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

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The Honourable Patrick LeSage, Q.C. Commissioner

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INQUIRY PROCEEDINGS

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MONDAY, SEPTEMBER 18, 2006
Upon commencing at 9:00 a.m.
THE COMMISSIONER: Good morning, everyone, and welcome to the roundtable discussion. This will not be a formal hearing as the other days have been. It will be an informal discussion period where we will be discussing the issue in the abstract, without specific reference to the facts in this case, but in a similar factual context situation, as well as other context situations. So, Mr. Code, if you would perhaps be the lead here.
MR. CODE: Thank you, Mr. Commissioner. The subject of today's proceedings or this morning's proceedings is paragraph 1(f) of the Order-In-Council, which is set out at the beginning of Professor Roach's paper:

> "To consider whether and in what way a determination or declaration of wrongful conviction can be made in cases where
> - the Minister of Justice for Canada directs a new trial under 696.3(a)(i), and
> - after a review of the evidence, Crown Counsel directs a stay of proceedings under section 579."

So it's the policy question that arises out of the intersection of 696 order of a new trial and a Crown stay, and the appropriateness of that remedy and whether there is some procedure for the declaration of a wrongful conviction that we asked Professor Roach to address. And he has produced an extremely thorough, lengthy, carefully thought-out paper. And Professor Roach, the commission owes you our thanks and gratitude for working under very tight timelines in what I know is an overwhelmingly busy schedule of yours. So we greatly appreciate your working it into your work over the summer and producing it in a timely way. So that's the main document everybody should have.

There is a second document that we asked Professor Roach to prepare and that is an executive summary, the short form of his paper. And then, thirdly, and what I think is the document I'll certainly be working off of, is a list of seven questions that we propose to work through in the course of the morning with the panel.

And procedurally what I propose to do is introduce each of the questions. I'll keep an

eye on the clock to try to make sure that we get through all seven of them by 12:30, 12:45 this morning. So at some point I am going to cut you off, but we will -- on each of the seven questions one member of the panel has the lead.

I will have Professor Roach introduce each of the seven questions, and then I'll ask the lead commentator to comment on it. There will be some discussion amongst the members of the panel. And then the parties can intervene after the panel has had an opportunity to speak to each of the issues.

Now, the first issue we are optimistic that it can be dealt with very briefly because it's the one issue under the seven that is a pure question of law. We don't believe it's controversial. It simply provides the legal foundation for the policy discussion that will ensue on questions 2 through 7.

So the first question: What is the effect of the prosecutorial stay under section 579 of the Criminal Code? What is the effect of the deeming that no proceedings have been commenced under 579(2)? Do you agree in a case in which a prosecutorial stay has been entered and a year

has passed that the only way of re-opening the case would be to lay new charges?

And if I could just synthesize or distill what the two points of law are. Number 1, are we all in agreement that the legal effect of the stay's key attribute in law is that it does not give rise to res judicata, which would allow protections for the accused? In other words, the proceedings can be recommenced at any time?

And, secondly, that the only effect of the one-year limitation period in 579(2) is it means the Crown has to start fresh with the laying of a fresh information or the preferring of a direct indictment. That being the only effect of the one-year limitation period is to allow the Crown to recommence where they left off when they entered the stay, if they do so within the one year time period. So, for example, if you already have a committal for trial and the case is proceeding in the Superior Court after a committal, when the stay is entered, you can resume it at that point. You don't have to go through a preliminary inquiry a second time, if you lift the stay within the one-year time period. Otherwise, post the one-year time

period, you have to lay a fresh information or a direct indictment.

So, Professor Roach, if you could briefly speak to that. And if there is nothing controversial about the state of the law on that first point, we will then proceed to the major policy issues.

MR. ROACH: Thank you, Mr. Code. Yes, I agree with those propositions of law that a prosecutorial stay, under section 579 of the Criminal Code, simply suspends but does not terminate or resolve proceedings. So in layperson's language, it simply puts the charge on hold. And my understanding of the law is the accused can be re-charged at any time.

Now, subsection 2, 579(2) which was added to the Criminal Code in 1972, allows the prosecutor, within a year of the entry of the stay, which can be done simply by instructing the clerk of the court, the Attorney General or counsel instructed by the Attorney General, asks the clerk to stay the proceedings. Under section 579(2), within a year the proceedings can be recommenced on the same indictment or the same information. So the indictment, the

committal can simply be revived within the year. It is kind of a shortcut. After the year, my understanding is 579(2) deems that the proceedings have never been commenced, but that this does not provide the accused any protection against double jeopardy, so that fresh proceedings, a fresh indictment, could be commenced.

And in my report I talk about at least one case that I found from Newfoundland where there was a prosecutorial stay and then three years later proceedings, very serious proceedings, were commenced on the same charge. So from the accused's perspective, it does not produce protection against recommencement.

The last thing that I would say about this is in my report I speak about the R. v. Hinse case which went to the Supreme Court twice, not involving a prosecutorial stay but kind of a cousin, a judicial stay. And I think that that case had some significance in that the Supreme Court recognized that an acquittal, as opposed to a stay, which kind of suspends or puts proceedings in limbo, was an appropriate remedy in a case where the evidence could not allow a

reasonable jury to find Mr. Hinse guilty beyond a reasonable doubt. And the Supreme Court in that case set aside a judicial stay and substituted it with an acquittal.

So the difference between a stay and an acquittal boiled down is a stay suspends proceedings, does not terminate proceedings; whereas, an acquittal terminates proceedings and protects the accused from further charges in relation to the same matter.

MR. CODE: Do any of the members of the panel wish to speak to that issue or is there any disagreement about that outline of the basic legal framework?

MR. QUIGLEY: I will just offer a brief comment, first to correct an error I have in my book in this respect. And, secondly, to say that it appears to be a very rare occurrence that a charge is relayed outside the year. And that points to me towards the need to limit prosecutorial discretion in some fashion, to have some mechanism to turn a stay, in fact, into an acquittal after a year has elapsed. Perhaps with the Crown having the ability to apply and demonstrate that there is something

fruitful in the ongoing investigation or some other reason to reinstitute the proceedings. Because, it seems to me, to have it hanging over the person is unfair. And as Kent has just shown the Supreme Court of Canada has acknowledged that a stay is not equivalent to an acquittal in terms of stigma and the effect of the public mind of the accusation against the accused.

MR. CODE: I think we're moving into the policy arena with those comments, Professor Quigley, so I'll move to the second question. And this is the overt policy question that Professor Quigley has just raised with his comments.

What is your understanding of the significance of an order of a new trial by the Minister of Justice under 696.3(a)(i) of the Criminal Code? Do you agree that it creates a reasonable expectation that the successful applicant will receive a new trial or a verdict of acquittal? Do you agree that the entry of a stay leaves some stigma in such a case?

So to again try to distill the policy question we are trying to get at there, I think there are two aspects to it. First of all,

the -- does the Minister's 696 order have the legal effect, initially, of setting aside the conviction or is that an exclusively judicial function that the conviction, having been entered by the judicial branch, does the judiciary have to pass upon the case or does the Minister's order potentially put an end to the judicial function? In other words, have we got a division of powers problem here with an executive order directing the matter going back to the courts and the entry of a stay preventing the judiciary from getting at the case again once it's gone back to the courts?

And, secondly, on a more practical level, regardless of the Minister's order, has the effect of restoring the presumption of innocence in law by actually setting aside the conviction, is the public and the individual accused, from a practical point of view, entitled to some adjudication on the case from the judicial branch? In other words, is there a need for a verdict on the merits in some fashion from the judiciary to remove the taint or the stigma left by the conviction that the Minister has now opined about?

So, Kent, if you could introduce that second topic, and I'll then call on Kerry Scullion. I didn't introduce the panel at the outset because, as I said, as we go through the questions, each one of you is going to take the lead on it. And Mr. Scullion, of course, is the well-known head of the 696 Review Unit in Ottawa. And he is, of course, the best equipped person in the country to speak to what is the effect of the 696 order and what expectations does it create because he is the one who creates those expectations.

MR. SCULLION: Thank you, Mr. Code.

MR. ROACH: Well, first of all, I think it's important to provide a little context about the 696 process, formerly called the 690 process. This is an extraordinary process that is available only to people who have exhausted all of the ordinary appeals. And it will generally require the person to produce new evidence or new considerations that were not before the courts that have found this person guilty. So I think it's important to start on the understanding that this is an extraordinary remedy, not frequently granted, not frequently

asked for. And I think most people would agree probably not easily granted. A lot of work goes into any 696 application.

Now, the statutory criteria for the Minister, either ordering a new trial or referring the matter for a new appeal to the Court of Appeal, is that the Minister has concluded that in a miscarriage of justice likely occurred. And so this is the threshold that any 696 applicant has to meet.

On the issue of the significance of the Minister of Justice, this is a Federal Attorney General's remedy, the significance of an order, in my paper at page 7, I've quoted from the Minister of Justice's most recent annual report. And there I think it's set out better than I could, where in that annual report it's explained:

> "The Minister's decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system where the

relevant legal issues are determined by the courts according to law. The issue of guilt, therefore, is determined by the court, not the Minister."

And speaking as a criminal and constitutional professor, it seems to me that behind that statement is a small "c" constitutional principle resolving around the separation of powers. And that is that convictions are something that is done by a judicial act. The issue of guilt or innocence and convictions is within the inherent domain of the judiciary. And I take it for that reason that the minister, him or herself, cannot simply nullify or vacate a judicial order.

Now, having said that, when the Minister of Justice orders a new trial then, obviously, that has some practical effect on the conviction. It means that if the person is to be subjected to a new trial that the prosecutor has to prove guilt beyond a reasonable doubt all over again. Or if the Minister orders a new appeal, then the burden is on the accused and the accused has another appeal. But it seems to me that in our system, and there could perhaps be other systems

perhaps better, but in our system 696, a successful 696 application puts it back into the judicial system.

And that leads to the second question that Mr. Code asked me, and that is does an order of a new trial under section 696 create a reasonable expectation for the successful applicant that he or she will have a day in court, another day in court? And my view is that it does create a reasonable expectation. The 696 applicant has gone through many hurdles and he or she has won. And it seems to me that that creates a reasonable expectation that they will be back before a judge who will reconsider their conviction. And here I would cite in support, and this is at page 8 of my report, and again it's material that I've simply taken from the Department of Justice's own material that says that if, on an application for ministerial review, if the minister is:

> "...satisfied by the information contained in the application that there is a reasonable basis to conclude that a miscarriage of justice likely occurred..."

a very high standard,

"...the Minister has the power to grant you a remedy (i.e., a new trial or hearing or a new appeal proceeding)."

There's nothing in those materials that says that that new remedy may be precluded by the entry of a stay.

Now, I recognize, as somewhat familiar with constitutional law, that there could be arguments that, well, this is all the Minister, the Federal Minister has to do. In the vast majority of criminal cases, it will be the Provincial Attorney General that then decides and may decide in a case to enter a stay. And I recognize that there is that division of responsibility between the Federal and the Provincial government.

But I think, from the perspective of the successful 696 applicant, who has won, after all, who has persuaded the Minister that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in his or her case, it is my view that there is a reasonable expectation that they will have another day in court.

MR. SCULLION: I guess this is where I come in.

First of all, we at the Criminal Conviction Review Group view the 696.1 process as the manner in which a case that is out of the system is put back in the system once the Minister makes his conclusions as to whether there is a reasonable likelihood that a miscarriage of justice took place. We don't have any strong views one way or the other on what happens after the process. After the Minister puts back the case into the courts, whether the Crown elects to proceed, whether they elect to stay, whether they elect to call new evidence. That's not a process that we're engaged in. We are not involved in that process, therefore, it doesn't form any part of our recommendations or our advice to the Minister. Does it create that expectation? In our view, it does not. As I said, it's simply the method by which a case that is out of the system is put back in the system.

And, again, as to whether the Crown will elect to proceed, that is not within the jurisdiction of the Minister. The Minister does not have that call. He doesn't -- he or she does not have that jurisdiction, does not have

the legislative authority to dictate to an AG what you do with that case once it's there. Perhaps the wording of the policy that was quoted by Professor Roach needs some work, maybe that's part of the problem here. But in a sense that, I mean, I don't think there is any more expectation when someone is charged with an offence and proceeds before a court and the court had the charges withdrawn, I am not so sure that there is a major difference just because the Minister has sent something back to the courts. Again, it's just the process by which a case that is out of the system is put back in the system.

And the significance of a new trial, I don't think there is anything more significant than if the Minister ordered an appeal under the provisions that he has. Obviously, the burdens are different. It is more advantageous to an applicant for an order for a new trial. But I don't think there is any more significance to the new trial, apart from that distinction, than there is for an order for an appeal. It's the same process. And we have referred cases back to the Court of Appeal where the AG, at the

appeal level, has decided to grant the appeal. So there is still that problem, whether there is an order for a new trial or an order for an appeal, the AG is still in a position, at that point, to determine whether they are going to hear an appeal, or they agree with the appeal, and the matter is referred back to the courts.

And we do take the position, as well, in the ministry that when the Minister orders a new trial, that vacates the conviction. I don't know how you can have a conviction at one time and an order for a new trial at another. I think that's just legally impossible. So it has to have that effect. Whether it says that anywhere or not, obviously it doesn't, but it has to have that effect. So that would be the policy comments I would make.

MR. CODE: So on the small "c" constitutional question that Professor Roach raised, your position would be, although it's the judicial branch that has entered the conviction, the executive branch can effectively set aside that conviction and restore the presumption of innocence?

MR. SCULLION: That's our position.

MR. CODE: By the order of a new trial?
MR. SCULLION: Yes. And there are other provisions in the code for that as well. A pardon, a person's conviction can be vacated by a pardon under section 748, 749 which is by the Governor In Council. There is no judicial determination, if an applicant makes an application for a pardon and then the veteran counsel grants the pardon, it is the same, it's the executive, again, has vacated the conviction, so there are other areas as well.
MR. CODE: And so if you are correct on the legal point, then, that the Minister's order vacates the conviction effectively and restores the presumption of innocence on the taint, stigma, practical issue, your position would be then?
MR. SCULLION: Well, I suppose there is always that legal limbo, if the Crown decides not to proceed. You know, we have never addressed our minds to that or, as I say, it is not a part of our process that that then creates -- if they call no evidence, if they withdrew the charges, does that change the perception? Apart from the fact that, you know, there becomes ultra factio

or res judicata, there is that significance. But as far as the stigma, I think anything short of a declaration of innocence by someone, there is always going to be that stigma. So I think that gets into some of the other questions that you have dealt with that later there. But I am not so sure that the stay, withdrawal, calling no evidence changes anything regarding the stigma or legal limbo, if you will, that process, I'm not so sure that there is anything that changes that.

MR. CODE: So the only thing that can completely remove the stigma would be a declaration of innocence of some kind?

MR. SCULLION: Well, that's my assumption, you know, based on the conversations and based on the comments that other people have made that nothing short of that is going to do. I mean, we have applications into the Minister now where there is a request that the person be declared factually innocent, actually innocent, or however you want to frame that. Because there is, obviously, a concern about whether it is a referral back for a new trial or a referral back for an appeal, that you will still have that

cloud, so --
MR. CODE: Anybody else at the panel wants to pick it up at this point, Justice Marshall?
JUSTICE MARSHALL: I would like to make a comment. But before I do, I would say to my colleagues on the panel what I said to them this morning. I come from a place where I was blissfully back half an hour ahead of Canada. And I am blissfully basking in it this morning. And as a result, I got at the meeting a half an hour late. So I had not the purpose of this possibility of an exchange.

And I don't want to be rude or anything, but perhaps I should have, if I had been there earlier, but I really wanted to make a comment, if I may, with due respect, on the statement that it does not create any expectation. And, again, I say with due respect, on the talking and the regarding of this as a process, which it is, but in all of these cases it is more than a process. There's a human life involved who the Minister of Justice, having looked over the evidence, has determined that there is a chance, a reasonable chance, of a miscarriage of justice. And I think that that is something

that, you know, we can't take -- go in to dismiss it by the fact that it is kicked back into a legal process.

There has been an objective decision made. It's very unusual that such an order should be made. It is not made every day. And the Minister has decreed or has ordered that there be a new trial. Now, a new trial is a new trial. It is not a stay. And with due respect, it seems to me, when a prosecutor gets in court and responds to that order and moves for a stay, he is really, he or she, is really negating that order. That order calls for a new trial.

And, you know, there's nothing -- you know, there is no scale to measure the depths of human tragedies. But surely, in our society -- for the person concerned primarily and his or her family. And in our society, there is no greater tragedy than somebody who may have been wrongfully convicted. And I think that if this order goes forth, that it should be, and we can't -- and I don't mean to be pejorative when I say this, because I lived myself for many years before I slipped into blissful retirement, on legal processes. And they are very important

and I don't denigrate them. But I just say that this is not a process. There is an expectation. There is an expectation for the person who obtained the order, certainly, but there should also be an explanation of society itself.

And I don't dispute the fact of the effect of the stay, but if it -- if this problem of wrongful convictions is so serious that one should look at the law and see if the law is operating properly, I do not believe that it is appropriate, in a situation like that, for a prosecutor to go in and counteract the Minister of Justice's determination. And neither do I believe that, you know, the matter, as I say, is so serious that if there has been a determination, it should be in court.

MR. CODE: Geoff, could I ask you to respond from the perspective of a senior prosecution official who has to make these kinds of decisions?

MR. GAUL: Thank you, Mr. Code and Mr. Commissioner. I come from a jurisdiction where the prosecution service is a pre-charge jurisdiction. Therefore, charges do not precede to court unless the Crown has vetted them. And

that we're satisfied that there is a substantial likelihood of conviction and that the public interest requires the prosecution. And you don't get the second part that have test unless you meet the first one.

With respect to due respect to the comments just made, frankly, I disagree. As my colleague, Mr. Scullion, said, the Federal Minister cannot direct Provincials Attorneys General to take the matter to court. An order is made to return the matter back to the judicial system. But as gatekeepers of that judicial system, Crown Counsel have to be the ones who decide whether a matter returns back to court.

I would also disagree with the categorization, and perhaps I'm backing up to the first question that was raised and discussed by Professor Roach, the categorization of the stay of proceedings, the stay of proceedings is much more than simply a suspension. The stay of proceedings is much more than putting a charge on hold. In fact, I disagree with that characterization. A stay of proceedings is a termination of the proceedings, full stop.

After one year, those charges are deemed to have never have been commenced. An accused person who charges are stayed against it's as if the charges were never laid and the jeopardy that that person was face must come to an end.

Which dovetails into my second comments, Mr. Commissioner, and that's with respect to this alleged stigma. If a prosecution has come to an end, if an accused is deemed never to have been charged, what better position is there than that the person was not charged?

I indicate that I should have prefaced my remarks that in British Columbia, we are currently -- we have a standing committee on policy and procedures within the prosecution service. We are currently reviewing our practice with respect to stays of proceedings and withdrawals in the light of the Lamer recommendations. And, naturally, we will anxiously await the results of this inquiry. So I couch my comments in that term, that we are currently reviewing our practice. We are, generally speaking, a stay of proceedings jurisdiction where we don't proceed with withdrawals that often.

But on the stigma question, Mr. Commissioner, the stigma, in my perception, in British Columbia's perception, is a transient one. There might be cases of a significant major high-profile case where it lasts longer. But, again, coming from British Columbia, where the Crown prosecution service, under the Crown Counsel Act, a statutory act creating our branch and creating or prosecution service, we have the obligation to liaise with the media and liaise with the public. We have an active media relations program where we explain to the media and explain to the public what we are doing. That is a statutory obligation on our part and we have a designated Crown Counsel that does that. Therefore, I would say that I don't agree that the accused is left in a legal or public limbo. I don't agree with that at all. The stay of proceedings is an end of the proceedings. That person is deemed not to have been charged once that period has come to a close.

It is more than just a trifling concept, the presumption of innocence. The person is presumed innocent. He is back to the state

where he was or she was at the outset. And, therefore, with respect, due respect to Former Justice Marshall, I would say it still the role of Crown Counsel to professionally and objectively assess the case to determine whether it should go forward, given that the Federal Attorney General cannot direct, should not direct, a Provincial Attorneys General to take a case to court.

MR. CODE: Professor MacFarlane?

MR. MacFARLANE: Thank you, Mr. Code. I have three points, and I will make them briefly. The first is with respect to the effect of a stay of proceedings. I disagree with the notion that it's simply a suspension. It is much more than that. At least three Courts of Appeal, if not four Courts of Appeal, have used this phrase, and I think it's the correct one, that:

> "A stay means that there is no longer a contest between the individual and the state. The prosecution has come to an end."

And that, I think, is the proper characterization of a stay of proceedings.

Secondly, with respect to the notion of a

reasonable expectation that the matter will be reconsidered, I'm sort of in between comments that have already been made. I do like Professor Roach's characterization in his paper very much. And I think it's right on that:

> "The Minister of Justice has ordered, under section 696.3 creates a legitimate and reasonable expectation that a successful applicant's conviction will be reconsidered by the courts because there is a reasonable basis to conclude that a miscarriage of justice likely occurred."

With the emphasis being on "will be reconsidered by the courts". When it's returned to the courts, everybody has to discharge their normal roles. The defence discharges their normal roles, trial judge does the same thing, as does Crown Counsel. One of the roles of Crown Counsel is to assess the case. And that could lead immediately to a stay of proceedings or it could lead to another approach to the case, the matter could proceed to trial. But one of the responsibilities of Crown Counsel is to assess the case. Where I disagree is this, it could lead immediately to a stay of

proceedings. But I do believe that at some point there has to be a reconsideration by the courts, and that could lead Crown Counsel to take the charges back to the courts before the one-year period is up for a reconsideration by the courts. So the point is the reconsideration is expected, but the timing of that is quite another matter.

The final point is with respect to the notion of stigma. And I would simply make this observation, and I think we have to be -- there is a note of caution here when it comes to stigma. Stigma is a very kind of a loose concept. It may or may not arise in an individual case. In Manitoba, which is a stay -- I will call it a stay jurisdiction, the objective of most defence counsel, at the trial level anyway, is to seek a stay. That's a normal common practice. There is no stigma that attaches to a stay of proceedings in Manitoba at the trial level. That's the objective.

I think after a 696 order has been made, the picture does change slightly. And the stigma may or may not arise based on comments about the case. What is the media saying?

What's the Attorney General saying? What's the Crown saying? What's the Mayor saying?

And I would point simply to the case of Mr. Sophonow where he was -- it wasn't a stay situation. He was acquitted by the courts. He was actually acquitted at the end of the day. But the stigma that attached to him is noted by Commissioner Corey as being horrendous, because of the official comments made by a number of people, stigma did arise and it attached to someone who had actually been acquitted. So my point on stigma is that it depends very much on individual cases and what is said about that case. There is no general rule that arises here that stigma does attach to a stay or it doesn't.

MR. CODE: So if I understand you, Bruce, your position is that a stay may be necessary as a temporary measure, as long as at some point a 696 case is brought back before the courts, which is the -- I think when we come to question 5, we're going to reach that issue. Have I understood you correctly on that?

MR. MacFARLANE: Yes, that's correct. I will be dealing with that point directly and specifically when we get to that question. But

I do believe that within that one-year period there has to be a reconsideration by the courts.
MR. CODE: So that the stay may be a useful and important temporary measure if there is re-investigation or reconsideration going on, as long as it's on the understanding that at some point it comes back to the court?
MR. MacFARLANE: That's correct.
MR. CODE: Any further comments from the panel? Professor Quigley?
MR. QUIGLEY: I think that there is a reasonable expectation of a re-hearing. The point of a section 696 application is a little bit different from the point of the trial and the appeal process. It's the person seeking exoneration for that charge, as opposed to the state seeking a conviction at the earlier stage or challenging convictions at the appeal stage. So I think perceptually they are a little bit different, albeit obviously connected.
Although the stigma, I think, points in a direction, as a matter of policy, saying the Crown should not be able to stay in these instances or at least that there should be restrictions or a process by which that's

determined.
THE COMMISSIONER: Mr. Quigley, I'm a little hard of hearing.
MR. QUIGLEY: Okay. I will try to speak up.
THE COMMISSIONER: Thank you.
MR. QUIGLEY: About a year ago in this city, there was a conference on wrongful convictions. And psychologists were speaking and indicating that the psychological effects of a miscarriage of justice or wrongful conviction are very devastating for a person. And so it seems to me a person who has gone through all of the hoops to persuade the Minister of Justice to order a new trial is entitled to a day in court. And that there is, indeed, stigma attached. And I echo what Bruce had just said. And because I come from Saskatchewan, I recall very well when David Milgaard was -- a new trial was ordered. And even as the province was entering a stay, the Provincial Minister of Justice was saying to the media that he believed that David Milgaard was guilty. Surely that's a pretty good indicator of stigma that we should try to redress through this process, when its function is, after all, to seek exoneration.

MR. CODE: If we're to stay on schedule here, we should move on to question 3. But I don't know if any of my colleagues want to jump in at this stage or whether you're content to hold your comments? Jerome?

MR. KENNEDY: Yes. I would like to question, Mr. Code. Morning panel members, my name is Jerome Kennedy. I am representing AIDWYC at this hearing. For Professor MacFarlane and Professor Gaul, I want to refer you to page 27 of Professor Roach's paper and ask you whether or not you agree with this comment where Professor Roach paraphrases Professor Lamer, page 27:

> "Chief Justice Lamer considered the DPP's defence of the stay as a remedy that leaves the person in the same position as any other person who enjoys the presumption of innocence as "legally correct but practically unrealistic". Chief Justice Lamer was speaking of the use of prosecutorial stays in general but his comments about a stay placing a person in legal limbo and tarnishing a person's reputation are particularly apt..."

And it goes on to talk about the situation with Mr. Driskell, for example.

"Chief Justice Lamer concluded that "in contrast to a stay of proceedings, as stated by the Crown, in open court, that it has no evidence to present often carries the implicit message that this person should not have been charged."

Do either one of you agree or disagree with Chief Justice Lamer's comments? And as Professor Quigley pointed out, would you not agree that there are devastating psychological consequences to an innocent person who has been convicted, sent to jail for many years, and the tragedies referred to by Justice Marshall? It appears to be you are both defending the use of the stay, that's why I direct my questions to you.

MR. MacFARLANE: Thank you, Mr. Kennedy. I'm looking at the issue through the eyes of a jurisdiction that is a stay jurisdiction, as opposed to a jurisdiction that uses an offer of no evidence or withdrawal. So that's the lens through which I'm looking at the issue of stays. And at the trial level, stays and proceedings

are entered probably by the tens of thousands on a yearly basis, so that's the context in which I'm looking at it. And that's why I endeavour to make a distinction between the trial level, where stays are handled all the time, and post-696, where there is an intense focus on the individual case and the action of the Federal Minister and the media and the Chief of Police and Attorney General and so on.

There is a much greater risk of a person being stigmatized where there is a focus on that case and there is a lot of commentaries about the case that are going on. So I would agree, in this sense, that a stigma often will attach to those relatively few cases that have gone through that legal process. But my view is quite different in terms of the mainstream entering of stays in the courts in this province.

MR. KENNEDY: Okay. So you distinguish, Professor, between the stay pre-trial and the stay post-appeal, post-696?

MR. MacFARLANE: Yes, sir.

MR. KENNEDY: Mr. Gaul?

MR. GAUL: I come from a jurisdiction, as I said

at the outset, that we're a pre-charge screening jurisdiction. There are only three formal jurisdictions in Canada that have that. And I believe it's Quebec and New Brunswick. Although I think other jurisdictions are looking at the issue.

I do disagree, as I said, with the categorization of what a stay is. I also disagree with the Chief Justice, Former Chief Justice Lamer's comments about the practical unrealisticness. I agree with what my colleague Mr. MacFarlane said about the high-profile cases, that there very well may be a stay and I agree with that. And I also agree with your comments about the significant consequences where a wrongfully convicted person spends time in custody.

As a brief aside, I have met Mr. Sophonow. We invited him in British Columbia to come and address, as our guest speaker at our Crown Counsel Conference, to point blank make it known to prosecutors the consequences of their decisions. So it's not something that we are unfamiliar with.

But I do say that if a stay of proceedings

is properly categorized, as it should be, as an end of the proceedings, full stop, deemed not to be charged, then while there may be some stigma attached to high-profile cases, generally speaking, it will only be of a transient nature. And we, too, as the expression is now developing, whether you're a stage or a station, we use the stay regularly in British Columbia to end the proceedings. It doesn't mean we don't use the not calling evidence. We will discuss that in a later question.

MR. KENNEDY: Okay, that's fine. Thank you.

MR. CODE: If we could move on to question 3, Jerome, I think you will see it raises your question more directly.

Question 3: Do you agree with proposals made by Chief Justice Lamer governing how Crown Counsel should exercise their discretion when deciding whether to enter a prosecutorial stay, withdraw charges or call no evidence in a case where there is at present no reasonable prospect of conviction?

Now, Professor Roach, if you could set out for us, in summary, the substance of the conclusions Chief Justice Lamer arrived at after

studying this issue and your own conclusions on the point, I would appreciate it.

MR. ROACH: Yes. While I was working on this report, I had the great good fortune of Chief Justice Lamer's report coming out. And he was looking at three cases in Newfoundland, Dalton, Parsons and Drukin. Two of which, at least, involved the use of a prosecutorial stay. And he provides, in his report, suggested guidelines that he suggests to be included in the Newfoundland Crown Prosecutorial Manual.

I think it's important to know that Chief Justice Lamer is talking about the use of prosecutorial stays across the board. He is not talking specifically about 696 cases or post-appeal cases, although I believe that, especially in Mr. Parson's case, that he examined that he was influenced by those sorts of use of stays.

But, basically, what Justice Lamer -- Chief Justice Lamer recommended is the prosecutorial stay should only be used where there is a reasonable likelihood of recommencement of the proceedings, but it has become necessary, for example, for the police to conduct further

examinations that were previously unforeseen. So the prosecutorial stay, in his view, allows further proceedings to go forth. And, therefore, should only be used in cases where there is a reasonable likelihood of recommencement of the proceedings.

And I think, equally as important, the example that he cites is that the case is under investigation. So the prosecutorial stay, I think as Chief Justice Lamer contemplates it, is kind of a breathing room, while the police conduct this further investigation which then should put the Crown in a possibility to make other decisions.

Now, the other important point about Chief Justice Lamer's guidelines, and I think why they are so helpful, is he doesn't just discuss the prosecutorial stay. These legal procedures really can only be understood in light of what the alternative legal procedures are. So that the issue, as Chief Justice Lamer contemplated it, isn't just a stay, but a stay as compared to other legal procedures.

And those other legal procedures that Chief Justice Lamer looked at were, first, the

withdrawal of charges. And he suggests that that is the appropriate prosecutorial response where there is no reasonable and probable grounds to lay the charge or there is no probability of conviction or that it's not in the public interest. So he draws a distinction between the prosecutorial stay and withdrawal of charges.

And he goes on to consider a third option, which I think will be quite central to our deliberations here today, and that is he contrasts the prosecutorial stay with calling no evidence. The Crown's decision for the case to go to court, but to call evidence and to request an acquittal. And, of course, if the Crown calls no evidence, an acquittal is going to resolve, because it is the Crown that has the burden to prove guilt beyond a reasonable doubt.

And Chief Justice Lamer comments that:

"Where there is no probability of conviction, nor a reasonable likelihood of recommencement of proceedings, that the appropriate response is not the prosecutorial stay, but the calling of no evidence and requesting an acquittal."

Now, I want to be clear, though, that I recognize that there is some risk. And there is some risk to society in calling no evidence to produce a verdict of acquittal. And the risk is that when there is a verdict of acquittal, the protections against double jeopardy or autre fois acquit apply. But I think that one of the reasons why Chief Justice Lamer was prepared to run this risk, and why I would agree with his guidelines, particularly in 696 application, is that he also reached the conclusion that the use of the stays in the cases that he examined, particularly in Mr. Parson's case, were influenced by tunnel vision. That is that he concluded that one of the reasons why a prosecutorial stay can be an attractive option in a miscarriage of justice case for the Crown is that it allows the option or the possibility of recommencement to be left out there.

As Professor Quigley said, in relation to the Milgaard case, it allows the Crown, on the one hand, to say, there is no reasonable probability of conviction and, therefore, it would not be ethically proper for us to prosecute this person at this time. But we

don't know what's going to come over the transom, you know, three, four, five, ten, fifteen years later. But Chief Justice Lamer is quite clear that the prosecutorial stay should only be used where there is, indeed, a reasonable likelihood of recommencement of the proceedings, for example, while the police are conducting further investigations. Thank you.

MR. CODE: If I could formally introduce Geoff Gaul at this point, as we have asked Geoff to take the lead responding to this third question. Geoff is the Director of Prosecutions for the Attorneys General Department in B.C. You will all remember him as the face and voice of the Air India prosecution. He was out there courting the media every day after court, and was a wonderful colleague to work with. So, Geoff, we are so glad that you are here because we know B.C. is looking carefully at this issue. And if you could respond to Professor Roach. I know you're the guy who has to make these difficult decisions in big cases. Is it appropriate for the Crown, in a case where there is not an active re-investigation going on, you don't have a reasonable prospect of conviction,

but to use the stay simply as a tool that allows you to leave open the possibility that something may come forward in the future, which would then allow you to re-open the case, in other words, to protect against the effects of double jeopardy?

MR. GAUL: Thank you, Mr. Code, Mr. Commissioner, I should also thank you for the invite to attend and to debate these important issues. There is a lot to be learned. And as I said in my earlier comments, British Columbia is currently reviewing. We have a standing committee on our policies and practices. In light of the Lamer report, we are reviewing that and how, if in any way, it does impact upon our practices in terms of terminating the proceedings. And the results from this inquiry will also be examined, so thank you for the invite.

I should say, and this is now a familiar refrain that you have heard, first off, we are a pre-charge jurisdiction, which is a marked contrast to Newfoundland. So former Chief Justice Lamer's comments and the guidelines he has set out with respect to the exercise of

prosecutorial discretion determining proceedings, is in the context of a policy laid charge without Crown involvement, and then subsequently the Crown making decisions.

Whereas in British Columbia, no charge proceeds to court, no charge is laid unless the Crown has vetted it first. The police -- there can be occasions where a police officer lays a charge, say over a weekend of some sort, but Crown, then, at the first opportunity reviews that charge and determines whether it meets the chargeable standard. And yes, there are occasions when on a Friday night a police officer might lay a charge and when the Crown looks at it on a Saturday morning or on a Sunday morning, we will stay it because it does meet the charge criminal standard.

And when I say stay, it is in the context of our belief of what a stay of proceedings is. So there is a marked contrast, once again, of what a stay is. The perception of a stay is simply a suspension, a leaving in limbo, an unresolved issue, is not the perception that we have. Maybe we have some work to do, in light of what is being said today and in light of what

was said by Chief Justice Lamer. But the reality, in our perspective at this stage, is a stay of proceedings is the end of an issue. It's a stop.

As my friend Mr. MacFarlane has pointed out, there is also a division of the use of stays of proceedings. And Chief Justice Lamer talks in a general sense, and it's at page 27 and 28 of Professor Roach's paper. And in a general sense, the use of the guidelines that he sets out is for general use of a stay of proceedings or how to determine a stay of proceedings. And, actually, we are talking about a more precise use of a stay or how to terminate proceedings in the 696 context.

But my friend Mr. MacFarlane is absolutely correct. Generally speaking, in the day-to-day operations of a prosecution service, the defence wants the matter to be ended as soon as possible. A stay of proceedings permits the prosecution service to end the matter as soon as it concludes, in British Columbia, that there is no longer a substantial likelihood of conviction or the prosecution is no longer in the public interest. We can do so out of court, without

judicial authorization, without seeking judicial authorization. It is the quickest route towards ending the matter against the accused, to the accused's benefit. So those are the context or that's the context of really my comments with respect to the guidelines set out at -- it is actually at pages 330 and 331 and 332 of the Lamer report. And Professor Roach has it set out at page 27 and 28 of his report.

In all intents and purposes, there is no practical difference between a withdrawal and a stay of proceedings. The matter can be reinstituted. Naturally with a stay of proceedings you can do so, a recommencement. The stay of proceedings allows for a recommencement within the time frame of the year without having to lay a new information. But procedurally, as I say, if we're talking about a prosecution service concluding there is no longer an evidentiary basis to carry on with a prosecution, to maintain the jeopardy that the accused is facing, if that's a conclusion the prosecution service reaches, in my view, it would be incumbent upon the Crown to, as quickly as possible, end those proceedings against the

accused, and the stay of proceedings allows that.

The guidelines that the Former Chief Justice sets out, he talks about the use of a stay of proceedings. He talks about calling no evidence or calling no further evidence. And he talks about or he refers to the use of the withdrawal. I must admit that I don't see a practical difference when it comes to the Former Chief Justice's comments in the use of the withdrawal. He concludes:

"A withdrawal of charges is appropriate where the Crown Attorney decides that;

i) Reasonable and probable grounds did not exist to lay the charge."

Now, again, I couch my comments in response to that in the fact that we do that at the front end. We do the assessment at the beginning, not after charges have been laid. So, in fact, that consideration is done at the outset in the prosecution. There is no probability of conviction or it's not in the public interests to proceed with the charge. Very similar, in my view, to what our charge approval policy is at the front end of things.

But then he carries on and he says -- so that's how he addresses the issue of withdrawal. At his third recommendation:

"It's appropriate for the Crown to start a trial but to elect to call" --

or, pardon me,

"...to elect to call no further evidence, and request an acquittal..."

Well, if the Crown concludes that there is no evidence, there is no case to present, and we're not in court yet, why would we attend to court and have the matter put before the court? Again, maintaining the accused's jeopardy, however long that takes, as opposed to ending it, in our view of what the end is, the stay of proceedings. The end of procedures deemed not to have been charged.

So the Chief Justice's recommendations, a withdrawal at one is the first recommendation. And then three, with respect to starting the trial and not calling evidence, are similar, in my view. If the Crown concludes that there is no case to bring into court, the case should not be brought to court. The case should be terminated as soon as possible. And that's what

a stay of proceedings allows.

The Former Chief Justice also recommends that where you are in the midst of a trial, and something develops with respect to the state of the evidence, then the Crown should recognize that and call no further evidence. I take no issue about that at all. That is the general practice. I would hope that's the general practice throughout Canada. It is clearly the general practice in British Columbia. Prosecutors are trained to recognize the fact that our role is not to get a conviction. Our role is to present, in a firm and fair manner, the evidence we have available. But if we conclude that our charge assessment standard is no longer meant, it is a continual assessment, then we call no further evidence.

With respect to -- so that's in the general context of the day-to-day operations of the prosecution service. If we're dealing with provincial -- whether it's provincial charges or indictments in Supreme Court, the issue is if the accused should no longer face the charge, the charge should be concluded immediately. And the stay of proceedings, in our view, being a

means where we can do so out of court, as opposed to attending court, is the best, most expeditious, fairest way to do so. I would also note that historically that the stay of proceedings has been around since the 1800s, since 1892. It is a power that the prosecution's service has, that the Attorney General has, and the prosecution service as the agent of AG has to exercise judiciously, fairly and objectively, but it allows it to end the proceedings as soon as possible.

Within the context of the 696 proceedings, Mr. Commissioner, there's a consideration to be given, and this is something we will learn from the results from this inquiry, if currently the belief is that there is no expectation to an actual trial, as I said in my earlier comments, the Federal Minister cannot order Attorneys General, Provincials Attorneys General, to proceed to a trial. If, therefore, there is no reasonable basis to have a belief that there will be a trial, I think it is still incumbent upon the prosecution service to do a charge assessment determination whether the matter should go back under 696, should go back the

court. Mr. MacFarlane's comments are apt. You've had a determination by the Federal Minister that a question has been raised. There may well have been a miscarriage of justice or wrongful conviction. And, therefore, there may be something to be learned, Mr. Commissioner, that we will get from this inquiry, that prosecution services should take an additional step beyond the stay of proceedings.

But I my wrap up my comments, Mr. Code, by saying that Chief Justice Lamer's guidelines, as they apply to the day-to-day operations, are not applicable or practical to a pre-charge jurisdiction. We already have our front-end assessments. We already provide -- and I think this should be the norm, we already provide for prosecutors to call no evidence. And the distinction between a stay and a withdrawal is one that is so marginal, I think there is practically no distinction.

MR. CODE: Just two brief comments, Geoff, thanks very much for that response. First of all, the distinction between pre-charge and post-charge, I think if we focus on 696 cases, which is what our terms of reference are here,

all 696 cases have reached the post-charge stage. So Crown charge screening, whether it is pre-charge as in B.C., or post-charge as in Ontario, has taken place in the case. The Crown decided it was a proper case to prosecute. It was prosecuted. Now it is being sent back. A charge is extant and before the courts. So any charge of screening is, by definition, going to be post-charge in the context of the 696 cases. So I think we have to look at the problem confronted to us as a post-charge reassessment of the case by the Crown after a 696 order. And pre-charge screening is really not an issue for us.

And, secondly, I would just comment that the fact that the stay power is a long-standing historic power, and you're quite right it, has been in our code since 1892. And before that it was a common law power in nolle prosequi. But I think it's fair to say, and I say this with the greatest of respect to B.C. and Manitoba, it was never exercised in the kind of routine, high volume way in which it is exercised in those jurisdictions of thousands and thousands of charges being stayed. It was always a very

rarely used personal prerogative of the Attorney General that has slowly, over time, got delegated down and became this kind of mass volume remedy that it is nowadays in some jurisdictions. So the appeal to history I don't think particularly helps your case here because historically it was a rarely, rarely used extraordinary prerogative.

But leaving those comments aside, can I call on any other members of the panel to respond to Chief Justice Lamer and his recommendations? And, again, I would ask that we keep them narrowly focused on the 696 context and not whether the stay generally should be used at the trial stage. Bruce?

MR. MacFARLANE: Thanks very much. Two quick comments. Mr. Commissioner, I would like to underscore the absolute need to confine your recommendations and your considerations to the 696 process. The guidelines from Chief Justice Lamer are much broader. They deal primarily with the trial level. And I would simply note that the Supreme Court decision called Atkinson, which was decided in 1977, would signal the absolute chaos if offers of no evidence were

entered or were entertained in dockets where a large number of charges were being terminated. Atkinson stands for the proposition that you need all of the normal trial trappings, an election, a plea personally entered and so on. And if that's not done, then it is not a legal trial. So there is a real need to confine your consideration to 696 and not made it broader than that.

Secondly --

THE COMMISSIONER: Even if I really wanted to?

MR. MacFARLANE: I'm simply urging that, Mr. Commissioner.

THE COMMISSIONER: Okay.

MR. MacFARLANE: Secondly, and this is fairly narrow, but I think an important point, and again, I am looking at this through the eyes of a stay jurisdiction where a withdrawal is completely unknown. And I note from Professor Roach's paper that there are a number of uncertainties concerning a withdrawal. When can you do it? When do you need a leave of the court? What is the effect of the withdrawal?

And one of the options, Mr. Commissioner, would be for to you recommend that the

Government of Canada undertake a study of whether, and to what extent, the entry of a withdrawal ought to be codified in the Criminal Code, because right now there is no authority. There is no authority in the Criminal Code for a withdrawal. It may well be helpful for jurisdictions that do mass stays, as Mr. Code has suggested, but at the moment --

THE COMMISSIONER: A little hyperbole there, I think.

MR. MacFARLANE: I think so, yes. I think, again speaking from a stay jurisdiction, there is a lot of anxiety. And I think there ought to be a lot of anxiety about adopting a practice that's not in the code, Mr. Code.

MR. SCULLION: I just have one comment that echoes something Bruce has said. The cases in Newfoundland, none of those cases came to the Minister under the section 696 or 690 process. They were all resolved before they got to that stage.

MR. CODE: That's because they have got such a great Court of Appeal. Rob?

MR. FRATER: Yes. If I can just chime in briefly on what Mr. MacFarlane said, it is

important to us at the Federal level that you not go beyond the specific context of the use of stays that's raised here. Because we, too, like B.C., will look at all of the proposals made by Chief Justice Lamer. And we will look at your proposals, as well, and try to respond to them.

And the use of stays, as opposed to withdrawals, is a very contentious matter for us. And in my canvassing of the way we do things across the country, there is no great consensus. And one of the things that is very important to our prosecutors is the very fact that withdrawals aren't mentioned in the Code. And so I think that is the explanation for why the stay is much more broadly used now, because many prosecutors do feel comfortable with something that is referred to in the Code, and they don't feel comfortable in using something that isn't.

MR. CODE: Thank you very much. Those are extremely helpful comments.

Turning, then, to the fourth question: Do you agree that a decision to enter a prosecutorial stay in a case where a new trial has been ordered under section 696.3(a)(i) of

the Criminal Code should be made by the Attorney General or the Director of Public Prosecutions and after hearing representations from the accused? And this is a question that deals with procedure. And the substance of the point is that the 696 order is made at a ministerial level. Should a line prosecutor be allowed to stay the proceedings or should a stay decision be made at the same ministerial level in order to assure the same level of accountability?

And, secondly, should it be made only after representations from the accused, given that the accused has had a right to make representations to the first minister at the 696 level? Ken, again, if you could outline the problem for us, I would appreciate it.

MR. ROACH: Yes, thank you. Well, these are two recommendations that I make in my report, in addition to Chief Justice Lamer's guidelines. But I think it is very, very important to recognize that I am only making these recommendations in the context of an order for a new trial under section 696. The inspiration for these recommendations really go back to what Mr. Code talked about as a bit of a legal

history of the nolle prosequi, which is the common law equivalent to the prosecutorial stay under section 579. And as Mr. Code said, this was seen as a personal prerogative of the Attorney General, so it wasn't a kind of routine procedural option as it has now become under section 579.

Now, obviously, it would be unrealistic to expect this to happen on a routine basis, but it seems to me that if someone has gone through all of the hurdles to convince the Federal Minister of Justice, who is the only person who actually makes the order, he is advised by people in Mr. Scullion's department and other eminent people like Justice Kaufman, who are asked to investigate these matters, but at the end of the day, it is only the Federal Minister of Justice that has this extraordinary power to either order a new trial or a new appeal after convictions have been exhausted. And so it seems to me that if that order of a new trial is not to take place, either temporarily or permanently, that the decision should be made at an equally high level within the provincial system. And I say that for a couple of reasons.

It isn't just that if one minister makes a decision, the other minister should make a decision that may, in some respects, be intentioned with the Federal Minister's decision. But I actually say this more for functional reasons, that if the Federal Minister of Justice is concluding that there is a reasonable likelihood that a miscarriage of justice likely occurred, there is -- you know, something smells wrong in the State of Denmark, and there is -- I think, it's very important that there be fresh eyes that look at this matter. And so it's my hope that by requiring this to be made at the highest level, either the Attorney General or the Director of Public Prosecutions, in systems that have that, that you will fight this phenomena of tunnel vision which Chief Justice Lamer clearly concluded did influence decisions to enter prosecutorial stays. So that's one functional reason.

The second functional reason for putting it at that level is that I very much believe that if a prosecutorial stay is being used after the 696 order, that this should be done because there is an active investigation going on, to

put the Crown in the best position that the Crown can be in to determine whether there is either a reasonable likelihood of conviction and the case can go forward or there is no reasonable likelihood of recommencement and the appropriate remedy is to call no evidence, ending in an acquittal. And so it's my hope -- and I know people like Mr. MacFarlane have far more practical experience on this, but it was my hope that by kicking it upstairs in that way it will ensure that the police investigation in the matter is one of the highest priority, so that the prosecutorial stay can be revisited within a year, which we will talk about in a minute.

The last is the issue of accountability. And with the advent of the Charter, prosecutorial decisions, exercises of prosecutorial discretion have been challenged under the Charter and under the common-law abuse of authority. And there have been some cases where there have been challenges to a prosecutorial -- the entry of a prosecutorial stay. But to my mind, although that is important, and that will proceed, the courts are relatively, I would say, quite deferential to

the exercise of prosecutorial discretion. And I think that there really does have to be another form, a counterbalance of legislative accountability. And following my teacher, the late John Edwards, I firmly believe that the Attorney General has an obligation, both to act in a quasi judicial manner with respect to prosecutorial decisions, not to make them on the basis of partisan political considerations, not to be dictated by the cabinet. But also that that person, the Attorney General, has a role to defend the decisions in the legislature. And so it's my hope that functionally, kicking the decision up to this level, will: One, ensure fresh eyes; two, ensure that any re-investigation is at the highest priority; and then, finally, increase public accountability for the exercise of this power.

And then, finally, the other suggestion that I make is that before a stay is considered, after a new trial has been ordered under section 696, that the Attorney General should actively ask the successful 696 applicant to make submissions and to provide some form of written submissions where, at least the person making

the decision, has whatever information the successful 696 applicant may choose to provide before that person. And, again, I say this because this will help the process of fresh eyes, that this will provide another perspective on a decision. Because, you know, I'm always cognizant that the 696 order by the Federal Minister of Justice is one that is rarely made. And it is one that is going to send alarm bells, rightly so, through the prosecutorial system, and I think that it really does deserve attention at the highest levels.

MR. CODE: Thanks, Kent. We designated Professor MacFarlane to take the lead on this question, for obvious reasons, given his long background working in Attorneys General departments. If I can just briefly introduce him formally at this point. He is well known to you here in Manitoba as a professor at the University of Manitoba Faculty of Law and as the Former Deputy Attorney General in this province. I, of course, remember him fondly as the Assistant Deputy Attorney General Federally in Ottawa, where he was a very kind friend, mentor and colleague to me when I needed all of the

help I could get in the early nineties learning my job. So, Bruce, we are very grateful to have you here. And if you could give us your views on this issue, obviously, in your personal capacity now as a law professor, freed up from the burdens of public service?

MR. MacFARLANE: Thank you very much, Michael. There are essentially two issues raised by this question. First of all, whether or not the Crown ought to seek submissions from counsel for the accused where it's -- where a stay is being considered post-section 696. And, secondly, whether or not the Attorney General ought to be the one who makes the decision ultimately. And I would like to thank Professor Roach on this particular point, in particular, because I think he has done a real service to the country in raising these recommendations. Subject to a couple of nuances, I think that both of these points are really good ones. I think that they would serve the country well. I would like to comment on both.

On the question of seeking representations from the accused, I think that that's a good idea. I think that in some situations an

accused might want to go either the no evidence route or the stay route for reasons that are known only to the accused. For instance, an accused might say, well, I would rather have a stay and have a deeming provision that the proceedings were never commenced because if an employer asks me: Have I ever been charged, I can say: No, I've never been charged. So in that sense, for that particular accused, a stay, which is matured for a year might be a stronger position to be in. So that's the sort of thing that I think the Crown could greatly benefit by in seeking submissions from an accused person on which route to go.

And I also point out that there are some parallels, in some parts of the country, with respect to direct indictments, where it is proposed that there be an executive override or an administrative override to a provincial judge's decision discharging. Often, at least in Manitoba, in my former capacity, I would seek submissions from an accused on prospects of a direct indictment where there was that sort of proposal arose. And I found these submissions helpful. So for a whole bunch of reasons, I

think that post-696 where a stay is being considered that the Crown ought to, as a matter of policy, seek submissions from an accused.

With respect to the second issue, and that is who is the ultimate decision-maker, I agree it ought to be made at a very, very high level, in essence, being a corporate decision. But I do depart from Professor Roach on one particular point, and that is whether it ought to be the Attorney General, the political office holder, or the Deputy Attorney General, as the head of the department, but non-political. It is an important distinction.

In speaking to deputies across the country, the sense that I have received is that there is an increasing desire to insulate Attorneys General from individual cases. And there is good reasons for that. An Attorney General who becomes actively involved in a prosecution can easily be accused of driving the case for political reasons, wanting to look tough on crime, for instance, or wanting to drive a political agenda of some sort. So it's almost a lose/lose for an Attorney General. There is, in some instances, an Attorney General who might

want to drive a political agenda, so there might, in fact, be a problem there.

But, more importantly, it might, to the public, appear as if there is a perception of a political agenda at play, and that places the Attorney General in a very, very awkward, if not impossible, position in terms of accountability in the legislature and to the public.

In general, and I'm speaking now from the Manitoba perspective, but I have reason to believe that it is broader than Manitoba, direct indictments are not signed by an Attorney General. They are signed by the Deputy. And other types of consents and other types of decisions that are made concerning individual cases are not made by Attorneys General for the reasons that I've just outlined. They are made by the Deputy Attorney General, and in a DPP system by the Director of Public Prosecutions. I think that that ought to be the practice here. It is being made at a very, very high level by the deputy head of the institution, who can draw in others, can draw in senior experienced people, can have a roundtable, can have a discussion on what should take place. But the

ultimate decision should lie with the Deputy as a corporate decision. So for those reasons, I would suggest that submissions are a good idea, but the decision ought to be made at the level of the Deputy or the DPP, not the Attorney General.

MR. CODE: Rob, it would be very helpful to get the Federal perspective on these issues.

MR. FRATER: Yes. If I can just add one thing with respect to submissions about why defence counsel, in particular, should be interested in that, in our decision to prosecute policy, we've changed it in recent years to try and become a bit more transparent. And we note in our -- in our policy, which is our general charging policy, that sometimes when we enter stays, we think it's in the public interest to communicate why we're staying charges. And it seems to me that what defence counsel might want to consider is trying to make submissions to the Attorney General about what sort of statement ought to accompany the entering of a stay, if it is to be done in open court.

MR. CODE: Can you help us at all, Rob, in terms of the level at which the power is held in the

Federal Department of Justice? Is it one that is closely held at very high levels? Is it delegated down? In these kind of practices, as a practical matter, would it inevitably go up to a very senior level?

MR. FRATER: Yes. I think it would inevitably go up to a senior level because that's our principle of accountability, that everything is being done in the Attorney General's name. And these sorts of decisions, I mean these are the most visible cases that a prosecution service would have. And it seems to me unthinkable that the decision-making is not being made at the highest level. So I'm a bit skeptical that there is actually a lot of value added to imposing a specific requirement that they be made by a specific decision-maker. I think they are in every case.

MR. CODE: And, again, in terms of Bruce's point about the minister versus the deputy, any thoughts on that?

MR. FRATER: I agree with Bruce's comments.

MR. CODE: Geoff, in B.C.'s experience, is this a power that, in these kinds of cases, that would inevitably go up to those very high

levels, in any event?
MR. GAUL: We have been remarkably lucky or fortunate not to have had a 696 application.
MR. CODE: Because you have pre-charge screening?
MR. GAUL: That's exactly right. I am glad you said that. But what we also have -- as I previously mentioned, we have the Crown Counsel Act which, by statute, creates our branch, the Criminal Justice Branch, the Prosecution Service. It also empowers the Assistant Deputy Attorney General as the head of the Prosecution Service and the buck stops with him or her. So decisions of this -- it is the power of the DPP, but the decisions of this nature would stop at his or her desk. The one twist that would allow for accountability or the Attorney General or the Deputy Attorney General to be involved, and, again, in our Crown Counsel Act, we can receive recommendations in writing with respect to how we conduct the cases, whether we charge or don't charge. And, therefore, if we make a decisions, say, for example, in a situation such as this to stay the proceedings, which I note the Milgaard case has already commented upon that that is

such an option. If we made such a decision, the Attorney General or the Deputy, under the Crown Counsel Act of British Columbia, could direct in writing the Assistant Deputy Attorney General to do otherwise. And those directions would be published in the B.C. Gazette. And, therefore, the public would know that there was that, for lack of a better word, political involvement.

The Attorney General needs to have that capacity to become involved if he or she thinks they need to be. But there is still that insulation on both ends that it is an independent, objective decision. But if there was to be that intervention, the Crown Counsel Act in B.C., Mr. Commissioner, allows for that and the public knows about it because those directions are published.

THE COMMISSIONER: I wonder, Mr. Code, if I might just interject a couple of questions here. Mr. MacFarlane, you indicated that it should be the Deputy or the DPP, if it was the DPP or perhaps the equivalent of the ADM, Assistant Deputy General Attorney, why would you include the ADM?

MR. MacFARLANE: I'm sorry, Mr. Commissioner,

why would I not include the ADM?
THE COMMISSIONER: No. Why would you include them? I thought you said, perhaps, it should be at the highest level, but then you gave your reasons why the Attorney General shouldn't be involved. And then you seemed to -- I thought you jumped, and you said it should be Deputy Minister, but it also could be the DPP?
MR. MacFARLANE: If I indicated that, I didn't mean to indicate that.
THE COMMISSIONER: Maybe you didn't.
MR. MacFARLANE: What I was suggesting was that if the responsibility lies with the Deputy, I would expect the Deputy to call into his or her office a number of people in the department, the senior people, including the ADM, to consult them. But once that consultation process had taken place, the power or the authority, the responsibility, would still be vested with the Deputy, and the Deputy would make that decision.
THE COMMISSIONER: Let me ask just one other question, and this is a dangerous question in the sense that it may get us sidetracked. But I wonder what the Attorneys General would say

about your recommendations, your respective, the Federal and yours, Mr. MacFarlane? Because, you know, it seems to me, that historically the Attorney General is more than a politician. And the Attorney General, if they are going to be an Attorney General, has to recognize that they have an authority and a position and a responsibility that is beyond their political responsibilities. And what we're doing in such a suggestion, is saying, well, you know, we don't want you. It may look political and it may do this. You know, that's their job as Attorney General, and they have to recognize that. And I don't see that we should be hiving things off from them. I wouldn't say I don't see, but some would say.

MR. MacFARLANE: I agree that an Attorney General -- all of the cases are brought on behalf of the Attorney General. And in theory an Attorney General could take any direction in any case, whether without a provision such as the Crown Counsel Act, right down to the level of: I'm directing you to call this particular witness in this particular case. I am speaking entirely at the level of perception, how would

that be seen by the public and others? And the danger to an Attorney General is it would be seen as being based upon political considerations, even though it wasn't.

I can see a Deputy Attorney General consulting with an Attorney General on an issue concerning the stay of proceedings. But at the end of the day, I would be very, very leery of recommending that Attorneys General assume this responsibility for the simple reason that there will be people out there, groups out there, that will see that as permitting an Attorney General to advance a political objective, whether he or she was, in fact, doing that or not.

MR. GAUL: And, Mr. Commissioner, in British Columbia, statutorily the a AG and Deputy General are barred. And our practice would be, in a 696 situation, it would make it to the Assistant Deputy Attorney General for the Criminal Justice Branch, who is the head prosecutor, it would make it to that level. A decision would be taken. And then the Deputy and the Attorney General would be advised of that decision and given an opportunity to direct us in writing, and we would have those

directions published.
THE COMMISSIONER: I guess I was prefacing my comments on what I believe is the constitutional responsibility of an Attorney General. And I must say I am biased by Professor Edwards in his book of law or his books of law on responsibilities of the Crown and that sort of thing, so I am from another era, and so on. Any other comments on that?
MR. FRATER: Yes. You should understand that I am, at the moment, in the mind set of an organization that is going through a change in which we are moving to establish a DPP for exactly all of the reasons that have been talked about. But even in the DPP system, the DPP is answerable to the AG. And under our proposed legislation, the AG will be able to make the decision if he or she so chooses.
MR. CODE: I think it's fair to say that B.C. has a modified DPP system, would that be accurate, Geoff?
MR. GAUL: That is fair.
MR. CODE: That the Attorney General has been cut out of a lot of decision making in that province, quite deliberately in that province.

THE COMMISSIONER: I won't get into a constitutional argument because I don't know any constitutional law.
MR. CODE: That process is because British Columbia has this terrible habit of charging it's former premiers with criminal offences, so you don't want the Attorney General to be seen to be involved in charging his political opponent.
MR. GAUL: I will just say no comment.
MR. CODE: We know you can make those decisions without any political bias, Geoff. Any comments from -- Professor Quigley?
MR. QUIGLEY: I would like to put in a pitch for abolishing the ability to stay following a section 696.6 decision. I think, as some of us have said before, these are proceedings directed towards exonerating, and so I think that we should abolish the power in that narrow context.
I am going to stray a little bit off topic, but very briefly just to say where I'm coming from. I think that we should overhaul the Criminal Code to make it more clear how criminal cases are terminated, including defining withdrawal or using some other term and so on.

And I am attracted to the idea of stays more generally to have them back an acquittal after a year, unless the Crown makes an application and is able to indicate that they are still undertaking investigations. So it's against that backdrop that I say it.

Now, if we didn't abolish the stays at the 696.3 stage, I would certainly support the proposals that Ken Roach has made, perhaps with an acknowledgment that the Deputy Attorney General and/or DPP, I think that's a debatable point, but might be a better person than the Attorney General. But certainly the opportunity to make submissions would be good. But I see that as the fallback to more thorough going before the ministeria.

MR. CODE: Any interventions from the parties?

MR. LOCKYER: Yes, I have one.

MR. CODE: Mr. Lockyer, you've been awfully silent.

MR. LOCKYER: Well, it's nice to have Mr. Scullion at my mercy. Something that no one has raised up to this point, either in Professor Roach's article or in this discussion, is one way of at least partially addressing the problem

of the stigma attached to people who have been wrongfully convicted, because this is something that I think has been a little bit underplayed in this discussion, and yet is really at the forefront of this whole discussion, the stigma that the wrongly convicted experience after going through all of these processes to try to set aside their convictions is something that none of us can ever begin to try and understand. And the sooner we realize that and the sooner we say that we must find a way to solve this problem, then the sooner we are going to solve the problem.

And I think, Mr. Scullion, there is a role that the Minister can play within the 696 process that has been played by Minister Cotler, but has not been played, as far as I can recall, either before him or since the last election. And that is this, that when the Minister grants an application, he doesn't give reasons. When he refuses an application, he does. And I don't understand that. I don't understand why, when he grants an application, he wouldn't explain why he is quashing the conviction entered by the courts 20 years ago. Or to take David

Milgaard's case, 23 years ago. Or I suppose in David Milgaard's case why he is referring it back to the appeal courts. Or in the Phillion case, just three weeks after 36 years, he is referring a case back to the Court of Appeal and yet he gives no explanation for it. He only gives an explanation if he refuses an application.

Now, Mr. Cotler was an exception to this. And thank God, one of the times that he was an exception to this was in Mr. Driskell's case where he, both in his official press release, said some very powerful things about the conduct of the Manitoba Police over the years, the Winnipeg Police Service, as I say over the years, the conduct of the Manitoba Prosecution Service or the Manitoba Justice over the years. He made some very pointed comments in that regard, which were undoubtedly helpful to Mr. Driskell in terms of the stigma that he wants to get rid of and wanted to get rid of. And then he made more comments in a personal press conference where he expressed his own opinion that he believed Mr. Driskell was innocent and, obviously, for Mr. Driskell that

was an extremely important moment as well. It still hasn't removed the stigma because of Manitoba Justice's position to the present day, but it sure helped.

So why, within your jurisdiction under 696, or the ministerial jurisdiction, can't we have the Minister tell us the reasons for his decision? In the Stephen Truscott case we ended up having access to an 800 page odd report from Mr. Kaufman as to the recommendations he had made to the Minister, so we got some idea there. Certainly, we're going to be seeking and demanding from you in the Phillion case the instructions -- or not instructions, wrong word, the advice given to the Minister by the appointee in that case that the Minister assigned to investigate the case on his behalf. Certainly, to this day, we haven't seen anything that he said, except in the context of the investigative summary. And I won't get into the details of that. But that is a non-releasable document anyway.

And, in fact, that raises a point, too, that when you have an investigative summary, which can certainly give some very strong ideas

as to where the thinking is, we have to sign these wretched guarantees that we won't even share it with our spouses, the information that we're getting. So I wonder if you could comment on that, that the Minister actually can certainly help send us in the right direction in these cases when he grants a remedy by, rather than just saying: I order a new trial, saying: I order a new trial for the following reasons, having carefully studied the case. Courts of Appeal do it all the time. Why can't the Minister do it?

MR. SCULLION: I'm rather reluctant on comparing ministers and what they do. But if I can just go to your last point about not disclosing a lot of the information in the investigative brief, and certainly I think and you made reference to Mr. Justice Kaufman's report, a lot of the material in these briefs are hearsay, hearsay three times removed. There is a lot of personal information about people. There is material that we gather, information that we gather that is not necessarily subject to cross-examination. So there are a lot of factors that go into an investigative report that, to make public at

certain points in time or at any time, perhaps, may do damage. And I realize that doesn't address your particular client, Mr. Lockyer, or any other particular applicant, but there is a lot of material in these reports that could harm other people. And as I say, it's information that we gather in our process. And to make all of this material public is probably not in the best interests of everyone, although I can agree with you, certainly, there are occasions when it's going to be in the best interests of the applicant or certainly will help the applicant. But we have to be mindful and we have to be careful that it's just not information on that particular person.

The other aspect is that this is a matter that, obviously, either going before a Court of Appeal or going back to a new trial. So again, you are releasing a lot of information that, as I mentioned earlier, is hearsay, can be hearsay, innuendo, there is a lot of different things that go into it. And so there is a concern, certainly from my level, and I believe from the Minister's level, that that information just should not be out in the open public, you know,

not subject to any type of caveats, because it is not necessarily in the investigative brief in that form. So there are a variety of reasons.

I agree with you that Mr. Cotler went beyond what other Ministers have in the past, and what other Ministers will go in the future. And that was his preference. That's -- he's the Minister. He makes those decisions and he can make those comments. Other Ministers in the past, and certainly some to come, will probably perhaps not be willing to do that. And, again, that maybe not answered your question properly, but certainly those are the concerns that we have.

When we do these investigations, and as I say, Kent Roach makes reference in the paper here to the form of investigation we do, we gather a lot of information. We have a lot of sources of information. And we do, as you know, share with the most important person, being the applicant and the applicant's counsel, that material is shared holus bolus. There is nothing that's held back, so you have access to that. As to at the end of the day, why doesn't the Minister go beyond what he has normally done

or he and she has normally done in the past? I'm not so sure I'm in a position to properly respond to you and say, you know: As Minister you should say this or: Minister, you shouldn't say that. I was standing five feet away from Mr. Cotler when he made those comments in the -- to the media. Those were not comments that we would generally hear a minister make. They were as surprising to me, not necessarily because I disagreed with them or agreed with them, but they were certainly beyond what other ministers have said in the past. So I'm not sure that answers your question, but that is the best answer I can provide you.

MR. LOCKYER: Well, it doesn't really. Because I mean you say, for example, I know and we will known, the applicant will know the Minister's justification for his order, and that's not so, we don't. The only case we have known that is in Mr. Driskell's case, by virtue of what the Minister said in the press conference and in his press release. And in Mr. Truscott's case, in virtue of the release of the report. But in the normal circumstances we are not told the Minister's decision. Take the Phillion case, we

don't know the basis for his decision. We just know his decision.

And I am not sure why you would be so reticent about the minister giving reasons. If the Court of Appeal can give reasons, he is essentially in that role in a ministerial application, he is playing that role, why can't he give reasons on the basis of a study of your group or the representatives, it is not your group, have conducted in the case?

MR. SCULLION: Well, we can certainly, in the next case that comes up, if the minister wants to provide reasons he can do that.

MR. LOCKYER: It's a good start.

MR. CODE: Well, I think we had better take a morning recess and let Madam Reporter have a break. If I could ask everybody to be disciplined about getting back here within no more than 15 minutes so that we can make sure we stay on schedule.

(Proceedings recessed at 10:54 and reconvened at 11:08)

MR. CODE: If we could resume, please. We're at question number 5. Do you agree that a decision to enter such prosecutorial stay should be

revisited as soon as possible and within a year with a view to either commencing the new trial or calling no evidence? This follows up on Professor Quigley's comment, I think. So, Professor Roach, could you address this question in those cases where a stay has been entered, whether in accordance with the Lamer guidelines or not, your proposal is that it ought to be brought back before the court within a year so that the section 579 time limit operates as a device to force the Crown and the police to actually make a final decision about the case before it passes into the status of having become a case that notionally never happened, I suppose?

MR. ROACH: Well, this idea that any decision to enter a prosecutorial stay should be revisited as soon as possible, and in any event within a year, is really connected to my understanding of the stay as something that leaves the accused open to further prosecution. And, again, I have to underline that I'm speaking about the 696 context in which the person will already have had to wait literally years for the 696 process to have unfolded, both in terms of their own

investigations and the process for decision-making. So if a decision to enter a stay is made, in my view it should be made only to allow the investigation to conclude. And within a year, a decision should be made either to commence the new trial or to call new evidence, or perhaps, and I may be a bit ambiguous about this in my paper, to extend the stay, but only for a temporary period of time, on the understanding that there is active and fruitful investigation, I believe is the term that I use on page 62.

A couple of additions here. One is the one-year time frame seems to me to be a reasonable time in the 696 context, because although the police may not have been conducting a re-investigation, any case where there is an application under 696, and it's gotten beyond the preliminary stage at the Federal level, it would seem to me that there is a heads up that this case is in play. So the one year seems to me to be a reasonable limit.

But I think there is even a more important legal reason, and that is, and I discuss this at page 55 and 56 of my report, is that there is

two Court of Appeal cases that I have found, one from B.C. and the other from Quebec, that suggest that one year after the stay, as a number of my colleagues on the panel have commented, the proceedings are deemed never to have been commenced. But that also has the effect of driving the court of any jurisdiction. So the court becomes functus after the year. And that really takes the case away from the judicial, which is where the Minister of Justice, the Federal Minister of Justice, has made a conscious and considered decision to put it back into the judicial arena. But once there has been one year after the stay, the judiciary is then, on current authority, functus and out of it. And it seems to me that it is important to have the judiciary involved in some way. So in summary, the one year, it seems to me to be a reasonable time to allow a re-investigation that should put the Crown in a position to either decide that there is a reasonable prospect of conviction and the trial is going to go ahead or there is no reasonable prospect of recommencement. And it avoids this problem of the court no longer having any role in the

matter one year after the stay has been entered. Thank you.

MR. CODE: We've already heard Professor MacFarlane express some support for this proposal. And we would like to ask Rob Frater to take the lead in responding to it. And if I could just briefly formally introduce him, those of us who practice in Toronto knew Rob as a humble line prosecutor who used to see around the ordinary criminal courts on a daily basis back in the eighties. And then, like all able young prosecutors, you got promoted and disappeared to the higher echelons of the department in Ottawa, and now we only see him in the Supreme Court of Canada. But we are very, very pleased to have such senior and respected counsel from the Department of Justice here to assist us with this problem. So thanks for coming, Rob, and making the effort to get yourself briefed up on the issue. And if you could respond to this particular proposal for us?

MR. FRATER: Thank you, Mr. Code. And thank you, commissioner, for inviting me here today. I guess, with respect to what Professor Roach is

saying, I have no difficulty with part of it, in the sense that when he says should a decision be reviewed, well, that's generally consistent with our practice of looking at charges generally. They are under constant review. That's our -- the way our obligation is framed that you should be looking at your case at all points to see whether you've still got a reasonable prospect of conviction and whether it's in the public interest to prosecute. So with respect to the 696 cases, in the limited situation where you're -- you've entered the stay to conduct the re-investigation, yes, you should be assessing the investigation to see whether your opinion of the case has changed.

Where I have some more difficulty is with the latter part of the question, which suggests that the reason you are reviewing it is either to commence the new trial or call no evidence. And there my problem is that I'm more with Mr. Gaul on what a stay means. And this is predicated on the idea that -- or the question is predicated on the idea that a new trial or calling no evidence is better for the individual, and it is in the double jeopardy

sense. It may not be capable of doing anything in the stigma sense. Because in my mind, at least, the best result for the person is a stay. Because the meaning of a stay is that after the year the charge didn't exist, so it's actually better than being presumed innocent. You've never been charged. So you don't even get to the point of presuming innocence. And I think the best result, the best possible result for a person in this situation is a stay that is accompanied by a statement from the prosecution arm that says: We're staying this and the reason why staying it is because this is an innocent person. The problem is not everyone is going to meet that criteria. And where does that leave the people who are -- the Crown is not willing to make the latter statement publicly? It may make matters worse for them, I think.

MR. CODE: Perhaps if I could try to focus the discussion a little bit here, everybody has agreed that offering no evidence and inviting a verdict of acquittal gives the accused protection against double jeopardy and, in that sense, is more beneficial to the accused. And

everybody agrees that entering the stay leaves the possibility of prosecuting at some future point open to the prosecution. And I think what -- in choosing between those two remedial tools, the one issue that the prosecution representatives here, like Geoff and Rob, are expressing a preference for the stay vehicle and trying to present it as being equally beneficial to the accused.

But what I'm not hearing is whether its preference, from a prosecution point of view, is because you want to leave open that faint possibility that some new piece of evidence might come along in the future, even where there is not an active re-investigation, there is no prospect of you're not aware of anything that might be coming forward. Is it being used simply as kind of a fail-safe tool in the event that something new does emerge, is that why prosecution agencies prefer it?

MR. FRATER: Well, I don't think it's that. To me it's about being -- not abdicating your authority as a prosecutor. Fundamental to our system is that the prosecutor has to make a decision about this case of whether it's

something that ought to be put before a court so that a verdict can be reached. And if you've come to the position that it is not such a case, your professional obligation is to do something about it. And the something, I think, is the stay, because it is as close as you can get to restoring the state of nature, as it were, where the person is simply never been charged, absent the difficulty of the one year. But after one year, that's really as good as it gets, it seems to me, for the person. And then what we're talking about is whether there ought to be something else, some other sort of hearing where true exoneration might be considered. But in terms of putting charges before the court, to me that's -- the entering of the stay is really the prosecutor doing their job.

MR. CODE: Any other comments from the panel?

MR. GAUL: Briefly, I've shared that perspective, too. I note that Professor Roach, at page 15 of his report, makes reference to the fact that there is not a lot of judicial consideration of the stay in the context of the 696 application. Although the Supreme Court of Canada, in the Milgaard reference, does touch on

the issue saying that it's open to the Attorney General under the Criminal Code to enter a stay in that course is deemed appropriate. It does come back to the fact, from my perspective, that the Crown is the gatekeeper. We don't take cases to court unless we believe there is an evidentiary foundation. If we don't reach that threshold, then it is incumbent on us to end the prosecution as soon as is possible. And the ending of the prosecution, this is where we part company with some of the panelists, is a stay of proceedings. It is a full stop. It's as if it never happened.

MR. CODE: Justice Marshall?

JUSTICE MARSHALL: I would like to just pass a few comments with respect to that. It really adverts to what I said in the opening. I have a great respect for the eminent prosecutors that are here, and I've listened to them very carefully. But when I hear words like "deemed not charged", which is of course in the Criminal Code, that's the effect of it, that's the legal effect of it, "deemed not charged". Yet I heard a comment a moment ago that it's a "state of nature", it's "as good as it gets", with the

greatest of respect, I can't associate myself with that. It is not as good as it gets. What is being overlooked here, and this I keep saying, these are legal principles, but they don't wash out in the general public. And somebody who has been wrongly convicted has a stigma attached to them.

Now, what do you do in the legal process to address that? I realize that it can be said that human nature is such that even a verdict of acquittal, without anyone being imprisoned, if these people had been wrongfully convicted, better put it this way, had been acquitted, there would be a bevy of people in the general public that would look on them as if, this is what we will come to in a moment, factual innocence, the guilty verdict, the not guilty verdict, doesn't mean that they are factually innocent, so there is a stigma there. And I know we will come to that, I think, in the next question.

But the use of the stay of prosecution, when somebody said a moment ago that it was, you know, a rarity, in the history of Britain it was a rarity. And it is being used to a -- it is

being used to a great degree. We are talking about people who -- somebody who has spent a period of time in jail. And, quite frankly, I don't think it's good enough that the -- you can just put it down to the fact that this is "as good as it gets, "deemed not charge", a year goes by, it's gone. He's free. He is not charged. What you overlook is he is stigmatized. There are people in society, after a year goes by, the charge evaporates. They are not always aware of the fact that the charge is lapsed, that the charge is -- well, you don't like the word, but I like the word limbo. I like the word stigmatic limbo that comes with a wrongful conviction. They still have that attached to them.

And that is why I would strongly agree with Professor Roach. Now, there are reasons for, you know, stays of prosecutions. There are legitimate reasons for it. But I agree that, you see, it's in the prosecutorial discretion. And it should be not an untrammeled discretion. It should be -- surely, when you are dealing with something as important as that, as a person who has been wrongfully convicted, that is a

person who the Federal Justice Department has looked at and said: There is reasonable grounds to believe it, that you just don't -- it is almost like -- and, as I say I don't want to be pejorative, and I know you guys probably -- I hope you won't think that, but it is almost like you are not in the land of the living. We don't live in a cocoon. We live in a place where stigma is attached to people.

And there is no tragedy worse than a wrongful conviction, and it does happen. It happens to innocent people. And when that occurs, it requires the most stringent attention of the justice system. And the justice system that does not do that, and does not respond to it, the consequences are huge for the wrongfully convicted, but they are also huge for society itself. There is nothing that can call or bring the administration of justice into repute and go to shake the portals of our society more than a lack of confidence by the general public in the justice system. And when they see people having been wrongfully convicted, something has gone wrong, that something has to be determined.

But it should not be dealt with -- if you

are going to use a -- I was given to using a stay in those instances anyway before a year, but there should be reasons given with respect to it. To me it's not good enough to say that the charge is deemed, you know, deemed as it didn't exist, because it does exist. And the people have it, have had to live with it. And society is going to have to live with it in the future with a loss of confidence in the justice system.

MR. CODE: Rob?

MR. FRATER: Yes. I don't want to be taken to be saying that the entering of the stay is sufficient to remove the stigma. I fully accept that there may have to be something else that the other questions are going to get to. What I am saying is that we have to understand what a stay means. And part of all of the problem with this is there has to be an educated aspect to all of this so that there is some understanding of what these various things mean. And I think that's what Justice Lamer was trying to get at was trying to give meaning to the various ways of terminating proceedings so that there would be a common understanding of what they mean.

MR. CODE: And perhaps just one final point of clarification here, Professor Roach, your proposal that the case may brought back within a year so that it can be dealt with in court is before the legal effect of 579(2) clicks in. I understand you to not be suggesting that there won't be cases where particularly complex police investigation, re-investigation, justifies extending the period of the stay for more than a year. But you could contemplate that there will be cases where police investigation or re-investigation may well be continuing beyond a year?
MR. ROACH: Yes. Although, I think that that's true. Although, I do think that it is important for this process to be as transparent as possible. Because, I mean, the problem is that you need to have fresh eyes looking at this case. Because I think that the learning that is developing around wrongful convictions suggest that there is going to be an unwillingness to move away from this person as a suspect. But, yes, I mean, I can concede in some cases where there would be justification for continuing a particularly fruitful police investigation and

one that is not tainted by tunnel vision.
MR. LOCKYER: I just want to address a question to Professor MacFarlane before we move on. If we use Mr. Driskell's case, which is why we are all here in the first place, in considering Manitoba's use of a stay of proceedings. The stay of proceedings was entered, as I recall, on March 5 of 2005 in Mr. Driskell's case. It, therefore, expired on March 4 of 2006. What happened in that year, anything? Did Manitoba Justice just forget about the case? March 4th came by and that was the end of that? Did anything happen?
MR. CODE: Like, I don't think, with respect, it's appropriate to use a panel discussion on policy issues to ask questions about the adjudicative facts of this case. If that's going to happen, Mr. MacFarlane has to be called as a witness.
THE COMMISSIONER: Mr. Lockyer.
MR. LOCKYER: Yes.
THE COMMISSIONER: Just turn it into a hypothetical and use John Smith.
MR. LOCKYER: All right.
THE COMMISSIONER: You don't have to go

March 2005 to March 2006.
MR. LOCKYER: Take out Driskell and put Smith in.
THE COMMISSIONER: Use some other name. Use Lockyer.
MR. LOCKYER: Okay. What would happen if that case were to arise tomorrow, in the ensuing year, at least in your experience in Manitoba Justice? Because then we can get an idea of the systemic significance of a stay of proceedings for a person who has been through the 696 process?
MR. MacFARLANE: I will take it away from the case of Mr. Driskell because I -- for the reasons that have already been expressed. But it seems to me that there is four steps here. And if you put it in the context of four separate steps, then it resolves into, I think, a relatively easy issue. If step number one is that the Crown has concluded that there is a police investigation that's ongoing, or there is some basis for entering a stay, as opposed to some other remedy, so the stay is entered, often on the basis that there is a police investigation that's ongoing. So everybody

knows that the clock is now ticking as a one-year period. Within that one year, it's my view, I am just speaking for myself, that there ought to be a review of the case, an evidentiary review. And if at that stage the Crown concludes that there is still no case, then I think that the Crown ought to turn to the defence and ask for submissions, which is the third stage. What in your view, what remedy would you be seeking? Are you seeking a no evidence offer or are you seeking a stay? And there could well be different answers from different accused persons.

And then based on that submission, the Crown can take the appropriate action. But it seems to me that there has to be certainty. There has to be -- our law is based largely upon certainty. You are charged or you're not charged. You own property or you don't own property. You are on bail or you are not on bail. There is no -- there is that lack of certainty, unless the case is drawn to a conclusion before the end of that year, as to precisely what the police would be doing, and that's going to vary case to case. They may

well have an open file which is not terribly active. They could have a very active file. But it will depend upon the police agency involved and the extents to which they have resources available for it, and whether they think that there is a prospect of finding evidence. It will vary very much from case to case. But it seems to me that those are the four steps.

MR. LOCKYER: In terms of the law, I don't think we heard the last step, Bruce? What happens after all of that?

MR. MacFARLANE: After the submissions are received, then the Crown will either enter a stay -- I'm sorry, will either go to trial or offer no evidence.

MR. LOCKYER: Okay. So that's your recommendation?

MR. MacFARLANE: Yes, that would be my recommendation. It seems to me that there has to be certainty to the process, and that that certainty ought to be developed during that one-year period.

MR. LOCKYER: Okay, thanks.

MR. GAUL: If I can just make a comment, I would

suggest that there is certainty. Once the stay is entered, the prosecution has concluded. The accused -- there is no longer a case before the court. Professor Roach refers to, in his paper, the Smith decision from the B.C. Court of Appeal. And that concluded a judge becomes functus upon the entry of a stay. It is as if the accused has not been charged. And that arose after the one year. Because that one-year period is simply a grace period for the prosecution to decide if it wishes to recommence without having to start from the beginning.

But what I think is the suggestion that there is no finality, which flows into the sense that there is limbo, there is uncertainty, is something that from my perspective I don't share. There is certainty. A stay is entered by the prosecution. It's a power the Attorney General has. It ends the prosecution, full stop.

MR. CODE: As I understand --

THE COMMISSIONER: Mr. Gaul, when you come up with that example, what came to my mind is when we used to publish in the papers years ago about in the divorce cases and the decree nisis were

granted. But you know what followed? A decree absolute. And that's what we don't have in a stay. We don't have a decree absolute. Now, it's a poor analogy and forgive me for even raising it.

MR. GAUL: I would suggest that when the prosecution does a charge assessment, and we're talking even in the context of a 696 application, the Minister has determined that there is a question as to whether there has been a miscarriage of justice, a question, and therefore, has sent it back for reconsideration. The prosecution reconsiders the state of the evidence and concludes there is no longer a prosecution to take to court. The stay is the appropriate measure because it stops that prosecution at the first opportunity.

MR. CODE: I think we're a little bit at cross-purposes here because, of course, your conception of the stay is as a tool that brings a permanent end to the proceedings. Whereas Chief Justice Lamer's approach to it, and Professor Roach's, is that no, the stay is used while there is still a hope of prosecuting. You've got an active investigation going on.

You've got an undercover officer who needs to be protected. There is some circumstance that causes you to want to keep the prosecution alive. So your view of the stay is one that doesn't involve any re -- there is no active reconsideration of the case going on. It's finished as of the time you entered the stay.
MR. GAUL: There can be. There can be ongoing investigation. That's in the police's discretion, not in the prosecution's service, so I am not excluding that.
MR. CODE: So I think what this particular question number 5 is directed to is that, assuming the use of a stay in a case where there is some active re-investigation going on. In other words, the case still is alive, and there is a hope of re-prosecuting. Audit to be brought back, audit to be kept under active re-consideration and active review. Which is what Bruce was speaking to in his four steps, assuming that kind of a case ought to be brought back and formally dealt with in court in the same fashion. So I think the kind of case you're addressing, where there is no active reconsideration going on because you've decided

it's over, is really not one that needs to be addressed under question 5. Is there any more? Have we exhausted question 5 or shall we move on?

MR. LOCKYER: Yes, I will ask Professor Roach one question, very shortly. Professor Roach, can I ask you this, in your opinion, is there any legal impediment to the commissioner, in this case, recommending, if he felt it was appropriate, that the proceedings be reinstituted against Mr. Driskell to enable Manitoba Justice to offer no evidence in the Manitoba Queen's Bench so that Mr. Driskell can be acquitted?

MR. ROACH: I see no legal impediment to that recommendation.

MR. LOCKYER: Thank you.

THE COMMISSIONER: Now, this was a hypothetical question, and you gave a hypothetical answer?

MR. ROACH: Absolutely, Mr. Commissioner.

MR. CODE: Turning to question 6, which is in many ways the most difficult and interesting, and certainly the most innovative of the questions that we have to address. Do you think that it is necessary or advisable to have a new

criminal procedure in which to make determinations and declarations that a wrongful conviction of an innocent person has occurred or should a not guilty verdict remain the only legal option under the criminal law? If a distinction is to be drawn between a not guilty verdict and a wrongful conviction, what is the appropriate basis and standard for such a distinction?

Now, again, if I could preface this question or distill what the issues or points are that we are trying to get at. I think there is two in particular. First of all, traditional criminal procedure admits of only two verdicts. And Chief Justice Lamer's judgment in Gurdich is the famous decision on this point, that all we know in criminal law and criminal procedure is the guilty or the not guilty verdict. And the third verdict of factual innocence, or actual innocence, is unknown to the criminal law. All we do is we restore the presumption of innocence by the -- or leave the presumption of innocence in place by the not guilty verdict.

And what we're asking is whether in these 696 cases, given that there has been a judicial

conviction that has been set aside by ministerial order and a finding that there has been a likely miscarriage of justice, do they raise a policy need for a third verdict where the factually innocent could litigate whether they are, in fact, actually more than simply presumed innocent, but are actually innocent?

And the second question, the more legal question emerging out of that policy question, if there is a policy need for such a third verdict or a third form of procedure: What is the jurisdictional source for that procedure and who would bear the burden in that new proceeding?

So, Professor Roach, if you could outline the topic for us, I would appreciate it.

MR. ROACH: Sure. Well, I must admit at the outset that I found this to be the most difficult of all of the questions that I was asked to address. Although, I do think it is one that is required by the Order-In-Council, which specifically talks about a determination or a declaration of a wrongful conviction. And there are problems with definition because a wrongful conviction is not a term recognized in

the Criminal Code. There certainly is a popular understanding of a wrongful conviction, which I take to be the conviction of an innocent person.

There are echoes of this popular understanding in the Burns and Raffey case, decided in 2001 by the Supreme Court of Canada, which, to my mind, is one of the most important decisions that our Supreme Court has ever rendered. And the gist of that decision was that the danger of convicting the innocent made it unsafe for Canada to send someone to face the death penalty. So wrongful convictions are out there as a term. I teach a course. Professor MacFarlane is also going to teach a course on wrongful convictions. But there is no definition of what a wrongful conviction is in our Criminal Code, so that's one issue.

There is, though, a definition of what a miscarriage of justice is. And, of course, that's the issue that is before the Minister of Justice on a 696 application, and also before our Courts of Appeal. And as Justice Kaufman suggests in his Truscott report, and I cite this at page 7, footnote 15, that this term "miscarriage of justice" includes the conviction

of the innocent, but also includes forms of unfairness that I believe also Justice Marshall has spoken about. So as a threshold matter, we have this seemingly technical, and I actually think that there is a lot behind it, definition of the issue. Are we talking about all miscarriages of justice, all unfairness that requires us to undo a conviction, or are we talking about the wrongful conviction of a person who is innocent? So I struggle with this issue.

On the one hand, as Mr. Code has pointed out, you have the Gurdich principle that an acquittal in our system is the legal equivalent to a finding of innocence. It revives the presumption of innocence. On the other hand, you have, I think, the lived experience of a number of people, Mr. Sophonow, Mr. Parsons, Mr. Milgaard, immediately come to mind that the acquittal may not remove the stigma that Justice Marshall has spoken about. Certainly, to my mind, an acquittal is better than a stay. But the issue that I try to answer in my paper is whether you need an acquittal plus in some situations.

So, I mean, I want to be perfectly clear that I'm not at all suggesting that there be a third verdict at trial, all right, that there be a not guilty, guilty and an innocence verdict at trial. What I am exploring, somewhat tentatively, is whether -- after there has been an acquittal in the 696 process, whether that be through a new trial that results in an acquittal or whether that be through a decision by the prosecutor that, because there is no reasonable prospects of conviction, that offering no evidence is appropriate and then an acquittal.

I am asking whether the accused, and I can't underline this enough, whether the accused should have an option of some additional procedure that will address his or her issue of innocence. And I want to make it very clear that for me it is fundamental that it be up to the formerly convicted person to decide whether to leave it at a not guilty verdict, which in a legal sense does revive the presumption of innocence, or whether that person feels that because of a variety of circumstances, particular to his or her case, that they need an acquittal plus. And if there were to be a legal

procedure that would need an acquittal plus, it would be one that an accused, I think as a practical matter, would have to bear some burden that there has been a not guilty verdict because of a failure of the Crown to prove guilt beyond a reasonable doubt and the issue then would be whether the accused's innocence should be established. And in setting this burden, I think it is very important that it not be set too high.

And in my report I look at the Supreme Court's Milgaard case which offers two different standards. The idea that the accused should have to establish his innocence beyond a reasonable doubt, and the idea that the accused should have to establish innocence on the basis of a preponderance of evidence or a balance of probabilities, something closer to the simple standard. And it is my view, of those two standards, it is the balance of probability standard that is far more preferable, should the accused want an acquittal plus. And I say this because the reasonable doubt standard is one that, you know, throughout the legal system we only expect the state, with its almost unlimited

resources, to bear.

And I think, in a practical way, the only persons that could discharge the Milgaard standard would be someone with a DNA exoneration. And, of course, in 1992, before Mr. Milgaard had his DNA exoneration, he was unable to establish that burden, as well as the lower burden of a preponderance of evidence.

But after some reflection, and not without some doubt, because I am concerned about undermining the integrity of the not guilty verdict, it seems to me that there should be some venue. And it should be a venue with a judge. It shouldn't necessarily be a venue that depends upon other people. But there should be a venue that, should the accused want to, the accused should be able to have the court focus its attention to the issue of innocent. In many cases people may decide not to go this extra burden. Someone who is a successful 696 applicant has already passed an awful lot of hurdles. But it does seem to me that we should consider giving the accused a choice of completing the story. Because as I say in my report, that the injury of miscarriage of

justice is, I think, beyond -- is irreparable. But the justice system may owe it to those people, even though you cannot repair that injury, to provide some legal venue to deal with issues of stigma and reputation that may still, unfortunately, and regrettably, linger after a not guilty verdict.

MR. CODE: And just briefly, Kent, if you could touch on the second aspect of the problem, if one was to adopt your policy analysis on this point, what is the jurisdictional legal source for this new procedure in criminal law, as opposed to a tort action?

MR. ROACH: That's right. Well, in criminal law I would see, with the jurisdictional basis, this would create this would create a certain amount of creativity, but it is something that the system is capable of. One jurisdictional basis would be the whole 696 process. To my mind, one of the most important developments in the 696 process, and it's nowhere written in Code, is the decision that a number of judges may, starting with Justice Waugh in the Phillion case to grant bail pending a 696 application. And to my mind that has, you know, changed the 696

process. So given the judicial creativity recognized there, I think that that would support this post-not guilty procedure.

The second jurisdictional basis that I would suggest would be that there is, in the existing law, cases that suggest that the judge does have some authority when the prosecutor goes to withdraw a charge late in the day or even when the prosecutor decides not to call any evidence. So I think a judge could say -- well, let's imagine a situation where there has been a 696, the decision has been made to call no evidence. The prosecutor could get up and say: We will be calling no evidence. And the judge could then look to the accused, and if the accused wants to present evidence that goes beyond the not guilty verdict to the issue of innocence, that could be presented and the judge could make a determination and a declaration that an innocent person has been wrongfully convicted as part of a procedure that would approve of the prosecutor's decision not to call evidence and would approve of it.

So adding this sort of procedure is not without its risk. I take very seriously. And,

you know, at the end of the day I may not be right. I recognize the danger of underlining the integrity of the not guilty verdict. But I think if the accused has the option, and if the judiciary is willing, this is something that should be available.

MR. CODE: Thanks very much, Kent. Because this was the most difficult legally and policy -- in legal and policy terms, the most challenging of the questions, we looked around for a panelist with the most intellectual musculature. And, of course, we said we must have a former Court of Appeal judge somewhere who is used to wrestling with these kinds of problems. And we, of course, landed in Justice Marshall's domain. And he is a former judge of the Newfoundland Court of Appeal. And as we've been told this morning, they don't do 696 reviews in Newfoundland. They just get their Court of Appeal to fix the case. And they have this consistent record of ferreting out all of the wrongful convictions at the Court of Appeal level. So, Justice Marshall, we are very grateful to have you here. And we know you've undertaken a task for the Newfoundland

government to review the prosecution service in your province, as a result of the Lamer inquiry. And if you could respond to Professor Roach's proposals, I'm sure that would be of great assistance to the commission.

JUSTICE MARSHALL: You know, of course, the muscles and brains has another connotation, don't you? A little bit, it makes it a little bit inconsistent, but I will take your first one.

Look, this gets to the nub, the real nub of the problem, and it's the most difficult one. And it is really the most difficult one because as Professor Roach said, there is no definition of a wrongful conviction. There is and there isn't. It's not qualified. I suppose you might say that every criminal case that is over -- that is turned back to the -- or an acquittal is entered or is turned back to the trial division is a wrongful conviction. So, you know, the problem is really sorting out the difference between a wrongful conviction and the anti-wrongful conviction. I will get to that in a minute. I have to weigh on that.

Let me just say, first of all, that I

entirely agree with what Professor Roach said on this. And I think particularly his comments today, they are very helpful and very imaginative, and so part of that excellent paper that I read that we are discussing here today.

Now, as it happened, I read a passage of an article in a European periodical of broad international circulation, which kept springing to my mind while I was reading the professor's scholarly paper. And particularly, on this particular subject, the passage contains an observation uttered nigh on 100 years ago by Winston Churchill, when he was then Home Secretary of the United Kingdom. It's very brief, and I read it as follows:

"Sir Winston said, before he was Sir Winston:

'The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."

Now, I thought that was a pretty profound statement. And he goes on to elaborate on it thusly:

"A kind and dispassionate recognition of

convicted criminals, an eagerness to rehabilitate all those who have paid their dues in the hard coinage of punishment"... is one of the things he was speaking about.

Now, there can be no doubt, I would suggest, that Churchill's unfailing test of the civilization of any country applies with equal force to the treatment of the state and its society of the wrongfully convicted, from whom -- and what do I mean by wrongfully convicted, from whom rankly undue hard coinage of punishment have been extracted in years of imprisonment for crimes they did not commit. Such tragedies can never be fully redressed. That said, civilized society has a clear duty to inquire into what happened, with a view to taking appropriate measures to see that the same thing doesn't happen again. That's an oxymoron, I think, as the younger generation would say. Such inquiries may address as well the hard coinage of the state payable to the wrongfully convicted for the incompensatable hard coinage punishment unjustly suffered by the wronged and his or her family. The most important redress, however, should be accorded outside of the

inquiry, I would suggest, by public exoneration by the state in commissioning an inquiry where overwhelming evidence points to the conclusion of a wrongful conviction. Affirmation by the state of the tragic error and the victims entitled to be recloaked with the presumption of innocence, which is a mantle enjoyed by every citizen, is more important to most than many, to the wronged, I mean, to the wrongly convicted than monetary compensation. Where inquiry is commissioned on overwhelming evidence, again Sir Winston's Churchill's civilized society, to which I referred, is ignoble in my opinion, if an inquiry as to what happened extended to any chance whatsoever on suggestion the victim is the author of his or own misfortune.

For me, from my own perspective, I am very interested in listening to the discussion of the bounds of redress and the need for full incredible inquiry in wrongful convictions. A year ago I gave a paper at the Edward in Conference in St. John's, which is included with your papers. And I won't go back to that now, I will just refer to the fact that it has been filed here. And I look forward, then, after

these -- these were the thoughts in my mind when I came to this panel discussion today.

Now, we're at the nub of this. But although I won't go to the paper, I have a great deal of concern, as the paper develops, over the introduction of a notion of factual innocence in the criminal law. It is foreign to the criminal law. Every citizen is -- and the whole basis of our criminal system has been proof every citizen is presumed innocent and is not -- is cloaked with the presumption of innocence and is not deprived of that cloak unless convicted on a trial. He regains, he or she regains the cloak if it is overturned on appeal. It has been sacrosanct in our time. And I suggest if the paper develops it further, I suggest that if we go into a factual innocence is to be the sole criteria, and now there, obviously, to be to be a criteria. If DNA comes into the equation, it's absolute. It's one of the gifts of science, the latest gifts of science and it is tremendous. But I suggest to you it's not the only one. There are times when DNA will be irrelevant.

I can think of a case that actually

happened where the -- on Crown evidence, not maliciously led or anything like that, but on Crown evidence a young man was convicted of right-handed mangled strangulation of his wife. On the basis of evidence led by the Crown, from the chief forensic pathologist in the province, which was totally and absolutely discredited by the evidence, new evidence, fresh evidence, which gave that man a new trial. And even further evidence on his retrial in which he was summarily acquitted. That from six or seven, from Wales, we heard from Wales, which is one of the leading universities on criminology in York, from Scotland, from Ireland, from Pennsylvania, from British Columbia, Manitoba, Saskatchewan, the most imminent forensic pathologists who said that -- who totally discredited, absolutely discredited the opinion that was given on which he was convicted. But they didn't just discredit it. They also pointed out how his wife died. They say she didn't die -- they mocked the fact that a right-handed man with strangulation, because apparently you can't -- you can't commit strangulation like that. But apart from the error that was made there, they

came to the opinion that the gentleman died of -- or his wife died of a cereal that she had ingested, which was, by the way, found when she was found unconscious on the couch in the house when he came home and was removed by the -- on her death in the Gander, in the Gander Hospital. So, in other words, this man was convicted of a crime and served eight and a half years in jail for a crime that was never committed. He was -- he was convicted of a crime in which DNA was irrelevant because he had tried to resuscitate his wife when he found her unconscious and the DNA was all over her. There were a few bruises on her neck when he was -- and inside her neck as he was trying to extract the cereal, but he was convicted.

That's why I say factual innocence, the best gift of science, a marvelous gift of science. But it would be a tragedy if it wasn't recognized that the revelations it makes to us shows us the frailties of the criminal law system. It's a good system. But you don't -- you don't -- it's based -- it's fragile because it's based on human frailties, as somebody who has got a great much greater passion than I have

for wrongful conviction has rightly pointed out.

And, you know, it would be -- so what do you do? I come back to Professor Roach, so what do you do then? Do you say factual innocence is going to be the criteria? One of them, yes, but not the only one. But the one also that should get us thinking a little bit, to search a little bit more, are the places where DNA is irrelevant.

In my paper that I have left here, I made a suggest to what it should also extend to egregious errors, and I mean egregious errors by the prosecution, in the prosecution of the case, an egregious error can be made innocently with all good intentions. If the prosecution, surely to God, is responsible for bringing on leading an expert evidence that persuaded the jury on a bogus theory that has no validity whatsoever, well, surely, you know, there has to be -- they have to be responsible. He was convicted in the final analysis because the prosecution -- the state, I don't say the prosecution because I don't -- prosecutors, I don't -- you know, there are really good prosecutors. And we do need prosecutors for sure. But the state has to be

responsible for it. So I say egregious error should be another criteria in that I would put there, and not presumed to fashion them all. That is why it is so appealing to see Professor Roach's suggestion that there be another alternative as well.

But there is another thing that I don't think that, in fact, he doesn't -- I know he doesn't mean it, because I listened carefully, and he didn't really say it, but this factual innocence shouldn't come in, again from the point of view that it gets turned around, that the wrongly convicted person has to prove his factual innocence. What we are doing then is we are turning up the presumption of innocence upside down. But there should be -- I would agree that there should be some procedure set up, some judicial procedure, not a declaration of innocence by the Attorney General of the province, as was sought to my knowledge, at one period of time. I doubt whether it is constitutional anyway because it is a judicial determination. But it should be -- it should be set up in the Criminal Code to type out the -- because, you cannot -- you see, you can't

contemplate all of the permutations and computations of human conduct and mistakes that are going to occur.

And this is a critical time in all of the western nations. It is not just in Canada. The Unites States, Britain, we have all heard from them, wrongful convictions, people being executed in the Unites States where DNA has shown they were innocent. And no society can exist -- apart from what Sir Winston said, you know, this is a test. And this is a test of civilized society now to come up with something and to address the fact that -- I've got great respect for my colleagues in the law who talk about what the law is. And you have to go by what the law is because there has to be a framework. But I say, in this context, what you've got to talk about is what the law should be and take an open examination of it from all of the other -- all of the aspects, the tunnel vision that occurs, the investigation area. But when we -- that's preventive in the future.

But in my estimation, I feel fairly strongly, very strongly about this, because there is nothing -- there is no richter scale in

the world that can measure the relative depth of human tragedy. But how -- I would suggest to you that up amongst the top of them will be people who have spent 20 years, 10 years, five years, that sounds like it is large or small, but I take it all the way down, three years, two years, one year, one day in jail, we can't afford to have it. Mr. Code, I'm sorry, I've monopolized your time.

MR. CODE: Far be it from me, to impose time limits on a Court of Appeal judge.

JUSTICE MARSHALL: His wife does.

MR. CODE: We caught each other's eye at the right time. I am quite grateful for Jerome from circulating your paper, which I had the benefit of reading. But I just want to be clear that the paper very strongly articulates a view that the terminology of "wrongful conviction", as that term is beginning to develop in legal usage, should not be limited to factual innocence. That it's a broader concept, more consonant with what we think of as miscarriages of justice. You say cases of egregious misconduct are wrongful convictions.

JUSTICE MARSHALL: I would prefer, excuse me,

not misconduct, if I said that, it is egregious error I would rather have. Because misconduct has a connotation that I don't think we need to settle on the prosecutorial branch.

MR. CODE: You say egregious conduct or error by officers.

JUSTICE MARSHALL: Well, I might have said that last year. But as you grow older, you get more mellow, we all know that, so it changes.

MR. CODE: I don't want to get into debates about terminology here, but the policy point you're making is that wrongful convictions, in a common sense term, in a practical sense, means more than factual innocence. Because there will be cases where, as a result of errors made in the original trial, you are never going to be able to prove one way or the other whether the person is innocent or not and that burden might not be undertaken.

JUSTICE MARSHALL: That's true. But there is another aspect to it. I am scared of this concept of factual innocence coming in and displacing the concept of the presumption of innocence and guilt beyond a reasonable doubt. Because if we get to that stage, you know, that

great gift of science that we got that shows us the wrongly convicted will now break the other way. You will want to see wrongful convictions that accumulate then.

MR. CODE: And Professor Roach is sensitive to the dangers of letting the idea of actual demonstrated innocence creep into the criminal law because it's reversing the burden of proof. But do I take it that Professor Roach's proposal, then, we don't change the verdicts available at trial. But in 696 cases, if the accused is able to undertake the burden of demonstrating actual factual evidence on a balance of probabilities, you are agreeing with him that in that narrow context it ought to be done?

JUSTICE MARSHALL: I would agree, except with one caveat. I always have to put a little caveat on it. But, you know, there are people who are wrongly convicted and spent a lot of time in jail. You know, I usually choose my words carefully, they are usually disadvantaged, or certainly disadvantaged if they have lost every asset in their family, and they are in jail for ten years. And you should -- there

perhaps should be some basis -- or they have been in for a certain period of time for a very serious thing like a murder conviction, it is like they don't -- they don't accept a guilty verdict on a first degree murder case, you know, so I don't -- I would just question as to whether or not there should be provision made for those people to be -- for this to be litigated whether they wanted it or not. Well, if they didn't want it, that would be different. But, you know, sometimes they may say they don't want it because they are so glad to have the thing over with. But still, as the years go by, you know? So I don't know how you can work that out. I don't want to replicate it, but I mean billable hours and that have got to be -- I guess that's another subject, billable hours have gotten to be an impediment to the justice system, too.

MR. CODE: That is not within our frames of reference.

JUSTICE MARSHALL: No, I'm sure.

MR. CODE: But if an accused in a 696 process is willing to undertake the burden of demonstrating factual innocence, Professor Roach says there

should be a procedural vehicle for that. And you're in agreement with that?
JUSTICE MARSHALL: In agreement totally with him, as most things in his paper.
MR. CODE: Any comments on that? Kerry?
MR. SCULLION: I would just like to make a few comments, particularly in relation to this actual innocence aspect of the review. When we conduct reviews on behalf of the minister, we are not searching for actual innocence. And I heard one of the other panelists mention earlier that it is an exoneration process. I don't see it as an exoneration process. And what we see it as is an application from someone who brings forth information that wasn't available for a trier of fact. And we review that and make assessments on what impact that would have had on the trial, the fairness of the trial. And certainly the vast -- well, the vast majority of cases, certainly in the last four years that I've been there, the seven cases that have been referred back, didn't touch on factual innocence. We are not concerned with factual innocence. What we're concerned about was the fairness of the trial process and that the

information that surfaced certainly left us in a position to make recommendations to the Minister that the trial process was the egregious error that was mentioned earlier. And I think that's the basis upon -- I mean, it may come up in a DNA case where you have that factual basis.

And we are having this discussion. I think this whole panel discussion, we are not really addressing the innocent people. Because the innocent people who are wrongfully convicted, I think everybody here would agree that there would be apologies. There would be public exonerations, regardless of how you phrase it. I don't see a problem associated with the Milgaards, with the Sophonows, with the Morins. They are recognized quickly. Well, perhaps not as quickly as some would like, but they are addressed. There is compensation.

What we are really dealing with here are cases that fall between the cracks, that are not factual innocence, the egregious error cases. And I agree that perhaps there may be procedures to deal with cases where there is less than the factual innocence component, but egregious error. And there are many times of egregious

error that we have seen in the applications.

And so as to whether there should be another process to address that that the applicant can make the burden of establishing that, that's a question for other people. And certainly I don't have any comments or problems with that. But our process, the process before the Minister, and, in fact, most of the cases that go to the Minister, we're not looking for factual innocence. That's not the threshold. That's not the onus on the applicant. It's way less than that, in fact.

MR. CODE: Geoff?

MR. GAUL: Thanks. I also commend Professor Roach for the creative solution that he is suggesting here. It is, obviously, prompting some debate, and fair enough. There is, obviously, some concerns, too, about the accused who does not choose to go this route. Will there be a stigma attached to that person, who doesn't want to take that extra step and try and have a judicial determination whether there was or was not a wrongful conviction or miscarriage of justice.

I actually have a question for Professor

Roach. And people understand my selfishness, what would the role of Crown Counsel be in such a proceeding? One can imagine that, leaving aside the debate earlier this morning as to how you terminate the proceedings. We don't call evidence, stay of proceedings. And we would withdraw, leave that aside for a second. Assume that that has happened. And the accused -- and I think it is a creative idea that needs to be mulled about. But the person then says: I want that. I think the professor refers to acquittal plus, that's catchy. He says: I want more than that. I want a judicial determination that I was wrongfully convicted or there is a miscarriage of justice. Question: What is the role of prosecution there? If we've just made a determination not to prosecute a case, are we now in an adversarial position of having to prove that there wasn't wrongful conviction?
MR. ROACH: Well, I mean, that's a difficult question. I think that, practically speaking, the burden would be on the previously convicted person. I think it would be up to the Crown to decide whether they wanted to take no position on that issue, whether they wanted to support

it, whether they wanted to oppose it.

But one of the reasons why I think it is important to move it into the judicial arena is, regardless of which of those three options the Crown takes, they are in a bit of a conflict of interest. They have some responsibility. Maybe it's not personal responsibility. Maybe it's an institutional responsibility of what their predecessors did in their shoes 10, 15 years previously. But they are in some kind of conflict of interest.

Now, it may very well be that a wise use of prosecutorial discretion, there will be times where the Crown agrees and asks for the finding of a wrongful conviction, and there may be times where the Crown doesn't take that position. But I think that it's important to get this out into the open and to get it before a judge.

MR. CODE: Any other comments from the panelists?

MR. FRATER: Can I just ask Professor Roach, too, since apparently it is okay for us to ask each other questions, whatever procedure might be devised? Should people that are acquitted be able to avail themselves of that procedure, too?

Because they may well find themselves in a situation where there is quite a considerable lingering stigma. And they believe their case is stronger than that, and they want the ultimate indication, should they be able to get into that process?

MR. ROACH: Yes. Well, I will hopefully, uncharacteristically, give a kind of "that was my mandate" sort of answer. I mean, I was focusing on the 696 process. But in the interests of intellectual candor, I think that generally our system needs to look at how we treat the acquitted. I mean, you know, in civil litigation if someone sues you and can't make out the claims, the successful defendant at least gets some money. When the state prosecutes and you are acquitted, you -- just generally, we do nothing for those people. And there are some other legal systems on the continent that do much more for those who are acquitted. So this may be a bit of a poison pill that may sink my proposal.

But in the interests of intellectual honesty, even though it is not in my report, and the mandate of the inquiry is only to examine

whether there needs to be a procedure to determine or to declare wrongful convictions in a case in a 696 case, I wouldn't be totally opposed to thinking creatively about different ways that the state can put those who are charged and found not guilty in the same position that they were in before the trial started.

THE COMMISSIONER: There is always one small difference that if one were trying to fix the scale, that the people who are acquitted, at first instance, have never been convicted. I'm not sure that makes much of a difference, but they haven't. The person who has been convicted, and then goes to the Court of Appeal, at least has been convicted. The Court of Appeal orders a new trial. And then normally they would -- there would be a new trial. It is not very common that there isn't. So, yeah, one could maybe draw a distinction. The reality is I will probably not make any comment in my report, but there is a distinction.

MR. CODE: Perhaps I could take Rob's question as an invitation to segue into the last question. Because this discussion can very

easily be carried on under question 7. We see question 6 and 7 as being very closely related. Because what question 7 asks is: What are the existing procedures which a person who is acquitted, whether through the 696 process or through an order trial, would have available to them? And it's the adequacy of those existing procedures, or the inadequacy of them, which will drive one into a consideration of Professor Roach's idea that you need to develop a new procedure. So, Professor Roach, if you could address question 7 which focuses on the adequacy of the public inquiries, the compensation process, tort actions and the existing panoply of remedies, with particular focus, I think, on civil actions and compensation proceedings under the compensation guidelines as being the two primary tools that we have in existence now for, potentially, a declaration of a wrongful conviction or a declaration of factual innocence. And if you could give us your views on their adequacy that led to you making your proposal?

MR. ROACH: Right. Well, in my paper, I start with a discussion of the issue of apologies and

recognition of innocence by police and prosecutors. And Professor MacFarlane's paper talks -- has done a paper on this with reference to the Sophonow case. And I think that that is extremely important. But I don't think that we can rely on that, precisely because the police and prosecutors are in a bit of a conflict of interest here and there is a concern about tunnel vision. Now, obviously, there are some cases where police and prosecutors have risen above that, and I applaud them for that. But for that reason, I did not want to put reliance on that process.

Another possibility is under section 696.3 (2), there is a possibility for the Minister of Justice to refer to the Court of Appeal really any question asking the Court of Appeal to opine on that matter. And I think that in some cases, particularly where the applicant is requesting that issue to be put to the Court of Appeal, and the case goes back to the Court of Appeal, that is possible.

I also, in my paper, at page 52 to 53, discuss a number of cases, mainly from Ontario. But also the Fell case from England where courts

have more or less, I think, on their own notion, addressed the issue of innocence. So those are some alternatives. Mr. Lockyer has addressed the issue of whether the 696 process itself and the reasons that the Minister gives, can that be used as a procedure? But, again, I'm somewhat uneasy with that because, as I see it, the logic of the 696 process is to send this back to court, and I do think it's very important that the court do it.

So we're left with either creating a new criminal procedure, such as I have recommended, or using the existing tort system to achieve these ends. And of those two, I'm fairly strongly of the view that it is the criminal procedure that is preferable. One, and I think Justice Marshall has already discussed this or mentioned this, is the issue of cost. That having a wrongfully convicted person have to follow with civil litigation, after going through all of these hurdles is, I think, unrealistic. Donald Marshall, for example, tried to sue the Sydney Police after his wrongful conviction and soon ran out of funds. Because you have to remember that in our civil

law system, unlike in the Unites States, it's not a freebie to sue anyone. You have to pay your lawyer. And the first thing your lawyer is going to tell you is that if you sue someone and you lose, you are going to have to pay them a significant amount of your costs. So that's one reason for rejecting the tort system.

Another reason, and Justice Cory in the Sophonow report looked at civil litigation as a means of compensation, he looked at malicious prosecution suits, false imprisonment suits and charter damage suits. And he concluded that they were all not fit for dealing with the issue of compensation. That all forms of civil litigation are going to be, in some ways, about fault and the negligence of the state. And, again, I agree with Justice Marshall when he says the issue here is not misconduct. There may be misconduct, but there may be miscarriages of justice without misconducts.

And then, finally, civil litigation is expensive. It has a downside risk. It is false based. And also, in many cases, the defendants will be able to offer perhaps a nominal settlement offer with confidentiality clause.

And so I really worry that the civil process just doesn't have the adequate tools to come up with a determination and a declaration of wrongful conviction. So I definitely have thought about the civil alternative. But on a balance, I have concluded that the better way to go is to graft it on to criminal proceedings following a not guilty verdict.

MR. CODE: Our last panelists, who we are formally introducing very late in the morning, who is going to take the lead in responding on this is Professor Tim Quigley. Professor Quigley, as we all know, is one of the leading scholars in this country on criminal procedure. He has produced one of the best case books on the subject. And he is a former colleague of Professor Roach's, when Professor Roach was at Saskatchewan University. And we are very grateful to have you here, Professor Quigley. If you could address Kent's critique of the existing procedures and whether it drives one into his proposal that we need a new criminal procedure? Thank you for your comments and compliments. I am going to largely agree with Kent's approach on this. I do want to back up a

little bit and look at, more generally, the section 696 process itself. I think we have made great strides in improving it in recent years. Much greater attention has been paid, certainly at the Federal Justice level, and at the provincial prosecutorial level. There is much more attention. And inquiries such as this one have done a pretty good job, on the whole, of ferreting out the truth of trying to determine where errors have been made.

Having said that, though, I would like to see us evolve to a situation where we did something more like what Great Britain has done, an independent body, independent from the Minister of Justice, and with powers of investigation and so forth to be able to refer matters back to the court. I think, ultimately, we do want judicial determinations in this area. And I agree very much with Kent. And I want to add, just simply, the multiplicity of proceedings that you would have if you have to go through tort remedies, never mind the different procedures. And, of course, you get into some constitutional issues and the adequacy of the various courts that we have and so forth.

So I think that, in a cautious way, we should begin to move towards a judicial determination of innocence and/or miscarriage of justice, appreciating that there are some definitional issues there. But certainly I agree with the remarks that we should avoid a focus on misconduct as the central criteria. We have to broaden the view on that. Because mistakes can be made without fault, eyewitnesses, for example, that sort of thing. So I would cautiously endorse the idea of moving towards a judicial determination.

One suggestion I have in response to Kent's qualms, I believe, about placing the burden on the defence and the balance of probability standard, we are left with very few options. Of course, why not consider putting the burden on the prosecution at that stage to demonstrate, on the balance of probabilities, that the accused was not innocent and/or a victim of a miscarriage of justice? That way there is a slight twist in the burden of proof. We might avoid some of the spins, trauma, et cetera, for an accused person to demonstrate her or his innocence.

I think it is better to do it as a part of the process. I know we are talking about section 696 here. Again as an evolution, if we were to see some merits in going in this direction, I wouldn't rule out the idea of down the road questioning the verdict that we have in criminal cases to this small extent. I think we really want to be careful not to undermine the purpose and rationale of an acquittal, namely that it is legal innocence. I don't think we want to water that down in any way.

But we might, if we saw our way through to this in cautious steps, adapt it to the trial stage, too, so that an accused who has received an acquittal might make an application, depending on who carries the burden of proof, to put the Crown to proof of the opposite of actual innocence and get a declaration right there, so as to avoid a multiplicity of proceedings. And we might even do the same in the appellate level. But I wouldn't at this point advocate those right away. I think we need to really think about whether we are attacking the rationale behind a not guilty verdict. And maybe we should do it in at least relatively few

cases at the 696 level where the applicant wants that process to be undertaken. If the applicant doesn't, then that's fine, but I think it should be initiated by that person.

THE COMMISSIONER: I wonder if I could just interject for a moment, because I'm quite sure I misspoke myself a few moments ago when I said I was probably not going to comment in my report. What I meant was I was not going to comment in my report on a situation where someone went to trial and was found not guilty at first instance. Obviously, that is beyond the scope, in any event, and nor would I. And I also -- any comment I would make would probably not be very specific because it's a very difficult, a very difficult topic. Are we at a --

MR. CODE: Any other comments on the 7 question, Bruce?

MR. MacFARLANE: I will make this very quick. At issue at this stage, really, is post-696. If the Crown enters a stay, should there be an innocence hearing is essentially what we're talking about. And I think that Professor Roach has really done a service to this commission by coming up with an innovative mechanism that will

allow the issue of innocence to be canvassed. I am very supportive of the notion of an innocence hearing, post-696, with three qualifications or three features built into it. And I just wanted to set them out. First of all, I think it should be only at the request of the applicant. I don't think it should be forced by the Crown. So it has to be applicant-driven.

Secondly, it seems to me, that in terms of the objective of the hearing, it ought to be truth-seeking. I would caution against developing all sorts of evidentiary rules and procedural rules. This is an attempt to really get to the bottom of what happened here. So the objective, I believe, has to be truth-seeking.

And, thirdly, I would suggest that there ought to be at least an expectation that the applicant ought to provide some explanation for his understanding of what occurred. Especially in situations where the applicant has never testified before and never provided a statement to the police, I think there ought to be an accounting on his part as to any involvement or any understanding that he might have had, so that there is no surprises later on that all of

a sudden the person that was found to be innocent, in the innocence hearing, for instance, makes a public confession.

JUSTICE MARSHALL: Just one moment. I will just be a second, very, very quickly. I agree it's a fact that it should be factually-driven. I do not agree that the wrongly convicted person should be put to explaining himself. It smacks to me of a reversal of the onus again.

And, finally, with regard to the other question, in the last question the commissioner made a valid point, should this apply in response to the question of acquittals, so in other words acquittals, should the same procedure be applied? This applies, I would suggest, to wrongful convictions. I mean, you can't really -- you can't open the door to -- but these are special cases. And if you get into acquittals, you are going to get back into this business of factual innocence, and I think that that is a slippery slope.

MR. CODE: I think Bruce's second point, in some ways, links back to Geoff's question about what would the role of the Crown be. It's very helpful. And you would hope that if this

procedure was to be developed, there would be a fair degree of informality. By the time this case has reached this stage in the process, there would be a lot of material that you would hope would get filed in an uncontested fashion, with a view of trying to get at the trial. And that would be, obviously, a natural comfortable role for the Crown to engage in. Any further questions on this seventh and last question?
MR. LOCKYER: Can I say something?
MR. CODE: Yes.
MR. LOCKYER: Mr. Commissioner, I wonder if I could address you? Could I make a plea that we devote an extra 45 minutes to this after lunch?
THE COMMISSIONER: I will have to ask my handlers here. I feel this is certainly an issue that I would like to address. I know Mr. Kennedy would like to address it on behalf of AIDWYC. And it's 12:45, but it is a very important issue. And I think it would be really good if we could have a bit more time.
MR. CODE: There are some practical issues here. People have planes booked because, certainly, we put it forward on the basis that we were going to finish. But I don't want to cut people off.

I mean, if James and Jerome have got submissions to make, we should hear them, or any questions they have to ask.
THE COMMISSIONER: What about other counsel here?
MR. CODE: Do we keep sitting until one o'clock, is that a compromise?
THE COMMISSIONER: Well, break now and resume at quarter to two.
MR. SCULLION: I can't speak for everybody, but our plane isn't until eight o'clock tonight, as far as the two of us here. I don't think you want to hear from me.
MR. GAUL: I believe my flight, Mr. Commissioner, leaves at 3:50. I have no idea how quickly one gets processed in Winnipeg.
MR. LOCKYER: Very quickly.
THE COMMISSIONER: Mr. Gaul, even if we did have to lose your input, I think it might be worth continuing. If we were to resume until quarter to two and go until 2:30, I don't think you can join us, Mr. Gaul.
MR. GAUL: I will see about trying to change my flight.
THE COMMISSIONER: And the only other thing is,

if you don't come back, you had said earlier about the -- you were looking forward to my comments on the stay part of it. And I can tell you that in 1973 or 1974, I was invited by Neil McDermott, who is in the head of prosecutions in B.C., to go out and speak to the prosecutors in B.C. on the issue of the stay. I think they heard my views then. I don't know that much changes was done. Actually, the truth is, I don't clearly remember what I did say, but I have an idea. But if you don't make it back, Mr. Gaul, I wanted to say how pleased we are that you have attended today. Your input has been most important. And the rest of you, we will see you at quarter to two. I should have asked Madam Reporter, could you be back by then?
THE REPORTER: Yes, that's fine.
MR. CODE: Just one minor detail, the room has to be reconfigured because we have a witness we are calling this afternoon. But if we break now until quarter to two and firmly agree that we are going to adjourn this panel at 2:30.
THE COMMISSIONER: Absolutely.
MR. CODE: Mr. Giasson can reconfigure the room so that we can then call a witness, say, at

quarter to three.
THE COMMISSIONER: Okay.
(Proceedings recessed at 12:50
and reconvened at 1:45 p.m.)
MR. CODE: Mr. Commissioner, I believe we were wrapping up question seven before the lunch recess, and perhaps I could first of all ask the panelists whether there are any comments from them on question seven, or the combination of six and seven. And then I know that Mr. Lockyer and Mr. Kennedy have some questions.

Any comments from the panel? Perhaps I could call on Mr. Lockyer, Mr. Kennedy, in whatever order they wish to address the panel.

MR. KENNEDY: Thank you, Mr. Code.

First, Mr. Commissioner, I would like to, on behalf of AIDWYC, thank Professor Roach for his paper which explores issues that are very dear to us and ones which we have been grappling with ourselves for a number of years.

By way of preamble, our association is known as the Association in Defence of the Wrongly Convicted. Whatever definition you use of wrongly convicted, our clients, for lack of a better term, are people who say to us, I was

convicted of a crime that I did not commit. So that's the basis of the wrongly convicted part of our name.

I have really two questions. First one, if I could just outline a couple of points. We have a situation where a Ministerial review has been conducted and a new trial ordered. The Crown enters a stay, or there is a not guilty verdict, whether it is as a result of calling no evidence or after a new trial, but we are into a situation where the state refuses to acknowledge innocence in its broadest form, that being that the wrongly convicted person did not commit the crime, or as Justice Marshall pointed out, a crime did not occur. This individual wants an acceptance of innocence and an apology. Professor Roach's paper addresses possible or potential procedures. As pointed out by a number of different people, the individual now once again benefits from the presumption of innocence. There has been an intervening event, like the Ministerial review or the acquittal that does raise questions about the integrity of the verdict or the likelihood of a miscarriage of justice.

This is where we divert somewhat, Professor Roach, with you. I want to ask you specifically, first, adopting Professor Quigley's suggestion, in these circumstances it is our position that the onus should be on the Crown to demonstrate why the individual, excuse me, why the state should not acknowledge innocence, in its fullest sense, and offer an apology.

In terms of the procedures you have outlined, Professor Roach, have you given consideration to that proposal that I'm suggesting to you?

MR. ROACH: Well, I have given consideration to the need to distinguish in a principled fashion the not guilty verdict from this not guilty plus, or innocence that I'm talking about. In my paper I argue to the conclusion that the way to distinguish that would be to require the previously convicted person to establish innocence on a balance of probabilities.

Professor Quigley has suggested a kind of intermediate standard, and that may very well be a workable standard. I guess I just have two concerns. One is, are you putting the Crown in

a position that it will be impossible, of kind of proving a negative?

If I understand the proposition, you are asking the Crown to establish why they are not recognizing this person's innocence. And so I'm having a little bit of difficulty wrapping my head around how the Crown would actually go about establishing it.

Secondly, I guess my second reservation, Mr. Kennedy, is that I worry a bit that by putting the burden on the Crown that this hearing, which I think taking Mr. MacFarlane's point, doesn't have to be terribly formal and should be geared at truth and to a certain extent reconciliation, I worry that the Crown will have a second bite at the apple. So that in a situation where there is, the Crown reaches the conclusion that there is no reasonable prospect of conviction and might just leave it at that, and then allow the previously convicted person to come forth and tell his or her story, that the burden of proof, if it is on the Crown, will force the Crown into an adversarial position, where the Crown will effectively be saying, we can't prove guilt beyond a reasonable

doubt, but we will prove that we have good reasons for not recognizing innocence on a balance of probabilities.

So, I mean, subject to those two reservations, I don't have any strong opposition to Professor Quigley's proposal. And I'm worried about putting too much of the burden, and too much expense, and too much time, and too much delay on the wrongfully convicted. Those are the reasons why I rejected the tort model.

MR. KENNEDY: Before I get to ask the other members of the panel for their comments on that, you recognized, Professor Roach, in your paper that in these cases the Crown has determined -- the police have determined that they have reasonable grounds to lay a charge. At some point the Crown has determined that there is a reasonable possibility or probability of conviction. So there is going to be, I think the way you put it in your paper, some circumstantial evidence or some evidence capable of raising suspicions.

Now, if the presumption of innocence, as talked about by Justice Marshall, is going to be given its full meaning that it deserves,

wouldn't the Crown, in the truth seeking process -- I agree with Professor MacFarlane -- in the truth seeking process have to at least acknowledge these two basics, and then why couldn't there be an onus on them to say, yes, this is why we are maintaining our position. Wouldn't that be workable, knowing we have these precipitating or intervening events leading into the innocence here?

MR. ROACH: Yes, I mean, it may be workable. And maybe the better way of looking at it is to be flexible on the burden of proof. I mean, I think it is important at this hearing to listen to the previously convicted person, to ensure that they have an opportunity to explain what has happened to them. But conversely, there may be some issues where the evidential burden is on the Crown. Because it is the Crown who has the knowledge that is relevant to the determination that the judge will make. So perhaps this choice of burden doesn't necessarily have to be an either/or, and on certain issues, the accused, the previously convicted person will present their case, and on certain issues the Crown will present their case. But, again, I

don't want to force the Crown into an adversarial, necessarily an adversarial position. And I don't want to encourage a kind of second bite. Because, I mean, the real dilemma in this whole exercise and why there is a certain degree of danger is to undermine the integrity of the not guilty verdict. And that's why to me it is absolutely crucial that this procedure not be foisted on the previously convicted person. And from that I think that the previously convicted person is going to have to have some role in this new procedure.

MR. KENNEDY: I think we are all agreed that this has to take place when the wrongly convicted person requests it.

Before I move to my second question, do any other members of the panel have a comment on the onus of the state as opposed to the applicant or individual?

MR. QUIGLEY: Since I'm the one who opened my big mouth, maybe I could do it very quickly.

The way I see it operating would be analogous to the doctrine of res ipsa loquitur in tort law, so you would have a presumption of wrongful conviction, and then the Crown could --

and bearing in mind that they have had reasonable and probable grounds to lay a charge at some point in the past, they would carry the burden of feeding that presumption. And so that in some instances the Crown might choose not to tender any evidence, they will allow the presumption to stand.

MR. KENNEDY: Professor MacFarlane.

MR. MACFARLANE: Thank you, Mr. Kennedy.

I mentioned earlier I thought it should be truth seeking, a truth seeking process, which did not carry with it the procedural rules and the evidentiary rules. I would suggest that that goes as far as the burden of proof as well. We, as lawyers and judges, we are consumed with notions of burden of proof. I'm not sure that it is essential. I would characterize it simply as a truth seeking hearing, where all of the evidence and information is provided to the presiding judge and then it is a question of weight.

MR. KENNEDY: Justice Marshall.

JUSTICE MARSHALL: I agree entirely that it should be a truth seeking venture, but also, I think you have to be quite careful as well that

the wrongly convicted person isn't being put to proof and put on trial again. And this is why I prefer the truth seeking. I mean, this is not, my understanding of Professor Roach, that this wasn't intended to be of a nature of a trial. And I don't think it should, because if you do that you could well defeat it. A person is wrongfully convicted. Now it is a truth seeking venture. And if you are getting involved with all of these -- they are necessary in trial, the strict rules of trial -- the wrongly convicted person is going to be put to the test again. And I don't think a chap who spent 10 or 12 years, or 20 years in jail, should be put to the test again. That's why I would concur with my colleague on my immediate left.

MR. KENNEDY: Anyone else have a comment before I move to my next question?

MR. CODE: If I could just briefly comment about this burden and shifting burden issue. It seems to me that these innocence hearings, if we are to embark on them, the practical reality is going to be two-fold. Number one, an accused will only undertake such a hearing if there is a substantially good case of innocence, there is

going to have to be some real positive evidence of innocence before an accused would ever risk moving off the verdict of not guilty and trying for something more.

So assuming some kind of a prima facie case of innocence, which is going to exist for any accused to risk this hearing and risk the Crown to rerun its case again, the practical reality is going to be that a tactical burden will shift to the Crown to say, in the face of this prima facie evidence of innocence, why aren't you acknowledging? I mean, if the Crown has some kind of a case still, the accused isn't just going to risk this hearing, it seems to me. They will be quite happy with their verdict of not guilty and they will go home at that point.

So I think Bruce's conception of this accords with the practical reality that if the burden is going to be a shifting burden, in any case, and it is going to be simply an open-ended inquiry in which at some point the Crown is going to have to explain why they are not acknowledging innocence.

JUSTICE MARSHALL: I agree to a limited extent with that, but you have to guard against it

becoming a self-justificatory exercise on the part of the Crown.

MR. KENNEDY: The second question might lead into that somewhat, and this is one that is somewhat jurisdictional in relation to the division of powers. We have talked today about the stigma, I think the hard coinage that the individual has paid, who has spent time in jail, who has been convicted, who has spent literally 10, 20 years in the system. In terms of having this innocence, the conception of this innocence hearing of -- does anyone see an impediment to this hearing being conducted within the province? And obviously there is constitutional issues. If I could use this as an example: Commissioner Lamer, in the inquiry in Newfoundland, determined early in the proceedings that a determination of factual innocence could be made within the ambit of a Provincial inquiry. However, he couldn't make a finding of guilt, because that would be a re-trial which would trespass upon the 91(27).

So, one conception that I have, for AIDWYC, is an agreement, and Professor Roach touches on this, an agreement -- somewhat as Professor

MacFarlane, an informal procedure -- an agreement between parties that an independent reviewer, such as a retired judge, be agreed upon by the parties and a review be conducted. Is there any impediment from a jurisdictional or division of powers perspective to that type of procedure being adopted by the province?

Professor Roach, I know you have thought about that.

MR. ROACH: Yes. No, I don't see any impediment, given Chief Justice Lamer's finding that factual innocence was within Provincial jurisdiction. I think this would be somewhat different than an innocence hearing that would build on 696, or judicial approval of the decision to call no evidence. But it is an alternative.

And, of course, the other thing that speaks in favour of Provincial jurisdiction is something that I don't think that any of us has mentioned yet, but is really the elephant that's in the room, and that's the issue of compensation.

So under your proposal, to do it provincially, could also be tied to the issue of

compensation. But that would mean, I think, a separate proceeding, that this would not occur at the time that the not guilty verdict was rendered by a criminal trial judge.

So I think, if I understand what you are proposing, Mr. Kennedy, is that it is a Provincial procedure, and I would only add that if it was, it seems to me that there is no reason why that also couldn't be linked to the issue of compensation, which I think is clearly within the Provincial jurisdiction.

MR. KENNEDY: Before I ask other members of the panel for their comments then, Professor Roach, do you see any difficulty from a constitutional division of powers perspective with the answer that the reviewer would have, the question that the reviewer would have to answer, the finding would be, for example, that there is insufficient evidence to make a finding of wrongful conviction, as opposed to going any further and addressing Justice Marshall's concerns that there is a re-trial of the wrongly convicted person, or potentially wrongly convicted person.

In other words, the findings will be

restricted. You wouldn't be -- you would get away from this informality, get away from guilt or innocence, and simply the question that the reviewer would answer is, is there sufficient evidence to make a declaration of wrongful conviction?

MR. ROACH: I mean, I guess the analogy here would be a narrowly focused provincial public inquiry into wrongful convictions, and we have certainly had plenty of those. Some which have dealt with compensation, some which haven't, some which have dealt with issues of innocence and what have you, and some that haven't.

MR. KENNEDY: Before I turn it over to Mr. Lockyer --

THE COMMISSIONER: If I could just comment, and I don't want to make this too complex, but if it is connected to the charge, and the charge is, the nature of a charge is within the exclusive jurisdiction of the Superior Court, then the province can't appoint the person. But it is probably not connected to that determination. So like murder, the province could not appoint a judge to decide a murder case, they simply can't do that, only a Federal, Superior Court judge

can do it. I guess you are really --
MR. KENNEDY: Talking about this inquiry, a type of Provincial inquiry. Professor MacFarlane?
MR. MACFARLANE: Your question was do you see any impediments. I guess I am not addressing the question of impediments, but it seems to me that one of the objectives of this Commission, and our work generally in the area of wrongful convictions is to ensure that there is consistency in approach across the country on all of the issues in relation to wrongful convictions. I worry a little bit that if we are proceeding province-by-province with individual provinces setting up individual mechanisms or bodies, that we might end up with a patchwork approach to the issue, and I'm not sure that that's in the interests of justice.
MR. KENNEDY: Anyone else?
Okay, I will turn it over to Mr. Lockyer. Thank you members, Mr. Commissioner.
MR. LOCKYER: The first issue I want to address is this; that the focus of your paper, Professor Roach, or at least what you said today focuses on the cases of people who have gone through the 696 process. And I understand why, because

that's an easily defined group of individuals. But, unfortunately, that group would not capture many of our most notorious wrongful convictions that have happened in this country. It wouldn't capture Guy Paul Morin's case, it wouldn't capture any of the NewFoundland cases. Greg Parsons was captured by Justice Marshall in the Newfoundland Court of Appeal. Ronald Dalton was captured by Justice Marshall in the Newfoundland Court of Appeal. Randy Druken was captured by the Newfoundland Court of Appeal. I don't believe Justice Marshall sat on that one. And as well, the case of Thomas Sophonow out of this province. So I don't see why we can't -- why you couldn't broaden the category to try and include those kinds of cases by calling them cases in which convictions have resulted that have become notorious in the jurisdiction as potential wrongful convictions. I think you can do better than that. But it seems to me to exclude those names, for example, that I have just gone through, and it would be an unfortunate and unnecessary exclusion.

MR. ROACH: I mean, I focused on 696 because that's what this Commission of Inquiry's

Order-In-Council addresses. But I agree with you in that I think I'm persuaded by Justice Marshall's distinction between a conviction and an acquittal. And you could even perhaps go further and say that this sort of procedure should be available for those who have been convicted and then have had their conviction overturned.

MR. LOCKYER: I personally don't take it that far.

MR. ROACH: But a broad definition, if the onus is then clearly on the previously convicted person to decide what to do, I think could perhaps work. But I take your point that many of our wrongful convictions have not gone through 696.

MR. LOCKYER: The next area that I wanted to address was this idea of an innocence process. First of all, if we consider the need for it, and the need for it, really, it seems to me arises out of the institutional biases that we have which caused, first of all, the person to be charged in the first place. And that's why I have little sympathy for any position that the Crown or the authorities may subsequently be put

in a difficult position if they have to prove anything. They are the ones who embarked on this course in the first place. So it seems to me that always the weight of establishing anything should continue to fall on them since they started the process.

And as well, the reason we need some kind of innocence process is because we can't rely on those same people to acknowledge innocence where it exists. Because the fact is from their own culture, it is when wrongful conviction is alleged -- that is certainly AIDWYC's experience, that as soon as you allege a wrongful conviction that immediately the wagons go into a circle, and every procedural motion that you can think of is thrown at you, and the Crowns multiply on the particular case. That's just something that happens as long as you throw it out, it is like crying fire in the theatre, crying wrongful conviction in the legal process.

So if we assume then that we do need some kind of process because we can't let the decision-makers who set this whole ball rolling in the first place also be the decision makers as to whether that ball should be burst, so to

speak.

Let's look at the cases that we are having to deal with, just looking at some of our cases in Canada. Milgaard, David Milgaard's case in 1992 is a classic. Here was a man who we now know for sure was innocent, who the Supreme Court of Canada was only prepared to say might not be guilty, that is effectively as far as they were prepared to take it. You had then a case of someone convicted of a crime that he didn't commit, where he didn't have DNA to prove his innocence, and where he didn't have a real culprit to prove his innocence, as did Donald Marshall, as ultimately did David Milgaard, as did Greg Parsons, for example. Those three, we had a real culprit at the end of the day so, of course, there had to be an acknowledgment of their innocence. So that's one type of case where we don't have the DNA, or we don't have the third party culprit.

The other kind of case is the no crime case. We have already had two pretty notorious ones in this country; Clayton Johnson in Nova Scotia, Ronald Dalton in Newfoundland, and Ronald Dalton is still struggling, God help him,

to establish that he was convicted of a crime that he didn't commit, cases where there was no crime in the first place. And there is reason to believe that in the comparatively near future, there are likely to be several more of those cases, especially in my province potentially. There is an inquiry going on, not a public inquiry, but an inquiry going on into a particular pathologist and his conduct over the years that could lead to several more cases potentially being no crime cases.

And Professor Roach, you talked about how unfortunate it might be to demand that the Crown prove a negative. The problem is, if they don't have to prove it, it is the applicant who is going to have to prove the negative. And he is not the one who started this process in the first place. And that particularly arises in these no crime cases, because the applicant is continually met by the authorities, Clayton Johnson was, Ronald Dalton still is, with the response that, well, you can't prove that this was not a crime, you can only say there is no evidence that it was.

And it seems to me, Mullins-Johnson, a case

that is in the works now in Ontario, is a particularly classic case of that, of a man convicted of the murder of his four-year old niece, where he can now show there is no evidence that his niece died as a result of a homicide, but he can't establish an actual cause of death because it is too late, the body is gone.

And it seems to me that in those types of cases, the truth seeking process -- and I agree with Professor MacFarlane's idea that it should be a truth seeking process, certainly, that's what our association is all about. If it is a truth seeking process, it should take into account the presumption of innocence, it should take into account that something hasn't happened unless you have proved that it has happened, which effectively means the onus is on the prosecution once you allege a wrongful conviction. But to call it a truth seeking process is fine with me, which brings me back to the issue of the onus, if you like. And I completely agree with Professor Quigley that it has to be an onus on the powers that be, and not the onus on the individual to try and prove that

something didn't happen, as opposed to the onus being on the prosecution to prove that something did. It is a bit of a statement to say the least. And if anyone would care to comment on that?

MR. ROACH: I mean, the no crime example, I think is obviously an important and good example. And it does, I mean, your point makes sense to me that in those circumstances you probably -- it is necessary, I think, for the state to prove that there was a crime in some way. I mean, it does seem unfair that the uncertainty about these things goes against the previously convicted person.

I think, you know, I may be moving off my paper a bit, and be attracted to this idea of a perhaps more open-ended process where both parties would play a role as appropriate in finding the truth.

MR. LOCKYER: I mean, we have talked stigma today. You take Mr. Mullins-Johnson, for example, a man convicted of murdering, sodomizing and murdering his four-year old niece, and then you place an onus on him to establish that she died of natural causes, when

there isn't a pathologist on the planet who can give a cause of death. I think it highlights as much as anything can highlight it. And the man should be able to go back to where he started, which is an uncle of a niece who died in the most unfortunate circumstances for unknown reasons.

The other feature that I think should play in this kind of thing that we are talking about is what Justice Marshall has talked of, and that is, it seems to me that you have to take into account the notion of fault on the part of the authorities, because that does arise in so many of these cases. The individual, for example, it may be far too late for him to be able to establish who actually committed the crime. It may be that, to take, you know, 20 years have past, for example, Mr. Fillion's case, 37 years have past and it is still going strong. Mr. Truscott's case 47, and it is still going strong. In other cases the prosecution, by that I mean the authorities as a whole, may not have preserved evidence. They may not have videotaped interviews, there should have been interviews, so we will never know quite what was

said or how it was said. They may have destroyed evidence that would have been capable of producing DNA results. It seems to me whether fault or not, whether actual negligence or malfeasance exists, it seems to me that where that kind of circumstance exists that it should play a huge, if not decisive, role in any attempt by an applicant to establish actual innocence. What do you think?

MR. ROACH: Well, there I think I probably do part company with you, Mr. Lockyer. I think that to the extent that this afterhearing becomes focused on fault, there is going to be a real danger of the Crowns being so much on the defensive that we may undermine the meaning of the not guilty verdict. And I think it is important that we get to the not guilty verdict, and for that reason I think Justice Lamer's guidelines are very important, and the additional protections that I have recommended, I also think are important. But I think there are other venues for proof of fault.

MR. LOCKYER: I think -- sorry?

THE COMMISSIONER: Mr. MacFarlane had a comment?

MR. MACFARLANE: I wasn't sure if the exchange

was finished, I just wanted to signify my interest in making a comment briefly.

I think that we are experiencing in the discussion, in the debate, a real problem associated with trying to formulate burden of proof. And it just highlights in my mind the need to try to avoid that.

One possible approach would be to characterize the innocence hearing as a truth seeking hearing that takes into account the realities of the individual case. For instance, takes into account the fact that the Federal Minister has intervened and found that there was likely a miscarriage of justice, takes that into account, takes into account the fact that the individual has now been restored to the presumption of innocence. It takes into account the fact that there was a stay and there is accordingly no obvious forum in which to demonstrate innocence. So it could be a truth seeking that takes into account the reality of the case.

Where I become a little bit concerned and a little bit nervous is moving into the area of fault, because that may not necessarily be

probative of the issue of innocence, although if one was talking about misconduct, it might be, because misconduct might show how an innocent person was otherwise enveloped. But we are getting into a murkier area there and I think we have to be careful that it is directly relevant to the issue of innocence.

MR. LOCKYER: So let me ask this; if this is to, if the idea of setting up a commission like this, a process like this appeals to Mr. Commissioner when he comes to prepare his report, how would you suggest the Commissioner might frame it, by setting up some kind of committee at a national level, at a provincial level to review this issue and to come up with direct recommendations for the Manitoba Government, for the Federal Government? How would you see it developing from here? Because I think that all -- I say all that's happening -- I think this is very important all that has been started today, but it is only the beginning of the ball. And it seems to me that the Commissioner needs some help as to how, if he wants to get this ball moving, how he does it in terms of getting it much further down the

road.
MR. ROACH: I think that it is possible, building on the jurisdictional basis that I have talked about with this innocence hearing, that is 696, an approval of withdrawal of charges or judicial approval of calling no evidence, I think it would be possible for this Commission to make a case that this is a possible judicial innovation, and that could be done without new legislation and without the issue of whether it is Federal or Provincial.

I have some concern that if we get into that issue of whether it is Federal and Provincial, and whether new legislation is needed, that there will be a lot of inertia here. And I look at the 696 bail cases as, I think, an excellent example of law reform that was done without legislation and was done by judges responding to the equities of individual cases. So I think that it is quite important to focus on the issue of why in these cases there is a reasonable expectation that the successful applicant has a day in court, and why, if there is no ongoing investigation, the Crown should generally call no evidence, and why the judge at

that point may have a role to play in making comments, making assessments, perhaps focused a bit more on the Crown, less of a burden on the applicant. So, I mean, my sense is that that's probably the optimal way for some progress to be made in this area.

THE COMMISSIONER: I would be interested in the views of other panelists on that.

MR. QUIGLEY: I would be fearful not to do it with legislation. For one thing, I'm not sure that judges wouldn't consider themselves functus at the point that the Crown had said they were calling no evidence and entered an acquittal. I think you would have a problem there. It strikes me that an amendment to the code to permit that type of a hearing under the guidelines obviously would be the preferable way, and analogize it to the granting of pardons and the like that occur at the Federal level in any case.

MR. MACFARLANE: It seems to me that this is so inextricably linked to criminal law and procedure that it would be very preferable to have it as an amendment to the Criminal Code. There are a number of prototypes of how to

proceed, models that would allow us to proceed and that the Commissioner might want to consider. The most common would be for the Commissioner to set out a vision, a broad framework of what he is recommending, then recommend that the Government of Canada take the lead and, in turn, in the development of the legislation, because they have responsibility for developing it, but in the process of policy development draw in the main stakeholders, the provinces, Canadian Bar Association, defence associations, Canadian Association of Crown Attorneys, AIDWYC. There is well established stakeholders who could greatly assist in the final shaping of it, and then it would go back to the Federal Government for legislation.

THE COMMISSIONER: Is there anything -- and it just came to my mind at the moment -- is there anything in the process of the old not guilty on account of insanity, or not criminally responsible, is there anything there that goes from the criminal law, provincially dealt with, the structure -- the authorization, isn't it, under the code for setting those committees?

MR. CODE: The constitutionality of it was

challenged in Swain, the Supreme Court and Canada Health, it was a federal power.
THE COMMISSIONER: But it was delegated to the province?
MR. CODE: Yes.
MR. LOCKYER: The last thing that occurred to me -- I know, Professor MacFarlane, you like the idea of consistency of approach across the country, but sometimes you have to start somewhere. And indeed the hair and fiber committee, for example, in this province has started somewhere, and has certainly developed into at least into one other province, and I am still trying to get it into my own province, and we are getting there. It just seems to me a recommendation to this government --
THE COMMISSIONER: Mr. Lockyer, I give you three minutes.
MR. LOCKYER: -- a recommendation to this government to set up a process within this province, or alternatively a recommendation to Manitoba Justice that they agree to make it part of their policy, that when someone in a wrongful conviction situation claims or demands that they actually be, that Manitoba Justice agree that

they have been wrongly convicted, that Manitoba Justice will then set up a procedure accordingly, and make it a matter of practice within the Manitoba Justice organization.

MR. MACFARLANE: It is often helpful to have an incubator to start off with. And I certainly have a preference for consistency across the country as a vision, but I can see some merit to starting on a smaller level, and then having the experience of that smaller pilot project which could then act as a basis for a larger approach.

MR. LOCKYER: Thank you for the time, Mr. Commissioner, I appreciate it.

MR. CODE: Any concluding comments from anyone?

THE COMMISSIONER: Let me then conclude with saying how deeply appreciative we are for your thought, your comment, your presence. It has been very helpful. It has been an interesting experience. I thought I knew a little bit about this area, very little, but I have learned a tremendous amount today, and I want to thank you all so much for participating in the teaching of the old Commissioner. Thank you all.

MR. CODE: Mr. Giasson needs ten minutes to reconfigure the room, so if I could ask for a

ten minute adjournment please?
(Proceedings recessed)
THE CLERK: This Commission of Inquiry is now in session.
MR. CODE: Mr. Commissioner, if I could just briefly speak to an administrative issue before I let my colleague, Mr. Dawe, get started with Mr. Christianson. Over the recess of the last few weeks we completed two additional interviews, with a great deal of cooperation from Mr. Olson and his clients, that I'm grateful for. We interviewed now Judge Lerner, and we interviewed Dale Schille, both of whom were reasonably senior Crown officials at various post appeal stages of the case, who we had originally made a decision not to interview, but partly as result of Mr. Lockyer's motion, and partly out of our own decision making process, we felt it would be advisable to interview them. Those interviews are completed and the witness statements are in their final stages of preparation, so we will be circulating two final witness statements within the next day or two, one from Judge Lerner and one from Dale Schille. I don't think there is anything of

earth shattering importance that came out of them, but they are helpful on a number of small points of detail, and I just wanted to alert my colleagues to the fact that there will be two new statements coming out by the middle of this week we hope at the latest.

And it may be, I don't know if Mr. Lockyer or Mr. Olson will want to make further submissions to you orally once they have got the statements, but we can schedule that if need be.

THE COMMISSIONER: I think after I have an opportunity to read Mr. Schille's statement, that I would then welcome any further comments that either Mr. Lockyer or Mr. Olson might have. Thank you.

MR. CODE: Mr. Commissioner, I have to excuse myself in the middle of this afternoon as I have commitments in Toronto tomorrow, but I will be back tomorrow night.

MR. DAWE: Good afternoon, Mr. Commissioner, Mr. Christianson. Before I begin with the formalities of tendering documents, Mr. Gates has asked me to mention on the record that with him at counsel table is Dr. John Bowen, who is now the director of investigation and

enforcement support of the forensic sciences and investigation services of the RCMP. In plain English, he is essentially the chief scientist of the RCMP who runs the labs, and Mr. Gates has asked if he can sit at the table with him.

THE COMMISSIONER: Welcome Dr. Bowen.

MR. DAWE: So as the first order of business, perhaps I could formally file the documents book that's been prepared for Mr. Christianson's evidence, and --

THE COMMISSIONER: Exhibit --

MR. DAWE: There are actually three different documents actually and I should explain what they are. The main book is, the large volume, tabs 1 to 9, this is the book of documents for Commission's Counsel's examination of Tod Christianson.

THE COMMISSIONER: 38A then will be the main book of documents relating to Mr. Christianson.

MR. DAWE: There will be a second single document which is something that I decided to include at the last minute, I will explain what it is shortly and I will tender it formally, but once it is tendered I suggest it be 38B. And the third book of documents which I think

perhaps should perhaps have a separate exhibit number is this thin document, set of documents, which contains Dr. Lucas' report, the addendum and other documents referred to. And it is kind of a dual purpose document in that it has some bearing on this witness' evidence, but also as it relates to the systemic issues that will be discussed on Thursday.

THE COMMISSIONER: The stapled pieces of paper will be exhibit 38B, and exhibit 39 will be the book of documents with the report of Douglas Lucas, the addendum of Doug Lucas and the letter of Terry Melton.

(EXHIBIT 38A: Book of Documents for Commission Counsel's examination of Tod Christianson)

(EXHIBIT 38B: Memorandum re 1996 Hair Proficiency Tests)

(EXHIBIT 39: Report of Lucas, addendum of Lucas, letter of Terry Melton)

MR. DAWE: Thank you very much. Mr. Christianson, to begin, the process we have been following here as sort of the first order of business, once you have been sworn and all of these things, is to get you to address the

interview summary. So perhaps we will deal with the formalities of having you formally called as a witness at this point.

TOD STEVEN CHRISTIANSON, being first duly sworn, testified as follows:

BY MR. DAWE:

Q You will see tab 1 of the main book of documents is a copy of this interview summary of the interviews you gave to Mr. Code and myself and to Dr. Lucas. The process we have been following is simply to tender that, and then it saves a lot of time and aggravation, which means that there are a lot of areas that I don't have to cover with you today.

So I will just ask you this: Have you had an opportunity to review the summary?

A Yes, I have.

Q Is it substantially accurate?

A Substantially accurate, yes.

Q Before I move on, there is one area where, due entirely to my own fault in preparing this, I think there is something in there that may be potentially misleading, so I just want to address that first.

If you look at page 3, the top of the page

indicates that you were in the hair and fibre section from 1982 to 1992, and then transferred to the biology section?

A Yes.

Q That is correct as I understand it, but as I understand it, you didn't stop doing hair and fibre work entirely in 1992?

A No.

Q In fact, you continued for several more years until 1999; is that correct?

A Yes, I think it was approximately 1999.

Q And that's when the hair and fibre, all of the hair and fibre operations, in effect, were transferred to another lab somewhere else?

A Yes.

Q All right. So, for instance, that explains why we see documents in the file that have you still giving hair comparison evidence in 1995, for instance, in the Starr case, and taking further proficiency tests in 1996 and that sort of thing?

A That's right.

Q The first area that I would like to cover with you, and there are a few fairly minor points that I want to raise here, is sort of the actual

examinations of the hairs that you conducted in the laboratory. Between us, it is fair to say that Dr. Lucas and Mr. Code and myself covered this process quite thoroughly in the interview, so I have only very few questions about this, and they are essentially just points that I want to follow up on things that were raised during the interview.

The first is, if you look at page 9 of the interview summary, you told us about how at the time of your examinations in the Driskell case the practice was to make notes about the questioned hairs on this photocopy of the hand-drawn chart, and that the practice changed at some point in the mid 1990s and the practice switched to using the same hair data work sheet that was used for the known hairs?

A That's correct.

Q For completeness on this point, I would just like to -- we have one example in the file of what appears to be a document where you have actually made notes following the new practice. They are not notes from a real case, they are notes from your practical examination 1996, and that's this supplementary document that's

stapled together, which I have indicated will become exhibit 38B. But before I introduce this formally, the only questions that I have for you are these; would it be fair to say that the point of these practical examinations was to have hair examiners replicate what they do in a real case?

A Yes. In fact, those are referred to as proficiency tests, so that was part of our quality assurance program, where we would all perform the same examinations on the same hairs and compare our results.

Q And the notes you would make would be similar in nature to the kinds of notes that you would make when you were conducting a real --

A Yes. The intent was that your notetaking would be analogous to that which you would use in a case.

Q Okay. So if you turn to the last couple of pages of the separate document, which I think is 38B, which you ought to have a copy of somewhere.

The last two pages are, if I am understanding this correctly, are notes that you made about the questioned hairs on this?

A Yes.
Q And that would be similar to the way in which it was done in a real case under the new, using these new forms; is that fair?
A That's correct, yes.
Q So just looking at this, it appears if you compare this, the extent of the notes both to the notes that you made in Driskell's case and also to the notes that you made about the known hairs, both in Driskell's case and in the proficiency test, would it be fair to say that after this change to the new form, the practice was that you took more notes than you did using the old form, but still fewer notes than you would take when looking at a known hair?
A Well, I would say that the amount of notetaking would be roughly the same. It was just a little bit more organized with this particular form, but the actual amount of detail would be almost identical.
Q Okay. Thanks. The second area that I just wanted to deal with briefly is this issue of photographs. At page 14 of the interview summary, you indicate that the Methods Manual didn't require photographs to be taken and it

wasn't the practice to take them, and you go on, to quote you, as explaining this was because such photographs had the potential to be misleading. Is that a fair summary?

A Yes.

Q I just have some follow-up questions about that. The first one is, was the equivalent that would have been required to take photographs available?

A Yes. We had some older film cameras that were designed for using with the microscope, but it would have been very awkward to do it. And it is not at all like today with the new digital cameras, and it was definitely subject to a lot more variation than it is now, so it wasn't a practical thing to do.

Q And did the practice of not taking photographs ever change during the years that you were a hair examiner?

A No.

Q They stayed constant. Were there ever any circumstances, unusual circumstances that might arise where it was considered to be necessary or advisable to take microscopic photographs?

A The only time that I ever took photographs in

casework was when there was some kind of an anomalous feature or something of interest that I wanted to forward on and share with examiners from other labs.

Q All right. And the third and final area in this, about the lab examinations, also at page 14 of your interview summary, you indicate that it wasn't lab policy at the time to have a second examiner actually get down and look through the microscope at forensically significant hair comparisons. And then you go on to say in this particular case you didn't obtain a second opinion?

A I don't believe so. It wasn't the practice, but periodically we would engage in a function that I called synergy, where we would sometimes request a fellow examiner to have a look or, you know, we would bring hairs of interest to their attention. But I would never document that and I can't recall if that occurred in this case.

Q I see. Can you give some indication of what sort of circumstances would arise that might --

A If there was an unusual feature or some particular issue that I thought would be of interest to another examiner, I would bring it

to their attention. But what we did after we changed the policy was the significant hairs would be reviewed completely and independently, and that didn't occur until sometime around when the Kaufman report came out.

Q I would like to turn now to what is going to be the first of the two main areas that I will be covering today. The first area, if I can sum it up this way, deals with your opinion regarding the probative significance of a finding that a questioned hair and known hair are microscopically consistent. And here I'm using the terminology that was in the Methods Manual at the time. Let me just indicate that in my questions I may occasionally refer to hairs as being a match or being consistent, and what I mean here is, to use the same definition that you gave in the interview summary, it says the shorthand for this conclusion that there is a known hair in the array or the bulk amount that has the same combination of features as the questioned hair within normal variation. Is that a fair way to say it?

A It is your words, but I understand what you mean, yes.

Q Okay. And if there is something that I said that's incorrect, you should--
A I will clarify.
Q Thank you. So you said at the outset -- would it be fair to say that in a criminal trial when microscopic hair comparison evidence is tendered, it is usually tendered in relation to the issue of identity in some sense? In other words, the party who tenders the evidence tenders it for the purpose of having the trier of fact draw some inference that the hair, the questioned hair came from the same person as the known hair. Is that fair?
A I think the way I would put it is that the purpose is to establish an association between a person or persons, or a place, using hair evidence.
Q Right. But ultimately the objective is generally to determine where the origins of a questioned hair, to say it came from a particular person; is that fair?
A Well, it would be, the purpose of the examination would be to conduct a hair analysis. And I mean, we would know at the outset that it is not possible to say that it came from a

particular person to the exclusion of all others. So it is a forensic examination of hair. The identity issue is something for the trier of fact to determine.

Q Right. I may have misspoken here, but my point is simply, the reason that the party who calls the evidence would call the evidence is because they want the trier of fact to draw inferences about the ultimate issue of identity?

A Okay.

Q So as a result of this, the second proposition that I will put to you and see if you agree with it, is that when you testified in a case, you or any other hair examiner, you were generally called on to express an opinion about two separate things; first of all, that some hairs had microscopic similarities to other hairs, and then secondly to say something about the probative significance of that in relation to this issue of identity. Is that fair to put it?

A Yes.

Q What I want to focus on now are really two closely related issues. The first is your opinion, and we talked about this in the interview and it is in the interview summary,

about the probative value of a finding of consistency between two hairs on this issue of identity. Specifically, the likelihood that two hairs from different people could nevertheless be microscopically consistent. And the second point that was very closely related is your understanding about what judges and juries should be told about this, about the value of a finding of consistency.

So, I understand from the interview summary that when you testified, when you wrote your reports, RCMP hair analysts were expected to give their evidence in accordance with the guidelines that were in the appendices 3-1 and 3-5 of the Methods Manual. Is that right?

A There were guidelines in place, yes.

Q And these guidelines essentially establish the general framework, but if I understood you correctly from the interview, they didn't dictate your exact choice of words or the exact way you explained it, but they set out the board parameters in which the evidence should be given?

A Right.

Q If I can take you first to 3-1, you will find

that at tab 4, the Methods Manual is at tab 4. And it is at page 24, which is a bit difficult to find, but in the bottom right-hand corner it says 24 over a line saying 84-12, it is appendix 3-1 at the top.

And this appendix, is it fair to say this is dealing directly with the issue of how you should write your reports, but it is also incorporated into appendix 3-5 which deals with how you should present evidence in court. Is that fair? Turn to appendix 3-5.

A Correct.

Q It says,

"During court testimony a conclusion should be stated in the same way they are written in the lab report, i.e. as written in appendix 3-1."

THE COMMISSIONER: Mr. Dawe, could you go a bit slower?

BY MR. DAWE:

Q Okay. Appendix 3-1 draws this distinction between strong positive and positive findings, and it specifies that a positive result was to be characterized using this consistent with standard, and then goes on to say that if hairs

had unusual characteristics and/or there were a large number of matching hairs, this could be then treated as a strong positive and examiners then at their discretion could add the possibility -- something like the remarks set out there, essentially saying that the possibility of questioning known hairs not coming from the same source was extremely remote. Is that a fair summary of it?

A Well, this is a slightly older methods guideline, and I didn't use this exact formula for giving my conclusions. Basically, by the time I was writing my reports, we essentially either gave a conclusion of a match or it was a non-match.

Q This is addressed in the interview summary.

A Yes. We never used a strong positive or a positive, it was either a positive or a non-match.

Q If you look --

A I'm just trying to indicate, I mean, it is not the literal procedure that I would have followed here.

Q Right, I think that's made fairly clear in the interview, as I recall.

If you turn to page 15 of the interview summary at tab 1? The end of the last full paragraph says,

"Christianson never used these remarks in his reports, however he indicated that the remarks reflected what he meant by a conclusion that two hairs are consistent, namely, i.e., the chances are not very high that the hairs originated from different sources."

A Yes. I think the style of reporting that we had adopted by the time I issued this report was to state the conclusion in the report, but not give an opinion. And the idea was that the meaning of the match was an opinion. So in my report I would have said that the hairs are consistent, and then if I had been asked in court to expand upon what consistent means, to me that constitutes an opinion. So that's why we separated them out.

Q So would I be fairly summarizing your position to say that, in your opinion, in every case the existence of a microscopic match between two hairs made the possibility of a coincidence, of the explanation being coincidence rather than

identity of origin made it a remote possibility, regardless of the number of matches and regardless of whether or not the hairs had unusual features?

A Yes. I think what you should take away from it is that we, or I, at that point had established a threshold. If the hair was not a strong match, we wouldn't call it, for whatever reason. So all of our hairs had to pass a threshold of being a strong match, or else we simply would have eliminated them somewhere, somehow.

Q And if I can ask you to turn two further pages into the interview summary, page 17? The first paragraph you provide us with a definition of what you mean by the term consistent within this context. Maybe just read that out, and you believe that's a fair way of putting it? If asked to define what it means --

THE COMMISSIONER: I'm not sure where --

BY MR. DAWE:

Q Page 17 of the interview summary, the first full paragraph, if asked to define -- maybe I will read it out, it will be simpler.

"If asked to define what it means for unknown hair to be..."

THE COMMISSIONER: It might be better if the witness reads, he doesn't speak quite so quickly.

BY MR. DAWE:

Q It is the part where you give a definition of "consistent with." I just wanted you to give that definition for us today?

A I mean, in the first paragraph of this page, there is two underlined words where it says-- "identical" and "remote" are underlined. I think I was paraphrasing there because we were discussing the meaning. When I say hair consistent, I always used the same wording, when a hair is consistent it means it either came from that individual or someone else with identical features and the chances of that are remote.

Q Okay.

A And that would be presented as an opinion.

Q Now, further on down the page, and it is actually -- sorry, it is over on the previous page that we talked about your views on the use of this terminology, "consistent with," and if I can just perhaps get you to expand on that today and indicate what your views are with respect to

that choice of words?
A Well, I think it is a good, I think it is the appropriate word to use in describing a hair match. I know that it had been an issue that had arisen from the Kaufman Inquiry. But I simply mentioned in our interview that it was a term that I used and I was comfortable with and I thought we should still be using with respect to that type of evidence.
Q All right. With respect to the criticism that's been directed at this language of consistency, as I understand it, one of the main concerns that Justice Kaufman raised is the term can be used to mean different things by different people, including different scientists, and that it therefore has potential to confuse the jury. What is your response to that criticism?
A I think that's a fair criticism. I think it indicates that we need to do a better job of explaining what we need, but it doesn't mean that we necessarily have to abandon the use of the word.
Q When you used the word in the context of hair comparisons, microscopic hair comparisons, what you meant by it was that you were signifying

that it was more than a mere possibility that the hairs came from a person, but something that was a substantial likelihood falling short of certainty. Is that a fair way to put it, or if not, how would you put it?

A I don't feel the need to change any wording from the way I put it in the trial. I mean, it either came from that person or someone else with hair that is identical to them, and I think that chance is remote.

Q So this is really a reflection then of your own views as to low likelihood of two hairs being consistent and it arising as a result of coincidence. And this is again something that's discussed at page 17 of the interview summary?

A Well, it is opinion evidence and that was my opinion, therefore, I mean, it does reflect my belief, yes.

Q And what you told us in the interview is that you thought that the 1 in 4500 estimate that had been, some people had taken out of the work of Dr. Gaudette was probably too high, but in your opinion the likelihood of coincidental match was more likely something in the range of 1 in 100 to 1 in 1000?

A Yes. It is opinion evidence, it is based on our experience and our knowledge of the biology of hair growth. But there have been many attempts to derive some empirical weight as to the evidence. Mr. Gaudette's studies were one of those. There have been others. And we also engaged as part of our training in an exercise called the 100 hair exercise, which also allows us to gauge our discriminating ability. So there are many studies. I mean, I don't think one has to link themself up to a hard and fast number. I think it is just important to say that it is good and discriminating evidence.

Q Well, I would just like to explore with you in a little more detail what is the basis for your belief that it is probably somewhere in this range. Firstly, is it fair to say that what we are talking about here when we are talking about the probability of a coincidental match is some assessment of the likelihood of people having microscopically indistinguishable hairs in the general population?

A I would just put it simply, I think you are talking about the discriminating ability of that particular type of evidence, your ability to

discriminate with hair.
Q Well, there is really two separate issues here, unless I'm misunderstanding this. One issue is your ability as an examiner to look at hairs in a microscope and say whether they are the same or different.
A Okay.
Q That is the first thing. And the second thing is, the second issue that arises is, what is the probability that two hairs, assuming that you have accurately identified them as being microscopically the same, what are the chances that they came from the same person? That seems to me to be a somewhat separate issue. And what I would like -- you've indicated that your belief is that the chances are that, somewhere in the 1 in 100 or 1 in 1,000 range, that there is only 1 in 100 to 1 in 1,000 chance that two microscopically similar hairs come from different people. And what I want you to expand on a bit is, how do you know that, why do you believe that?
A I think the thing we have to be cautious of is getting into the wording of probabilities and chances of it coming from one person or another.

I think the simplest way and the way that I think of it, as a person who does it, is the discriminating ability of this evidence. So, for example, the 100 hair exercise gives you a good example, because what you do in that exercise is you have 100 questioned hairs and a known sample, and you have to do the hair comparison of all of the questioned hairs to the known hair sample and you have to make your conclusions. Now, that gives me, as a specialist working in this area, a feeling for the discriminating ability of this test.

Q I can certainly understand how the 100 hair test might give you some confidence that you can distinguish like from unlike hairs, but I'm having some difficulty understanding how the 100 hair test tells you about the incidence rate of coincidental hairs in the general population. Because if you pass the 100 hair test and you correctly identify that the hairs that are microscopically indistinguishable from the known hairs and the ones that aren't, doesn't all this tell you that whoever assembled the test happened to put the 100 hairs together that way that didn't have any coincidental hairs?

A All it tells me is that I'm able to discriminate 100 questioned hairs with a known sample, and that is as far as I take it. The probability does not extend to the population, it is not like you have a lottery and you draw a hair out of a lottery and see whether it matches or not. It is a discriminating ability of the test.
Q But all the test allows you to do is to discriminate, based on the visual appearance of these hairs, whether they are the same when viewed through a microscope, whether they look different, when looking at all of these characteristics. And the proposition that I'm putting to you is that that doesn't tell you anything about -- by looking at two hairs, you can tell if they are the same or if they are different, but you can't tell anything, just from that, about whether they are from the same person or not. That requires a further assumption about the probability of like hairs coming from different people. Is that fair?
A Well, I don't think of it in terms of probabilities. I think of it in terms of, and I think I used the term that I expect that you would be able to discriminate 100 to 1,000

people by virtue of their hair. That has nothing to do with the probability. I think we are getting locked into that term, and I prefer to describe it as a discriminating ability of the test.

Q All right. One of the main criticisms that's been directed at hair microscopy evidence generally is that, it has been suggested that there is simply inadequate empirical foundation that would allow analysts to make any kind of safe assumptions about the instance of coincidental matches in the population. How would you respond to that criticism?

A Well, I think I would use as a counter argument to that the fact that we had to do this 100 hair exercise. Clearly, it is possible to discriminate based on the biological characteristics of the hair, and I could do it successfully during training, in what is a very difficult test of the method. And my subsequent experience in 10, 15 years of working with hair, hasn't lead me to diminish that belief.

Q We may have already covered this and I don't want to belabour the point, but the 100 hair test is an artificial construct in the sense

that somebody has taken 100 hairs and put them in a package and told you to look at them. And I'm really having some difficulty understanding how your ability to distinguish the hairs that looked the same from the hairs that don't look the same tells you anything about, by itself, about the origin of those hairs?

A Well, you are correct, it is an artificial construct, but that's how science works. You create models and you test based on your model and you learn from your model. That is science. That's an empirical test of the method. There is nothing that is unscientific about it. There is no way to plan in advance and say what any forensic case is going to be like. They are all unique and they are all distinct. But you can find common elements and you can construct tests that are a very fair measure of the challenges and the techniques involved. And that's what the 100 hair exercise was designed to do.

Q That's a pretty complex answer, and there is a couple of, there are two different points that I want to explore arising out of that.

THE COMMISSIONER: I'm having trouble hearing you.

BY MR. DAWE:
Q There was a lot packaged up in that answer, there were two separate follow-up questions I have arising out of that.

The first one, you talked about scientific method involving coming up with theoretical models and testing them. My first question is, is there some theoretical model that would give you any kind of understanding of how often coincidental hairs should arise in the population?
A I don't think there is a test that -- like there is no absolute experiment that you could do to determine that.
Q I wasn't talking about experiments, I'm talking about theoretical models. Is there some model that's been devised that has some predictive power that would say, well, we should, if this model is correct, find coincidental hairs every so often. That would be a model that you could test by devising an experiment?
A Well, Mr. Gaudette's study clearly indicated that if you have enough hairs and you do enough comparisons, you are going to find hairs that you can't discriminate. So we know that that's

possible. And that also was an empirical test. So, yes, there is a test and it was done.

Q I wasn't asking you about empirical test. You talked about there being a theoretical model. What I'm asking is, are you aware of any, has anyone ever come up with a theoretical model that would be testable, but the model part of it is having a theoretical construct that would allow you to explain why everybody should have different hairs, or why most people should have different hairs, are you aware of anything like that?

A No.

Q Now, talking about empirical tests, and I agree that leaving aside any questions that might come up about methodological problems, certainly the approach that Dr. Gaudette was taking of looking at hairs in the population in a blind manner and seeing if he could tell them apart is the way in which he would go about constructing a test. My point is simply that that's not what the 100 hair exercise is, it is not a blind study of hairs in the population; is that fair?

A It is not a blind study, it is fair to say that it is not a blind study.

Q I would go so far as to put it to you that the 100 hair test simply doesn't tell you anything about what the instance of coincidental hairs in the population is. It allows you -- it is a test of your ability to determine whether or not two hairs are similar, but it is simply not a test of likelihood of coincidental matches. Do you agree or disagree with that?
A Well, I guess I disagree. I think it is possible that you could have two questioned hairs in the question hair exercise that were not from the same person that matched the standard, that would be possible. So, I mean, once again, it is a question of the discriminating ability of the test based on the biological features present.
Q Let me put it this way, you are familiar with Dr. Gaudette's results in his studies that he performed?
A Sorry, I didn't hear that?
Q You are familiar with Dr. Gaudette's papers and the empirical tests he did?
A It is Mr. Gaudette, and his initial study was done with Dr. Keeping.
Q You would agree with me when he looked at these

hairs, he found some hairs that came from different people that he couldn't distinguish?
A Yes, that is fair.
Q So if whoever was preparing the 100 hair test happened to put two of those hairs into the test, you would find another person who performed the test would then conclude that these hairs were consistent with each other. Is that fair?
A They could have concluded that it was from the same sample, yes.
Q They could have, but it wouldn't -- so my point simply is that all that the 100 hair test allows you to do is to determine what kind of hairs have been included in the package, it doesn't give you any information about the incidence of hair --
A In the population in general.
Q Thanks. If I can just move on now. This is a fairly simple question that's going to follow a fairly complicated setup, I'm afraid. So I am going to have to ask you to bear with me as I put some things to you. The question essentially arises out of some of these transcripts that we have included in the

documents book in other cases. And I just preface this by saying, only one of these is evidence by you, the other two are by your colleague, James Cadieux, and I just want to be clear that I'm not asking you to comment on his evidence. But perhaps if you can just indicate, who was James Cadieux? Who is James Cadieux?

A James Cadieux was the supervisor of the hair and fibre unit while I was with the unit. And thank you for -- I mean, I would just like to clarify, I mean, I saw that these documents were included, these transcripts, and I really can't comment on them.

Q Anyway, I will explain to you, there is really only one question that I have arising out of this. And the point that I draw from these sets of transcripts is that you will see in the Unger and Starr cases, which are cases from 1992 and 1995 respectively, and one was a case where you testified, that's Starr, and the other is a case where Mr. Cadieux testified. And in those two cases what you will see, and I will take you through them in a minute, you frame, both of you frame your evidence about the likelihood of coincidental matches in a way which, as I read

it, is really consistent, it is in accordance with the view that you have expressed about being an unlikely event. But when you get to the third transcript the evidence seems to be expressed differently. And the question that I will ultimately have for you is whether there was some change in RCMP policy about the way in which evidence should be presented that would explain that?

A Well, without even observing the transcript, I was not aware of any changes in our policy regarding the expression of a match for hair, from the time I started doing casework in 1985 until I stopped.

Q Well, that may short circuit the inquiry then. That was really the only point of taking you to the transcript was to attempt to refresh your memory.

So as far as you are concerned, when you gave evidence in the cases that you did up until 1999, or whenever it was that you last testified, I don't know if it would have been 1999 or shortly thereafter, you expressed an opinion about the probability of coincidental matches that was essentially the same as what --

A I did, yes.
Q Then I will leave the point.
The last area that I would like to deal with then is really just looking at a couple of aspects of the specific evidence that you gave at Mr. Driskell's trial. And this is an area where we have covered it in some detail in the interview already, and the record really speaks for itself. We have a transcript of the words you used and they can be parsed to one's heart's content, but there are two specific areas where I would just like to ask some further questions. The first one is, if I can take you to the transcript, it is at tab 5. If I can take you to 148, the numbers in the upper right-hand corner, not the ones in the lower right-hand corner. You see starting around line 10 is where you begin explaining what you mean by the term consistent. Do you see that?
A Yes.
Q Right. And I won't read it all out to you, but just picking it up at line 20, you say,
"And the point about this type of analysis is that it is not a positive identification, all right, because the only

way you could do that is to look at all of the hairs from all of the person's head that exist, and that's an impossibility. But I can tell you, based on my experience, that the chances of just accidentally picking up a hair and having it match to a known sample are very small. So if the hair is consistent...",

this is carrying over the next page,

"...that means it either came from the same person as that known sample or from somebody else who has hair exactly like that."

The first question that I have arising out of this is, I would like to suggest to you that really the issue that the jury had to consider here in this case wasn't the probability that any particular hair that was picked up from the sample matched the known hair, but rather it was the probability of coincidental matches occurring within the entire body of questioned hairs that you looked at. In this regard, I suggest to you that the more questioned hairs that the examiner looks at, the greater the likelihood of an incidental match becomes. Is

that a fair way to put it?
A I think that's a fair way to put it, yes.
Q Thanks. As I read the transcript, you didn't explain to the jury that the number of questioned hairs that were looked at had some bearing on any assessment of the probability of it being coincidental match; is that fair?
A No, I didn't mention that.
Q And the second issue, and this is the final issue in your testimony that I think I need to take you to, because we have really covered the rest of it in some detail in the interview notes, is your use of analogies at the trial. And there are a couple of different analogies that you draw. The first you will see if you flip over the page, page 149, this is -- actually we are already on 149, my apologies. Just beginning below the part where we stopped reading at line 5, it says,

"In order to give you a sort of guideline or a rule of thumb to determine how much weight to put on that, you can look around the room and just see how many people even have similar hair styles."

And a little bit further down the page on line

14 you make another analogy, you draw this analogy between the possibility of someone accidentally mistaking one person for another. And you follow up on this analogy in cross-examination if you turn to page 152, line 6,

> "There are so many characteristics on the hair that you become familiar with looking at that it becomes like looking at a face, and you and I both know it is possible to confuse a face.
>
> Okay.
>
> But when you are looking at it in detail for a specific face, the chances become less."

My question arising out of this is, is there not some concern that use of analogies like this might have the effect of confusing the jury about the issue that they really have to consider, which is the likelihood of a coincidental microscopic match, because they might improperly conclude that the order of magnitude of there being a coincidental match was somehow akin to the same order of magnitude of the number of hair styles in the courtroom or

something like that?
A I mean, this is an analogy, and the difficulty here in reviewing, in retrospect, is of course during this I'm speaking to a jury, I'm trying to get feedback from their understanding, I'm looking to try and communicate with them, and I'm adjusting my analogies accordingly. I think that the analogy of a face is a good analogy because it represents biological information that's under genetic control, just like the biological information in your hair is. The question is how to convey that notion to a lay juror. And I think this analogy is quite meaningful and fairly accurate and actually conservative. I'm not trying, as we mentioned before, I'm not trying to give them an idea about probabilities, I'm trying to give them an idea about discriminating ability and how much information is present in the hair. And I'm drawing an analogy to something that we all deal with in our day-to-day experience. I still think it is quite a reasonable analogy. I guess like any analogy, you can take issue with it. It is not intended to be an absolute truth, it is an analogy.

Q The concern that I have, let's just take a look at the example of faces, for instance, and suppose -- certainly faces are biological characteristics, I don't dispute that. And I agree that one can certainly probably come up with 20 different measurements that one could do on a face, and one could come up with a method of assessing those 20 characteristics and deciding whether faces are the same or different. But the concern that I have, is there any basis for thinking that the probability of coming up with two faces having these 20 identical parameters within normal variation, whatever that might be, is there any basis for thinking that is even on the same order of magnitude as the likelihood of being two coincidental matching hairs?

A The basis is that, I'm using that analogy because I believe it is accurate based on my training and experience.

Q When you are trained to give this kind of evidence, are you trained specifically to use any sort of analogies, or that analogy in particular?

A No, we trained to try and communicate

effectively, that's what we are trained to do.
THE COMMISSIONER: I have not read this transcript, but it struck me that the analogy came from the lawyer who was cross-examining. Am I not right? Sorry, no. Sorry, it was part of the answer.
MR. DAWE: It is an answer to a question but it wasn't suggested by --
THE COMMISSIONER: I apologize.
BY MR. DAWE:
Q Let me put it this way. I think it is probably fair to assume that the average juror knows what a face looks like and thinks they are capable of distinguishing one face from another. The concern that I have, that I raise and I want to put to you whether you think it is a concern, is that juror might somehow improperly draw inferences based on their own experience with being able to tell one face apart from another, and somehow conclude that because they have never seen someone who has an identical face from somebody else, that therefore there is no prospect of identical hairs coming off different heads?
A Well, if you are asking me if I'm concerned

about a juror potentially misconstruing my evidence, absolutely, all of the time. I mean, it is an issue with our legal system. All I can do is give them the evidence and what I believe is the best interpretation. And I hope they understand. And unfortunately, I have no information about their technical background and I have no -- I don't receive any questions from them to confirm what they have understood or not. So I have to choose what I think is an effective analogy that sort of plays to the lowest common denominator of our experience. And that is something that we all do every day, and that's facial recognition, or pattern recognition of biological features. And I don't see it as any more complicated or sophisticated than that.

Q The last area that I would like to deal with before I end this is, you recall at the conclusion of the interview we conducted with you back in the spring, we asked you whether, with the benefit of hindsight, whether there is anything that you would have done differently in this case, either in the lab or when you were giving your evidence? And you said you thought

about it and there wasn't anything. Is that fair?

A That's correct. I mean, I would give the same evidence today.

Q Right. And you are aware, I take it, that there have now been a number of cases, including this one, where subsequent DNA testing has strongly suggested, at a minimum, that hairs that were introduced at trial and presented to a jury as being consistent with one another actually came from different people? You are aware of there being a number of cases like that, both here and elsewhere?

A I'm aware of contrary evidence, yes.

Q And I take it that you've read Dr. Lucas' report as well?

A Yes.

Q So you recall that Dr. Lucas refers to a fairly recent study conducted by the FBI in the U.S. where they looked at 80 hairs that were microscopically associated with one another and performed mitochondrial DNA testing, and these testing showed that nine of these hairs actually came from different people. Are you familiar with that study?

A I'm familiar with the study, yes, Houck and Bodowle.
Q So my question for you is, in view of this, does it not concern you that, are you not at least somewhat concerned that there is at least a possibility that the likelihood of coincidental matches appearing in the population are perhaps much higher than you believed back in the 1980's or 1990's, or that other hair examiners believed back then?
A Once again, we never developed an expression for a probability of a hair match in the population. I think, as I was describing to you, I considered hair evidence to be discriminating, and I still consider hair evidence to be discriminating. However, the fact is that for nuclear DNA, it is billions of times more discriminating. That's the fact. And therefore there are going to be some instances where one could not discriminate with the hair, the DNA, the nuclear DNA will be able to do that. That's not necessarily -- I mean, that's just to be expected in a certain number of cases.
Q Right. But what you told us in the interview and what I think you reiterated today is that

the standard explanation that you gave to triers of fact in countless cases, presumably, all of the ones you did, I presume, you told them that a finding that one hair was consistent with another hair, and you probably worded it differently in different cases, but the gist of it was that you communicated that the chances of the hairs coming from different people was a remote chance. Is that fair?

A Yes.

Q And my question then is, in light of some of these other studies that have been done, in light of some of the findings that have been made, or some of the test results that have come back in this case and some other cases, does it not concern you that maybe it is not as remote as you thought and most other hair analysts thought at the time?

A Well, I suppose, the easiest thing is that I define remote as something, a small possibility, something like between 1 and 101 and 1 and 1000. It is difficult even to come up with a number or a word to explain what a discriminating ability of 1 in 300 trillion is when you are dealing with DNA. I don't think the problem is with the

idea of a hair, a coincidental hair match being remote, that's not the problem. We just have very little appreciation for how discriminating nuclear DNA testing is. It is not millions, it is billions of times more discriminating. And that's not a problem with the hair evidence, the hair evidence was the best we had at the time. And then when new, this new wonderful technology came along, we migrated to it as quickly as we could.

Q I'm not asking you about comparing hair evidence with DNA evidence or anything like that. The concern that I'm raising with you is asking whether this is something that is a concern to you, is that you have, and I'm not trying to single out you here, I think this is a fairly consistent practice of hair analysts across the board, but if you told triers of fact, judges and juries, that the prospect of a coincidental match occurring was remote, and by that you meant something between 1 and 100 or 1 and 1000, is there not some concern in your mind now that maybe it is really not that remote after all, it is a lot higher than that?

A Well, as a scientist, when I see these results,

I mean, I look at them and I want to test them, I want to try different things. I have lots of ideas as to how they could have occurred. I don't think the small number of cases is a representative sample that you can use to start to draw conclusions. There is lots more research that can be done on these things. Forensic samples are notoriously difficult to deal with and, I mean, I am willing to change my opinion about it, I'm not sure I have seen enough evidence yet to change my mind.

Q All right. I will leave it there. Those are my questions.

THE COMMISSIONER: I don't know what the view of counsel is. We have had a moderately long day. I don't know, for instance, Mr. Olson, do you think you will have any questions?

MR. OLSON: I doubt it very much, Mr. Commissioner.

THE COMMISSIONER: Mr. Abra?

MR. ABRA: No, I don't think so, Mr. Commissioner.

MS. CARSWELL: I suspect very few, if any.

THE COMMISSIONER: Okay.

MR. LOCKYER: Lots.

MS. WOLSON: None.
THE COMMISSIONER: I think we have been going, we have been in this hearing for almost six hours today, and that's longer than our normal day, I think we are about eight minutes short, or seven minutes short of six hours, so I think it might be -- I take it you are not anxious to start today?
MR. LOCKYER: No, I'm actually a bit jet lagged, Mr. Commissioner, so I prefer not to.
MR. DAWE: I think in view of the indication from counsel that there will not be vast amounts of questions I think early recess today will not throw us off schedule too badly.
THE COMMISSIONER: I think we have put in a fairly good day today. 9:30 tomorrow, yes, 9:30 tomorrow.
(Adjourned at 4:00 o'clock)

COURT REPORTER'S CERTIFICATE

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

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