.

12 To Commission Counsel, Mr. Dawe, Mr. Code,
13 and, of course, to Mr. Giasson and the various
14 members of the commission staff, I want to
15 acknowledge the very, very efficient manner in
16 which this inquiry has unfolded on time, on
17 schedule and, while I am not privy to this
18 information, I rather suspect on budget.

19 To Mr. Lockyer, who I regret isn't here,
20 and I will have a bit more to say about
21 Mr. Lockyer, to Mr. Libman and to Mr. Kennedy,
22 who I also regret is not here, I think we all
23 owe them a debt of thanks for continuing to
24 remind us of Mr. Driskell's perspective on each
25 and every aspect of this inquiry. Mr. Driskell

1 is, after all, the reason we are all here. I'm
2 sorry, as I mentioned a moment ago, that
3 Mr. Lockyer isn't here for the balance of the
4 hearing. I confess that I don't always agree
5 with him, but I greatly admire his passion and
6 the commitment that he has brought to this very,
7 very important exercise as we have a look at how
8 the criminal justice system didn't work the way
9 we all want it to.

10 Finally, I want to say a special word of
11 thanks to my colleagues from the Winnipeg bar,
12 to Messrs. Olson and Olson, Mr. Abra, to
13 Ms. Carswell and Ms. Hanlin, Mr. Prober and his
14 colleague, Mr. King, to Mr. Wolson, Miss Wolson,
15 to Mr. Wullum, and certainly last, but not
16 least, my friend and neighbour, Mr. Tapper. I
17 have greatly, greatly appreciated the warmth of
18 their welcome as the guy from away, and the
19 friendship that they have extended over the
20 course of this inquiry. It has been a real
21 pleasure to have been part of this process. So
22 I thank all of you for the opportunity. Thank
23 you.

24 THE COMMISSIONER: Well, let me just say I
25 concur in all that you have said, except that I

1 would just add one more and that is yourself,
2 and your courtesy, patience and the dedication
3 that you've brought to this inquiry.

4 MR. GATES: Thank you very much, sir. And I
5 doubt you will concur in everything I'm about to
6 say to you, but I hope you concur in some of it.

7 I do not have a written outline, sir, but I
8 can tell you in advance that I am going to be
9 dealing with four points.

10 I want to spend a bit of time with respect
11 to questions number 4 and 5, items 4 and 5 that
12 were dealt with by Commission Counsel yesterday
13 relating to Sergeant Orr's involvement in this
14 matter, I have a very few comments.

15 My second point relates to RCMP records and
16 the unfortunate destruction of some of the Swift
17 Current files. And that was issue number 19
18 raised by my friend, Mr. Code.

19 Third, I want to spend some time on the
20 evidence of Mr. Christianson and the role that
21 he played in the investigation and in the
22 prosecution of Mr. Driskell.

23 And, finally, time permitting, I have a few
24 submissions to make to you, sir, with respect to
25 the issue of Swift Current immunity. Though I

1 am mindful of your suggestion to us, sir, before
2 we broke last month that the minutia of who said
3 this, who said that is probably not all that
4 helpful to what it is that is before you.

5 So that's a bit of a road map, sir, of
6 where I plan to go this morning.

7 Let me start, sir, with issue number 1,
8 which has to do with, as I say, items number 4
9 and 5 that my friend, Mr. Code, raised with you
10 yesterday. Item number 4, as you will recall,
11 he described as:

12 "The dispute between Anderson and Orr as to
13 whether the Swift Current arson
14 investigation was a complete bar to
15 Zanidean's entry into the RCMP Witness
16 Protection Program or merely an
17 impediment."

18 Question number 6 -- I'm sorry, I think I
19 said 4 and 5. I meant 4 and 6. Number 6:

20 "The dispute between Anderson, Vandergraaf
21 and Orr as to whether the various calls of
22 the Swift Current RCMP in April 1991 were
23 part of a co-ordinated effort and whether
24 Orr properly recorded and reported his
25 calls."

1 I plan to deal only with whether or not Orr
2 properly recorded and reported these calls.

3 Before I begin, sir, may I offer a
4 suggestion that I'm sure you are very well aware
5 of, as a result of having sat here for the
6 number of weeks that you have, and that is the
7 wisdom in the adage that hindsight is 20/20
8 vision. There are many things that should have
9 been, with the balance -- I'm sorry, with the
10 benefit of the knowledge that we have today,
11 they should have been done. We would do them
12 differently today.

13 But I would urge you, sir, to be careful
14 about applying a standard or a set of
15 assumptions about what should be done today with
16 the benefit of all of the information, knowledge
17 and understanding that we have about the factual
18 underpinnings of this matter to events that
19 happened a very long time ago and for which not
20 everyone had the benefit of that 360-degree
21 vision.

22 Yesterday my friend, Mr. Code, with respect
23 to the fourth issue that he placed before you,
24 raised the issue about whether or not -- and
25 these are my words, not Mr. Code's -- whether or

1 not there were conflicting views as to the issue
2 of an outstanding charge relative to entry into
3 the RCMP Witness Protection Program, was it a
4 complete bar, was it an impediment? And he
5 said, at paragraph 143 of the document that was
6 filed before you:

7 "The opposing positions having likely
8 hardened over time making it difficult to
9 resolve."

10 My submission to you, sir, is that, in
11 fact, there are no opposing positions. But,
12 rather, there is, and you have seen before you,
13 the manifestation of some confusion. And at
14 times, I would submit, that it is considerable
15 confusion as to how the program operated.

16 Before I identify the three areas of
17 general confusion that I submit are relevant to
18 your consideration, I would say, very
19 respectfully, that Sergeant Orr's very detailed
20 notes, very detailed notes about his involvement
21 in this matter, as well as his testimony before
22 this inquiry, was to the effect, as best I
23 recall, and he was consistent throughout, that
24 the existence of an outstanding charge was not
25 an impediment to entry into the program.

1 THE COMMISSIONER: Yes, that clearly -- at least
2 that was what I thought he clearly said.

3 MR. GATES: That there was some confusion about
4 that point.

5 THE COMMISSIONER: Yes.

6 MR. GATES: Seems equally clear, in my
7 submission.

8 THE COMMISSIONER: Yes.

9 MR. GATES: I suggest to you, sir that, there
10 are three levels of confusion. The first level
11 of confusion relates to some general confusion
12 about the RCMP's role in witness protection, in
13 the Witness Protection Program generally, what
14 were and what were not Witness Protection
15 Program issues. For example, in my submission,
16 these were witness protection issues: change of
17 names, change of identity, relocation to a new
18 location somewhere in the country, assistance in
19 securing employment in a new location, those
20 were part of the Witness Protection Program.

21 But there were a number of things that we
22 have heard a lot of evidence about which, I
23 submit, were not part of the program: the
24 preparation of the application form, the
25 preparation of a threat assessment, any

1 temporary security measures that may have been
2 required, financial issues, before and after
3 relocation. I also suggest what falls into this
4 category is the resolution of outstanding
5 charges and securing immunity in appropriate
6 cases, which, in my submission, it's clear from
7 all of the evidence, is always a Crown issue,
8 the issue of immunity. Those were not part of
9 the Witness Protection Program.

10 The second area of confusion, I submit,
11 flows from the distinction between temporary
12 measures taken by an investigative agent to
13 address security issues and concerns relative to
14 a witness and the formal RCMP Witness Protection
15 Program; temporary versus permanent.

16 The third area where, I submit, we have
17 encountered confusion in the course of this
18 inquiry was around the issue of whether or not
19 Zanidean was or was not actually in the Witness
20 Protection Program, the formal program. And, in
21 my submission, that confusion was compounded, at
22 times, by virtue of the fact that following his
23 April 4, 1991 call to the Winnipeg Police
24 Service about the death threat that he found on
25 his vehicle, he was under a form of witness

1 protection orchestrated by the Winnipeg Police
2 Service, facilitated by Corporal Orr, as he then
3 was, as assistance to the Winnipeg Police
4 Service. And you will no doubt recall that he
5 was moved. Mr. Zanidean moved or was moved
6 himself and supported in the City of Calgary as
7 part of that temporary relocation.

8 Back to the first point about confusion
9 about the RCMP's role in witness protection
10 generally, I would say a couple of things.
11 First of all, you will recall, sir, that there
12 was a three-step process from a documentary
13 point of view. There was an application. There
14 was an MOU, or there would have been an MOU,
15 between the RCMP and the Province of Manitoba.
16 And there would have been a letter of agreement
17 between the RCMP and Mr. Zanidean, who was the
18 subject of the application. We know there never
19 was an application. There was a draft
20 application. But Mr. Zanidean and his wife
21 never committed themselves to the idea of
22 seeking entry into the program, so there never
23 was an application. There never was an MOU.
24 There never was an MOA. This process didn't get
25 very far.

1 As well, you will recall, sir, that there
2 is considerable evidence before you that, as
3 time elapsed, Sergeant Orr was increasingly of
4 the view that Mr. Zanidean wasn't suitable for
5 the program, even if he did wish to apply. And
6 you will recall, as well, and I believe it was
7 mentioned yesterday, that it was Corporal Orr
8 who, in fact, suggested that the April 29th
9 meeting with Staff Sergeant Vandergraaf and
10 Mr. Miller, the idea of a one-time cash payment.

11 On the second point, that is the
12 distinction between informal witness protection
13 and the formal RCMP Witness Protection Program,
14 I submit, sir, that it is important to bear in
15 mind that the program was relatively new when
16 this event was unfolding. And that a number of
17 the witnesses who appeared before you testified
18 that they had never had any experience dealing
19 with an application or with the program. You
20 will recall, I submit, or I suggest,
21 specifically, Corporal Orr's evidence about the
22 difficulties he had with Mr. Zanidean and
23 Mr. Zanidean's lawyer, Mr. Kovnats, trying to
24 explain to them what the program was and wasn't
25 about, and trying to manage their expectations

1 about what they could expect.

2 THE COMMISSIONER: Is my memory correct that
3 this was the first attempt at a formal Witness
4 Protection Program RCMP-involved in Manitoba?

5 MR. GATES: I don't recall that, sir. But I --

6 THE COMMISSIONER: It's of no particular
7 consequence, but I thought --

8 MR. GATES: I certainly believe that a number of
9 the witnesses had said it was the first time
10 they had ever been involved in it. I'm sorry,
11 sir, I don't remember whether Sergeant Orr
12 actually said that.

13 While there may have been some confusion,
14 sir, I do want to take a moment and say that, in
15 my submission, some of the confusion is more
16 imagined than real. And you may well want to
17 ask yourself whether or not some of the
18 confusion was, in fact, very convenient, given
19 what we know around the issues around whether or
20 not there was or was not immunity.

21 In the book of authorities or the book that
22 I have filed, the green book, I have included
23 four letters involving the Winnipeg Police
24 Service and the RCMP. And I only propose to
25 take you to a couple of them. And those

1 letters, sir, are found at tab number 3. They
2 are all together. The first letter is a letter
3 from Deputy Chief Klippenstein to Chief
4 Superintendent Callens dated April 10, 1991.
5 And this has to do with the temporary relocation
6 to Calgary. What I submit is clear from the
7 letter from Deputy Chief Klippenstein is a clear
8 understanding that the RCMP are assisting the
9 Winnipeg Police Service in relocating or helping
10 to relocate Mr. Zanidean to Calgary as a matter
11 of assistance. It's not the Witness Protection
12 Program.

13 The second letter, sir, is Staff Sergeant
14 Vandergraaf's letter to Corporal Orr dated the
15 16th of April. I'm sorry, let me go back for a
16 moment. I haven't included this, but if you
17 look at tab 10 in Mr. Orr's book, you will see a
18 continuation report that was prepared by
19 Sergeant Paul dated April 10th, the same date as
20 Deputy Chief Klippenstein's letter to Chief
21 Superintendent Callens. I draw this to your
22 attention, sir, because there is a significant
23 difference between what Deputy Chief
24 Klippenstein is saying on October 10th and what
25 Sergeant Paul is saying on October 10th.

1 The continuation report, and I'm sorry that
2 I haven't included that in the book that I
3 provided to all of my friends, it clearly
4 indicates that Zanidean is under the Witness
5 Protection Program, which we know is not the
6 case.

7 THE COMMISSIONER: Yes.

8 MR. GATES: And his own deputy chief knows is
9 not the case.

10 THE COMMISSIONER: Yes.

11 MR. GATES: I leave for your consideration the
12 other letters that are included in this tab.
13 They include further correspondence from Staff
14 Sergeant Vandergraaf to Chief Superintendent
15 Callens. And, finally, a letter from Chief
16 Superintendent Callens to Deputy Chief
17 Klippenstein on May 22, 1991, which is the last
18 letter in the materials.

19 In my submission, this later correspondence
20 is important for a couple of reasons. By
21 May 22nd, the RCMP still didn't know what was
22 going on with Zanidean. But what I submit is
23 significant, sir, is that Chief Superintendent
24 Callens makes it crystal clear that the RCMP is
25 asking the Winnipeg Police Service for

1 particulars as to Zanidean's requirements. It's
2 clear, I submit, that this helps us to see the
3 relative responsibilities between the requesting
4 agency and the RCMP relative to witness
5 protection. The ball is in the Winnipeg Police
6 Service's court.

7 I now want to turn, sir, to item number 6
8 which my friend, Mr. Code, dealt with yesterday
9 in his argument before you. And I propose to
10 address only the second part of that, having to
11 do with whether or not Sergeant Orr -- Corporal
12 Orr properly recorded and reported his call. At
13 page 128, the fourth bullet in Mr. Code's
14 submissions yesterday, he said, and I quote:

15 "The more serious issue here is the
16 adequacy of Orr's note-taking and
17 reporting, especially the relations with
18 second call to Upton on April 12, 1991.
19 The cryptic nature of his note and Orr's
20 curious use of ellipsis infers that the
21 note may have been deliberately incomplete.
22 Given the importance of the topic under
23 discussion, Orr's note raises questions
24 about his practices and professionalism."

25 I have a number of submissions to make on this

1 point.

2 First of all, sir, Corporal Orr
3 acknowledged when he was questioned by
4 Commission Counsel before the inquiry that his
5 note on this occasion, and indeed on a couple of
6 other occasions, was cryptic and did not purport
7 to be a verbatim account of what transpired. He
8 said that he doesn't know why he used the three
9 dots at the end of the entry relative to his
10 April 12th call to Sergeant Upton in Swift
11 Current.

12 And I have included, sir, at tab 8 of the
13 green book three pages from the transcript where
14 he is questioned by Mr. Code in this regard. I
15 am not going to read them to you, sir, but this
16 is the relevant passage of evidence that I
17 submit Mr. Code appears to be relying on. I
18 say, with respect, that I have difficulty with
19 Commission Counsel's conclusion on this point
20 and, in my submission, it's unfair. And it's an
21 unfair conclusion for a number of reasons, not
22 the least of which is that it ignores the very,
23 very extensive and detailed notes that Sergeant
24 Orr prepared relative to this aspect of the
25 case, the whole issue with respect to

1 negotiation of discussion with Mr. Zanidean.

2 Indeed, in my submission, Mr. Commissioner,
3 Corporal Orr's notes are, in fact, the only
4 contemporaneous notes that we have about much of
5 this aspect of the case. And so while I
6 appreciate that there may be a natural tendency
7 to look to the one source of information that
8 you do have and wish or hope that it was in
9 greater detail, I submit that is -- it would be
10 unfair to place on Corporal Orr's shoulders the
11 entire burden for the fact that we don't have
12 all of the information that we wish we had.

13 As you know, sir, and I say this with
14 respect, there are no notes from Bruce Miller.
15 There are precious, precious few notes or
16 documents from the Winnipeg Police Service about
17 any of these discussions or negotiations with
18 Mr. Kovnats -- sorry, with Mr. Zanidean. And
19 there is precious little documentation from
20 Mr. Kovnats. In my submission, all of those
21 people were also under a duty to make
22 contemporaneous notes relating to the
23 discussions and negotiations with Zanidean.

24 And so we are left, sir, with the
25 Commission being entirely dependent upon

1 Sergeant Orr's account of what transpired during
2 these critical discussions with Mr. Zanidean.
3 Again, I appreciate that there may be a strong
4 desire for more information. We wish that
5 Corporal Orr had told us every single word that
6 was said by every single player. But, in my
7 submission, it is completely inappropriate to
8 call into question his overall practices with
9 respect to note-taking and then to go on and to
10 question his professionalism because this one
11 note doesn't go as far as we might wish it did.
12 And, indeed, I'm troubled by the -- by the
13 conclusion that Commission Counsel would invite
14 you to draw, and indeed the speculation that I
15 submit is at the heart of his invitation to you,
16 that goes to Corporal Orr's motives because he
17 used three dots at the end of that April 12th
18 entry, as if it reflects some deliberate or
19 sinister attempt on his part to conceal
20 information.

21 My second submission about fairness relates
22 to what I submit is the obligation that rested
23 on Commission Counsel to put this theory
24 directly to the witness, when the witness was in
25 a position that he could have responded. If he

1 failed to do that, and I have included the
2 transcript so that, Mr. Commissioner, you can
3 look at the passage. I submit that he was
4 not -- this notion of a deliberate withholding
5 of information or a lack of professionalism was
6 not put to him. And that having not put that to
7 him fairly when he was before the Commission, I
8 submit you should not accede to Mr. Code's
9 invitation to draw these conclusions with
10 respect to Sergeant Orr's practices and
11 professionalism.

12 I go a little further, sir, and say that we
13 have heard nothing from Commission Counsel as to
14 what appropriate standard he is measuring
15 Corporal Orr's actions, again with respect to
16 this, seemingly, one note. If he is saying that
17 you should draw negative inferences about
18 Sergeant Orr's notes on this one occasion, he
19 should, in my submission, give you some
20 appropriate standard against which to measure.

21 I am sure he would not be suggesting that
22 Sergeant Anderson or Sergeant Paul or Staff
23 Sergeant Vandergraaf or Mr. Miller are the
24 appropriate standard. We have virtually nothing
25 from them. And so I conclude my submissions on

1 this point, sir, by saying to you that I submit
2 that the invitation that Commission Counsel has
3 left with you, with respect to Corporal Orr's
4 professionalism and his practices, is unfair
5 under the circumstances and, in my submission,
6 unwarranted by all of the material that's before
7 you.

8 Next, Mr. Commissioner, I want to say a few
9 things, and I propose to be very brief on this
10 point, and that is with respect to issue number
11 19 which was raised by Commission Counsel
12 yesterday, having to do with the RCMP records.

13 The question or the issue was framed as follows:

14 "Should the RCMP have preserved all of
15 their relevant records relating to the
16 Swift Current arson and their decision not
17 to prosecute Zanidean?"

18 Commission Counsel at page, I think it's
19 page 139, says:

20 "Given the institutional knowledge within
21 the RCMP that their relevant files would be
22 important to a possible miscarriage of
23 justice in the Driskell case, steps
24 arguably should have been taken to preserve
25 these files."

1 Commission Counsel is, Mr. Commissioner,
2 referring to the two Swift Current files that
3 were opened and maintained by Constable Burton
4 relative to the arson investigation. The
5 investigation file, as you will recall, and the
6 protected B file that he opened early on when he
7 became concerned, indeed suspicious, about the
8 actions of the Winnipeg Police Service, these
9 two files are not available, that is very clear.
10 But we do, sir, have copies of many of the
11 documents from these files. And that was the
12 basis upon which part of the disclosure was made
13 by the RCMP. This documentation comes from an
14 intact F division headquarters file. The file
15 was disclosed, as I've mentioned a moment ago,
16 to Commission Counsel as part of the RCMP
17 disclosure package.

18 You have before you, sir, and I included as
19 part of the RCMP disclosure the RCMP policy with
20 respect to file retention. That was filed with
21 Commission Counsel on June 8th. And we know
22 from that policy, sir, and I can certainly
23 direct you to it if you require, for an arson
24 the policy dictated that the retention period
25 was five years for routine investigation, ten

1 years for files that were related to policy.

2 I can tell you, sir, that I have, as of
3 Friday of last week, ascertained the two Swift
4 Current files were destroyed in 1995 and 1996
5 respectively. We also know, from Constable
6 Burton's evidence before this Commission, in
7 response to questions from Mr. Wolson, that he
8 took steps, prior to leaving the detachment, to
9 bring the importance of this file to those
10 remaining at the detachment. And I have
11 included, sir, and I won't read it to you, at
12 tab 5 are the series of questions that were put
13 to Inspector Burton by Mr. Wolson with respect
14 to this point.

15 Let me say, sir, that I submit you should
16 look at this issue in context. And the context,
17 I submit, includes the following, this
18 investigation was finished. It was concluded.
19 There was nothing more to be done. Following
20 extensive review by senior members of the RCMP
21 in Saskatchewan, and a consultation with the
22 Saskatchewan Department of Justice, Mr. Quinney,
23 the arson investigation was concluded. There
24 was nothing more to be done.

25 The investigation had revealed three

1 suspects: Mr. Zanidean, Mr. Zanidean's sister,
2 who owned the property, and Mr. Driskell. The
3 police had proposed charging both Zanidean and
4 Zanidean's sister. And, as you know from the
5 evidence that was placed before you, ultimately
6 the Saskatchewan Department of Justice took the
7 view that there was a potential abuse of process
8 argument available to Mr. Zanidean, in light of
9 the immunity issue, and that they were not
10 prepared to proceed with charges.

11 I have included, sir, at tab 2, for your
12 benefit, and I won't read them to you, three
13 letters that I submit bear on this point. The
14 first one is Mr. Quinney's letter to Mr. Miller
15 dated January 16, 1992, which we've had frequent
16 reference to. The second and third letters are
17 exchanges of correspondence between Mr. Quinney
18 and Chief Superintendent Egan, who was in charge
19 of criminal operations for F division.
20 Mr. Quinney -- sorry, Chief Superintendent Egan
21 wrote to Mr. Quinney on March 30, 1992.
22 Mr. Quinney responded on April 7, 1992.

23 In my submission, having taken this
24 information to the highest levels of the
25 province, and the decision having been made that

1 there was nothing further to be done, the
2 investigation was over.

3 With the benefit of hindsight, sir, and
4 knowing today how valuable it might be to our
5 reconstruction of these events long ago, if we
6 had had the two Swift Current files, it would be
7 very easy to say they shouldn't have been
8 destroyed. I submit that the importance of
9 these files is much clearer in 2006 than it
10 would have been in 1995 and 1996 when they were
11 destroyed. It wasn't nearly as clear, I submit,
12 of the relevance of this investigation to what
13 was going on then with respect to Mr. Driskell's
14 conviction in Manitoba. And I would submit that
15 it is important to bear in mind that a Winnipeg
16 murder trial in 1991 probably wasn't big news in
17 Swift Current, Saskatchewan.

18 Again, sir, with the benefit of hindsight
19 it, would have been preferable if we had -- if
20 we had the files. And I appreciate that there
21 has been a suggestion made that as a result of
22 Inspector Hall and Ewatski's visit to
23 Saskatchewan, there was some knowledge that the
24 issue wasn't closed as of 1993. There is some
25 knowledge, as a result of Staff Sergeant

1 Ferguson's involvement with the Winnipeg Free
2 Press and the series of articles that they did
3 around the same time, that there were still some
4 issues swirling in Manitoba. But to find, in
5 these circumstances, that there was something
6 improper in the fact that these files were not
7 retained beyond the normal time frame set forth
8 in the RCMP policy, in my submission, is a bit
9 of a reach.

10 The third issue that I would like to deal
11 with, sir, and probably where I will spend the
12 most amount of time, has to do with
13 Mr. Christianson and his evidence before the
14 Commission with respect -- his trial evidence at
15 Mr. Driskell's trial and his evidence before
16 this Commission.

17 Let me say at the outset very clearly, and
18 I have three points to make, sir, what the
19 position of the RCMP is on this issue. First of
20 all, and this is set forth in my recent letter
21 to Mr. Lockyer with a copy to Commission
22 Counsel, it's in Mr. Lockyer's systemic issues
23 material, the RCMP accepts that the results of
24 the mitochondrial DNA testing are correct and
25 that the three hairs came from someone other

1 than Perry Harder. Let there be no confusion
2 about that.

3 Second, we say that Mr. Christianson was
4 well trained and fully qualified to perform the
5 microscopic hair examinations in the Harder
6 case. Mr. Christianson followed
7 well-established and approved methodology in
8 conducting his examinations. His conclusions
9 were articulated in accordance with forensic
10 laboratory services guidelines and the generally
11 accepted practice in the field at the time.
12 That is to say the tests were conducted in
13 accordance with accepted scientific procedures
14 then in place. His findings cannot,
15 unfortunately, be confirmed due to the
16 destruction of the hair exhibits in the DNA
17 testing process. However, the RCMP forensic
18 laboratory services says that it is appropriate
19 to assume that most hair and fiber experts would
20 have reached the same conclusions in 1990, 1991,
21 that Mr. Christianson reached.

22 Third, sir, the RCMP says that the evidence
23 given by its employee, Tod Christianson, during
24 the Driskell trial was in accordance with what
25 most forensic hair and fiber experts would have

1 provided at the time the tests were conducted.
2 His conclusions and testimony on the probative
3 value of the evidence reflected what was
4 typically stated within the international
5 forensic community at the time. Further, the
6 RCMP states that Mr. Christianson did not
7 overstate the probative value of his evidence.

8 What I want to do, sir, is very quickly
9 direct you to what Mr. Christianson actually
10 said at trial. There has been so much
11 discussion and such extensive questioning around
12 what he did and didn't say. I submit it's
13 important to bring it back to what, in fact,
14 happened at the trial because that, in fact, is
15 what the inquiry needs to be concerned with. I
16 am not going to read it to you, sir. But in
17 Mr. Christianson's book of documents that were
18 prepared by Commission Counsel, at tab 5 you
19 will find his trial evidence. And I would
20 direct you, sir, to three specific spots. At
21 page 1244 of the transcript, Mr. Christianson
22 says:

23 "I was able to find one scalp hair in these
24 vacuumings that was consistent with this
25 hair sample from the grave site."

1 Page 1244, the bottom of the page, sir, are
2 the numbers.

3 THE COMMISSIONER: Yes.

4 MR. GATES: At page 1246 Mr. Christianson offers
5 his explanation for what he means when he says
6 that a hair is consistent.

7 And, finally, and I will read this to you,
8 at the bottom of page 1246, line 20 and on to
9 page 1247, line 4, Mr. Christianson said the
10 following:

11 "And the point about this type of analysis
12 is that it is not a positive
13 identification, all right? Because the
14 only way you could do that is to look at
15 all of the hairs from all the person's head
16 that exist, and that's an impossibility.
17 But I can tell you, based on my experience,
18 that the chances of just accidentally
19 picking up a hair and having it match to a
20 known sample are very small. So if the
21 hair is consistent, that means it either
22 came from the same person as that known
23 sample or from someone else who has hair
24 exactly the same."

25 I next, sir, want to take you to Mr. Lucas'

1 report. And I have extracted a portion of that,
2 though I have acknowledged that I haven't
3 included it all, simply out of a desire not to
4 burden the Commission any more than was
5 necessary with more paper. But as you will
6 recall, sir, and this is not in the materials,
7 but the extracts from Mr. Lucas' report, the
8 extracts can be found at tab 4.

9 THE COMMISSIONER: Tab 4 or tab 5?

10 MR. GATES: Tab 4.

11 THE COMMISSIONER: Oh, yes. Yes.

12 MR. GATES: But before I come to that, sir, I
13 would remind you, sir, that Mr. Lucas was
14 retained by Commission Counsel, as Mr. Lucas
15 says at the beginning of his report on page 1:

16 "To review and prepare a report in the
17 forensic science aspects of the
18 Commission's mandate."

19 The letter of retainer went on to say:

20 "Our concern, on which we ask you to
21 report, is whether Mr. Christianson's work
22 on this case, in particular his testimony,
23 was consistent with sound, professional and
24 scientific practice at the time."

25 Mr. Christianson's testimony in the

1 Driskell trial is covered at pages 19 through 22
2 of Mr. Lucas' report, and I have included those
3 four pages at tab 4 in my materials. I would
4 also direct your attention, which is also
5 included in this book, to the summary Mr. Lucas
6 provides at the end of his report, pages 32 and
7 33.

8 THE COMMISSIONER: Okay.

9 MR. GATES: With respect to his conclusions, I
10 would direct your attention, sir, to conclusion
11 2 with respect to the continuing acceptance of
12 microscopic hair examination. Conclusion number
13 3 with respect to Mr. Christianson's training
14 and qualifications to perform the examinations
15 in the Harder case. Conclusion number 4 with
16 respect to the methods used by Mr. Christianson
17 being well-documented and generally accepted in
18 forensic science. Conclusion 5 with respect to
19 Mr. Christianson's work notes. Conclusion 6
20 with respect to Christianson's conclusions being
21 expressed in terms that were in accordance with
22 guidelines at the time. And conclusion 8, in
23 particular, sir, I would draw your attention to.
24 And I am going to read it in it's entirety:

25 "Mr. Christianson's testimony was quite

1 straightforward and in accordance with what
2 most forensic hair and fiber examiners,
3 given the same observations, would have
4 provided at the time. He acknowledged that
5 microscopic hair examination does not
6 provide a positive identification, and that
7 he could not provide population
8 distribution numbers. The only evidence
9 that some examiners might not agree with is
10 his statement that the chances of a random
11 match between the hairs from two different
12 sources are very small."

13 I have included it in the materials before
14 you in this green book. But I would ask you,
15 when reviewing this issue, to bear in mind what
16 Mr. -- I'm sorry, some of it is included, some
17 of it is not. At pages 19 and 31, Mr. Lucas
18 makes comments about Mr. Christianson's
19 testimony. And at page 20, which is not
20 included, he in fact commends him, in my
21 submission, for the way in which he described
22 the hair evidence not being positive evidence of
23 identification.

24 The only criticism that I can read in
25 Mr. Lucas' report that was submitted for the

1 commission is that he found Mr. Christianson's
2 analogy to hairstyles well-meaning, but not
3 particularly relevant. In my submission, that
4 is the only point at which Mr. Lucas offers any
5 criticism of Mr. Christianson's work on this
6 case. At no point, in my submission, does
7 Mr. Lucas suggest that Mr. Christianson's trial
8 evidence overstated the probative value of the
9 hair comparison evidence. He did, it's clearly
10 acknowledged, indicate that some examiners might
11 not agree with one aspect of his conclusion.
12 But he does not, in my submission, conclude that
13 there was an overstatement of the probative
14 value of this evidence.

15 Sir, as was so apparent from the most
16 interesting exchange of views that we had at the
17 expert panel dealing with forensic science
18 issues, there is no unanimity as between
19 scientists as to many of the issues that
20 confront this Commission. And I would point out
21 a couple of them. One that I thought was
22 particularly interesting was that Mr. Lucas,
23 like Mr. Christianson, did not agree with
24 Justice Kaufman's recommendation in the Morin
25 Inquiry Report about the suggested language of

1 "may or may not". You may recall that Mr. Lucas
2 himself had difficulty with this language.
3 Mr. Lucas also, you will recall, indicated
4 during the course of the expert panel that at
5 one time in his career he fully supported the
6 use of "consistent with", the language that was
7 used by Mr. Christianson. In fairness, as I
8 recall his evidence before the Commission during
9 the expert panel, he indicated that he no longer
10 held that view. But it was clear in his
11 evidence, in my submission, that at one point he
12 most certainly did hold the view that that was
13 an appropriate use of language to describe the
14 results of a forensic science examination.

15 Finally, with respect to Mr. Lucas,
16 Mr. Commissioner, and this comes at page 24, and
17 again I have not reproduced it, sir, but it is
18 in his report, he describes in this report that
19 a few of the practices or procedures were not
20 generally accepted in the forensic science
21 community in 1990, 1991. But he goes on to say,
22 sir, in what I submit is an important conclusion
23 from Mr. Lucas:

24 "None of them, in my opinion, raise to the
25 level of being considered systemic issues."

1 THE COMMISSIONER: Sorry, what page was that
2 excerpt?

3 MR. GATES: That was, sir, at page 24.

4 THE COMMISSIONER: 24, okay.

5 MR. GATES: Again, I haven't included it, but
6 you will recall that Mr. Lucas, following the
7 receipt of the letter from Dr. Terry Melton to
8 Mr. Lockyer, providing an addendum to his
9 report. And, again, I haven't reproduced it.
10 But I do commend it to you because Mr. Lucas,
11 who was hired, retained by this Commission to
12 look at these issues, did, in his addendum, and
13 I quote, say the following:

14 "It is possible that both examiners'
15 conclusions were correct since they are
16 based on totally different parameters."

17 I am not sure that this analogy is a
18 perfect one or a useful one. But, sir, you
19 might want to think of this in terms of a filter
20 or a sieve. Filters and sieves come in
21 different -- in different varieties. And some
22 of them have very large openings that allow
23 material to go through, others have very small
24 openings that allow material to go through.

25 If one were to consider the work that was

1 done by Mr. Christianson at a much earlier stage
2 than we're at now with respect to DNA testing,
3 you might think of it in terms of the big sieve.
4 It had big holes and a lot of material was
5 allowed to go through the sieve. You might
6 think of the mitochondrial or the DNA testing as
7 a much more refined instrument, a sieve that has
8 very, very, very small openings that allow
9 material to go through.

10 What Mr. Lucas is saying, as I understand
11 it, is that Mr. Christianson used the big sieve.
12 And the conclusions that emanate from his test
13 results are not necessarily wrong because the
14 material that got through his sieve didn't get
15 through the other sieve. And, in my submission,
16 it is actually no more complicated than that.

17 I want to say a couple of things, sir,
18 about the expert panel and about the conduct of
19 the trial. There were many, many interesting
20 and important moments during the expert panel
21 that I would commend to you, sir, for your
22 consideration of this issue. But there are two
23 that I want to bring to your attention. The
24 first one came from Mr. Tilstone. And this can
25 be found, sir, at page 5675 of the transcript of

1 this inquiry, lines 8 through 22.

2 "And there, Mr. Commissioner, I was
3 interested in your interjection earlier on
4 this morning."

5 And I pause here, sir. You may recall that
6 there was an interesting exchange that you
7 became involved in, sir, with respect to the
8 reliability of eyewitness identification, and I
9 believe that that's what Mr. Tilstone is
10 referring to here.

11 "Because I think there is a fundamental
12 misunderstanding in the legal community
13 that this thing called science is
14 absolutely certain, and it is not. It is
15 not at all certain. There is a lot of
16 variability and a lot of uncertainty in
17 science. And to put it at its very
18 simplest, if we take probably one of the
19 most common tests that come out of a
20 laboratory or out of forensic science,
21 blood alcohol determination, if we take the
22 same sample and give it to 100 labs, you
23 will get 100 different answers because
24 there is an intrinsic uncertainty in what
25 we do."

1 The other point that I would draw to your
2 attention, sir, is a point that was made by
3 Mr. Bromwich during the course of the panel.
4 And he said, page 5649 of the transcript, line
5 21 to 25:

6 "The number of times we learned that
7 terribly significant evidence was not even
8 challenged in court by defence lawyers was
9 stunning to us as we reviewed a large
10 number of cases."

11 THE COMMISSIONER: I'm sorry, the lines of that?

12 MR. GATES: 21 to 25.

13 THE COMMISSIONER: Thank you.

14 MR. GATES: I raise this with you, sir, because
15 I now want to bring you back to what happened in
16 this case. The one further reference that I
17 would give you to the expert panel, and you will
18 recall, sir, that there was a number of
19 interesting exchanges about the difficulty of
20 communication and the challenges of language as
21 between scientists and lawyers, and that
22 occurred at page 5650 to 5651.

23 "In this instance, sir, the evidence before
24 you is that Mr. Christianson had no
25 pre-evidence contact with either

1 Mr. Dangerfield or Mr. Lawlor."

2 And I say, with respect to Mr. Brodsky, his
3 cross-examination of Mr. Christianson was brief
4 and, in my submission, fairly superficial.
5 Mr. Brodsky asked 38 questions and it occupies
6 7.5 pages of the trial transcript.

7 One final thing that I would bring to your
8 attention from the expert panel is a comment of
9 Dr. De Forest. And he said, at page 5578, lines
10 4-7:

11 "I think that in this case at hand here a
12 good cross-examination could have undercut
13 the impact of the evidence presented in
14 this case."

15 With respect, sir, Mr. Brodsky did not
16 challenge Mr. Christianson on his testimony. He
17 did not ask him what he meant when he used the
18 words: "the likelihood of similarity being very
19 small", the "very small" being the important
20 words, in my submission, in that passage. He
21 never asked Mr. Christianson what he meant by
22 that. I mention Mr. Brodsky very respectfully,
23 sir, because Mr. Christianson didn't act alone
24 in this trial. There were other players in the
25 criminal justice system who had a role to play

1 in how this evidence -- if there is some issue
2 about Mr. Christianson overstating the probative
3 value, there were other people who were involved
4 in the trial who had a responsibility as to how
5 this evidence went to the jury. If
6 Mr. Christianson overstated the probative value
7 of the evidence, which is a position that I do
8 not admit, I submit one would have expected
9 Mr. Brodsky and, indeed, the trial judge to have
10 commented on the fact. Mr. Brodsky was, after
11 all, charged with the responsibility of ensuring
12 that Mr. Christianson's evidence was seen in the
13 most favourable light to his client.

14 So the last reference that I would make to
15 you, sir, from the book, can be found at tab
16 number 6, I believe it is, sir. There are two
17 pages in the closing address to the jury by
18 Mr. Brodsky. And I would direct your attention
19 to line 22 at page 168 of the transcript, at the
20 bottom of the page, where he starts to talk
21 about Mr. Christianson's evidence. And he
22 concludes at line 14 on page 169.

23 Mr. Dangerfield's closing address to the
24 jury on this point are the next two pages in the
25 transcript, pages 215 and 216. Starting at line

1 18 on page 215 and continuing on to line 22 on
2 page 216.

3 Finally, sir, the trial judge's charge to
4 the jury on this point is found at page 41 of
5 the transcript, the last page of this tab. And
6 you will see that between lines 8 and lines 20
7 are what the trial judge had to say on this
8 particular issue. Those are my submissions,
9 sir, with respect to Mr. Christianson.

10 The last issue I want to spend a few
11 minutes on, sir, I have actually gone longer
12 than I had planned, has to do with the issue of
13 immunity on the Swift Current arson charge. You
14 will recall my friend, Mr. Code, dealt with
15 these issues in a number of different places
16 yesterday. And according to my notes, he dealt
17 with them at issues 2, 3, 5 and 18.

18 And you will recall that my friend,
19 Mr. Lockyer, this was his first question as part
20 of his submissions to the Commission yesterday.
21 And the question he posed was:

22 "Before he testified at Mr. Driskell's
23 trial, was Mr. Zanidean given immunity from
24 prosecution for the Swift Current arson by
25 Saskatchewan Justice, the Winnipeg Police

1 Department, Manitoba Justice?"

2 And you will recall Mr. Lockyer suggested
3 the answers to these questions were: With
4 respect to Saskatchewan Justice, no; with
5 respect to the Winnipeg Police Department, yes;
6 and with respect to Manitoba Justice, that the
7 evidence was not conclusive, but probable, as I
8 recall what he said to you yesterday. I don't
9 propose to repeat what Mr. Lockyer said to you.
10 But this is one of those occasions where I am in
11 complete agreement with Mr. Lockyer's
12 submissions to you. In my submission,
13 Mr. Lockyer's comments about question number 1
14 before you, sir, are dead on.

15 Let me simply leave you, sir, with a few
16 points which I would urge you to factor into
17 your decision-making process relative to this
18 issue. We heard a lot of evidence, it occupied
19 more than the first week of this inquiry, about
20 some very conflicting evidence relative to the
21 Swift Current arson investigation and an alleged
22 arrangement or an arrangement between Sergeant
23 Anderson and Constable Burton. There are two
24 very different versions of what happened. Was
25 it an agreement between police agencies to hold

1 off on the pursuit of an investigation, relative
2 to Zanidean, until after he testified in
3 Driskell's trial or was it a more substantive,
4 albeit improper, granting of immunity from
5 prosecution?

6 My submission is that the precise nature of
7 the arrangement, was it one of the two options
8 that I have just suggested to you, is probably
9 not terribly significant to you, sir. And it's
10 not terribly significant, save for one notable
11 exception. It's not significant, I would say,
12 sir, because of the undisputed fact before you,
13 or facts before you, that Mr. Zanidean's demands
14 for immunity and for other favourable
15 consideration, initially made by Mr. Zanidean
16 himself, and later carried forward by
17 Mr. Zanidean and his counsel, Mr. Kovnats, were
18 never disclosed to the defence. That, in my
19 submission, is the most important issue before
20 you.

21 It would seem to be common ground amongst
22 the parties that these demands, these
23 discussions and these negotiations, and any deal
24 or arrangement reached, were discloseable facts.
25 They should have been disclosed. But they were

1 largely, if not entirely, not disclosed.

2 I would go a little further in saying to
3 you, sir, that the fact that Mr. Brodsky may
4 have been aware, indirectly, of some of this
5 information, as a result of the work of his
6 private investigator on this file or as a result
7 of his late-night meeting with Mr. Kovnats, whom
8 he was acquainted with outside of this case, on
9 the eve of trial, is of no moment. That whether
10 or not he was aware from other sources is not
11 relevant, in my submission, to the issue of
12 whether or not there was proper disclosure.

13 The important exception that I would offer
14 to you, sir, for your consideration on how you
15 approach this issue involving the significance
16 of this dispute between Swift Current and the
17 Winnipeg Police Service, is in relation to the
18 issue of credibility. And I say to you,
19 respectfully, that Sergeant Anderson's
20 credibility is an important issue to you in and
21 of itself, never mind this specific issue.

22 And with that, sir, I would conclude my
23 submissions. Thank you.

24 THE COMMISSIONER: Thank you very much,
25 Mr. Gates. Under time and, I trust, under

1 budget.

2 THE COMMISSIONER: We will adjourn for 15
3 minutes.

4 THE CLERK: All rise. We adjourn this
5 commission of inquiry.

6 (Proceedings recessed at 10:35 a.m. and
7 reconvened at a 10:50 a.m.)

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

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

11 THE COMMISSIONER: Good morning, Ms. Carswell.

12 MS. CARSWELL: I have provided to my colleagues,
13 and to the court, my summary. And I trust that
14 the clerk has put it in front of you?

15 THE COMMISSIONER: I have it, yes.

16 MS. CARSWELL: I suspect this is a case, Mr.
17 Commissioner, where your instructions to us have
18 now produced for you all manner of different
19 interpretations of bullet points. But the way
20 that I have chosen to present to you the
21 information I intend to refer to is by
22 generalized broad headings that are bolded. And
23 then references to the testimony of specific
24 individuals that are particularized by volume
25 and page number so that, if you wish, you can

1 make reference to it.

2 THE COMMISSIONER: Good.

3 MS. CARSWELL: It is not going to be my practice
4 here to refer to much of what I have in this
5 material. It's for your reference as you deal
6 with these issues.

7 THE COMMISSIONER: Okay.

8 MS. CARSWELL: When I started, Mr. Commissioner,
9 to prepare the submission for this inquiry, it
10 seemed to me that there were some general
11 principles that became very important in placing
12 the evidence that you have to look at into the
13 proper context. And I suspect that if we all
14 thought about it, it would become relatively
15 obvious. But we didn't hear anything about it
16 yesterday, so I felt it was important that I
17 take the time to say something about it, as
18 Mr. Gates did earlier.

19 The thing that I think needs to be in the
20 forefront of everyone's thoughts, as we analyze
21 the factual issues before this inquiry, relate
22 to perspective. And that is that we are looking
23 at, for a number of reasons which I will get
24 into, these events many years after they
25 occurred from a very different perspective. And

1 that perspective issue, I think, provides all of
2 us here, as well as you, Mr. Commissioner, with
3 some challenges as we assess the actions of
4 people who are involved in the matter involving
5 Mr. Driskell, the investigation and
6 post-conviction evidence that we've heard.

7 And the first of those perspective
8 challenges, I suggest, and one that was
9 mentioned by Mr. Gates briefly, is the one of
10 time. And we have to recognize that things have
11 moved on in a number of areas since 1990, '91,
12 or even 1993. There have been significant
13 developments in almost every area of the justice
14 system since that time. And for some of the
15 areas that we've dealt with, we know in the area
16 of law we have got Stinchcombe being proclaimed
17 by the Supreme Court after the investigation of
18 this matter, indeed after the trial.

19 We have advances in forensic science,
20 moving from hair comparison evidence to
21 mitochondrial DNA. Investigative techniques
22 have changed, as well as the organizational
23 structure of the investigation itself.

24 And you heard about the structure of the
25 Winnipeg Police Service at the time, and I will

1 be speaking more on it later in my submission.
2 But certainly now you know that there is a
3 dedicated homicide unit, dedicated homicide
4 investigators with a supervisor, and access to
5 an analyst that all involve, using what's called
6 a major case management model. Whether or not
7 it's the particular brand name attached doesn't
8 really matter, but the substance of it is all
9 the same, and that's changed.

10 And while it would be easy for us to stand
11 here and judge the actions of the individuals by
12 the standards of today, I submit to you it would
13 be entirely unfair to do so.

14 The next perspective challenge, I submit,
15 we all have is not because of the distance of
16 time, but the level of our knowledge. We've
17 combed through mountains of paper from every
18 participant in this matter. We have analyzed
19 every word. No one involved in this situation
20 had the same opportunity for clarity that we've
21 had. They only had their own material. They
22 weren't able to examine the issue from everybody
23 else's point of view. Hindsight, indeed, for us
24 is 20/20. And, again, I think we have to be
25 careful in recognizing that the people whose

1 actions we're here to look at, and perhaps judge
2 and criticize, are not given the same
3 opportunity. Decisions that are made in the
4 midst of a major event rarely seem perfect in
5 all respects when examined in retrospect.

6 Finally, there is one other area that
7 affects our perspective, and I have broken that
8 into two subsets. The first is the amount of
9 missing material and the lack of independent
10 recollection by the witnesses. We know that the
11 RCMP files were purged in Swift Current. And I
12 don't mean that in a pejorative way. That's a
13 fact that we have had to deal with. Inspector
14 Burton has suggested to us that perhaps three
15 quarters of the file that he generated was gone,
16 and that's in his evidence at volume 2, page
17 328.

18 We know that Mr. Gumieny's source witness
19 protection file was purged and is no longer
20 available. Mr. Brodsky's file no longer
21 contains disclosure we know he received, in
22 particular, police notes. He also acknowledged
23 that many of his internal memos appear to be
24 missing.

25 Sergeants Anderson and Paul and Sergeant

1 Vandergraaf indicate there may well be items
2 gone from the Winnipeg Police Service file, even
3 though that file was not subject to any form of
4 institutional purging or destruction.

5 And, finally, counsel for Manitoba Justice
6 has fairly acknowledged that their file also may
7 be incomplete, in that it's gone through many
8 hands over the years.

9 But there is a second subset of things that
10 were missing, and that's because of the limits
11 of the time schedule for this inquiry and its
12 mandate. We've not necessarily heard from or
13 have statements from many of the people who
14 played an important role in Mr. Driskell's
15 investigation, prosecution, appellate and
16 subsequent post-conviction. Chief Henry,
17 Mr. Driskell's investigators, the Karas, to name
18 some from different categories. As well, there
19 are some key people who, unfortunately, are no
20 longer with us. And, therefore, we don't have
21 their recollections. And I'm thinking of
22 Mr. Miller and Mr. Quinney.

23 I thought that it was important,
24 Mr. Commissioner, to place that perspective that
25 I think we all have to go into this with the

1 consideration that we don't have everything that
2 existed. And, therefore, we should be cautious
3 when attributing to people motive or coming to a
4 determination of absolute fact when, in fact, we
5 don't have all of the material.

6 I am going to deal firstly with a basket
7 category, if I could, of Winnipeg Police Service
8 issues with respect to the trial process, and
9 those are the notetaking, report-writing and
10 disclosure to the Crown issues.

11 And before I start, I feel I have to
12 correct a small statement by Mr. Gates this
13 morning. And that was he indicated that the
14 Swift Current file, the protected B file, was
15 initiated by then Corporal Burton as a result of
16 his mistrust of the Winnipeg Police Service.
17 And I think his evidence was clear it was
18 because of his interaction with one Winnipeg
19 Police Service officer. And, in fact, he later
20 conceded that once the complaint, I will call it
21 complaint, because he does at some point in
22 evidence and then suggest it wasn't initially
23 meant to be a complaint, came forward, he did
24 get good cooperation from senior management of
25 the Winnipeg Police Service. And, in addition,

1 Staff Sergeant Ferguson, I think, was at pains
2 to say that he had a very good relationship with
3 Winnipeg Police Service over the years, absent
4 the one unfortunate comment that he has relayed.

5 I do not stand here, Mr. Commissioner, and
6 suggest that all of the appropriate notes were
7 taken and all of the reports that were necessary
8 were written. The evidence doesn't support
9 that. And it's clear, and this is detailed at
10 length in the cites at my outline, and I don't
11 intend to go through it, that many people spoke
12 to the fact that it didn't reach the standard at
13 the time. The standard of the time was that
14 officers were expected to take notes on
15 important issues related to the investigation
16 and that those notes were to be used in the
17 generation of reports that should contain
18 material necessary for the Crown to prosecute
19 the case.

20 You heard from a number of witnesses on
21 this point. And I think it's a given that, in
22 this particular case, there were issues in
23 relation to those notes and the reports that
24 were ultimately generated. And it's clear, not
25 only from Chief Ewatski, but certainly Staff

1 Sergeant Vandergraaf's evidence, that in this
2 particular case the standards that should have
3 been upheld, according to the Winnipeg Police
4 Service, perhaps were not, in select instances.

5 But in saying that, I think it's also
6 important to note that the absence of reports,
7 notes, correspondence is not necessarily
8 restricted to Winnipeg Police Service and its
9 members. When you go through the disclosure for
10 Manitoba Justice, you note an almost absence of
11 any notation, other than trial notes, from the
12 two trial Crowns on any of the dealings they had
13 with witnesses pre-trial. Mr. Code has already
14 gone through the absence of any notes or any
15 substantive notes in relation to Mr. Miller's
16 dealing with the witness. And I don't intend to
17 go there, except to say that, as a general
18 proposition, there is a lack of notes from most
19 parties involved in this matter.

20 It makes you wonder, when you look at it in
21 the context of stepping back, as opposed to
22 looking at the particular actions of the
23 individual, whether that was more the practice
24 of the day. But I suspect, at the end, the
25 evidence is clear that it was not.

1 You'll also have heard much evidence on
2 issues where there was indication that oral
3 briefing was much more common than it is today.
4 We know that the Crowns received oral briefings.
5 The evidence of Mr. Lawlor is clear that that
6 happened at that particular time period.
7 Mr. Brodsky's pre-trial memorandums, again that
8 Mr. Code ably referred to yesterday, so I am not
9 going to repeat that, make it clear that the
10 Crowns had a level of knowledge about the
11 admissions of Mr. Zanidean and the fact that
12 Swift Current was involved.

13 There was one further particular piece of
14 information that they also had, that wasn't
15 pointed out by Mr. Code yesterday, and I think
16 it's one that's important. We know that the
17 Manitoba Justice file contained Sergeant Paul's
18 notes. Some time after May 17th, he forwarded
19 those notes to the Crown. We also know, because
20 we have had the opportunity to review those
21 notes, that those notes contain a second
22 admission by Mr. Zanidean in October to setting
23 the fire. So whether or not there was
24 ultimately a report generated on that particular
25 admission, that information, we know, reached

1 the hands of the Crown Attorneys.

2 Just on the point of oral briefings, in
3 addition to Mr. Lawlor, you will recall
4 Mr. Brodsky also spoke to this point about the
5 fact that during this particular time police and
6 Crown would meet much more regularly. And that
7 was his experience as a very senior Crown that
8 did these matters on a regular basis.

9 I have already talked, very briefly, about
10 the structure of the department at that time,
11 and that was that this type of investigation was
12 conducted by members of a unit that dealt with,
13 in essence, all serious crimes against persons
14 in the City of Winnipeg. Sergeant Vandergraaf
15 was not necessarily in command or overseeing
16 this investigation, but became, as it's been
17 described, in de facto control of the
18 investigation. His evidence was that the
19 documents that were produced were ultimately
20 read, but not always read by him. And you will
21 recall that he mentioned a Sergeant Reilly
22 referring to some of the police reports. And
23 those signatures are available on the police
24 documents. He ultimately, fairly, indicated
25 that he would become aware of them in the normal

1 course.

2 We have also heard that oral briefings were
3 much more the norm at the Winnipeg Police
4 Service back in this time, as they were held on
5 an every-morning basis where evidence and
6 developments in a case were discussed. That's
7 not the case today.

8 And as I've indicated, the Winnipeg Police
9 Service now has a dedicated homicide unit, and
10 you have heard a number of witnesses talk about
11 that, that utilizes a major case model. So as
12 of today, there is a supervisor overseeing the
13 entire investigation and ensuring that
14 everything happens as it should. Back in 1989,
15 '90, '91, that wasn't the case. And I would
16 point out we haven't heard any evidence that
17 that type of structure was unusual or different
18 than that adopted by any other police agency in
19 Canada. And I would suggest to you it was
20 likely the norm.

21 Certainly it shouldn't be a surprise that
22 the Winnipeg Police Service's position is that
23 we agree with what was suggested by Mr. Code
24 yesterday, that if the Crown was not aware of
25 the information, whether through the reports or

1 the oral briefings, they certainly were aware of
2 enough information that inquiries should have
3 been made. And you have heard that there was a
4 very high level of cooperation between police
5 officers and the Crowns involved in a homicide
6 prosecution in that it was not uncommon for them
7 to prepare reports based on specific requests
8 from Crown attorneys.

9 I felt that I had to comment briefly on one
10 thing Mr. Code raised yesterday, just with
11 respect to his point 8. And that was the --
12 I'll just flip so I don't misspeak myself.

13 "Did Anderson, Paul, Vandergraaf orally
14 brief Miller and Dangerfield about the
15 arrangement reached with the RCMP,
16 including any decision to conceal it from
17 Zanidean until after he testified?"

18 And I only want to speak to this to one
19 point because I had some concerns when I heard
20 his submission, and I know that other counsel
21 will probably speak to this in more detail than
22 I do. And the concern I had was with his
23 position that because of a general lack of notes
24 by the police officers about this arrangement,
25 that somehow that would provide substantiation

1 for the fact that it didn't happen.

2 I think that position ignores a couple of
3 things. First, that there seems to be a general
4 lack of notes, as I've already said, on a number
5 of issues, not only by police, but certainly by
6 the Crown. It tends to ignore, as well, the
7 fact that witnesses indicated that there was a
8 high level of trust between the departments and
9 that they felt that they didn't necessarily have
10 to memo everything as it happened.

11 And, finally, I would ask you,
12 Mr. Commissioner, to recall the evidence with
13 respect to the Hall and Ewatski evidence of
14 Mr. Miller in 1993. This is after he has
15 received all of the Quinney correspondence.
16 Some nine days earlier was the last of the
17 letters dated April 28th of 1993. And that
18 letter indicated that "Winnipeg City Police",
19 and I'm quoting from the letter:

20 "Winnipeg City Police investigators still
21 maintained that he did not tell Zanidean
22 about the immunity until after Zanidean had
23 testified."

24 And you'll recall that Chief Ewatski
25 indicated there was no reaction to that or no

1 concerns raised about that by Mr. Miller. And
2 my only submission on this point is that I
3 think, perhaps, it's fairer to say that there
4 may be circumstances that make this area
5 unclear. And that comes from the evidence of
6 Mr. Miller's character and the concern that any
7 able counsel would have about this type of
8 arrangement. But I don't think you can go so
9 far as to conclude that the lack of notes is
10 determinative in this area. And it also ignores
11 the viva voce evidence you have heard of all of
12 the Winnipeg Police Service members.

13 Finally, in respect of the duty of the
14 Crown to ask if they had not received the
15 information, I would even go further. There was
16 nothing to prevent the Crown attorneys from
17 including it in any of the disclosure letters to
18 Mr. Brodsky. They certainly were able to
19 include: We were advised by the Winnipeg Police
20 Service that they have no information on this
21 point. There was nothing, if they had received
22 an oral briefing, to prevent them from saying:
23 We are advised from the Winnipeg Police Service
24 that Mr. Zanidean has admitted to the commission
25 of arson in Swift Current.

1 Certainly, I am not standing here
2 suggesting, Mr. Commissioner, that the police
3 report is not the proper way to do things. I am
4 suggesting, I think as Mr. Code did yesterday,
5 that if there is responsibility here, it's a
6 shared responsibility. And I am certainly
7 suggesting to you that, based on the evidence
8 you've heard, those failures were not ones that
9 were endorsed by City of Winnipeg Police
10 practices at the time. That's all I intend to
11 say on that issue.

12 And I intend to move to the issue of the
13 1993 review report. And that was an issue dealt
14 by Mr. Code at, I believe, 22 of his materials,
15 which is contained at page 141. And in making
16 his submission to you yesterday,
17 Mr. Commissioner, he suggested that the area of
18 post-conviction disclosure obligation was clear,
19 and he referred to the Martin report. And I
20 think that's an overstatement, perhaps. I think
21 the area is certainly becoming more clear. I
22 think that various inquiry reports are providing
23 us with sufficient guidance that any information
24 should be passed on.

25 But what we have to remember is this is not

1 a situation of post-trial or post-appeal. This
2 is post-conviction, post-appellate process.
3 There is no more court process in place. And to
4 say that the situation is clear now is one
5 thing. But to suggest that post-conviction,
6 post-appellate disclosure obligations were clear
7 in 1993, I think, is clearly an overstatement.

8 If you go through the items that are
9 suggested, and I intend to, and this may be the
10 area where I spend the longest, where, as he put
11 it:

12 "The Hall and Ewatski review arguably
13 uncovered new information in documents that
14 had been previously unknown to the Crown
15 such as the following:"

16 And I am reading from his bullet point:

17 "The Crime Stoppers payments to Gumieny and
18 Zanidean,

19 Paul's report setting out his account of

20 Zanidean's June 20, '91 utterance,

21 proof of the identity of the anonymous

22 caller to Brodsky on June 20, 1991 in which

23 the caller (Zanidean) arguably recanted his
24 evidence,

25 Gumieny's post-conviction threats to recant

1 his trial testimony,
2 substantial RCMP documentation about the
3 Swift Current arson and the "arrangement"
4 between the WPS and RCMP not to charge
5 Zanidean with the arson,
6 the fact that Sargeant Mann had been
7 looking for Zanidean in Winnipeg prior to
8 Zanidean becoming a Crown witness."

9 If I could deal with first the -- and I am
10 not going to deal with them in the order that
11 Mr. Code presented them, but with the level of
12 detail from the RCMP. And, again, these are
13 points where I have cited the evidence in my
14 summary. And I am not going to go into it,
15 Mr. Commissioner.

16 We now know that that's true. Chief
17 Ewatski acknowledged that certainly there were
18 details that he and Hall became aware of that
19 now we know are not in the Crown file. But, and
20 this is the "but" I think that's important, when
21 Ewatski and Hall meet with Mr. Miller in May of
22 1993, and later with Crown Attorneys,
23 Dangerfield and Lawlor, in August of 1993,
24 Mr. Miller and Mr. Dangerfield had all of the
25 Quinney correspondence. And that's located,

1 Mr. Commissioner, in tab 6 of Exhibit 43A. And
2 it is placed in there. That was the material
3 for Chief Ewatski's examination by myself in
4 chronological order. So I think it's a useful
5 reference point because all of the letters are
6 under one tab.

7 Because of that correspondence, we know
8 that the Crown was aware that there was a
9 dispute over whether immunity had been granted
10 and when. They knew that the evidence supported
11 Mr. Driskell's version of events in relation to
12 the motive and, therefore, there was an issue on
13 perjury. They also had a copy of the analyst's
14 report which provided, I would suggest, some
15 substantial detail on the particulars of the
16 arson itself.

17 And it's with that as a backdrop that we
18 now know that Hall and Ewatski have this
19 conversation with Miller. You will recall they
20 had not yet seen the Swift Current file. They
21 have seen Corporal Orr's file the day before.
22 And they have some questions that you know that
23 they have generated as a result -- I'm sorry. I
24 will wait for my learned friends to be quiet.
25 I'm hearing you, I'm sorry.

1 THE COMMISSIONER: I'm sorry, go ahead.

2 MS. CARSWELL: I just -- Mr. Code and Mr. Dawe
3 were having a conversation. And I could hear
4 them, so I was finding it a bit distracting. So
5 I apologize to them. I know they are trying to
6 find a reference, so perhaps I will just stop.

7 MR. CODE: No, you carry on. I won't say a
8 word.

9 THE COMMISSIONER: Yes. When Hall and Ewatski
10 interviewed Miller, they had yet to go to Swift
11 Current.

12 MS. CARSWELL: Yes.

13 THE COMMISSIONER: It was a few days later, I
14 think.

15 MS. CARSWELL: That's right. But we do know
16 that their questions for Miller include some of
17 the things that they have learned from Orr's
18 file. We know that the Chief indicated in
19 evidence, in retrospect, he now knows they
20 didn't have every detail of that report. But it
21 was his view at the time, and based on what we
22 now know, from the material in their file, it
23 was his position that they had many salient
24 facts of the investigation. And it was that
25 information that allowed the Chief and Hall to

1 conclude that Justice knew what they were
2 talking about. They weren't coming there with
3 new information to Justice. In fact, in many
4 cases with respect to the \$20,000 payment,
5 Justice had more information than they did.

6 I would also point out that this is another
7 situation where Mr. Code's reasoning can be
8 applied. There is no reason why Manitoba
9 Justice, armed with the Quinney letters, could
10 not have asked for the Swift Current file from
11 the RCMP directly, through Mr. Quinney. Or
12 Mr. Miller could have said to then inspectors
13 Hall and Ewatski, could you -- I am concerned
14 that you are saying things to me that I don't
15 know from the Orr file. Could you generate a
16 report for me so that I can disclose that?
17 Those requests weren't forthcoming.

18 The next issue that was raised in that
19 section was that -- that I wish to deal with was
20 that Sergeant Mann had been looking for Zanidean
21 prior to his coming to the attention of the
22 Winnipeg Police Service as a witness. And on
23 this point, I would echo the comments of my
24 learned friends, Mr. Gates, this morning. This
25 proposition as a "new fact" was put neither to

1 Inspector Hall in his interview, nor Chief
2 Ewatski, and the fact that it was new to the
3 Crown and that it was something that should have
4 been disclosed to them, so we don't have their
5 response on it. And I think with respect to
6 this one particular issue that they have raised,
7 it would be unfair to make comment on it,
8 without having -- without them having the
9 ability to respond on their perspective on this
10 issue.

11 THE COMMISSIONER: I am not exactly sure what
12 you're saying. Can you just repeat that?

13 MS. CARSWELL: Certainly. The fact that Mann
14 was look for Zanidean.

15 THE COMMISSIONER: Zanidean.

16 MS. CARSWELL: Prior to him coming to the
17 attention of the police as a witness.

18 THE COMMISSIONER: Right.

19 MS. CARSWELL: Was not put to the Chief or
20 Inspector Hall during interview or in
21 cross-examination as a "new fact" that should
22 have been disclosed. You will recall that they
23 went -- Commission Counsel and numerous counsel
24 went through the description of new facts
25 disclosed in the report in their examination of

1 the Chief and asked for an explanation of why
2 certain material had not been provided. This
3 was not one of those bullet points, if I can
4 call it that, that was put to the witness.

5 And next is the Gumieny post-conviction
6 threat to recant. And I would refer you to the
7 summary Mr. Code prepares at -- or, I'm sorry,
8 Mr. Dawe prepared at paragraph 128, which set
9 out that Mr. Gumieny acknowledged that he made
10 these threats, but confirmed with Sergeant
11 Osborne, and later with Commission Counsel, that
12 he told the truth at the time of trial and in
13 his statement. That doesn't absolve them of
14 their disclosure responsibility, and I'm not
15 suggesting that it does.

16 But we know that Inspector Hall sends
17 Mr. Miller a letter indicating that Mr. Gumieny
18 intends to go to the media, that he is unhappy.
19 We also know that on June 1, 1993 Hall and
20 Miller have a telephone conversation in which
21 Mr. Miller indicates that he has already talked
22 to the press in Ottawa about Mr. Gumieny and his
23 unhappiness. Again, with that backdrop, it's
24 easy to understand Hall and Ewatski's position
25 that the information had been passed on to

1 Manitoba Justice. Again, I would note,
2 notwithstanding the letter, that there isn't a
3 request that comes back from Manitoba Justice
4 suggesting: Could you put this in a police
5 report so that we can pass this on? Nor is
6 there anything to prevent them from passing
7 Inspector Hall's letter directly to Mr. Brodsky.

8 The next three items that Mr. Code
9 indicates are the items we have heard, I think,
10 the most about at this inquiry. And those are
11 the three items that Mr. Schille's analysis
12 determined that were not in the Crown file after
13 he had the opportunity to review, obviously, the
14 Crown's file, but also the 1993 review. The
15 three items I've just spoken about listed in
16 Mr. Code's material was not, to Mr. Schille's
17 mind, at least, new material to the Crown. And
18 I think that's important as well.

19 The first is the Crime Stoppers payment.
20 Certainly both the Chief and Inspector Hall
21 agree that this was new information to the
22 Crown. They both indicate that they believed
23 that the information was not discloseable
24 because of the privilege that attached to the
25 information that came into Crime Stoppers. They

1 both subsequently acknowledged, in hindsight,
2 that the material should have been put in a
3 report and provided to the Crown. But if we
4 think about the basis for their
5 misunderstanding, it is settled case law that
6 Crime Stopper's information attracts privilege.
7 And Mr. Schille confirmed that when he
8 acknowledged that that sort of information is
9 not available to Crown attorneys in the
10 prosecution of offences, so it's reasonable that
11 the Chief and Hall would believe that this was
12 information that they weren't supposed to pass
13 on to everyone.

14 The next is the Zanidean recantation
15 threat. And that is the -- it's been divided
16 into, basically, two parts. And I'm going to
17 leave it divided. Mr. Zanidean's threat to go
18 to the media to Sergeant Paul in the hotel room
19 June 20, 1991. We know from the evidence that
20 that's the last contact Anderson and Paul have
21 with Mr. Zanidean. We know that the content of
22 that threat is that he will go to the media and
23 tell the media that he was told what to say.

24 If we look at Mr. Quinney's letter of
25 January 16, 1992, and again that's contained in

1 tab 6 of Exhibit 43A, that's the same text of
2 the threat that's related by Sergeant Anderson
3 to the Swift Current Police in July. No one
4 here at this inquiry, I think, has or would
5 suggest that that's not a discloseable fact.
6 Both Hall and Ewatski, once discovering of the
7 threat, take action. And what action do they
8 take? They get Sergeant Paul to write a report,
9 which is, we've heard, the mechanism by which
10 disclosure was to go to the Crown. And you'll
11 note that the report, the type of report he
12 writes, is a supplemental report, the type we
13 have heard so much about, the four pages,
14 including the pinks. I am not going to suggest,
15 because I think it's clear, that somehow that
16 pink copy did not make it into the hands of the
17 Crown. But Hall and Ewatski do what they should
18 do, I think in this case, and they tell the
19 person who was the recipient of the threat:
20 Write a proper report, and he does.

21 Just on that point, the evidence of
22 Mr. Schille was that this threat, in his mind,
23 once he heard that was likely the same
24 recantation that the Crown was aware of through
25 the Quinney letter. And I believe that the

1 evidence is clear that that is, in fact, the
2 case.

3 The final point of new information is the
4 Zanidean telephone call to Mr. Brodsky. We know
5 that part of the text of that call appears in
6 newspaper accounts in March of 1993. And those
7 are the same accounts that start the review
8 process and start action at the Ministry to
9 ensure that these cases are reviewed. Hall and
10 Ewatski both indicate that it was their view
11 that everyone had read these same reports they
12 were. And, certainly, they were aware that the
13 call was one of the issues being raised by
14 Mr. Brodsky on behalf of Mr. Driskell in the
15 media. And, again, at that tab is also included
16 the briefing notes and other material from
17 Manitoba Justice.

18 Certainly, they also indicate that their
19 decision not to prepare a report on this was
20 influenced by the fact that they believed that
21 Mr. Driskell's counsel was aware of the call
22 because he's the one who provided them with the
23 tape. I suggested through questions a number of
24 times that Mr. Brodsky had a responsibility to
25 bring that tape forward for investigation,

1 whether to police or to the Crown Attorney. And
2 as I sat and listened to counsel for
3 Mr. Driskell yesterday express the view that,
4 but had this material been brought forward in
5 1993, it would have been possible to link the
6 caller and the recantation threat in 1993, being
7 Mr. Zanidean. I couldn't help but think that if
8 Mr. Brodsky had brought forward the call in 1991
9 to the authorities, it would have been possible
10 that they would have been linked then.

11 So while certainly there was a
12 responsibility to prepare a report on this,
13 there is also a responsibility that rests with
14 other players in the system of justice who
15 should have come forward with this information.
16 I don't think there is any doubt to any of us
17 listening to the tape, and certainly Mr. Brodsky
18 conceded, that he believed it was Mr. Zanidean.
19 He couldn't prove it, but he certainly believed
20 it. And if he did, he has got a tape-recording
21 of a witness in a major homicide, where he is
22 counsel for the accused, threatening to --
23 saying that his evidence was lies.

24 And I would suggest to you,
25 Mr. Commissioner, that if you take those sorts

1 of factors into account, and in particular the
2 interviews with the Crown and the mandate of the
3 investigators, inspectors, then Inspector
4 Ewatski and Mr. Hall, in going forward and
5 speaking to the Crown, when they hear that the
6 Crown is satisfied, when they hear that the
7 Crown indicates that they have a high level of
8 knowledge on a number of things, it's reasonable
9 for them to draw the conclusion that they did,
10 and that is that this material was in the hands
11 of the Crown. They now, because of hindsight,
12 and the factors I've talked about earlier, the
13 fact that we've pulled the Crown's file apart,
14 pulled our file apart, pulled everyone's file
15 apart, we now know that that's not the case.
16 But the question I think you have to answer is,
17 was it reasonable for them to come to that
18 conclusion at the time? And I think it was.

19 With respect, then, to what I think will be
20 one of my last issues, and that's the issue of
21 the post-conviction disclosure of the report, I
22 take the same view as Mr. Code, that if there
23 was information in the report that appropriately
24 a police report should have been prepared on
25 that information and then provided. And that, I

1 think, is clear. Because, otherwise, you do not
2 have, and the Chief spoke of this in his
3 evidence, the opportunity for police services to
4 get internal advice on investigations that's not
5 going to be subject. And you are going to have
6 reticence by those people doing the review about
7 speaking out and being frank. And this allows
8 people to speak out and be frank to the chief of
9 the day about the problems they might see in an
10 investigation. Certainly, new evidence should
11 be placed into a report. And I don't object
12 with Mr. Code's position on that point, and nor
13 does the Winnipeg Police Service.

14 The report, we know, was ordered as an
15 internal document for the Chief. At the point
16 in the career initially of Chief Ewatski when he
17 wrote this report, and Inspector Hall, neither
18 of them would have had the authority to pass it
19 on on their own, in any event. And if you
20 accept my reasoning on the points we just went
21 through to, on the content of the report, why
22 would they? They believed that the information
23 in the report was already known to the Crown.
24 Their opinions wouldn't have been known to the
25 Crown, but those were their opinions. They

1 weren't evidence.

2 Throughout this matter, both Hall and
3 Ewatski have been consistent in their position
4 that the report didn't contain anything that, in
5 their view, the Crown didn't already know. And
6 to highlight that, I am going to adopt a bit of
7 reasoning that Mr. Code used yesterday in
8 relation to the conflict between Burton and
9 Anderson on the Burton call where he allegedly
10 makes comments about his superiors and them
11 overruling him. And you will recall that was
12 point 18 that Mr. Code talked about. And the
13 reason I ask you to adopt this is it is
14 absolutely illogical that Chief Ewatski would
15 publicly go forward and say that, in his view,
16 the information was in the hands of the Crown if
17 he didn't believe it.

18 At the point he makes that statement, we
19 know that on November 24, 2003, Justice Oliphant
20 has released the content of the report publicly.
21 It is in the hands of the media. It's in the
22 hands of the Crown. Yet the next day, and the
23 Chief was cross-examined vigorously by
24 Mr. Lockyer on this point, on November 25th he
25 goes forward and makes those remarks. I can

1 think of no logical reason why he would do so,
2 when he understands that the Crown has the
3 report and they are going to be comparing it to
4 his file, to their file. As Mr. Code so
5 astutely said yesterday, it makes no sense he
6 would say something untrue which could so easily
7 be proved -- disproved, I should say.

8 In relation to the issue that was raised
9 briefly yesterday by Mr. Lockyer, and that you
10 had some comment on, Mr. Commissioner, and that
11 being about Crown requests for the report, the
12 Winnipeg Police Service certainly acknowledges
13 that Mr. Schille's evidence was that he orally
14 requested this material from Inspector
15 McCorrister.

16 And I would suggest that to put that
17 request and what was happening in context, you
18 have to look at Exhibit 48, which is
19 Mr. Schille's book, tab 14. And at that time
20 you have Mr. Schille basically being designated
21 as a conduit to provide disclosure to
22 Mr. Lockyer as this matter proceeds forward.
23 And he, in essence, says that in his letter of
24 April 17, 2003, which is in the tab, which sets
25 out that he has been asked to be -- to provide

1 disclosure on behalf of the Winnipeg Police
2 Service. In other words, let's have a
3 centralized point where Mr. Lockyer can come and
4 give his requests. And then I will go to the
5 police service and then I'll provide the
6 material to you. And that letter refers to the
7 disclosure of investigative material on the
8 original investigation and not post-conviction
9 material as what's going to be disclosed.

10 We then have Inspector McCorrister's
11 memorandum to Mr. Schille, which is dated
12 April 22, 2003. And that is located at that
13 same tab, again the reference is Exhibit 48, tab
14 14. And if you look at that letter or memo,
15 it's clear the first line puts it into context.
16 It says:

17 "With respect to the request for disclosure
18 made by James Lockyer..."

19 That's the context in which the police
20 service was responding to requests at that time.
21 And that was, in fact, the Chief's evidence on
22 this point.

23 We know that there is a process in place,
24 Mr. Commissioner, for review of criminal
25 convictions. And that's set out in the Criminal

1 Code at section 696. There is much
2 correspondence in this file, starting very early
3 in the process, suggesting that disclosure would
4 follow the process. File the application and
5 then material will come. And that starts as
6 early as in suggestions to Ms. Duncan that the
7 application be filed. We know that Mr. Schille
8 indicated in his evidence that Manitoba Justice
9 took a similar position with respect to some of
10 their material. It would not be provided until
11 a 696 application was filed and then the
12 material would be disclosed to the Federal
13 Department of Justice. That was the process.

14 I think, Mr. Commissioner, the Chief's
15 statement speaks to this. And if the process
16 doesn't work, it is not necessarily right to
17 step outside the process, but it is right to
18 change the process. That's something I know you
19 are going to be dealing with in the systemic
20 issues portion, and we will be responding then.
21 But certainly in criticizing the Chief for
22 failing to release the report, I don't think it
23 could be said that the report wasn't released.
24 It was that the report wasn't going to be
25 released until the proper process was started.

1 In closing, I think that it's clear that
2 Winnipeg Police Service practice was clear on
3 what should have been done in this with respect
4 to notes, to Crown disclosure. There is no
5 difference in the evidence we have heard. There
6 were instances that we have heard of where
7 actions of individual officers fall outside what
8 was the appropriate practice at the time. And I
9 think that when you analyze the facts of this
10 particular circumstance, and they are
11 unfortunate, there were a lot of failures, that
12 at the end of the day, with the use of hindsight
13 and trying to keep this in perspective, I think
14 that you have to conclude that inspectors, then
15 Inspector Hall and now Chief Ewatski, acted
16 reasonably based on the facts that they had
17 available to them at the time.

18 On a personal note, Mr. Commissioner, I
19 would like to thank you for your patience and
20 courtesy to me throughout this process. I can
21 tell you it was an honour to appear in front of
22 you.

23 THE COMMISSIONER: Thank you, Miss Carswell.
24 Actually, don't go.

25 MS. CARSWELL: Don't go.

1 THE COMMISSIONER: I've got a couple of
2 questions.

3 MS. CARSWELL: Certainly. I was so close.

4 THE COMMISSIONER: And these are questions I
5 don't have an answer to, and that's why I'm
6 asking them. In a situation where the public,
7 everyone, knows that questions are being asked
8 directly, and indirectly, through the media
9 about matters that have transpired, may have
10 transpired, and accepting in this question that
11 I am going to ask you, for the purpose of your
12 answer, that the police department believed that
13 Justice had all of the information that they
14 had, or substantially all of the information
15 that they had, but the Justice Department is not
16 forthcoming with matters of disclosure which,
17 perhaps by the time the issue was raised
18 publicly, everyone agrees would be discloseable
19 information. What, if any, obligation does the
20 police service have to say: Well, listen, we
21 are sitting back here, and we are seeing
22 questions being asked that, to our belief, are
23 not being properly answered. What, if any,
24 responsibility or what should they have to do?

25 MS. CARSWELL: Well, I'm not sure I have an

1 answer for you, Mr. Commissioner. I know that
2 Stinchcombe clearly speaks to Mr. Brodsky's
3 evidence. His clear understanding is that
4 police disclose to the Crown and Crown discloses
5 to defence. There is no process that I know of,
6 other than disclosure Federal Justice in 696 for
7 direct disclosure to defence. Again, this may
8 be one of those systemic issues that, at the end
9 of the day, you, fortunately not I, need grapple
10 with. Because it strikes me that the Chief's
11 evidence was that until late November of 2003,
12 and you know that's when Mr. Schille withdraws
13 from doing the bail application, that he wasn't
14 aware that this material hadn't been disclosed
15 until this comes to light at that point.

16 So in putting it in an academic sense,
17 because that's the only way I can, I suppose
18 what the police service could have done, if they
19 believed that proper disclosure hadn't been
20 made, was write to Manitoba Justice and say: We
21 believe that information has not reached the
22 hands of Mr. Brodsky. I suppose the other thing
23 that they could have done, and that was done, as
24 you've heard in the Sophonow case, was where
25 they felt -- the Winnipeg Police Service felt

1 there was concern about Mr. Sophonow's
2 conviction, we sought his agreement to go
3 through defence files, as well as ultimately
4 getting agreement to some access for Crown
5 information as well. And that assisted in
6 coming to the conclusion that information didn't
7 necessarily get to where it should have been, in
8 addition to the conclusion that Mr. Sophonow was
9 not responsible for the death of Barbara
10 Stoppel.

11 So I suppose there is a couple of things
12 they could do. One, seek access to defence file
13 to see if defence has what they had. But that
14 would require consent, obviously, of not only
15 the accused person, the then convicted person,
16 but also his counsel, and likely a waiver of
17 privilege.

18 THE COMMISSIONER: Okay. Thanks, Miss Carswell.

19 MS. CARSWELL: Thank you.

20 THE COMMISSIONER: We do have a half an hour, if
21 someone would like to begin. But I am not
22 suggesting, which I guess in the normal case
23 would be you, Mr. Abra. I just thought that if
24 you wanted to utilize it, you may.

25 MR. ABRA: I would certainly be prepared to

1 start. And if you could sit longer, I can
2 finish.

3 THE COMMISSIONER: I actually can't sit beyond
4 12:15. I mean, I will in the afternoon. I will
5 be back in the afternoon. But if you want to
6 start your submissions, it is entirely up to
7 you.

8 MR. ABRA: Well, I'm prepared to start,
9 Mr. Commissioner, if you want, and that gives us
10 sort of a half an hour. The other alternative
11 is I could start at 1:30, instead of 2:00, to
12 finish earlier this afternoon, whichever you
13 prefer. I will need to distribute my argument
14 to everybody.

15 THE COMMISSIONER: Could we start at quarter to
16 two, would that be fine?

17 MR. ABRA: Yes.

18 MS. CARSWELL: Yes.

19 THE COMMISSIONER: Okay. We will adjourn now
20 and recommence at quarter to two.

21 THE CLERK: All rise.

22 (Proceedings recessed at 11:47 a.m. and
23 reconvened at 1:45 p.m.)

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

1 THE COMMISSIONER: Mr. Abra.

2 MR. ABRA: Good afternoon, sir. I gave to the
3 clerk my outline. Have you received a copy of
4 it?

5 THE COMMISSIONER: I have it, yes.

6 MR. ABRA: Thank you. Sir, there are seven
7 issues that I wish to cover this afternoon, each
8 of which are itemized in the outline. And then
9 I will have some comments to make at the end
10 about Mr. Code's submission to you as well.

11 But the first point that I want to make,
12 which I expect may take the most time, relates
13 to the issue of whether Bruce Miller was aware
14 of the agreement that had been made between the
15 RCMP and Swift Current and Sergeant Anderson
16 related to whether or not Mr. Zanidean would be
17 prosecuted for arson.

18 Now, as you are aware, it's been the
19 evidence of all three of Sergeant Anderson,
20 Staff Sergeant Vandergraaf and Sergeant Paul
21 that they discussed that matter with Bruce
22 Miller at every step of the negotiations and
23 that he was fully apprised and fully aware of
24 what the situation was, and that in fact, he
25 gave advice to them related to how it should be

1 handled as far as the trial is concerned.
2 And I'm submitting to you, with respect, that
3 there is overwhelming evidence that supports the
4 conclusion, and the only conclusion that I
5 submit, with respect, you should come to is that
6 Mr. Miller had no knowledge at all about what
7 had gone on between Sergeant Anderson and
8 Constable Burton. Or to use the vernacular, so
9 to speak, or at least the police forces
10 involved, the Swift Current RCMP and the
11 Winnipeg Police Service.

12 And I'm submitting to you, with respect,
13 that you simply cannot and should not accept the
14 evidence of Anderson, Paul or Vandergraaf as far
15 as their allegations that they provided all of
16 this information to Miller.

17 The first comment that I wish to make is
18 the one that Mr. Code of course made yesterday
19 and which I stressed or attempted to stress in
20 my cross-examinations of all of the witnesses,
21 is that they have absolutely no notes and no
22 entries anywhere in police reports about any of
23 these purported meetings that they had with
24 Mr. Miller. And yet they want you to believe
25 that they were meeting with him constantly, that

1 they were keeping him apprised of what was going
2 on with the negotiations with the Swift Current
3 RCMP and that he ultimately gave them advice as
4 to how it should be handled.

5 And I submit to you, with respect, that
6 it's absolutely unbelievable that matters of
7 that significance and discussions that had gone
8 on of the nature that they want you to believe
9 went on took place. The notes are just one
10 aspect of it, but the deception that the three
11 of them exhibited throughout this process is
12 demonstrated in the manner that they dealt with
13 Lawlor and Dangerfield in failing to apprise
14 them of the arrangements that had been made.

15 Not only did they not tell Lawlor and
16 Dangerfield about the agreement that they had
17 with Swift Current RCMP that Zanidean would not
18 be prosecuted, but when they were asked specific
19 questions about it by Mr. Lawlor and Mr. Brodsky
20 in correspondence, they did not give truthful
21 responses. They gave very deceptive responses
22 and some of them were outright false.

23 Now I'd like to take you initially to tab 1
24 and that's Mr. Brodsky's first letter requesting
25 disclosure of February 7th of 1991. And in

1 particular, points 5 and 6 in that letter
2 wherein Mr. Brodsky makes it clear that he wants
3 full disclosure with respect to witness
4 protection programs and outstanding charges that
5 have not been dealt with, parole applications
6 and so on.

7 And of course in number 16, Mr. Brodsky
8 asks for any other statements from Zanidean in
9 addition to these written statements that he has
10 been provided copies of.

11 Now, Mr. Dangerfield responded to that
12 letter and his response is at tab 17, sir. And
13 he indicates in it that the Crown is not
14 prepared to provide any of the information
15 related to witness protection and that the other
16 issues are being passed on to the Winnipeg
17 Police, that being numbers 5 and 6.

18 Now I'll deal further later on with respect
19 to the information that Mr. Dangerfield refused
20 to give to Mr. Brodsky.

21 But as you are aware, Mr. Brodsky followed
22 that letter with a letter dated April 25th of
23 1991, which is tab 2. And in particular at
24 number 5, he asks,

25 "...what favourable considerations were

1 given to them..."

2 and he's talking about the witnesses.

3 "...for the not pressing of charges or
4 laying of charges, and other matters that
5 would influence them to testify in a
6 particular fashion,"

7 related to witnesses. In this particular case, we
8 are talking about Mr. Zanidean of course. He
9 goes on in number 9, over on page 2, sir, asking
10 for information the Winnipeg Police Service has
11 related to an arson in Swift Current.

12 Over on tab 3, Mr. Lawlor sent that letter
13 to Winnipeg Police Service and asked for
14 responses. And in particular, itemized all of
15 the paragraphs that he wanted responses to,
16 including paragraphs 5 and 9 of Mr. Brodsky's
17 letter.

18 Now, firstly, if you go behind Mr. Lawlor's
19 faxed message. On April 29th, he writes to
20 Mr. Brodsky, and I draw your attention
21 specifically to number 1 where he says,

22 "Re: paragraph 9"

23 which is the one related to the Swift Current
24 arson,

25 "Winnipeg Police have nothing on these

1 incidents."

2 That was an outright falsehood.

3 Because Anderson and Paul had an admission from
4 Zanidean that he had been involved in the
5 setting of that fire in his sister's home and
6 Vandergraaf knew that Mann had received the full
7 RCMP file related to the investigation of that
8 fire.

9 According to Mr. Lawlor, he received
10 that information from the Winnipeg Police. He
11 couldn't recall specifically whether it was from
12 Vandergraaf, Paul or Anderson, but it doesn't
13 really matter. It was false. And it was
14 intentionally deceptive because they did not
15 want the Crown to know what Zanidean had told
16 them and they did not want Mr. Brodsky to know
17 what the Crown had told them -- or excuse me,
18 what Mr. Zanidean had told them.

19 Now the other piece of work is tab 4, an
20 Anderson supplementary.

21 THE COMMISSIONER: Yes.

22 MR. ABRA: And the last entry on page 1.

23 THE COMMISSIONER: Yes.

24 MR. ABRA:

25 "...protection is the only favourable

1 consideration given to any witness. We are
2 not aware of any stayed charges or any
3 other deals made with any witness in
4 exchange for testimony."

5 Now, Anderson knows, when he writes that
6 supplementary, that he's already got an
7 agreement from Burton and Swift Current RCMP
8 that Zanidean will not be charged with arson.
9 That agreement was made back in April of 1991.
10 He sends this supplementary in May.

11 Now, as Mr. Lawlor said, and everybody
12 generally seems to be in agreement, that that
13 was very carefully worded. I am submitting,
14 with respect, it's false. Anderson has been
15 very careful to say "not aware of any stayed
16 charges or any other deals made with any
17 witness." Why did he put it in like that?
18 Because he didn't want to disclose that he had a
19 deal with Burton. Burton is the one that he
20 made the agreement with but it related to
21 Zanidean. And Anderson had a duty to notify
22 Mr. Lawlor of that and he didn't do so.

23 You know, it's interesting. I asked all of
24 the witnesses this, but they allege, Anderson
25 Paul and Vandergraaf allege that Miller was

1 aware of everything that was going on. Well, as
2 I asked each of them, and they didn't provide
3 any answer at all. If indeed Mr. Miller was
4 aware of everything that was going on, why
5 didn't you add in your supplementary if you
6 require any further information about witness
7 protection negotiations, possible immunity and
8 so on, speak to Bruce Miller. Even if it didn't
9 go in the supplementary, it could have gone in
10 the note that was sent to Lawlor. It's over on
11 the third page of that tab, sir. It's sent by
12 Anderson and Paul. And in that covering note,
13 nowhere do they mention at all that Miller knows
14 anything about Zanidean.

15 And then you have the questions that
16 Mr. Brodsky sent to Lawlor and Dangerfield under
17 tab 5 in preparation for the pretrial. And
18 Brodsky is following up, seeking the answers to
19 those particular issues that I have identified
20 for you. And obviously what happened was that
21 Dangerfield or Lawlor spoke to either Anderson,
22 Paul or Vandergraaf and were told what they
23 apparently indicated at the pretrial that
24 Mr. Brodsky has put into his memos that are
25 under tab number 6. That being that the RCMP in

1 Swift Current are not doing anything about the
2 charges or about the arson investigation. And
3 apparently, we're told that Winnipeg Police had
4 made no agreements with respect to the
5 Saskatchewan matter because Mr. Brodsky has put
6 in the second memo, the Winnipeg Police can only
7 make agreements with respect to the area they
8 are responsible for. And according to
9 Mr. Lawlor, that information had to have come
10 from either Vandergraaf, Anderson or Paul. And
11 yet that information is given at a pretrial on
12 May 22nd, almost three months after Anderson has
13 made his agreement with Burton that Zanidean
14 isn't going to be charged.

15 And you will recall that both Dangerfield
16 and Lawlor testified that at no time were they
17 told by any of Anderson, Vandergraaf or Paul
18 anything about the negotiations they had with
19 Swift Current RCMP or the agreement that had
20 been made.

21 Well, here's Vandergraaf, Anderson and Paul
22 knowing full well that Lawlor and Dangerfield
23 are not only trial counsel but are responsible
24 for disclosure. And they are not told anything
25 about it.

1 I submit to you, with respect, the only
2 conclusion that you can come to is there was a
3 deliberate intentional desire to conceal that
4 information so that it couldn't be used when
5 Zanidean testified and when he was
6 cross-examined.

7 It's unbelievable that Anderson, Paul and
8 Vandergraaf would try and convince you that we
9 told Bruce Miller everything, and we thought
10 Miller would tell the others in the Crown's
11 office, being Lawlor and Dangerfield, when they
12 know that Lawlor and Dangerfield are trial
13 counsel. They are dealing with them on a
14 regular basis and they know from the
15 correspondence that I have referred you to that
16 Brodsky is asking all sorts of questions, and
17 very specific questions, that they don't want to
18 disclose the answers to. And they want you to
19 believe, with respect, Mr. Commissioner, well,
20 we told Bruce Miller.

21 There's no note of it, there's absolutely
22 no indication anywhere that Miller was advised
23 of this information and that he had the
24 opportunity to reply or had any information
25 about it.

1 Now, there's no question that Anderson,
2 Vandergraaf and Paul were all aware of the fact
3 that the Swift Current arson was going to affect
4 Zanidean's credibility at the trial. They
5 admitted that. What they say is, well, we told
6 Bruce Miller. It was up to him to deal with.

7 It's trite to say Mr. Miller is not here to
8 give his version of events.

9 But they knew it was going to affect
10 Zanidean's credibility. And I submit to you,
11 with respect, the only conclusion you can come
12 to is that they deliberately concealed that
13 information. And they are now trying to
14 convince you, well, they told Bruce Miller and
15 that was enough disclosure.

16 Do you not think that if Miller was aware
17 of that, he would have said you've got to tell
18 Lawlor or Dangerfield or put it in writing for
19 me so I can give it to Lawlor or Dangerfield?
20 Just let it sit, doing nothing? It's
21 inconceivable I respectfully submit.

22 And the explanation that is given by
23 Anderson and Paul is, well, we didn't really
24 consider the admission to be that significant,
25 although they admitted that it went to

1 Zanidean's credibility. But really, as far as
2 we were concerned, we were doing no more than
3 doing assistance for RCMP in Swift Current
4 related to their investigation and we intended
5 on opening a file in that regard. Well, funny
6 thing, no file was ever opened. There is no
7 indication any attempt was ever made to open
8 that file.

9 But I reiterate that both Anderson and
10 Vandergraaf admitted that they knew that it was
11 going to affect Zanidean's credibility.

12 Now, the issue then becomes events
13 subsequent to. Anderson was a little bit fast
14 and loose with the truth as well when it came to
15 the investigation by Ewatski and Hall.

16 Now, I'd like to take you, sir, to tab 7.
17 And this is the phone conversation between Hall
18 and Anderson. And specifically what Hall is
19 asking about is whether or not there was any
20 immunity agreement. And if you go to page 27,
21 sir, and Anderson makes the comment after he's
22 talking about Kovnats who he describes as
23 Zanidean's horrible lawyer. But he goes on to
24 say,

25 "ANDERSON: One of the things he would have

1 told you is that one of the stumbling
2 blocks all along was that they wanted an
3 ironclad guarantee that he wouldn't be uh,
4 charged. And Miller wouldn't give it to
5 him and I wouldn't give it to him and --

6 HALL: Okay.

7 ANDERSON: -- nobody would give it to him.

8 HALL: That's very good,"

9 and so on.

10 THE COMMISSIONER: I'm sorry.

11 MR. ABRA: It's right at the top of page 27,
12 sir.

13 THE COMMISSIONER: There's different numbers on
14 the pages top and bottom.

15 MR. ABRA: Top of the page, I'm sorry. The
16 numbers at the bottom are a little bit
17 obliterated. But if you look at page 27 which
18 is the second last page of the telephone
19 conversation.

20 THE COMMISSIONER: Yes. And where is this
21 again?

22 MR. ABRA: The first comment by Anderson is
23 right at the top.

24 "...the fact that right down to the end in
25 parts of the protection negotiations, if

1 you're talking to that horrible lawyer of
2 his, what was his name again...and
3 Zanidean's lawyer."

4 And Anderson says,

5 "One of the things he would have told you
6 is that one of the stumbling blocks all
7 along was that they wanted an ironclad
8 guarantee,"

9 that's referring to Kovnats, and Zanidean,

10 "...that he wouldn't be charged. And
11 Miller wouldn't give it to him and I
12 wouldn't give it to him."

13 Anderson makes no mention of the fact in that
14 conversation with Hall that he had an agreement
15 with Swift Current RCMP.

16 Now, that information came to Hall and
17 Ewatski's attention when they went out to Swift
18 Current. And if you'll go to tab 8, the extract
19 from their report, the last page under the tab.

20 THE COMMISSIONER: Yes.

21 MR. ABRA: In essence what they are saying is
22 that Miller, Dangerfield and Lawlor have all
23 told them that there's no immunity and there was
24 no promise of immunity for Zanidean. But that
25 Anderson told Zanidean immediately after he had

1 testified that he wasn't going to be prosecuted
2 for the Swift Current arson. And they got that
3 from Anderson's memorandum, which is tab 9.

4 And this is the memorandum that was given
5 to Inspector Johns where Anderson, at page 2,
6 has described the negotiations that he had with
7 Burton and that his, Burton's, superiors had
8 agreed that Zanidean would not be prosecuted and
9 that Anderson agreed not to tell Zanidean until
10 after he had testified.

11 So what have we got? We got Anderson
12 telling two different stories. When he speaks
13 to Hall and Ewatski, he tells him no, there was
14 no immunity. But in the meantime, he's written
15 a memo to Johns two years earlier describing
16 exactly what went on.

17 And I submit to you, with respect, sir,
18 that from Miller's point of view, as far as he
19 was aware, there was no agreement for immunity.
20 That's what he told Ewatski and Hall, and that
21 was his understanding. And he had no knowledge
22 whatsoever of what had gone on between Burton
23 and Anderson as far as that agreement is
24 concerned.

25 Now, one of the other issues is that the

1 two documents from Winnipeg Police Service that
2 are particularly significant that outline what
3 the agreement is and the discussions that have
4 taken place are that memorandum of Anderson's
5 along with the source witness protection
6 application for Zanidean that was filled in by
7 Vandergraaf and Anderson. And that extract from
8 that, sir, is under tab 10 where they described
9 at page 481, just that one page that I have put
10 in, the status of the negotiations.

11 Now, neither of those documents, being
12 Anderson's memorandum of October '91 to Johns,
13 nor the source witness protection application
14 for Zanidean were ever provided to the Crown's
15 office. As a result of which, Miller had no
16 access to them and had no way of determining
17 what was in them.

18 So in conclusion, sir, with respect to the
19 allegation by Anderson and Paul and Vandergraaf
20 that they told Miller everything that was going
21 on, I submit to you, with respect, there is no
22 way that you should accept that evidence.
23 Clearly they were not truthful with you, they
24 are trying to blame Bruce Miller for a matter 15
25 years later and they haven't got one tittle of

1 evidence to support this story. And I submit to
2 you, with respect, that you ought not to accept
3 it.

4 As Mr. Code indicated in his submission to
5 you yesterday, both Vandergraaf and Anderson
6 admitted how significant this agreement was.
7 Anderson's term was a blockbuster because it
8 solved the problems they were having in
9 Zanidean's witness protection. Well, if it was
10 a blockbuster, why was it not reduced to
11 writing? Why was it not given to the Crown?
12 But more significantly, in the documents that
13 I've gone through with you, there was a
14 deliberate and intentional attempt on the part
15 of Anderson, Paul and Vandergraaf to keep the
16 information related to that agreement from the
17 Crown's office. And I submit to you, with
18 respect, that's the conclusion that you must
19 come to.

20 Now I'd like to turn nextly briefly, I'm on
21 page 5 of my matter, the issue of Corporal Orr.
22 And I'm not being critical of Corporal Orr when
23 I describe his evidence. But the bottom line is
24 that he admitted both to Mr. Code, when he
25 testified initially in his examination, and then

1 to me in cross-examination, that it was his
2 habit to keep detailed notes, or as best he
3 could, of everything significant and anybody
4 that he talked to.

5 He has no note with having spoken to Miller
6 after he had spoken initially to Sergeant Upton
7 in Swift Current who had advised him that Swift
8 Current RCMP were closing their file on
9 Zanidean. Or when he spoke to Constable Burton
10 a couple of days later and Burton told him that
11 no charges would be laid against Zanidean.
12 Those two memos of Orr's, sir, are at tabs 11
13 and 12 respectively in my brief.

14 Tab 11 is the phone call to Upton that you
15 are familiar with. And 12 relates to the phone
16 call to Burton. And that phone call was made as
17 a result of Miller phoning Orr and saying
18 Zanidean and Kovnats are demanding immunity, can
19 you find out what the status is on the Swift
20 Current matter?

21 He phones Burton. When I say he, I mean
22 Orr, phones Burton. Burton tells him we're not
23 charging Zanidean and there is no note on his
24 file to indicate that he then phoned Miller with
25 that information. To the contrary, I submit to

1 you, it's clear he didn't. Because you'll note
2 in the note that he has made of his call with
3 Burton, that Burton asked him effectively to
4 keep it quiet until they got a statement from
5 Driskell. And I submit, with respect, that Orr
6 did not provide that information to Miller. He
7 had no idea what was being talked about or what
8 information was being given to Orr by Upton and
9 Burton with respect to the Swift Current arson.

10 The last point, and I think probably the
11 most significant in this regard, is that, as you
12 know, Kovnats was demanding immunity. He did it
13 in the letters that he sent to Miller, which I
14 have included in the tabs 13 and 14. In
15 addition, according to Kovnats, in the numerous
16 conversations he had with Miller, he was
17 demanding immunity. And he was upset that
18 Miller wasn't honouring what he perceived to be
19 an agreement.

20 Well, firstly, I submit with respect, there
21 was no such agreement, at least insofar as
22 Miller was concerned. And Kovnats's two letters
23 to Miller do not reflect that there was an
24 agreement. There's nothing in them that even
25 intimates that this is to confirm our agreement.

1 Both letters are written in a manner of what
2 Zanidean wants, not what Miller has agreed to.
3 But do you not think, sir, that if Miller was
4 aware that an agreement had been made between
5 Winnipeg Police and the RCMP that Zanidean
6 wasn't going to be prosecuted, they would have
7 told Kovnats that to get him off his back?
8 Well, obviously he would have.

9 The issue is not whether it was immunity
10 between justice departments or whether it was an
11 agreement between police departments that
12 Zanidean would not be prosecuted. That
13 distinction, I submit, is irrelevant. What is
14 significant is that Zanidean was getting what he
15 wanted, that being that he wasn't going to get
16 charged. And assuming for a moment that Miller
17 was aware that there had been an agreement
18 between the two police services in that regard
19 and he thought that immunity was necessary
20 between justice departments, which is what
21 Kovnats was demanding, do you not think that
22 Miller would have contacted Saskatchewan Justice
23 to arrange that immunity? Supposedly, according
24 to Vandergraaf, Paul and Anderson, Miller was
25 well aware of all of these agreements or this

1 particular agreement that Anderson had with
2 Swift Current RCMP. Well, here Miller has got
3 Kovnats on his back demanding immunity. And if
4 Kovnats had said I'm not satisfied with an
5 agreement between police departments, get it
6 from Saskatchewan Justice, do you not think
7 Miller, if he was aware of the fact that the two
8 police services had an agreement, would not have
9 followed up on it? I submit clearly he would
10 have.

11 You know the frustration that he was having
12 from Kovnats. You heard that from Whitley when
13 he testified. I submit to you, with respect, he
14 would have done anything to get Kovnats off his
15 back with respect to that issue especially if he
16 knew it had been answered.

17 The only conclusion you can come to, with
18 respect, is that Miller simply was not aware and
19 was never told of that agreement prior to
20 Mr. Driskell's trial. It's inconceivable that
21 Anderson, Paul and Vandergraaf would tell Miller
22 as they allege without making any note of it,
23 and more significantly without telling Lawlor
24 and Dangerfield, who were the trial counsel,
25 that they did exactly the opposite. They

1 deliberately concealed the information from
2 Lawlor and Dangerfield. And I submit, with
3 respect, that's the only conclusion that you can
4 come to.

5 Sir, I'd like to move on to the next issue,
6 which I will deal with quickly, that being
7 whether in fact Miller ever gave the advice to
8 Vandergraaf, Anderson and Paul, that Zanidean
9 not be told until after he testified. And you
10 heard me, during the course of the Inquiry, ask
11 all of the witnesses that knew Bruce Miller
12 about whether they can conceive him of doing
13 anything of that nature firstly without telling
14 George Dangerfield who was trial counsel, and
15 secondly, because it was so clearly improper.
16 And I submit to you that there's no way in the
17 world you can accept the fact that Miller ever
18 gave that advice. It's again a situation of
19 Vandergraaf, Paul and Anderson trying to blame
20 Miller for the decision that they made to tell
21 Zanidean after he had testified of which Miller
22 had no knowledge. It's unbelievable that any
23 counsel would ever give advice of that nature to
24 any witness in order that the witness would
25 effectively give false answers. And that was

1 the result of it.

2 Now, the next issue relates to disclosure
3 to Mr. Brodsky, and whether or not Mr. Miller
4 can be held accountable for the fact that
5 Mr. Brodsky was not told much of the information
6 that he requested. And Mr. Code made the point
7 yesterday that at some point, Miller had a duty
8 to advise Lawlor and Dangerfield about where
9 things stood with Zanidean and Kovnats.
10 That's Mr. Code's take on the situation,
11 something you will have to determine.

12 My submission, on behalf of Mr. Miller, is
13 that nothing had really been agreed to. He was
14 having such a difficult time with Kovnats, that
15 they agreed on nothing. And, therefore, there
16 wasn't any final agreement that he could advise
17 Dangerfield and Lawlor of. Now it may be that
18 you'll find that he should have kept them
19 apprised of developments, of which there weren't
20 very many.

21 But I would also draw your attention to the
22 fact that the specific documents that I've
23 already referred you to, being Mr. Brodsky's
24 letters requesting disclosure, were never shown
25 to Miller. Both Lawlor and Dangerfield said

1 that they didn't show them to Miller. If they
2 had have, there might have been the opportunity
3 for him to advise Mr. Brodsky where things
4 stood.

5 But the other issue that I want to comment
6 on in this regard, Mr. Commissioner, is the fact
7 that Mr. Brodsky, as Driskell's lawyer, had some
8 opportunity, in fact a significant opportunity,
9 to follow up on Dangerfield's refusal to provide
10 information on witness protection. Dangerfield
11 wrote in his reply to Brodsky at February 7th,
12 that there are monies being paid to protect
13 Zanidean because he's in witness protection. By
14 all accounts, Brodsky never followed up on that.

15 Now, we all have 20/20 hindsight but even
16 in pre-Stinchcombe days, Mr. Brodsky was
17 certainly in a position to have raised and
18 followed up on that issue and said to
19 Mr. Dangerfield I'm not satisfied with that
20 explanation, I want to know how much was being
21 paid. I don't care where he's going. You don't
22 have to tell me that. But I'm entitled to know
23 how much is being paid either to him or on his
24 behalf, and what arrangements are being made for
25 him. And if Brodsky had pursued that matter

1 with Dangerfield and Lawlor, they would have had
2 no alternative but to go to Miller to seek the
3 information. Or why didn't Mr. Brodsky raise it
4 before Mr. Justice Morris at the pre-trials?
5 Because even pre-Stinchcombe, we all know that
6 that kind of information was discloseable. An
7 accused on his or her accounts are entitled to
8 the information and Mr. Brodsky didn't follow up
9 on it with Mr. Dangerfield. He knew what
10 questions to ask because he asked Mr. Zanidean
11 when he cross-examined him, how much are you
12 receiving in start-up costs? How much has been
13 paid to you? How much has been paid on your
14 behalf?

15 Well, rather than ask Zanidean that at
16 trial, why weren't those questions being asked
17 of Mr. Dangerfield and Mr. Lawlor much earlier?
18 For some reason, Mr. Brodsky asked the question
19 once, Dangerfield said you're not getting the
20 information, and Brodsky never pursued it. He
21 had a right to. And if he had, the only one
22 that could have given the information was
23 Miller. But it was never pursued.

24 And if Miller had been asked that, then as
25 I have indicated at page 9 of my brief, there

1 was certain information that he could already
2 provide, that being that the approximate cost,
3 whether Zanidean went into witness protection or
4 not, and was instead paid the relocation amount,
5 was going to be approximately \$20,000. Orr
6 testified to that. And that Manitoba Justice
7 was buying Zanidean's house. And how much was
8 involved in that?

9 The difficulty is the information was
10 there, Miller wasn't asked for it. When Brodsky
11 sought it, Dangerfield turned him down and
12 Brodsky never pursued the matter.

13 So I'm submitting to you, with respect,
14 that although Mr. Code's point may be well taken
15 that Miller should have provided more
16 information, Dangerfield saw fit to tell
17 Mr. Brodsky initially in February of 1991 that
18 we're not telling you how much is involved, and
19 the matter was never pursued. So how was Miller
20 to know it was a matter of some significance?

21 Now, the same issue applies with respect to
22 the next issue that I have raised at page 9,
23 sir, is should Miller have provided more
24 information to Lawlor and Dangerfield than he in
25 fact did? And firstly, I submit to you, it's

1 quite clear that Dangerfield did have knowledge
2 and he had to have received it from Miller. And
3 in particular, the issue was that he knew that
4 Miller was acting, in essence, as a liaison
5 between Orr and Gumieny and Zanidean, and that
6 money was indeed being paid for witness
7 protection. And that Mr. Dangerfield was aware
8 of that and that ultimately Zanidean got \$20,000
9 for relocation.

10 The other significant factor in all of this
11 of course is the fact that Mr. Dangerfield was
12 at the Public Safety Building when this
13 confrontation took place with Kovnats. And
14 although there's a significant difference of
15 opinion between Mr. Dangerfield and Mr. Kovnats
16 as to what exactly was talked about there, it's
17 pretty clear that Kovnats was upset and Zanidean
18 was upset. That's the reason Dangerfield was
19 called down there. Here they were a week from
20 trial and one of his significant witnesses has
21 left town and they had to arrest him on a
22 material witness warrant.

23 So Dangerfield had to have some idea at
24 least at the end of that confrontation at the
25 Public Safety Building that there was some

1 problems with Mr. Zanidean. And ought to have
2 asked Miller what the status of the negotiations
3 were.

4 And then the next issue, as part of this,
5 relates to the evidence that you heard right at
6 the end from Mr. Lawlor. And it relates to tabs
7 18 and 19 and the queries of information four
8 years after the trial or three and a half years
9 after the trial -- four and a half years after
10 the trial, excuse me, where Janie Duncan was
11 seeking information and Miller drafted a
12 response. But as shown at tab 19, he puts in
13 the question,

14 "Check with Shermie,"
15 who is Greg Lawlor,

16 "Did they lead evidence on witness
17 protection deals? Everything done through
18 witness protection was lead in evidence?"

19 Clearly Miller was under the impression that
20 Dangerfield and/or Lawlor had lead evidence of
21 Zanidean's witness protection. And the only way
22 that he could have thought that would be that as
23 far as he was concerned, he had provided that
24 information or enough information to Lawlor and
25 Dangerfield that they could lead that evidence

1 at the trial. It may not have been reduced to
2 writing but clearly Miller must have believed
3 that he had sufficiently informed Lawlor and
4 Dangerfield as to what arrangements had been
5 made for Mr. Zanidean.

6 Mr. Commissioner, I'd like to go nextly to
7 page 11 which is the issue of the failure to
8 advise Mr. Brodsky of Mr. Quinney's information.
9 And there's no question that that information
10 should have been shared with Mr. Brodsky. We
11 are all in agreement with that. There's no
12 question that it wasn't shared with him.

13 The finding that I'm asking you to make is
14 that it was not a deliberate concealing of that
15 information, it was unintentional, and it was
16 certainly not egregious misconduct as Mr. Code
17 described it yesterday.

18 If indeed you accept my argument that
19 Anderson, Paul and Vandergraaf mislead and
20 deliberately provided false information to
21 Lawlor and Dangerfield and, in essence,
22 testified falsely before you about their
23 allegation that they told Miller what was going
24 on about the agreement when indeed they didn't,
25 then that's egregious misconduct.

1 I'm submitting to you, with respect, that
2 there's a significant difference between
3 malfeasance and non-feasance. And there's not a
4 tittle of evidence that supports the finding, I
5 respectfully submit, sir, that there was any
6 intentional or deliberate attempt by the Crown's
7 office to conceal that information from Brodsky.
8 It should have been provided to him, there's no
9 question about it. It didn't happen. Why it
10 didn't, nobody knows. But clearly Miller,
11 Dangerfield and Whitley were all in agreement
12 that that information should be provided. It
13 wasn't and it should have been. That is
14 non-feasance I respectfully submit.

15 It's blame-worthy. You are entitled to be
16 critical of it obviously. I expect you will be.
17 But again, I reiterate, that you ought not to
18 come to the conclusion that it was a deliberate
19 concealing of information.

20 And at this juncture, I have to make a
21 comment on Mr. Code's submission to you about it
22 being the egregious part of the inquiry I
23 believe is the wording that I wrote down. This
24 is I believe the sixth Commission of Inquiry
25 that I've participated in over the last number

1 of years. And this is the first one where there
2 has been an adversarial position taken like that
3 by Commission Counsel. Mr. Code has taken a
4 position for you, asking you to make that
5 finding. And I submit, with respect, that's
6 inappropriate.

7 It's quite permissible and appropriate for
8 Mr. Code to say these are the issues. On the
9 one hand you have this, on the other hand you
10 have that. But you are the one that has to make
11 that decision. I submit to you, with respect,
12 it was inappropriate for Mr. Code to, in
13 essence, advise you that you ought to make a
14 finding that it was the most egregious part of
15 the inquiry.

16 As indicated, I dispute that. You are the
17 one that has to make that finding. It was
18 inappropriate for Commission Counsel to make
19 that submission to you, I respectfully submit.

20 The next issue is the meetings between
21 Miller, Hall and Ewatski. And again, I
22 reiterate that when Miller told Hall and Ewatski
23 that, to his knowledge, there had been no
24 immunity for Zanidean, he was telling the truth.
25 He knew nothing about the agreement that had

1 been made with Swift Current RCMP.

2 There is no indication, although Ewatski
3 and Hall had apparently reviewed Orr's file the
4 day before, there's no indication from Ewatski's
5 testimony that they ever mentioned to Miller
6 what Orr's file showed. But Miller was adamant
7 that there had been no promise of immunity.

8 Do you not think, if he was aware of the
9 fact that there had been an agreement made with
10 Swift Current RCMP, that he would have mentioned
11 that to them? And for some unbeknownst reason,
12 Ewatski and Hall never saw fit to show to Miller
13 the memorandum that Anderson had written to
14 Johns some two years before.

15 If indeed they were trying to get to the
16 bottom of this whole investigation, would it not
17 have made sense to pull out that memo, because
18 they had it, and show it to Miller and say,
19 well, here is what Anderson says happened, what
20 do you know about this? They didn't.

21 And similarly, after they met with Miller
22 May 13th, they then went out to Swift Current.
23 And that's where they became very knowledgeable
24 about everything that had gone on between
25 Anderson and Burton, and got the whole picture

1 of what had gone on. Because there was a full
2 picture of it in the RCMP file in Swift Current.
3 All of the negotiations and all of the
4 agreements that had been made.

5 Such being the case, why did Ewatski and
6 Hall not come back to Miller and say we've been
7 to Swift Current, this is what we found took
8 place, what do you know about that? They
9 didn't. By Ewatski's own admission to me, they
10 never went back to see Miller, never gave him
11 the opportunity to comment on that nor,
12 apparently, when they met with Lawlor and
13 Dangerfield in August did they tell Lawlor and
14 Dangerfield, you know, this is what we learned
15 from Swift Current RCMP's file, what have you
16 got to say about it? Did you know about this?
17 Apparently that was never discussed. And it
18 would have been the easiest way to get to the
19 bottom of this whole situation.

20 The last issue that I wish to deal with,
21 Mr. Commissioner, very briefly, is Miller's
22 replies to Judge Enns. And they are his
23 questions, sir. As you are aware, he sent
24 questions to various counsel and people that
25 have been involved in the Driskell matter and

1 Miller replied. I thought that I have included
2 them. I'm sorry, I don't seem to have.

3 In any event, Judge Enns asked Mr. Miller,
4 amongst all of the others, as to what disclosure
5 had been given to Mr. Brodsky to his knowledge.
6 And this question was very specific from Judge
7 Enns. What disclosure was given to Mr. Brodsky.
8 That's all that Judge Enns asked. And
9 Mr. Miller, quite appropriately replied, I never
10 dealt with Mr. Brodsky, I don't know what
11 disclosure was provided to him.

12 Judge Enns did not ask Mr. Miller for any
13 details of the witness protection arrangements
14 that he had discussed with Kovnats or whatever,
15 or what arrangements had been made or what
16 payments had been made. All he asked was what
17 was disclosed to Brodsky. And Miller, quite
18 appropriately, wrote back and said, I have no
19 knowledge of that.

20 Similarly, with respect to Mr. Gumieny,
21 Mr. Miller wrote in his reply that he did not
22 have any personal dealings with Mr. Gumieny.
23 And there is no evidence that he did. Zanidean,
24 we know that Miller met with numerous times
25 personally but there is no evidence that he ever

1 met with Gumieny. I think I said Gumieny, I
2 meant with Zanidean, personally, along with
3 Mr. Kovnats. But there's no evidence anywhere
4 that he ever dealt personally with Gumieny. All
5 of the witness protection arrangements were made
6 by Sergeant Osborne and Sergeant Williams of the
7 Winnipeg Police Service through Corporal Orr.
8 There's no question from the Orr file that we
9 now have that Miller was the one that authorized
10 the payments on Gumieny's behalf. And
11 apparently, he had some dealings with Gumieny
12 after his placement in Ottawa because Gumieny
13 was an unhappy camper by that point. And Miller
14 had some dealings with that. But of course he
15 didn't have the opportunity to review Orr's file
16 at the time that he was responding to Judge
17 Enns.

18 And I submit to you, with respect, when
19 Mr. Miller said that he didn't have any
20 dealings, personal dealings, with Gumieny, that
21 was accurate because he never met him. But he
22 obviously did have some indirect dealings with
23 the Gumieny witness protection program 13 years
24 later when he replied to Judge Enns. I submit
25 the only conclusion you should come to is that

1 Miller simply forgot that he dealt with
2 Gumieny's matter.

3 Sir, there's one final matter that's not
4 contained in my own brief that I wish to deal
5 with in Mr. Code's submission yesterday. The
6 first comment I want to make is that I'm sure
7 that you'll find the summary of the evidence
8 that Mr. Dawe has prepared to be helpful but I
9 wish we had received it sooner. I only got it
10 yesterday. I think most other counsel did. I
11 really haven't had the opportunity to even
12 review it, other than certain portions of it.
13 So I wish we had received it a couple of weeks
14 ago so we could have told you whether or not we
15 agree or disagree with what's in it.

16 I say that with respect. I know you took
17 copious notes throughout the matter and followed
18 the evidence very closely. But I do have some
19 concerns simply about the fact as to what use is
20 going to be put to by this summary.

21 Having said that, the one issue that I wish
22 to relate to Mr. Code's submission yesterday in
23 addition to the issue of what he characterized
24 as the egregious conduct which I submit is not
25 accurate, was inappropriate, is right at the end

1 of his submission to you at page 142 where he,
2 in essence, accuses Mr. Miller of providing
3 inaccurate or misleading information to
4 Mr. Finlayson and that Finlayson alleges in a
5 memo, after speaking to Miller, that Miller had
6 told him that Zanidean was not prosecuted in the
7 Swift Current arson because of lack of evidence.

8 Now this memo, which Mr. Code is commenting
9 on, is not even in evidence before you. It came
10 from the Department of Justice disclosure.
11 Finlayson does talk about it in his statement
12 and we do have an agreement, there's no
13 question, that you're entitled to refer to any
14 documents that had been filed. But as you
15 pointed out to counsel, if anything, if you're
16 going to put any weight on anything that hasn't
17 been tendered as an exhibit, you'll give us the
18 opportunity to comment on it.

19 If this document is as significant as
20 Mr. Code now seems to be indicating it is, why
21 was it not filed as an exhibit? Because if I
22 had known that Mr. Code was going to be taking
23 the position that he's taken in this argument
24 that he put before you yesterday, I might have
25 asked for the opportunity to have Mr. Finlayson

1 called just to deal with this issue. I'm asking
2 you, sir, to ignore that matter. It's trivial.
3 THE COMMISSIONER: For what it's worth, I
4 thought the reference was simply to Finlayson's
5 statements and the interview statements
6 certainly are part of the matters that I
7 expected, not only that I would rely on but that
8 counsel were --

9 MR. ABRA: There's no question about that. You
10 can rely on Finlayson's statement.

11 THE COMMISSIONER: Okay.

12 MR. ABRA: What I am saying to you is that if
13 Mr. Code had considered that particular memo of
14 Finlayson's, which he does comment on in his
15 interview, but the memo was never tendered
16 before you as part of the book of documents
17 relating to Whitley, Lawlor and Dangerfield,
18 which are also the ones that contained Miller's
19 information. And all I'm saying to you is it's
20 kind of unfair to make a comment of the nature
21 that Mr. Code has made at page 142 about Miller
22 when I didn't have the opportunity to address it
23 in evidence at all.

24 Do I make my point clear on that, sir?

25 THE COMMISSIONER: Yes, you do, you do, yes.

1 All right.

2 MR. ABRA: I look at the time, I think I've gone
3 one hour and 10 minutes. Subject to any
4 questions you may have, sir, that completes my
5 submission.

6 THE COMMISSIONER: I thank you very much. At
7 the risk of opening up a risky door, I certainly
8 would have no objections, I'm not inviting, but
9 I would have no objections to anyone who wishes
10 to, in writing, make a submission, simply make a
11 letter to me about inaccuracies in the facts in
12 the summary.

13 Now I, like you, saw it for the first time
14 yesterday morning; however, even had I seen it
15 before, I wouldn't have picked many of the
16 things --

17 MR. ABRA: I'm sure it's very capably done.
18 Mr. Dawe is certainly very competent and very
19 capable in that regard and knows the evidence
20 extremely well. All I'm saying is that most of
21 us haven't had the opportunity to -- so I guess
22 the issue really becomes if you are planning, I
23 realize it's difficult for you to comment on
24 this at this juncture, but if you are planning
25 on making significant use of that summary, then

1 I think we would like to know that so that we
2 can comment. In any case, as you know, it's
3 difficult for counsel to cover every issue.

4 THE COMMISSIONER: Absolutely. I think, at
5 least I sort of expected after I saw this, that
6 I probably will be making significant use of it.
7 Certainly if I see anything here that differs
8 with my view, and I've done summaries of the
9 evidence day by day --

10 MR. ABRA: Yes, you have mentioned that.

11 THE COMMISSIONER: -- I will rely on my summary
12 or on what other submissions, if there are other
13 contrary submissions made. But if there are any
14 significant matters in the Code/Dawe summary,
15 factual issues or any other type of issues, I
16 would welcome, as I say I'm not encouraging, but
17 I'm totally open to receiving a written
18 submission on those points.

19 MR. ABRA: Certainly, thank you.

20 THE COMMISSIONER: I don't see that this is
21 something where the door closes as of this
22 moment.

23 MR. ABRA: Thank you very much, sir.

24 THE COMMISSIONER: Thanks, Mr. Abra. Well, I
25 guess we will take our afternoon recess.

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

3 (Proceedings recessed at 2:53 p.m. and
4 reconvened at 3:09 p.m.)

5 THE CLERK: All rise. This Commission of
6 Inquiry is now in session.

7 MR. TAPPER: Good afternoon, Mr. Commissioner.
8 It's a pleasure to be here for a change. The
9 documents that I had provided to you are a two
10 page outline or a two and a half page outline of
11 my argument. I provided you an outline.

12 There are a series of extracts of
13 transcript which I will be referencing in the
14 course of my submissions and a couple of
15 documents that I brought forward just for
16 convenience more than anything else.

17 I'd like to start by saying what might be
18 obvious on behalf of Mr. Whitley, and that is
19 why I'm here, and why I'm not here. I'm here to
20 represent Stu Whitley and his interests in this
21 inquiry. That much is obvious. I am not here
22 to discuss the various controversies and issues
23 that have consumed and will consume 99.9 per
24 cent of this Inquiry. The submission that I
25 will make to you is that Mr. Whitley is not

1 really on the periphery of this case, of this
2 inquiry, but is essentially not involved. And
3 I'm going to provide you with a fair number of
4 details in support of that proposition in the
5 next several minutes. In fact, I doubt that
6 I'll take the full hour and 15 that is allotted
7 to me.

8 Mr. Whitley was a Crown Attorney and
9 articled in 1973. He's been in Manitoba for
10 many years until he left in 1995. In 1984, he
11 became head of the Constitutional Law Branch.
12 In 1987, he became Director of Prosecutions in
13 Manitoba. In 1989, he became ADM until '95 when
14 he left.

15 Of interest, subsequent to his departure,
16 there are now three Directors of Prosecutions
17 and a specific ADM responsible for Prosecutions.
18 His role was a combined role. And as you will
19 hear from me in due course, probably ad nauseam,
20 I will be asking you not to confuse what his
21 role was and what his role was not.

22 After he left Manitoba, he went to the
23 Yukon and he became Deputy Minister of Justice
24 there and he is now with the Federal Department
25 of Justice, Senior Regional Director for

1 Northern Canada.

2 You heard a significant amount of evidence
3 about his prosecutorial attitude. And he was
4 not someone who came to you and said in 2006, my
5 attitude today is described in 1990 as
6 so-and-so. We can tell, actions speak louder
7 than words, we can tell what he did in those
8 years. In October of 1990, he brought in a
9 disclosure policy which predated Stinchcombe.
10 The disclosure policy was very similar to, in
11 effect, which Stinchcombe mandated. But
12 nonetheless, it predated Stinchcombe.
13 He told you that there was resistance in the
14 Crown office from some individuals about that
15 policy.

16 Now I'm not going to take you through all
17 of those various documents. In fact, I'm sure
18 that you have a better handle of the documents
19 than I do at this stage, but 36(A) is where the
20 disclosure policies are found. He told you that
21 he implemented an Ethical Code of Conduct for
22 Crown Attorneys and he described that in a memo
23 found at Exhibit 30(A), tab 4, page 2. That
24 also predated Stinchcombe. He told you that
25 that also was met with resistance and yet he

1 imposed it. He told you that it was his mandate
2 to change the Crown culture.

3 And if you go to the extracts which I have
4 provided to you of the transcript of evidence,
5 this is taken by the way from volume 16 almost
6 universally, tab 1, page 4632, bottom right
7 corner starting at line 21.

8 "I believe that, I believe that when I was
9 given the position of Director of
10 Prosecutions in '87 or '88, whenever it
11 was, I was given the mandate to change the
12 culture. There was a strong belief in the
13 Minister of the time and his Deputy that
14 we, as prosecutors, were far too close to
15 the police, that we had to distance ourself
16 from the police, and that there is almost a
17 seductiveness about the closeness with
18 which one can handle the relationship with
19 the police officers to the point where, as
20 a matter of instinct, you trust what the
21 police officer tells you without the
22 ordinary kind of second-guessing that would
23 go on when you look at a file and try and
24 do an analysis."

25 He told you as well that he implemented the

1 structure of senior management committee
2 processes. He told you as well that he was not
3 opposed to disciplining a Crown Attorney for
4 ethical breaches and that he, in fact, did that
5 on more than one occasion. And the extract of
6 the evidence is at tab 2, I'm not going to read
7 it to you, of his evidence that demonstrates
8 that.

9 He spoke extensively in his evidence about
10 issues of Crown culture, disclosure issues and
11 matters concerning wrongful convictions. He was
12 forthright in sharing information with
13 Mr. Lockyer concerning what he provided to Judge
14 Enns. That's at Exhibit 35(I). And I point
15 out, with respect to all others in the room, he
16 was the only one to do so.

17 And I'll suggest, with respect, this
18 demonstrates not merely his character and
19 predisposition to disclosure and fair play, it
20 demonstrates that he would not shy away from a
21 delicate or even uncomfortable conversation.

22 And in that respect, I also point out that
23 those several other witnesses went out of their
24 way, to use the proverbial, to fall on their
25 swords and make public proclamations of the lack

1 of fairness of the trial facing Mr. Driskell and
2 their regret in that respect.

3 Mr. Whitley was the one person who did so
4 privately and in person. It was clear that he
5 had done such out of the probing eyesight of the
6 media or Driskell's counsel. And when it was
7 reported to his counsel, Mr. Lockyer chose to
8 ask Mr. Whitley on the stand. And I'll submit
9 to you he was clearly uncomfortable about making
10 a public spectacle of his private apology. I
11 suggest to you, that spoke to his sincerity and
12 to his integrity.

13 As an ADM, he provided to you a list of his
14 responsibilities in many different areas. That
15 list is found in the transcript, volume 20, page
16 4797, and that's at tab 3 of the extract which I
17 gave you. I'm not going to read it to you. You
18 can refer to that at another time.

19 Mr. Dangerfield somewhat confirmed how busy
20 he was at his evidence at page 4352 of volume
21 18. It cannot be forgotten or overemphasized
22 that during the material times, my client was
23 the ADM. He was not the Director of
24 Prosecutions. Mr. Dangerfield confirmed that
25 Mr. Whitley was difficult to get ahold of,

1 that's at page 3860 and 61 of volume 17, and
2 Mr. Dangerfield's statement to Commission
3 Counsel, page 2 of tab 1 of Exhibit 30A.

4 He told you that he travelled a lot. Page
5 4801 of volume 20. He told you that
6 Mr. Dangerfield was free to conduct his own
7 cases and make his decisions independently. He
8 told you that although Dangerfield was to report
9 to him from a practical perspective, this
10 usually did not happen. He told you that
11 Mr. Miller was also a very senior Crown Attorney
12 and was left to work independently. And of
13 course, I point out the obvious, Mr. Miller was
14 Director of Prosecutions. And he told you that,
15 as a matter of practice, it was highly unusual
16 for him to overrule a decision of a senior Crown
17 Attorney like Mr. Dangerfield and Mr. Miller.

18 His initial involvement of the Driskell
19 case starts in November of 1990. There was a
20 memo from Mr. Lawlor to Mr. Whitley requesting
21 his attention to a direct indictment. That's at
22 tab 7 of Exhibit 30(A), in the context of
23 witness protection.

24 Mr. Whitley was involved in the approval of
25 early payments for witness protection issues.

1 The same volume, 30(A), tabs 10 and 12. And he
2 told you that that was consistent with the legal
3 requirement, the statutory legal requirement
4 that the ADM be involved in approving such
5 payments. His memo of October 21, 1991, tab 58
6 Exhibit 30(B). But it's also consistent,
7 Mr. Commissioner, that the notion that he was a
8 finance person in this context, not in charge of
9 prosecution details.

10 In this case, Mr. Dangerfield said
11 repeatedly in his evidence that he was told to
12 report to Miller on the case and that Miller
13 would be the go-between between persons for
14 witness protection issues.

15 If you turn to tab 5 of the extract,
16 Mr. Dangerfield said,

17 "We were just told that this is what was to
18 happen. I was to take my instructions from
19 Miller which I normally would take them
20 from Mr. Whitley."

21 That's at line 10. Overall, it was clear that
22 Miller was in charge of dealing with the
23 specifics of the witness protection negotiations
24 based on the wealth of documents and evidence of
25 those involved.

1 The application for witness protection for
2 Zanidean says Mr. Miller was in charge. That's
3 at tab 19 of Exhibit 30(A) at page 458. It's a
4 little bit obscure in that document, but if you
5 look at the top right-hand corner, you'll see
6 the person in charge was Bruce Miller.

7 At tab 6 of the extract that I provided to
8 you, line 13, Mr. Dangerfield's evidence.

9 "I was told by Mr. Whitley that I would
10 take my instructions from Mr. Miller and
11 Mr. Miller would be the go-between between
12 the RCMP and the government in dealing with
13 the payments and the development of this
14 Witness Protection Program. So for this
15 trial, the positions were reversed by
16 Mr. Whitley's instructions."

17 At tab 7, Mr. Dangerfield again said in his
18 evidence that Mr. Whitley had the final say
19 before the Minister was approached but the
20 day-to-day negotiations were conducted by
21 Miller. His evidence, line 12,

22 "Well, I guess Mr. Whitley had the final
23 say before the Minister was approached. I
24 suppose the day-to-day negotiations were
25 done by Mr. Miller, I don't know."

1 THE COMMISSIONER: Mr. Tapper, just slow down a
2 little bit. I noticed the reporter is having a
3 little --

4 MR. TAPPER: My apologies to the reporter.
5 Question 16,

6 "Fair enough. So your understanding was
7 Miller was doing the hands-on negotiating
8 and Whitley would have the final say?

9 A Yes."

10 Mr. Kovnats had potentially three meetings with
11 Mr. Miller and Mr. Whitley and would only
12 describe the first one, January 22, 1991.
13 That's confirmed in Mr. Whitley's evidence at
14 page 4534 in volume 19. Mr. Kovnats'
15 recollection of that meeting, extracted at tab 9
16 of the document I have provided to you, page
17 2763,

18 "I don't remember whether we discussed
19 anything about immunity. I don't think we
20 did. We were discussing the money matters
21 at the time and the house deal and his
22 protection."

23 Kovnats' notes also support the notion that
24 immunity was not discussed with Whitley.
25 Mr. Kovnats' letter of December 14, 1990, tab 11

1 of Exhibit 30(A), went to Bruce Miller. I point
2 out to you the lack of any communications or
3 letters between Mr. Whitley and Mr. Kovnats
4 directly.

5 I remind you that Tom Orr of the RCMP
6 Witness Protection Program made no suggestion
7 that Mr. Whitley was ever involved in witness
8 protection issues or negotiations. I remind you
9 that the Winnipeg Police officers Anderson and
10 Paul made no reference of Mr. Whitley being
11 involved in witness negotiation matters or
12 negotiations. I remind that you that Officer
13 Vandergraaf confirmed that Bruce Miller was the
14 point man for witness protection negotiations.
15 It's clear that all police members reported to
16 Bruce Miller.

17 Mr. Miller may have kept Mr. Whitley
18 apprised of some early issues up to the 4th of
19 March, 1991. You see references to that at tab
20 14 of Exhibit 30(A), December 28, 1990. Tab 15,
21 January 11, 1991, and tab 18, 4th of March 1991.
22 But when you look at those, they all relate to
23 financing issues, witness assistance.

24 The March 4, '91 memo is the last memo to
25 Mr. Whitley in these matters until June of 1991.

1 Mr. Whitley told you in June of 1991 he was in a
2 conference in Vancouver on domestic violence.
3 Volume 19 of the transcript at page 4566, he
4 told you that he had some personal issues at the
5 time. His twins were born on May 9, 1991. He
6 told you that in the spring of 1991, he was
7 involved in the Pollock Inquiry. I don't know
8 if you're familiar with that, but suffice it to
9 say, it was a real cause celebre in Manitoba
10 involving some police issues, a lawyer who was
11 arrested in front of his office and taken by
12 television camera to the police station, and
13 Mr. Whitley was heavily involved in that.

14 There is no evidence to suggest that he was
15 involved in any arrangements for Mr. Zanidean in
16 the spring of 1991.

17 At tab 10 of the extract, page 4558, at
18 line 12, Mr. Whitley said this,

19 "I don't recall any discussions along those
20 lines. I think I would have taken it for
21 granted that these were obvious disclosure
22 items and that Bruce would have discussed
23 this with George in the ordinary course of
24 events."

25 And I suggest to you as well the obvious because

1 of the proximity of their offices, he expected
2 Mr. Dangerfield and Mr. Lawlor to keep
3 Mr. Miller informed.

4 I share the comments of others that the
5 suggestion that Mr. Miller and Mr. Whitley
6 instructed Mr. Dangerfield not to know the
7 details of the witness protection negotiations
8 is not logical and not supported by anyone else.
9 Mr. Whitley described that at pages 4561 and 62
10 of volume 19. I point out as well, it was not
11 supported by Mr. Lawlor.

12 Mr. Whitley said in fact, it was contrary
13 to policy, ethics, common sense. It could lead
14 to the perpetration of a false representation to
15 the court.

16 If you go to tab 11, Mr. Whitley was not
17 aware of any details of the trial or the
18 evidence being put in. The retainer letter sent
19 to Kovnats came days after Zanidean testified
20 and suggested that Kovnats could be paid for
21 auditing Zanidean's testimony. That's at page
22 4546 in volume 19. And the point there is that
23 dealt again with financing.

24 Now, before I carry on with my factual
25 observations, I want to stop for a moment and

1 discuss a question of law. We're not going to
2 find jurisprudence in public inquiries and how
3 to interpret lines of authority or
4 responsibility in an Attorney General's
5 prosecution department. We have to borrow from
6 other areas of the law.

7 I provided to you an extract from the
8 Granger and Ottawa Hospital case. This is
9 Justice Cunningham's decision. It's a medical
10 malpractice case, obstetrical malpractice case,
11 and it's an unusual thing, I suggest, probably
12 for me to borrow that kind of case in this
13 context but there are strong analogies dealing
14 with what Justice Cunningham had to decide and
15 the decision that you will face in the context
16 of Mr. Whitley.

17 What was happening in Granger was you had
18 an obstetrical team that will relate to
19 interactions between attending obstetricians,
20 residents, interns and nurses. And when you go
21 to paragraph 32, under the heading "Interaction
22 Between Nurses and Physicians," the following
23 was said:

24 "Whether or not this relationship exists
25 elsewhere, more particularly in some parts

1 of the United States, it seems to me that
2 one of the hallmarks of the Canadian Health
3 System and a tertiary hospital such as the
4 Ottawa General with all of its attendant
5 teaching responsibilities, is that those
6 involved in obstetrics work as a team and
7 that the interaction between members of
8 that team is vitally important,
9 particularly in terms of reliance on one
10 another for the provision of accurate
11 information. Looking carefully at the
12 evidence of all obstetrical experts called,
13 I have little doubt that our system of
14 health care, with its obvious concerns for
15 patient care as well as its defined budget
16 considerations, could not function in any
17 other way. We simply do not have the
18 financial resources to enable every
19 professional to double-check the work of
20 other professionals. And because each
21 professional within the obstetrical team
22 has a defined role, it is essential that
23 each person's role be carried out within a
24 standard of care and training appropriate
25 to the professional involved."

1 Paragraph 33.

2 "If staff, obstetricians for example,
3 cannot rely upon staff obstetrical nurses
4 to provide accurate assessments given all
5 of the constraints under which they are
6 operating, I am satisfied our system would
7 fail.

8 And that regard I rely upon, there's some
9 case references which deal with these
10 variations.

11 It is not the responsibility of the staff
12 obstetrician assigned during a particular
13 shift, coverage of a number of patients
14 including labouring mothers to sit with the
15 mother and monitor her throughout her
16 labour and then deliver the child. We
17 simply do not have the resources nor would
18 it be necessary for this to be done. That
19 is why we presumably have well-trained and
20 competent staff nurses who have a defined
21 role within the obstetrical team. It is
22 not for the obstetrical nurses to fully
23 understand all of the subtleties that may
24 be determined on a fetal heart monitor
25 strip. But it is the responsibility of

1 that nurse to understand and report
2 problems to someone else on the obstetrical
3 team, problems such as severe persistent
4 variable decelerations."

5 Thirty-four,

6 "We cannot expect the staff doctor to
7 question the professional capabilities of
8 others on the obstetrical team. The same
9 would clearly apply to all other units
10 within a hospital of the same nature. The
11 staff obstetrician should be entitled to
12 rely upon the information being given to
13 him or her by the staff nurse on the
14 understanding that the nurse assigned by
15 the hospital to these duties has been
16 properly trained, is sufficiently
17 experienced, and knows what he or she is
18 doing at all times within the scope of his
19 or her professional responsibilities."

20 There is then a quote from Anderson and
21 Salvation Army and that quote is there. I'm not
22 going to provide it to you again.

23 Colloquially, the analogy, taking it a step
24 further, a manager does not give his best driver
25 a parcel to deliver and then instruct him on the

1 rules of the road. And then at the end of the
2 trip, ask him whether he observed those rules of
3 the road. Mr. Whitley was overseeing
4 professionals. You do not expect him to micro
5 manage. Even if you were to think about that,
6 you have to ask yourself which cases would he
7 micro manage? All of them? Only murders? Not
8 rapes? Childnappings? Traffic accidents with
9 fatalities? Mr. Whitley's job was policy and
10 the general direction of the department.

11 I'm coming back into the facts of the case.
12 His next involvement is June 21, 1991 when
13 Mr. Miller writes Kovnats about relocation costs
14 not exceeding \$20,000 for Mr. Zanidean, tab 57,
15 Exhibit 30(B), also described in the transcript
16 at 4576 of volume 19. We know that Mr. Whitley
17 took that letter to the Deputy Minister Graeme
18 Garson around June 24th which got returned to
19 Mr. Miller with approval. And I stop there to
20 remind you that that is in relation to
21 financing.

22 As I understand my learned friend
23 Mr. Code's argument, Mr. Whitley should there
24 and then have made inquiries about whether or
25 not the members of the professional team were

1 doing their job and making disclosure of that
2 fact, applying the reasoning of the Granger
3 decision that argument fails.

4 There is also the document, the folder,
5 witness protection folder which is marked B.
6 Miller and S. Whitley only, tab 59, Exhibit
7 30(B). Mr. Whitley told you, volume 19, pages
8 4559 and 4560 that that was for security reasons
9 only on a need-to-know basis. It did not
10 necessarily mean that he was privy to and
11 involved with all the information contained in
12 the file or that Dangerfield could not have seen
13 it. Again, however, it was a financing issue.

14 We then get into the post appeal period,
15 March and April of 1993. We know that
16 Mr. Miller has the two letters from Richard
17 Quinney. We know that July 7, 1992, Mr. Miller
18 sends a letter to Mr. Dangerfield, tab 63.
19 Mr. Dangerfield said he had no recollection of
20 getting it. There is no evidence whatsoever
21 that Mr. Miller was involving Mr. Whitley at all
22 during this stage. And it is clear, I submit to
23 you, that Mr. Miller was handling those matters
24 on his own.

25 In March of 1993, Mr. Whitley told you that

1 he was having health issues. On the 12th of
2 March 1993, a Friday, he ended up in bed on the
3 weekend and on Monday, went into the hospital
4 for a cardiac conversion 15th of March 1993
5 which took him off work for some three weeks.
6 That was the weekend of the media storm.
7 Although we don't have evidence specifically on
8 it, the reasonable inference of the involvement
9 of Mr. Lerner, was that Mr. Whitley simply
10 wasn't there. Mr. Lerner's interview says he
11 doesn't recall why he was involved but I submit
12 to you it was obvious.

13 On the 11th of March, Mr. Miller sent the
14 Quinney letters to Mr. Dangerfield. This time,
15 however, Mr. Dangerfield acknowledges getting
16 them.

17 On the 16th of March, Mr. Dangerfield wrote
18 a memo directly to Ron Perozzo, the then acting
19 Deputy Attorney General, without Mr. Whitley's
20 involvement. And we know that from tab 66,
21 Exhibit 30C.

22 We also know that on the 19th of
23 March 1993, there is a memo from Bruce Miller to
24 George Dangerfield dealing with the Janie Duncan
25 issue with other handwriting on it and we know

1 that that handwriting is not Stu Whitley's.

2 We know that the first involvement we see
3 of Stu Whitley being back at work is dated
4 April 8, 1993 because he writes Chief Henry, and
5 that's exhibit 35(G) at page 3.

6 And then we get to the April 13th memo.
7 And the memo says on its face, it's sent from
8 Bruce Miller to Stu Whitley. There is no
9 evidence from Mr. Dangerfield or anyone else
10 suggesting that the memo and the contents
11 supposedly attached to it were ever specifically
12 discussed with Mr. Whitley. We just have the
13 memo.

14 Mr. Dangerfield told you he never heard
15 back from Mr. Whitley. If you go to tab 12 of
16 the extractions I gave you, bottom of the page
17 at line 23,

18 "Q In any event, it was sent up to
19 Mr. Whitley on April 13th according to this
20 memo. Did you ever hear back from
21 Mr. Whitley?

22 A No.

23 Q Did you ever casually discuss the matter
24 and say by the way, Stu, what did you do
25 with that draft letter to Mr. Brodsky?

1 A No."

2 Mr. Lerner said he had no recollection of
3 seeing the memo and no discussions with
4 Mr. Whitley or Mr. Miller about it. That's in
5 his interview statement. He also says in his
6 interview statement no one ever mentioned to him
7 that Mr. Whitley was involved in these matters.

8 There are no drafts, and I'm going to be
9 harping a little bit about these drafts,
10 Mr. Commissioner. There are no drafts attached
11 to the April 13th memo as described in it. It
12 cannot be a coincidence that there are no
13 drafts. You have to ask yourself what I suggest
14 is a rhetorical question, why would Stu Whitley
15 remove and destroy the drafts but not the memo?
16 They are the only missing documents. Is it not
17 more likely simply that they were not there?

18 You know that Mr. Schille confirmed in his
19 examination by Mr. Prober when he first reviewed
20 the file, he did not see any drafts attached to
21 the memo.

22 In my respectful submission, my friend
23 Mr. Code has completely overlooked the issue of
24 the drafts. It makes no sense they were
25 destroyed. This would imply a sinister

1 motivation at a time when there was no reason
2 for this. There is no evidentiary basis for a
3 finding that they were destroyed. The greater
4 likelihood is that they didn't exist.

5 The old philosophical principle of Occam's
6 razor, the obvious solution is usually correct.
7 If they didn't exist, that, I submit, bolsters
8 the conclusion the memo was simply never sent.
9 Mr. Dangerfield had no recollection of drafting
10 it. And why would he be involved in drafting
11 memos relating to matters in which Mr. Miller
12 had all the information?

13 I also point out that not only would it
14 imply sinister motives, on Mr. Whitley's behalf,
15 to have destroyed the drafts but not the memo,
16 it would demonstrate stupidity. And surely of
17 one thing alone, Mr. Whitley did not impress as
18 stupid.

19 And when we're dealing with impressions, I
20 pause and I say this with the greatest of
21 respect to the late Bruce Miller, we know that
22 all the witnesses described him as a wonderful
23 fellow and a very ethical lawyer but no one
24 described him as being decisive or proactive.
25 We know there was a failure of duty. Whether or

1 not Mr. Miller believed the information to be
2 important, we'll never know. Whether or not he
3 dealt with it in a certain way that would be
4 admirable, we'll never know.

5 There was an appearance, I submit, of
6 casualness to the dealing with that series of
7 documents. There is an unacceptable length of
8 time that the matter languished for want of
9 attention.

10 The contents of those letters from Quinney
11 to Miller are such that it would be unlikely
12 Mr. Whitely would have forgotten about such
13 matters.

14 It is significant that he was never
15 provided with the initial letter until a month
16 or so before his evidence in this inquiry. It
17 would have been useful for him to have had it
18 when he communicated with Judge Enns or, for
19 that matter, Mr. Lockyer. It is also unlikely
20 that he would not have addressed these matters
21 as it is not consistent with his character and
22 background and what he was trying to accomplish
23 in his department.

24 And in that regard, I turn you to tab 13
25 when Mr. Code, very pointedly said to

1 Mr. Whitley, line 13,

2 "Q Is it possible, Mr. Whitley, that you
3 were in the loop and you have just
4 forgotten?

5 A No, that is absolutely not true. This
6 goes against everything I was trying to do
7 in the department, everything I was trying
8 to do. It makes no sense."

9 There is no reason for Mr. Whitley to have
10 covered any of this up. He had no personal
11 involvement, he had no personal reason. He had
12 no personal embarrassment, other than the
13 department's embarrassment. And no single
14 lawyer, my learned friend Mr. Code included,
15 made that suggestion to him.

16 What Mr. Whitley told you about was when
17 the perjury word came up, the bells rang, the
18 lights went on.

19 We know that on April 15th, 1993,
20 Mr. Miller wrote Tom Orr of the RCMP. That's
21 tab 70 of 30(C). On April 16th, Mr. Miller
22 wrote to Mr. Quinney again and got a response on
23 April 28th. Now, why are those significant?
24 The April 13th memo, at the bottom, told you
25 that the file was attached. If in fact

1 Mr. Miller was writing these letters on
2 April 15th and April 16th, is it not more likely
3 that he still had the file with him? Can you
4 say on the evidence that it was not with him?
5 Can you say on the evidence that he somehow
6 magically copied the whole file, sent copies to
7 Mr. Whitley and kept a copy? That is not what
8 was happening and that's not the evidence before
9 you.

10 Mr. Whitley told you he did not receive the
11 memo. That evidence is before you.

12 He does not recall any conversations with
13 Mr. Miller around that period of time. He told
14 you that, volume 19, page 4602. He told you
15 that Mr. Miller may have discussed it with him
16 in a general way but not in a way that attached
17 any significance to it, volume 19, page 4609.
18 And he told you he doesn't recall briefing the
19 Minister on that.

20 One of the things you're going to have to
21 decide is what, if any, conversations happened
22 that Mr. Whitley doesn't remember and Mr. Miller
23 isn't here to tell you about it? You get
24 absolutely into the world of speculation on that
25 point. And I'm going to be inviting you at the

1 end of the day not to speculate.

2 But one of the reasonable possibilities I
3 suppose is that when the word perjury wasn't
4 involved until only a month before the inquiry
5 started, what Mr. Whitley thought they were
6 talking about was a disclosure issue that didn't
7 relate to that, that related to financing and he
8 said to Mr. Miller, you take care of it.

9 Mr. Whitley's point, though challenged by
10 my friend Mr. Code, was that had he known that
11 perjury was the hot button issue, it would have
12 stood out in his memory. He would have
13 remembered that with absolute clarity. There
14 are no other memos from Mr. Miller to Mr.
15 Whitley or Dangerfield after the April 13, 1993
16 memo that raised the issue again.

17 Mr. Whitley has no recollection of an
18 internal review at the time either.

19 December 9, 1993, Mr. Whitley wrote to the
20 RCMP advising them that he passed the file on to
21 Miller who had handled the file since inception.
22 He indicates that it was Miller's file and there
23 was a note on the letter from Mr. Miller
24 indicating, "I wish to keep it, thanks," in his
25 own handwriting. That's exhibit 35(G) at page

1 19. If you recall that particular document, the
2 letter is from Whitley to the RCMP but there's
3 just a scribble at the bottom, "I wish to keep
4 it, thanks," and we have identified that as
5 Bruce Miller's handwriting.

6 We know that this issue was never brought
7 up at the senior management committee where
8 others were present such as Michael Watson.
9 Mr. Whitley said it should have been brought up,
10 but it was not.

11 All of these things suggest that these
12 issues did not get past the Director of
13 Prosecutions to the ADM.

14 Mr. Whitley did agree that the Ministry had
15 dropped the ball in this particular case. But
16 the Ministry dropping the ball does not mean
17 that he personally did.

18 He gave you evidence about his attitude
19 towards disclosure and disclosure of perjury.
20 He told you it went against his views of Crown
21 culture and what he was trying to do in the
22 department.

23 There is some evidence he had a minimal
24 involvement back in April of 1993 when the John
25 Gumieny issue resurfaced in the summer of 1993

1 when he threatened to go to the media if he were
2 not paid to relocate. There's a July 13, 1993
3 memo from Mr. Miller to Mr. Whitley concerning
4 that issue, but it does not reference Zanidean
5 and it does not reference any of the issues
6 raised by Mr. Quinney. So there is absolutely
7 nothing whatever to do with that.

8 And interestingly, there is the February 7,
9 1995 memo from Mr. Whitley to Mr. McFarlane
10 which is part of the attachments which I gave
11 you and was part of the Attorney General's
12 handouts. And when you look at that. It's a
13 memo to Mr. McFarlane from Mr. Whitely dated
14 February 7, 1995, paragraph 1,

15 "How could such a delay/confusion arise?
16 All matters arising in the Driskell case
17 were handled by Mr. Miller."

18 You can see that paragraph.

19 "The letter which arrived in my absence
20 addressed to me was forwarded to Mr. Miller
21 as Acting Assistant Deputy Attorney General
22 and as he had conduct of the case. As you
23 can see, all subsequent correspondence was
24 between the RCMP and Mr. Miller. This was
25 never subsequently brought to SMC or me."

1 And this letter is dated February 1995, not
2 2006, not some recent fabrication by Mr. Whitely
3 but February 1995.

4 We know that he resigned in February of
5 1995 and left the department in April of 1995.
6 We know that when Mr. Whitley spoke to Judge
7 Enns, he did not have the initial letter from
8 Quinney raising the issue of perjury. We also
9 know that he was the only party to release his
10 response to Judge Enns to Mr. Lockyer.

11 Now, how do we look at this series of
12 facts? It is one thing to acknowledge vicarious
13 responsibility, the ADM buck stops on his desk.
14 It is another to say that it attracts personal
15 liability.

16 This Commission is charged with the mandate
17 of assessing personal responsibility. The buck
18 stops here is a different concept than whether
19 or not there is personal responsibility or
20 liability attaching to Mr. Whitley. Before you
21 stain his reputation and career, you must have
22 before you a basis, an evidentiary and
23 justiciable basis for doing such. And I submit
24 there is not one here.

25 My friend, Mr. Code, complains of a failure

1 to supervise. There are different types of
2 supervision. One would relate to policy
3 direction, implementation of policy and
4 enforcement. To direct or describe it otherwise
5 would mean that a DPP or ADM would have a direct
6 hands-on involvement in all cases. This would
7 be so regardless of whether it was a murder or
8 traffic violation, whether senior counsel were
9 handling it or an articling student, whether
10 there was adverse publicity attached or none
11 whatever. It would require the DPP or ADM to
12 possess a microprocessor of unprecedented
13 magnitude between his ears, as well as the
14 ability to clone himself a hundred times a day.

15 Another form of supervision would be
16 specific supervision wherein an activity
17 required close supervision being performed by a
18 specific person. It might be required due to
19 specific instruction requirements, participant
20 incapability or peculiar participant behaviour.
21 But we don't have any evidence of that here.

22 I submit that my friend's complaint
23 confuses these models. An ADM is not required
24 to inject specific supervision into the conduct
25 of his two most senior prosecutors in the

1 province. His task is to create policies for
2 them to follow. That is what Mr. Whitley did
3 and, I submit, admirably in the sense that he
4 was ahead of the Stinchcombe curve.

5 The whole point that I make with reference
6 to the Granger decision is that there has to be
7 reliance upon professionals in a team,
8 especially at this level of seniority. Whitley
9 would have been frozen in his job and never able
10 to move forward in his position or the
11 administration of his department. No
12 pre-Stinchcombe edicts would have been made if
13 his time were spent exhaustively performing
14 post-mortems on every case of substance being
15 handled by senior prosecutors.

16 To be sure, there were failures in this
17 matter both personal and systemic. But the
18 point is and the point I think forgotten by my
19 friend, is that you don't throw a can of paint
20 against the wall and see where the spray takes
21 us. You have to be able to show that it
22 attaches to the individual who is the target of
23 it.

24 And now the next part of my submission, I
25 acknowledge I have to descend into an area that

1 I consider unfortunate and perhaps even unhappy.
2 I am going to deal with my friend Mr. Code's
3 oral submissions.

4 I agree with Mr. Abra, having been involved
5 in commissions myself. The Commission Counsel
6 should not be adversarial. But leaving that
7 aside, more serious events occurred yesterday.

8 In the course of dealing with major errors,
9 omissions and perhaps ethical breaches by any of
10 the various police, Mr. Dangerfield, Mr. Lawlor
11 and Mr. Miller, and I remind that he dealt with
12 evidence very critically of Mr. Dangerfield
13 sitting quietly by as supposedly perjured
14 evidence was being given. And yet he appeared
15 to reserve his one resort to adjectives and
16 hyperbole, the use of the word egregious when
17 discussing Mr. Whitley. In my submission, the
18 only thing that was egregious was Mr. Code's
19 submission.

20 I believe I have shown you, through the
21 documents and the facts and the transcripts, the
22 error of my friend's principle objective
23 arguments. But I now have to deal with his
24 subjective argument. He said there was a
25 difference between trial, where there's a heat

1 of the battle, and behaviour in the calm seas
2 thereafter, which he said was egregious. He
3 said in his submission describing, amongst
4 others, my client Mr. Whitley, there was a
5 monumental departmental failure. It is entirely
6 logical that the matter would get bumped on to
7 Whitley's desk. It was his job to brief as
8 Minister. It was simply not credible to believe
9 Whitley would be kept in the dark, it is not
10 rational to believe that ongoing briefings
11 weren't brought to Whitley's attention.

12 As best I could, Mr. Commissioner, those
13 are verbatim quotes from my friend's submission.
14 He is specifically alleging that when
15 Mr. Whitley swore under oath that he did not
16 know about the Quinney materials or the perjury
17 issue, he gave false evidence.

18 Now I ask you to look at Mr. Code's last
19 question to Mr. Whitley at 4626 of volume 19.

20 "Q You have forgotten about a lot in this
21 case, have you not, Mr. Whitley?

22 A Yes, I have."

23 I know, Mr. Commissioner, that you spent many
24 years on the bench. Judges measure credibility
25 typically in one of three manners: accuracy or a

1 failure to draw the proper inference, a failure
2 of recollection or a failure of honesty.

3 My friend, Mr. Code, clearly suggested to
4 Mr. Whitley that he suffered from a failure of
5 recollection. That's the question which I read
6 to you. He argued yesterday that there was a
7 failure of honesty.

8 He ignored entirely the complete
9 unchallenged and entirely corroborated thrust of
10 Mr. Whitley's career in Manitoba, his mandate,
11 his legacy of disclosure even before
12 Stinchcombe. He accused my client of attempting
13 to deceive the Commission of, in essence, giving
14 false or perjured evidence without so much as
15 even putting the question to him. A grotesque
16 violation of Browne v. Dunn, the recent decision
17 of 1893. But not only a violation of Browne v.
18 Dunn, but of common courtesy and professional
19 obligations. And that wasn't his only Browne v.
20 Dunn violation because in his written
21 submission, he said Mr. Whitley had to have
22 received the Quinney materials because when he
23 never put that to him -- let me rephrase that.
24 He said Mr. Whitley had to have received the
25 Quinney materials but he never put that to him

1 directly in his evidence.

2 I invite you to read 4623 through 4626
3 yourself to get a flavour of the questions that
4 my friend, Mr. Code, put to Mr. Whitley. But
5 the reality is, though he came close, he never
6 pulled the trigger and asked the question.

7 Browne v. Dunn is not a rule of law
8 restricted to courts of law, it is a rule of
9 common sense. It applies as fully at a cocktail
10 party, if one were choosing to besmirch
11 someone's character at the party. It is about
12 fairness. Fairness is a core value in any
13 judicial or quasi judicial proceeding. It is
14 surely axiomatic that it applies at a public
15 inquiry where someone's professional reputation
16 is called into question on a national scale.
17 And one cannot lose sight of the fact that Stu
18 Whitley is a significant player in the
19 administration of justice in Canada. I do not
20 ask for deference, I do, however, ask for the
21 simple common courtesy of providing him the
22 opportunity to respond before calling him
23 deceptive.

24 My friend raised his voice in argument only
25 when speaking about my client. Perhaps in a

1 vain effort to punctuate an otherwise weak
2 position when he had not done that in discussing
3 any other witness. And you have to ask yourself
4 why.

5 You cannot, I submit, find that Mr. Whitley
6 deceived you on the basis of Mr. Code's
7 suspicions, even if delivered in a loud tone.
8 There has to be an evidentiary basis. There has
9 to be a justiciable basis. There is not one
10 here. You have to ask yourself, is the evidence
11 clear and convincing. He said, my friend
12 Mr. Code, rely on logic. So do I. Where is any
13 evidence the April 13th memo went anywhere?
14 Where are the drafts? Why are they missing from
15 everyone's files? Why would Mr. Whitley have
16 destroyed the drafts but not the memo, thinking
17 he might be called to answer for this 13 years
18 later in a public inquiry? Miller's memo said
19 on its face, "file attached." Yet he's writing
20 on it file two and three days later. Are we to
21 assume he copied that entire file? My friend,
22 Mr. Code, says resort to logic. I say so do I,
23 resort to common sense.

24 He asks you to find on the slimmest of
25 inferences the opposite to that which was

1 emphatically denied by Mr. Whitley.
2 Occam's razor, the obvious is usually right.
3 Character is a life rooted in enduring values.
4 All of the ethical and policy and administrative
5 measures brought in by Stu Whitley, not merely
6 glossed over by my friend Mr. Code but ignored
7 entirely, speak to the measure of Stu Whitley.
8 Character sometimes means choosing what is
9 difficult rather than what is convenient, just
10 as my client wrote a reply to Mr. Lockyer and
11 was the only one to do such. Just as he
12 privately spoke to Mr. Driskell and was the only
13 one to do such.

14 I cannot leave this argument without
15 commenting upon the written submissions of
16 Mr. Lockyer on the systemic issues. It is clear
17 that not only he had no substantial criticism of
18 Mr. Whitley, but additionally virtually held up
19 his observations as a model.

20 Paragraph 17, when discussing independent
21 review as a prosecution conduct. Paragraph 36,
22 in discussing the practice of withholding a deal
23 with a witness until after the evidence is
24 given.

25 I am suggesting to you the Commission ought

1 not to be critical of Mr. Whitley when
2 Mr. Driskell's own lawyer was not.

3 In my friend Mr. Lockyer's oral
4 submissions, he said Mr. Whitley put it best at
5 page 4570 of his evidence, and I read it to you
6 now.

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

23 Was that, Mr. Commissioner, the position of
24 someone covering up a disclosure that ought to
25 have been provided? How do you proceed from

1 that to the clear and convincing proposition
2 that he lied, that he was a hypocrite when he
3 said that? You cannot. You cannot take my
4 friend, Mr. Code's, can of paint and throw it at
5 the wall and see if some stains Mr. Whitley.
6 There are, in this matter, legitimate targets.
7 I'm asking you to restrict the ambit of your
8 criticisms to those. Thank you.

9 THE COMMISSIONER: I just wanted to ask you one
10 question. It was something you referred to at
11 the outset of your comments about the structure.
12 I am clear, am I not, in understanding that at
13 the time of these events, there was one
14 Assistant Deputy Minister for criminal law?

15 MR. TAPPER: Correct.

16 THE COMMISSIONER: That's my only question,
17 thank you. We will adjourn until tomorrow
18 morning unless someone wanted to start this
19 afternoon? I'm not going to give you the
20 choice.

21 THE CLERK: All rise. This Commission of
22 Inquiry stands adjourned until 9:30 tomorrow
23 morning.

24 (Proceedings adjourned at 3:59 p.m.)

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COURT REPORTER'S CERTIFICATE

DEBRA KOT and LISA REID, duly appointed Official
Examiners in the Province of Manitoba, do hereby
certify the foregoing pages are a true and
correct transcript of our Stenotype notes as
taken by us at the time and place hereinbefore
stated.

Debra Kot

COURT REPORTER

Lisa Reid

COURT REPORTER

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