

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

The Honourable Patrick LeSage, Q.C. Commissioner

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

Monday, September 18, 2006

Volume 21

INQUIRY PROCEEDINGS

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1 MONDAY, SEPTEMBER 18, 2006

2 Upon commencing at 9:00 a.m.

3 THE COMMISSIONER: Good morning, everyone, and
4 welcome to the roundtable discussion. This will
5 not be a formal hearing as the other days have
6 been. It will be an informal discussion period
7 where we will be discussing the issue in the
8 abstract, without specific reference to the
9 facts in this case, but in a similar factual
10 context situation, as well as other context
11 situations. So, Mr. Code, if you would perhaps
12 be the lead here.

13 MR. CODE: Thank you, Mr. Commissioner. The
14 subject of today's proceedings or this morning's
15 proceedings is paragraph 1(f) of the
16 Order-In-Council, which is set out at the
17 beginning of Professor Roach's paper:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MR. SCULLION: Thank you, Mr. Code.

14 MR. ROACH: Well, first of all, I think it's
15 important to provide a little context about the
16 696 process, formerly called the 690 process.
17 This is an extraordinary process that is
18 available only to people who have exhausted all
19 of the ordinary appeals. And it will generally
20 require the person to produce new evidence or
21 new considerations that were not before the
22 courts that have found this person guilty. So I
23 think it's important to start on the
24 understanding that this is an extraordinary
25 remedy, not frequently granted, not frequently

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

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

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

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

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

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

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

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

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

21 "...satisfied by the information contained
22 in the application that there is a
23 reasonable basis to conclude that a
24 miscarriage of justice likely occurred..."
25 a very high standard,

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SCULLION: That's our position.

1 MR. CODE: By the order of a new trial?

2 MR. SCULLION: Yes. And there are other
3 provisions in the code for that as well. A
4 pardon, a person's conviction can be vacated by
5 a pardon under section 748, 749 which is by the
6 Governor In Council. There is no judicial
7 determination, if an applicant makes an
8 application for a pardon and then the veteran
9 counsel grants the pardon, it is the same, it's
10 the executive, again, has vacated the
11 conviction, so there are other areas as well.

12 MR. CODE: And so if you are correct on the
13 legal point, then, that the Minister's order
14 vacates the conviction effectively and restores
15 the presumption of innocence on the taint,
16 stigma, practical issue, your position would be
17 then?

18 MR. SCULLION: Well, I suppose there is always
19 that legal limbo, if the Crown decides not to
20 proceed. You know, we have never addressed our
21 minds to that or, as I say, it is not a part of
22 our process that that then creates -- if they
23 call no evidence, if they withdrew the charges,
24 does that change the perception? Apart from the
25 fact that, you know, there becomes ultra factio

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

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

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

1 cloud, so --

2 MR. CODE: Anybody else at the panel wants to
3 pick it up at this point, Justice Marshall?

4 JUSTICE MARSHALL: I would like to make a
5 comment. But before I do, I would say to my
6 colleagues on the panel what I said to them this
7 morning. I come from a place where I was
8 blissfully back half an hour ahead of Canada.
9 And I am blissfully basking in it this morning.
10 And as a result, I got at the meeting a half an
11 hour late. So I had not the purpose of this
12 possibility of an exchange.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. CODE: Professor MacFarlane?

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

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

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

25 Secondly, with respect to the notion of a

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

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

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

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

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

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

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

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

16 MR. CODE: So if I understand you, Bruce, your
17 position is that a stay may be necessary as a
18 temporary measure, as long as at some point a
19 696 case is brought back before the courts,
20 which is the -- I think when we come to question
21 5, we're going to reach that issue. Have I
22 understood you correctly on that?

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

1 I do believe that within that one-year period
2 there has to be a reconsideration by the courts.

3 MR. CODE: So that the stay may be a useful and
4 important temporary measure if there is
5 re-investigation or reconsideration going on, as
6 long as it's on the understanding that at some
7 point it comes back to the court?

8 MR. MacFARLANE: That's correct.

9 MR. CODE: Any further comments from the panel?
10 Professor Quigley?

11 MR. QUIGLEY: I think that there is a reasonable
12 expectation of a re-hearing. The point of a
13 section 696 application is a little bit
14 different from the point of the trial and the
15 appeal process. It's the person seeking
16 exoneration for that charge, as opposed to the
17 state seeking a conviction at the earlier stage
18 or challenging convictions at the appeal stage.
19 So I think perceptually they are a little bit
20 different, albeit obviously connected.

21 Although the stigma, I think, points in a
22 direction, as a matter of policy, saying the
23 Crown should not be able to stay in these
24 instances or at least that there should be
25 restrictions or a process by which that's

1 determined.

2 THE COMMISSIONER: Mr. Quigley, I'm a little
3 hard of hearing.

4 MR. QUIGLEY: Okay. I will try to speak up.

5 THE COMMISSIONER: Thank you.

6 MR. QUIGLEY: About a year ago in this city,
7 there was a conference on wrongful convictions.
8 And psychologists were speaking and indicating
9 that the psychological effects of a miscarriage
10 of justice or wrongful conviction are very
11 devastating for a person. And so it seems to me
12 a person who has gone through all of the hoops
13 to persuade the Minister of Justice to order a
14 new trial is entitled to a day in court. And
15 that there is, indeed, stigma attached. And I
16 echo what Bruce had just said. And because I
17 come from Saskatchewan, I recall very well when
18 David Milgaard was -- a new trial was ordered.
19 And even as the province was entering a stay,
20 the Provincial Minister of Justice was saying to
21 the media that he believed that David Milgaard
22 was guilty. Surely that's a pretty good
23 indicator of stigma that we should try to
24 redress through this process, when its function
25 is, after all, to seek exoneration.

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

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

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

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

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

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

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

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

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

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

23 MR. MacFARLANE: Yes, sir.

24 MR. KENNEDY: Mr. Gaul?

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

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

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

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

25 But I do say that if a stay of proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 And Chief Justice Lamer comments that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 accused, and the stay of proceedings allows
2 that.

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

12 "A withdrawal of charges is appropriate
13 where the Crown Attorney decides that;
14 i) Reasonable and probable grounds did not
15 exist to lay the charge."

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

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

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

6 or, pardon me,

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

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

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

1 a stay of proceedings allows.

2 The Former Chief Justice also recommends
3 that where you are in the midst of a trial, and
4 something develops with respect to the state of
5 the evidence, then the Crown should recognize
6 that and call no further evidence. I take no
7 issue about that at all. That is the general
8 practice. I would hope that's the general
9 practice throughout Canada. It is clearly the
10 general practice in British Columbia.

11 Prosecutors are trained to recognize the fact
12 that our role is not to get a conviction. Our
13 role is to present, in a firm and fair manner,
14 the evidence we have available. But if we
15 conclude that our charge assessment standard is
16 no longer meant, it is a continual assessment,
17 then we call no further evidence.

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

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

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

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

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

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

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

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

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

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

16 MR. MacFARLANE: Thanks very much. Two quick
17 comments. Mr. Commissioner, I would like to
18 underscore the absolute need to confine your
19 recommendations and your considerations to the
20 696 process. The guidelines from Chief Justice
21 Lamer are much broader. They deal primarily
22 with the trial level. And I would simply note
23 that the Supreme Court decision called Atkinson,
24 which was decided in 1977, would signal the
25 absolute chaos if offers of no evidence were

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

10 Secondly --

11 THE COMMISSIONER: Even if I really wanted to?

12 MR. MacFARLANE: I'm simply urging that,

13 Mr. Commissioner.

14 THE COMMISSIONER: Okay.

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

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

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

9 THE COMMISSIONER: A little hyperbole there, I
10 think.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 The second functional reason for putting it
22 at that level is that I very much believe that
23 if a prosecutorial stay is being used after the
24 696 order, that this should be done because
25 there is an active investigation going on, to

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

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

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

19 And then, finally, the other suggestion
20 that I make is that before a stay is considered,
21 after a new trial has been ordered under section
22 696, that the Attorney General should actively
23 ask the successful 696 applicant to make
24 submissions and to provide some form of written
25 submissions where, at least the person making

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 levels, in any event?

2 MR. GAUL: We have been remarkably lucky or
3 fortunate not to have had a 696 application.

4 MR. CODE: Because you have pre-charge
5 screening?

6 MR. GAUL: That's exactly right. I am glad you
7 said that. But what we also have -- as I
8 previously mentioned, we have the Crown Counsel
9 Act which, by statute, creates our branch, the
10 Criminal Justice Branch, the Prosecution
11 Service. It also empowers the Assistant Deputy
12 Attorney General as the head of the Prosecution
13 Service and the buck stops with him or her. So
14 decisions of this -- it is the power of the DPP,
15 but the decisions of this nature would stop at
16 his or her desk. The one twist that would allow
17 for accountability or the Attorney General or
18 the Deputy Attorney General to be involved, and,
19 again, in our Crown Counsel Act, we can receive
20 recommendations in writing with respect to how
21 we conduct the cases, whether we charge or don't
22 charge. And, therefore, if we make a decisions,
23 say, for example, in a situation such as this to
24 stay the proceedings, which I note the Milgaard
25 case has already commented upon that that is

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

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

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

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

1 why would I not include the ADM?

2 THE COMMISSIONER: No. Why would you include
3 them? I thought you said, perhaps, it should be
4 at the highest level, but then you gave your
5 reasons why the Attorney General shouldn't be
6 involved. And then you seemed to -- I thought
7 you jumped, and you said it should be Deputy
8 Minister, but it also could be the DPP?

9 MR. MacFARLANE: If I indicated that, I didn't
10 mean to indicate that.

11 THE COMMISSIONER: Maybe you didn't.

12 MR. MacFARLANE: What I was suggesting was that
13 if the responsibility lies with the Deputy, I
14 would expect the Deputy to call into his or her
15 office a number of people in the department, the
16 senior people, including the ADM, to consult
17 them. But once that consultation process had
18 taken place, the power or the authority, the
19 responsibility, would still be vested with the
20 Deputy, and the Deputy would make that
21 decision.

22 THE COMMISSIONER: Let me ask just one other
23 question, and this is a dangerous question in
24 the sense that it may get us sidetracked. But I
25 wonder what the Attorneys General would say

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

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

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

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

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

1 directions published.

2 THE COMMISSIONER: I guess I was prefacing my
3 comments on what I believe is the constitutional
4 responsibility of an Attorney General. And I
5 must say I am biased by Professor Edwards in his
6 book of law or his books of law on
7 responsibilities of the Crown and that sort of
8 thing, so I am from another era, and so on. Any
9 other comments on that?

10 MR. FRATER: Yes. You should understand that I
11 am, at the moment, in the mind set of an
12 organization that is going through a change in
13 which we are moving to establish a DPP for
14 exactly all of the reasons that have been talked
15 about. But even in the DPP system, the DPP is
16 answerable to the AG. And under our proposed
17 legislation, the AG will be able to make the
18 decision if he or she so chooses.

19 MR. CODE: I think it's fair to say that B.C.
20 has a modified DPP system, would that be
21 accurate, Geoff?

22 MR. GAUL: That is fair.

23 MR. CODE: That the Attorney General has been
24 cut out of a lot of decision making in that
25 province, quite deliberately in that province.

1 THE COMMISSIONER: I won't get into a
2 constitutional argument because I don't know any
3 constitutional law.

4 MR. CODE: That process is because British
5 Columbia has this terrible habit of charging
6 it's former premiers with criminal offences, so
7 you don't want the Attorney General to be seen
8 to be involved in charging his political
9 opponent.

10 MR. GAUL: I will just say no comment.

11 MR. CODE: We know you can make those decisions
12 without any political bias, Geoff. Any comments
13 from -- Professor Quigley?

14 MR. QUIGLEY: I would like to put in a pitch for
15 abolishing the ability to stay following a
16 section 696.6 decision. I think, as some of us
17 have said before, these are proceedings directed
18 towards exonerating, and so I think that we
19 should abolish the power in that narrow context.

20 I am going to stray a little bit off topic,
21 but very briefly just to say where I'm coming
22 from. I think that we should overhaul the
23 Criminal Code to make it more clear how criminal
24 cases are terminated, including defining
25 withdrawal or using some other term and so on.

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

7 Now, if we didn't abolish the stays at the
8 696.3 stage, I would certainly support the
9 proposals that Ken Roach has made, perhaps with
10 an acknowledgment that the Deputy Attorney
11 General and/or DPP, I think that's a debatable
12 point, but might be a better person than the
13 Attorney General. But certainly the opportunity
14 to make submissions would be good. But I see
15 that as the fallback to more thorough going
16 before the ministeria.

17 MR. CODE: Any interventions from the parties?

18 MR. LOCKYER: Yes, I have one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. LOCKYER: It's a good start.

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

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

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

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

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

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

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

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

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

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

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

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

1 saying, I have no difficulty with part of it, in
2 the sense that when he says should a decision be
3 reviewed, well, that's generally consistent with
4 our practice of looking at charges generally.
5 They are under constant review. That's our --
6 the way our obligation is framed that you should
7 be looking at your case at all points to see
8 whether you've still got a reasonable prospect
9 of conviction and whether it's in the public
10 interest to prosecute. So with respect to the
11 696 cases, in the limited situation where
12 you're -- you've entered the stay to conduct the
13 re-investigation, yes, you should be assessing
14 the investigation to see whether your opinion of
15 the case has changed.

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

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

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

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

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

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

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

18 MR. CODE: Any other comments from the panel?

19 MR. GAUL: Briefly, I've shared that
20 perspective, too. I note that Professor Roach,
21 at page 15 of his report, makes reference to the
22 fact that there is not a lot of judicial
23 consideration of the stay in the context of the
24 696 application. Although the Supreme Court of
25 Canada, in the Milgaard reference, does touch on

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

14 MR. CODE: Justice Marshall?

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

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

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

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

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

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

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

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

25 But it should not be dealt with -- if you

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

11 MR. CODE: Rob?

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

1 MR. CODE: And perhaps just one final point of
2 clarification here, Professor Roach, your
3 proposal that the case may brought back within a
4 year so that it can be dealt with in court is
5 before the legal effect of 579(2) clicks in. I
6 understand you to not be suggesting that there
7 won't be cases where particularly complex police
8 investigation, re-investigation, justifies
9 extending the period of the stay for more than a
10 year. But you could contemplate that there will
11 be cases where police investigation or
12 re-investigation may well be continuing beyond a
13 year?

14 MR. ROACH: Yes. Although, I think that that's
15 true. Although, I do think that it is important
16 for this process to be as transparent as
17 possible. Because, I mean, the problem is that
18 you need to have fresh eyes looking at this
19 case. Because I think that the learning that is
20 developing around wrongful convictions suggest
21 that there is going to be an unwillingness to
22 move away from this person as a suspect. But,
23 yes, I mean, I can concede in some cases where
24 there would be justification for continuing a
25 particularly fruitful police investigation and

1 one that is not tainted by tunnel vision.

2 MR. LOCKYER: I just want to address a question
3 to Professor MacFarlane before we move on. If
4 we use Mr. Driskell's case, which is why we are
5 all here in the first place, in considering
6 Manitoba's use of a stay of proceedings. The
7 stay of proceedings was entered, as I recall, on
8 March 5 of 2005 in Mr. Driskell's case. It,
9 therefore, expired on March 4 of 2006. What
10 happened in that year, anything? Did Manitoba
11 Justice just forget about the case? March 4th
12 came by and that was the end of that? Did
13 anything happen?

14 MR. CODE: Like, I don't think, with respect,
15 it's appropriate to use a panel discussion on
16 policy issues to ask questions about the
17 adjudicative facts of this case. If that's
18 going to happen, Mr. MacFarlane has to be called
19 as a witness.

20 THE COMMISSIONER: Mr. Lockyer.

21 MR. LOCKYER: Yes.

22 THE COMMISSIONER: Just turn it into a
23 hypothetical and use John Smith.

24 MR. LOCKYER: All right.

25 THE COMMISSIONER: You don't have to go

1 March 2005 to March 2006.

2 MR. LOCKYER: Take out Driskell and put Smith
3 in.

4 THE COMMISSIONER: Use some other name. Use
5 Lockyer.

6 MR. LOCKYER: Okay. What would happen if that
7 case were to arise tomorrow, in the ensuing
8 year, at least in your experience in Manitoba
9 Justice? Because then we can get an idea of the
10 systemic significance of a stay of proceedings
11 for a person who has been through the 696
12 process?

13 MR. MacFARLANE: I will take it away from the
14 case of Mr. Driskell because I -- for the
15 reasons that have already been expressed. But
16 it seems to me that there is four steps here.
17 And if you put it in the context of four
18 separate steps, then it resolves into, I think,
19 a relatively easy issue. If step number one is
20 that the Crown has concluded that there is a
21 police investigation that's ongoing, or there is
22 some basis for entering a stay, as opposed to
23 some other remedy, so the stay is entered, often
24 on the basis that there is a police
25 investigation that's ongoing. So everybody

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

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

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

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

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

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

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

24 MR. LOCKYER: Okay, thanks.

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

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

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

21 MR. CODE: As I understand --

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

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

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

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

1 You've got an undercover officer who needs to be
2 protected. There is some circumstance that
3 causes you to want to keep the prosecution
4 alive. So your view of the stay is one that
5 doesn't involve any re -- there is no active
6 reconsideration of the case going on. It's
7 finished as of the time you entered the stay.

8 MR. GAUL: There can be. There can be ongoing
9 investigation. That's in the police's
10 discretion, not in the prosecution's service, so
11 I am not excluding that.

12 MR. CODE: So I think what this particular
13 question number 5 is directed to is that,
14 assuming the use of a stay in a case where there
15 is some active re-investigation going on. In
16 other words, the case still is alive, and there
17 is a hope of re-prosecuting. Audit to be
18 brought back, audit to be kept under active
19 re-consideration and active review. Which is
20 what Bruce was speaking to in his four steps,
21 assuming that kind of a case ought to be brought
22 back and formally dealt with in court in the
23 same fashion. So I think the kind of case
24 you're addressing, where there is no active
25 reconsideration going on because you've decided

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

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

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

17 MR. LOCKYER: Thank you.

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

20 MR. ROACH: Absolutely, Mr. Commissioner.

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

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

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

24 And what we're asking is whether in these
25 696 cases, given that there has been a judicial

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

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

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

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

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

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

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

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

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

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

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

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

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

1 resources, to bear.

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

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

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

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

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

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

4 The second jurisdictional basis that I
5 would suggest would be that there is, in the
6 existing law, cases that suggest that the judge
7 does have some authority when the prosecutor
8 goes to withdraw a charge late in the day or
9 even when the prosecutor decides not to call any
10 evidence. So I think a judge could say -- well,
11 let's imagine a situation where there has been a
12 696, the decision has been made to call no
13 evidence. The prosecutor could get up and say:
14 We will be calling no evidence. And the judge
15 could then look to the accused, and if the
16 accused wants to present evidence that goes
17 beyond the not guilty verdict to the issue of
18 innocence, that could be presented and the judge
19 could make a determination and a declaration
20 that an innocent person has been wrongfully
21 convicted as part of a procedure that would
22 approve of the prosecutor's decision not to call
23 evidence and would approve of it.

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

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

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

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

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

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

25 Let me just say, first of all, that I

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

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

16 "Sir Winston said, before he was Sir
17 Winston:

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

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

25 "A kind and dispassionate recognition of

1 convicted criminals, an eagerness to
2 rehabilitate all those who have paid their
3 dues in the hard coinage of punishment"...
4 is one of the things he was speaking about.
5 Now, there can be no doubt, I would
6 suggest, that Churchill's unfailing test of the
7 civilization of any country applies with equal
8 force to the treatment of the state and its
9 society of the wrongfully convicted, from
10 whom -- and what do I mean by wrongfully
11 convicted, from whom rankly undue hard coinage
12 of punishment have been extracted in years of
13 imprisonment for crimes they did not commit.
14 Such tragedies can never be fully redressed.
15 That said, civilized society has a clear duty to
16 inquire into what happened, with a view to
17 taking appropriate measures to see that the same
18 thing doesn't happen again. That's an oxymoron,
19 I think, as the younger generation would say.
20 Such inquiries may address as well the hard
21 coinage of the state payable to the wrongfully
22 convicted for the incompensatable hard coinage
23 punishment unjustly suffered by the wronged and
24 his or her family. The most important redress,
25 however, should be accorded outside of the

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

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

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

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

25 I can think of a case that actually

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

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

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

1 for wrongful conviction has rightly pointed out.

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

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

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

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

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

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

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

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

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

12 JUSTICE MARSHALL: His wife does.

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

25 JUSTICE MARSHALL: I would prefer, excuse me,

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

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

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

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

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

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

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

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

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

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

22 JUSTICE MARSHALL: No, I'm sure.

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

1 should be a procedural vehicle for that. And
2 you're in agreement with that?

3 JUSTICE MARSHALL: In agreement totally with
4 him, as most things in his paper.

5 MR. CODE: Any comments on that? Kerry?

6 MR. SCULLION: I would just like to make a few
7 comments, particularly in relation to this
8 actual innocence aspect of the review. When we
9 conduct reviews on behalf of the minister, we
10 are not searching for actual innocence. And I
11 heard one of the other panelists mention earlier
12 that it is an exoneration process. I don't see
13 it as an exoneration process. And what we see
14 it as is an application from someone who brings
15 forth information that wasn't available for a
16 trier of fact. And we review that and make
17 assessments on what impact that would have had
18 on the trial, the fairness of the trial. And
19 certainly the vast -- well, the vast majority of
20 cases, certainly in the last four years that
21 I've been there, the seven cases that have been
22 referred back, didn't touch on factual
23 innocence. We are not concerned with factual
24 innocence. What we're concerned about was the
25 fairness of the trial process and that the

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

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

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

1 error that we have seen in the applications.

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

13 MR. CODE: Geoff?

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

25 I actually have a question for Professor

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

1 it, whether they wanted to oppose it.

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

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

19 MR. CODE: Any other comments from the
20 panelists?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 procedure was to be developed, there would be a
2 fair degree of informality. By the time this
3 case has reached this stage in the process,
4 there would be a lot of material that you would
5 hope would get filed in an uncontested fashion,
6 with a view of trying to get at the trial. And
7 that would be, obviously, a natural comfortable
8 role for the Crown to engage in. Any further
9 questions on this seventh and last question?

10 MR. LOCKYER: Can I say something?

11 MR. CODE: Yes.

12 MR. LOCKYER: Mr. Commissioner, I wonder if I
13 could address you? Could I make a plea that we
14 devote an extra 45 minutes to this after lunch?

15 THE COMMISSIONER: I will have to ask my
16 handlers here. I feel this is certainly an
17 issue that I would like to address. I know
18 Mr. Kennedy would like to address it on behalf
19 of AIDWYC. And it's 12:45, but it is a very
20 important issue. And I think it would be really
21 good if we could have a bit more time.

22 MR. CODE: There are some practical issues here.
23 People have planes booked because, certainly, we
24 put it forward on the basis that we were going
25 to finish. But I don't want to cut people off.

1 I mean, if James and Jerome have got submissions
2 to make, we should hear them, or any questions
3 they have to ask.

4 THE COMMISSIONER: What about other counsel
5 here?

6 MR. CODE: Do we keep sitting until one o'clock,
7 is that a compromise?

8 THE COMMISSIONER: Well, break now and resume at
9 quarter to two.

10 MR. SCULLION: I can't speak for everybody, but
11 our plane isn't until eight o'clock tonight, as
12 far as the two of us here. I don't think you
13 want to hear from me.

14 MR. GAUL: I believe my flight,
15 Mr. Commissioner, leaves at 3:50. I have no
16 idea how quickly one gets processed in Winnipeg.

17 MR. LOCKYER: Very quickly.

18 THE COMMISSIONER: Mr. Gaul, even if we did have
19 to lose your input, I think it might be worth
20 continuing. If we were to resume until quarter
21 to two and go until 2:30, I don't think you can
22 join us, Mr. Gaul.

23 MR. GAUL: I will see about trying to change my
24 flight.

25 THE COMMISSIONER: And the only other thing is,

1 if you don't come back, you had said earlier
2 about the -- you were looking forward to my
3 comments on the stay part of it. And I can tell
4 you that in 1973 or 1974, I was invited by Neil
5 McDermott, who is in the head of prosecutions in
6 B.C., to go out and speak to the prosecutors in
7 B.C. on the issue of the stay. I think they
8 heard my views then. I don't know that much
9 changes was done. Actually, the truth is, I
10 don't clearly remember what I did say, but I
11 have an idea. But if you don't make it back,
12 Mr. Gaul, I wanted to say how pleased we are
13 that you have attended today. Your input has
14 been most important. And the rest of you, we
15 will see you at quarter to two. I should have
16 asked Madam Reporter, could you be back by then?
17 THE REPORTER: Yes, that's fine.

18 MR. CODE: Just one minor detail, the room has
19 to be reconfigured because we have a witness we
20 are calling this afternoon. But if we break now
21 until quarter to two and firmly agree that we
22 are going to adjourn this panel at 2:30.

23 THE COMMISSIONER: Absolutely.

24 MR. CODE: Mr. Giasson can reconfigure the room
25 so that we can then call a witness, say, at

1 quarter to three.

2 THE COMMISSIONER: Okay.

3 (Proceedings recessed at 12:50

4 and reconvened at 1:45 p.m.)

5 MR. CODE: Mr. Commissioner, I believe we were
6 wrapping up question seven before the lunch
7 recess, and perhaps I could first of all ask the
8 panelists whether there are any comments from
9 them on question seven, or the combination of
10 six and seven. And then I know that Mr. Lockyer
11 and Mr. Kennedy have some questions.

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

15 MR. KENNEDY: Thank you, Mr. Code.

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

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

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

4 I have really two questions. First one, if
5 I could just outline a couple of points. We
6 have a situation where a Ministerial review has
7 been conducted and a new trial ordered. The
8 Crown enters a stay, or there is a not guilty
9 verdict, whether it is as a result of calling no
10 evidence or after a new trial, but we are into a
11 situation where the state refuses to acknowledge
12 innocence in its broadest form, that being that
13 the wrongly convicted person did not commit the
14 crime, or as Justice Marshall pointed out, a
15 crime did not occur. This individual wants an
16 acceptance of innocence and an apology.

17 Professor Roach's paper addresses possible or
18 potential procedures. As pointed out by a
19 number of different people, the individual now
20 once again benefits from the presumption of
21 innocence. There has been an intervening event,
22 like the Ministerial review or the acquittal
23 that does raise questions about the integrity of
24 the verdict or the likelihood of a miscarriage
25 of justice.

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. ROACH: Yes, I mean, it may be workable.

11 And maybe the better way of looking at it is to
12 be flexible on the burden of proof. I mean, I
13 think it is important at this hearing to listen
14 to the previously convicted person, to ensure
15 that they have an opportunity to explain what
16 has happened to them. But conversely, there may
17 be some issues where the evidential burden is on
18 the Crown. Because it is the Crown who has the
19 knowledge that is relevant to the determination
20 that the judge will make. So perhaps this
21 choice of burden doesn't necessarily have to be
22 an either/or, and on certain issues, the
23 accused, the previously convicted person will
24 present their case, and on certain issues the
25 Crown will present their case. But, again, I

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

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

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

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

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

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

8 MR. KENNEDY: Professor MacFarlane.

9 MR. MACFARLANE: Thank you, Mr. Kennedy.

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

22 MR. KENNEDY: Justice Marshall.

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

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

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

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

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

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

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

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

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

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

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

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

8 Professor Roach, I know you have thought
9 about that.

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

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

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

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

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

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

25 In other words, the findings will be

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

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

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

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

1 can do it. I guess you are really --

2 MR. KENNEDY: Talking about this inquiry, a type
3 of Provincial inquiry. Professor MacFarlane?

4 MR. MACFARLANE: Your question was do you see
5 any impediments. I guess I am not addressing
6 the question of impediments, but it seems to me
7 that one of the objectives of this Commission,
8 and our work generally in the area of wrongful
9 convictions is to ensure that there is
10 consistency in approach across the country on
11 all of the issues in relation to wrongful
12 convictions. I worry a little bit that if we
13 are proceeding province-by-province with
14 individual provinces setting up individual
15 mechanisms or bodies, that we might end up with
16 a patchwork approach to the issue, and I'm not
17 sure that that's in the interests of justice.

18 MR. KENNEDY: Anyone else?

19 Okay, I will turn it over to Mr. Lockyer.
20 Thank you members, Mr. Commissioner.

21 MR. LOCKYER: The first issue I want to address
22 is this; that the focus of your paper, Professor
23 Roach, or at least what you said today focuses
24 on the cases of people who have gone through the
25 696 process. And I understand why, because

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

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

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

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

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

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

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

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

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

1 speak.

2 Let's look at the cases that we are having
3 to deal with, just looking at some of our cases
4 in Canada. Milgaard, David Milgaard's case in
5 1992 is a classic. Here was a man who we now
6 know for sure was innocent, who the Supreme
7 Court of Canada was only prepared to say might
8 not be guilty, that is effectively as far as
9 they were prepared to take it. You had then a
10 case of someone convicted of a crime that he
11 didn't commit, where he didn't have DNA to prove
12 his innocence, and where he didn't have a real
13 culprit to prove his innocence, as did Donald
14 Marshall, as ultimately did David Milgaard, as
15 did Greg Parsons, for example. Those three, we
16 had a real culprit at the end of the day so, of
17 course, there had to be an acknowledgment of
18 their innocence. So that's one type of case
19 where we don't have the DNA, or we don't have
20 the third party culprit.

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

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

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

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

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

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

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

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

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

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

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

8 The other feature that I think should play
9 in this kind of thing that we are talking about
10 is what Justice Marshall has talked of, and that
11 is, it seems to me that you have to take into
12 account the notion of fault on the part of the
13 authorities, because that does arise in so many
14 of these cases. The individual, for example, it
15 may be far too late for him to be able to
16 establish who actually committed the crime. It
17 may be that, to take, you know, 20 years have
18 past, for example, Mr. Fillion's case, 37 years
19 have past and it is still going strong.

20 Mr. Truscott's case 47, and it is still going
21 strong. In other cases the prosecution, by that
22 I mean the authorities as a whole, may not have
23 preserved evidence. They may not have
24 videotaped interviews, there should have been
25 interviews, so we will never know quite what was

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

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

23 MR. LOCKYER: I think -- sorry?

24 THE COMMISSIONER: Mr. MacFarlane had a comment?

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

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

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

8 One possible approach would be to
9 characterize the innocence hearing as a truth
10 seeking hearing that takes into account the
11 realities of the individual case. For instance,
12 takes into account the fact that the Federal
13 Minister has intervened and found that there was
14 likely a miscarriage of justice, takes that into
15 account, takes into account the fact that the
16 individual has now been restored to the
17 presumption of innocence. It takes into account
18 the fact that there was a stay and there is
19 accordingly no obvious forum in which to
20 demonstrate innocence. So it could be a truth
21 seeking that takes into account the reality of
22 the case.

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

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

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

1 road.

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

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

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

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

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

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

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

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

25 MR. CODE: The constitutionality of it was

1 challenged in Swain, the Supreme Court and
2 Canada Health, it was a federal power.

3 THE COMMISSIONER: But it was delegated to the
4 province?

5 MR. CODE: Yes.

6 MR. LOCKYER: The last thing that occurred to
7 me -- I know, Professor MacFarlane, you like the
8 idea of consistency of approach across the
9 country, but sometimes you have to start
10 somewhere. And indeed the hair and fiber
11 committee, for example, in this province has
12 started somewhere, and has certainly developed
13 into at least into one other province, and I am
14 still trying to get it into my own province, and
15 we are getting there. It just seems to me a
16 recommendation to this government --

17 THE COMMISSIONER: Mr. Lockyer, I give you three
18 minutes.

19 MR. LOCKYER: -- a recommendation to this
20 government to set up a process within this
21 province, or alternatively a recommendation to
22 Manitoba Justice that they agree to make it part
23 of their policy, that when someone in a wrongful
24 conviction situation claims or demands that they
25 actually be, that Manitoba Justice agree that

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

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

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

14 MR. CODE: Any concluding comments from anyone?

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

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

1 ten minute adjournment please?

2 (Proceedings recessed)

3 THE CLERK: This Commission of Inquiry is now in
4 session.

5 MR. CODE: Mr. Commissioner, if I could just
6 briefly speak to an administrative issue before
7 I let my colleague, Mr. Dawe, get started with
8 Mr. Christianson. Over the recess of the last
9 few weeks we completed two additional
10 interviews, with a great deal of cooperation
11 from Mr. Olson and his clients, that I'm
12 grateful for. We interviewed now Judge Lerner,
13 and we interviewed Dale Schille, both of whom
14 were reasonably senior Crown officials at
15 various post appeal stages of the case, who we
16 had originally made a decision not to interview,
17 but partly as result of Mr. Lockyer's motion,
18 and partly out of our own decision making
19 process, we felt it would be advisable to
20 interview them. Those interviews are completed
21 and the witness statements are in their final
22 stages of preparation, so we will be circulating
23 two final witness statements within the next day
24 or two, one from Judge Lerner and one from Dale
25 Schille. I don't think there is anything of

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

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

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

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

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

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

6 THE COMMISSIONER: Welcome Dr. Bowen.

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

11 THE COMMISSIONER: Exhibit --

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

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

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

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

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

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

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

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

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

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

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

6 BY MR. DAWE:

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

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

17 A Yes, I have.

18 Q Is it substantially accurate?

19 A Substantially accurate, yes.

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

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

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

4 A Yes.

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

8 A No.

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

11 A Yes, I think it was approximately 1999.

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

15 A Yes.

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

22 A That's right.

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

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

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

18 A That's correct.

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

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

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

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

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

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

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

1 A Yes.

2 Q And that would be similar to the way in which it
3 was done in a real case under the new, using
4 these new forms; is that fair?

5 A That's correct, yes.

6 Q So just looking at this, it appears if you
7 compare this, the extent of the notes both to
8 the notes that you made in Driskell's case and
9 also to the notes that you made about the known
10 hairs, both in Driskell's case and in the
11 proficiency test, would it be fair to say that
12 after this change to the new form, the practice
13 was that you took more notes than you did using
14 the old form, but still fewer notes than you
15 would take when looking at a known hair?

16 A Well, I would say that the amount of notetaking
17 would be roughly the same. It was just a little
18 bit more organized with this particular form,
19 but the actual amount of detail would be almost
20 identical.

21 Q Okay. Thanks. The second area that I just
22 wanted to deal with briefly is this issue of
23 photographs. At page 14 of the interview
24 summary, you indicate that the Methods Manual
25 didn't require photographs to be taken and it

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

5 A Yes.

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

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

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

20 A No.

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

25 A The only time that I ever took photographs in

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

5 Q All right. And the third and final area in
6 this, about the lab examinations, also at page
7 14 of your interview summary, you indicate that
8 it wasn't lab policy at the time to have a
9 second examiner actually get down and look
10 through the microscope at forensically
11 significant hair comparisons. And then you go
12 on to say in this particular case you didn't
13 obtain a second opinion?

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

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

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

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

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

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

1 Q Okay. And if there is something that I said
2 that's incorrect, you should--

3 A I will clarify.

4 Q Thank you. So you said at the outset -- would
5 it be fair to say that in a criminal trial when
6 microscopic hair comparison evidence is
7 tendered, it is usually tendered in relation to
8 the issue of identity in some sense? In other
9 words, the party who tenders the evidence
10 tenders it for the purpose of having the trier
11 of fact draw some inference that the hair, the
12 questioned hair came from the same person as the
13 known hair. Is that fair?

14 A I think the way I would put it is that the
15 purpose is to establish an association between a
16 person or persons, or a place, using hair
17 evidence.

18 Q Right. But ultimately the objective is
19 generally to determine where the origins of a
20 questioned hair, to say it came from a
21 particular person; is that fair?

22 A Well, it would be, the purpose of the
23 examination would be to conduct a hair analysis.
24 And I mean, we would know at the outset that it
25 is not possible to say that it came from a

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

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

10 A Okay.

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

21 A Yes.

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

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

10 So, I understand from the interview summary
11 that when you testified, when you wrote your
12 reports, RCMP hair analysts were expected to
13 give their evidence in accordance with the
14 guidelines that were in the appendices 3-1 and
15 3-5 of the Methods Manual. Is that right?

16 A There were guidelines in place, yes.

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

24 A Right.

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

1 that at tab 4, the Methods Manual is at tab 4.
2 And it is at page 24, which is a bit difficult
3 to find, but in the bottom right-hand corner it
4 says 24 over a line saying 84-12, it is appendix
5 3-1 at the top.

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

12 A Correct.

13 Q It says,

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

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

20 BY MR. DAWE:

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

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

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

16 Q This is addressed in the interview summary.

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

20 Q If you look --

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

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

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

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

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

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

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

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

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

19 THE COMMISSIONER: I'm not sure where --

20 BY MR. DAWE:

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

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

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

4 BY MR. DAWE:

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

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

18 Q Okay.

19 A And that would be presented as an opinion.

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

1 that choice of words?

2 A Well, I think it is a good, I think it is the
3 appropriate word to use in describing a hair
4 match. I know that it had been an issue that
5 had arisen from the Kaufman Inquiry. But I
6 simply mentioned in our interview that it was a
7 term that I used and I was comfortable with and
8 I thought we should still be using with respect
9 to that type of evidence.

10 Q All right. With respect to the criticism that's
11 been directed at this language of consistency,
12 as I understand it, one of the main concerns
13 that Justice Kaufman raised is the term can be
14 used to mean different things by different
15 people, including different scientists, and that
16 it therefore has potential to confuse the jury.
17 What is your response to that criticism?

18 A I think that's a fair criticism. I think it
19 indicates that we need to do a better job of
20 explaining what we need, but it doesn't mean
21 that we necessarily have to abandon the use of
22 the word.

23 Q When you used the word in the context of hair
24 comparisons, microscopic hair comparisons, what
25 you meant by it was that you were signifying

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

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

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

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

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

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

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

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

1 discriminate with hair.

2 Q Well, there is really two separate issues here,
3 unless I'm misunderstanding this. One issue is
4 your ability as an examiner to look at hairs in
5 a microscope and say whether they are the same
6 or different.

7 A Okay.

8 Q That is the first thing. And the second thing
9 is, the second issue that arises is, what is the
10 probability that two hairs, assuming that you
11 have accurately identified them as being
12 microscopically the same, what are the chances
13 that they came from the same person? That seems
14 to me to be a somewhat separate issue. And what
15 I would like -- you've indicated that your
16 belief is that the chances are that, somewhere
17 in the 1 in 100 or 1 in 1,000 range, that there
18 is only 1 in 100 to 1 in 1,000 chance that two
19 microscopically similar hairs come from
20 different people. And what I want you to expand
21 on a bit is, how do you know that, why do you
22 believe that?

23 A I think the thing we have to be cautious of is
24 getting into the wording of probabilities and
25 chances of it coming from one person or another.

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

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

1 A All it tells me is that I'm able to discriminate
2 100 questioned hairs with a known sample, and
3 that is as far as I take it. The probability
4 does not extend to the population, it is not
5 like you have a lottery and you draw a hair out
6 of a lottery and see whether it matches or not.
7 It is a discriminating ability of the test.

8 Q But all the test allows you to do is to
9 discriminate, based on the visual appearance of
10 these hairs, whether they are the same when
11 viewed through a microscope, whether they look
12 different, when looking at all of these
13 characteristics. And the proposition that I'm
14 putting to you is that that doesn't tell you
15 anything about -- by looking at two hairs, you
16 can tell if they are the same or if they are
17 different, but you can't tell anything, just
18 from that, about whether they are from the same
19 person or not. That requires a further
20 assumption about the probability of like hairs
21 coming from different people. Is that fair?

22 A Well, I don't think of it in terms of
23 probabilities. I think of it in terms of, and I
24 think I used the term that I expect that you
25 would be able to discriminate 100 to 1,000

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

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

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

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

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

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

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

24 THE COMMISSIONER: I'm having trouble hearing
25 you.

1 BY MR. DAWE:

2 Q There was a lot packaged up in that answer,
3 there were two separate follow-up questions I
4 have arising out of that.

5 The first one, you talked about scientific
6 method involving coming up with theoretical
7 models and testing them. My first question is,
8 is there some theoretical model that would give
9 you any kind of understanding of how often
10 coincidental hairs should arise in the
11 population?

12 A I don't think there is a test that -- like there
13 is no absolute experiment that you could do to
14 determine that.

15 Q I wasn't talking about experiments, I'm talking
16 about theoretical models. Is there some model
17 that's been devised that has some predictive
18 power that would say, well, we should, if this
19 model is correct, find coincidental hairs every
20 so often. That would be a model that you could
21 test by devising an experiment?

22 A Well, Mr. Gaudette's study clearly indicated
23 that if you have enough hairs and you do enough
24 comparisons, you are going to find hairs that
25 you can't discriminate. So we know that that's

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

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

13 A No.

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

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

1 Q I would go so far as to put it to you that the
2 100 hair test simply doesn't tell you anything
3 about what the instance of coincidental hairs in
4 the population is. It allows you -- it is a
5 test of your ability to determine whether or not
6 two hairs are similar, but it is simply not a
7 test of likelihood of coincidental matches. Do
8 you agree or disagree with that?

9 A Well, I guess I disagree. I think it is
10 possible that you could have two questioned
11 hairs in the question hair exercise that were
12 not from the same person that matched the
13 standard, that would be possible. So, I mean,
14 once again, it is a question of the
15 discriminating ability of the test based on the
16 biological features present.

17 Q Let me put it this way, you are familiar with
18 Dr. Gaudette's results in his studies that he
19 performed?

20 A Sorry, I didn't hear that?

21 Q You are familiar with Dr. Gaudette's papers and
22 the empirical tests he did?

23 A It is Mr. Gaudette, and his initial study was
24 done with Dr. Keeping.

25 Q You would agree with me when he looked at these

1 hairs, he found some hairs that came from
2 different people that he couldn't distinguish?

3 A Yes, that is fair.

4 Q So if whoever was preparing the 100 hair test
5 happened to put two of those hairs into the
6 test, you would find another person who
7 performed the test would then conclude that
8 these hairs were consistent with each other. Is
9 that fair?

10 A They could have concluded that it was from the
11 same sample, yes.

12 Q They could have, but it wouldn't -- so my point
13 simply is that all that the 100 hair test allows
14 you to do is to determine what kind of hairs
15 have been included in the package, it doesn't
16 give you any information about the incidence of
17 hair --

18 A In the population in general.

19 Q Thanks. If I can just move on now. This is a
20 fairly simple question that's going to follow a
21 fairly complicated setup, I'm afraid. So I am
22 going to have to ask you to bear with me as I
23 put some things to you. The question
24 essentially arises out of some of these
25 transcripts that we have included in the

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

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

14 Q Anyway, I will explain to you, there is really
15 only one question that I have arising out of
16 this. And the point that I draw from these sets
17 of transcripts is that you will see in the Unger
18 and Starr cases, which are cases from 1992 and
19 1995 respectively, and one was a case where you
20 testified, that's Starr, and the other is a case
21 where Mr. Cadieux testified. And in those two
22 cases what you will see, and I will take you
23 through them in a minute, you frame, both of you
24 frame your evidence about the likelihood of
25 coincidental matches in a way which, as I read

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

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

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

19 So as far as you are concerned, when you
20 gave evidence in the cases that you did up until
21 1999, or whenever it was that you last
22 testified, I don't know if it would have been
23 1999 or shortly thereafter, you expressed an
24 opinion about the probability of coincidental
25 matches that was essentially the same as what --

1 A I did, yes.

2 Q Then I will leave the point.

3 The last area that I would like to deal
4 with then is really just looking at a couple of
5 aspects of the specific evidence that you gave
6 at Mr. Driskell's trial. And this is an area
7 where we have covered it in some detail in the
8 interview already, and the record really speaks
9 for itself. We have a transcript of the words
10 you used and they can be parsed to one's heart's
11 content, but there are two specific areas where
12 I would just like to ask some further questions.
13 The first one is, if I can take you to the
14 transcript, it is at tab 5. If I can take you
15 to 148, the numbers in the upper right-hand
16 corner, not the ones in the lower right-hand
17 corner. You see starting around line 10 is
18 where you begin explaining what you mean by the
19 term consistent. Do you see that?

20 A Yes.

21 Q Right. And I won't read it all out to you, but
22 just picking it up at line 20, you say,

23 "And the point about this type of analysis
24 is that it is not a positive
25 identification, all right, because the only

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

9 this is carrying over the next page,

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

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

1 that a fair way to put it?

2 A I think that's a fair way to put it, yes.

3 Q Thanks. As I read the transcript, you didn't
4 explain to the jury that the number of
5 questioned hairs that were looked at had some
6 bearing on any assessment of the probability of
7 it being coincidental match; is that fair?

8 A No, I didn't mention that.

9 Q And the second issue, and this is the final
10 issue in your testimony that I think I need to
11 take you to, because we have really covered the
12 rest of it in some detail in the interview
13 notes, is your use of analogies at the trial.
14 And there are a couple of different analogies
15 that you draw. The first you will see if you
16 flip over the page, page 149, this is --
17 actually we are already on 149, my apologies.
18 Just beginning below the part where we stopped
19 reading at line 5, it says,

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

25 And a little bit further down the page on line

1 14 you make another analogy, you draw this
2 analogy between the possibility of someone
3 accidentally mistaking one person for another.
4 And you follow up on this analogy in
5 cross-examination if you turn to page 152, line
6 6,

7 "There are so many characteristics on the
8 hair that you become familiar with looking
9 at that it becomes like looking at a face,
10 and you and I both know it is possible to
11 confuse a face.

12 Okay.

13 But when you are looking at it in detail
14 for a specific face, the chances become
15 less."

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

1 something like that?

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

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

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

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

25 A No, we trained to try and communicate

1 effectively, that's what we are trained to do.

2 THE COMMISSIONER: I have not read this

3 transcript, but it struck me that the analogy

4 came from the lawyer who was cross-examining.

5 Am I not right? Sorry, no. Sorry, it was part
6 of the answer.

7 MR. DAWE: It is an answer to a question but it
8 wasn't suggested by --

9 THE COMMISSIONER: I apologize.

10 BY MR. DAWE:

11 Q Let me put it this way. I think it is probably
12 fair to assume that the average juror knows what
13 a face looks like and thinks they are capable of
14 distinguishing one face from another. The
15 concern that I have, that I raise and I want to
16 put to you whether you think it is a concern, is
17 that juror might somehow improperly draw
18 inferences based on their own experience with
19 being able to tell one face apart from another,
20 and somehow conclude that because they have
21 never seen someone who has an identical face
22 from somebody else, that therefore there is no
23 prospect of identical hairs coming off different
24 heads?

25 A Well, if you are asking me if I'm concerned

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

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

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

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

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

14 A I'm aware of contrary evidence, yes.

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

17 A Yes.

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

1 A I'm familiar with the study, yes, Houck and
2 Bodowle.

3 Q So my question for you is, in view of this, does
4 it not concern you that, are you not at least
5 somewhat concerned that there is at least a
6 possibility that the likelihood of coincidental
7 matches appearing in the population are perhaps
8 much higher than you believed back in the 1980's
9 or 1990's, or that other hair examiners believed
10 back then?

11 A Once again, we never developed an expression for
12 a probability of a hair match in the population.
13 I think, as I was describing to you, I
14 considered hair evidence to be discriminating,
15 and I still consider hair evidence to be
16 discriminating. However, the fact is that for
17 nuclear DNA, it is billions of times more
18 discriminating. That's the fact. And therefore
19 there are going to be some instances where one
20 could not discriminate with the hair, the DNA,
21 the nuclear DNA will be able to do that. That's
22 not necessarily -- I mean, that's just to be
23 expected in a certain number of cases.

24 Q Right. But what you told us in the interview
25 and what I think you reiterated today is that

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

10 A Yes.

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

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

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

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

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

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

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

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

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

20 THE COMMISSIONER: Mr. Abra?

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

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

24 THE COMMISSIONER: Okay.

25 MR. LOCKYER: Lots.

1 MS. WOLSON: None.

2 THE COMMISSIONER: I think we have been going,
3 we have been in this hearing for almost six
4 hours today, and that's longer than our normal
5 day, I think we are about eight minutes short,
6 or seven minutes short of six hours, so I think
7 it might be -- I take it you are not anxious to
8 start today?

9 MR. LOCKYER: No, I'm actually a bit jet lagged,
10 Mr. Commissioner, so I prefer not to.

11 MR. DAWE: I think in view of the indication
12 from counsel that there will not be vast amounts
13 of questions I think early recess today will not
14 throw us off schedule too badly.

15 THE COMMISSIONER: I think we have put in a
16 fairly good day today. 9:30 tomorrow, yes, 9:30
17 tomorrow.

18 (Adjourned at 4:00 o'clock)

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COURT REPORTER'S CERTIFICATE

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

Cecelia Reid
COURT REPORTER

Lisa Reid
COURT REPORTER

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