

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

Friday, September 22, 2006

Volume 25

INQUIRY PROCEEDINGS

COMMISSION STAFF:

Mr. Michael Code	Commission Counsel
Mr. Jonathan Dawe	Associate Commission Counsel
R.L. (Bob) Giasson	Chief Administrative Officer
Wendy Bergmann	Administrative Assistant
Kathy Karamchand	Administrative Assistant
Nancy Pelletier	Administrative Staff
David Bruni	Legal support staff

APPEARANCES

Mr. Alan M. Libman and	
Mr. James Lockyer	For Mr. James Driskell
Mr. E.W. Olson, Q.C.	For Province of Manitoba
Mr. Jay Prober	For George Dangerfield
Mr. D. Abra, Q.C.	For The Estate of Bruce Miller
Mr. R. Tapper, Q.C.	For Mr. Stuart Whitley
Mr. D. Gates, Q.C.	For the RCMP
Ms. K. Carswell	For the Winnipeg Police Services and certain members
Mr. R. Wolson, Q.C.	For the Winnipeg Police Association and certain members
Mr. J. Kennedy, Q.C.	For the Association in Defence of the Wrongly Convicted

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1 Friday, September 22, 2006

2 Upon commencing at 9:33 a.m.

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

5 THE CHAIRMAN: I apologize for the delay. My
6 clock is slightly different than the one here,
7 but I would have been a minute late anyways.
8 Mr. Prober.

9 MR. PROBER: Yes, good morning,
10 Mr. Commissioner. I have the lead this morning
11 with respect to examining Mr. Lawlor, and if
12 you're ready.

13 THE CHAIRMAN: Yes.

14 BY MR. PROBER:

15 Q Mr. Lawlor, I have sort of a delicate question
16 for you before we get into the nitty-gritty and
17 that is, have you had sufficient opportunity to
18 observe Mr. Code to tell us whether he's a type
19 A personality or not? Actually, you probably
20 don't need to answer that question. I think the
21 maxim res ipsa loquitur might apply,
22 Mr. Commissioner.

23 THE CHAIRMAN: Most people here are too young to
24 even know res ipsa loquitur.

25 MR. PROBER: Mr. Code knows, that's what's

1 important.

2 BY MR. PROBER:

3 Q In any event, Mr. Lawlor, good morning to you as
4 well, by the way. You indicated yesterday that
5 you and George Dangerfield kept each other
6 apprised of any disclosure matters in a general
7 way?

8 A In a general way I suppose.

9 Q And would it be fair to say that where there
10 were important matters that you knew about, you
11 would advise Mr. Dangerfield?

12 A I would expect so.

13 Q Yes. And same with him?

14 A Yes.

15 Q And there was some question put to you yesterday
16 about whether it's proper for a Crown prosecutor
17 to sort of intentionally or willfully keep
18 themselves ignorant of a particular matter.
19 That was asked in a general way. Did you ever
20 intentionally or willfully keep yourself in the
21 dark about a particular matter?

22 A No, I assumed that we were getting full
23 disclosure.

24 Q Absolutely. Have you, in your association with
25 Mr. Dangerfield, which would have been what, 20,

1 25 years?

2 A Sure.

3 Q Maybe closer to 30. Did you ever know
4 Mr. Dangerfield to intentionally or willfully
5 keep himself in the dark about a particular
6 matter?

7 A Not at all.

8 Q No. And did you ever know George Dangerfield to
9 intentionally suppress or conceal evidence at
10 all?

11 A No.

12 Q In fact, if I were to suggest to you that it was
13 exactly the opposite, if it was an issue of
14 disclosure or non-disclosure, George Dangerfield
15 would err on the side of full disclosure?

16 A Yes.

17 Q Yes. If you could turn to tab 29, please, which
18 would be in volume 2, in particular, page 4,
19 paragraph 16? "Discuss with George," you
20 probably told us this; is that your writing?

21 A It is.

22 Q So when there were important points of
23 disclosure, you discussed these matters with
24 Mr. Dangerfield, correct?

25 A Yes.

1 Q And is it fair to say that leading up to the
2 trial, between you and George Dangerfield, you
3 were the one really for responding to the
4 disclosure requests by Mr. Brodsky?

5 A Between the two of us.

6 Q Yes?

7 A Yes.

8 Q In other words, I can take you through the tabs
9 if necessary, but most of the information we
10 have, the letters and so on, you are writing to
11 the police, after you get requests from
12 Mr. Brodsky, following up to get information
13 from the police; correct?

14 A Yes.

15 Q Okay. If you would look at tab 34, please?
16 Mr. Abra may have covered this yesterday. You
17 had said in your evidence-in-chief that you
18 thought you would have passed the whole letter
19 on to the police. And that makes sense, because
20 if you look at tab 34, you are referencing in
21 that fax --

22 A Paragraphs.

23 Q -- only paragraphs; right?

24 A I would have sent the whole letter.

25 Q Right, you would have sent the letter. That

1 would have been at that time, as I recall, the
2 letter of April 25th, which is back a couple of
3 tabs?

4 A No. My fax is dated April 26th.

5 Q No, no, but I am saying Brodsky's letter would
6 have been April 25th, the tab before?

7 A Oh, I'm sure. I thought you said 28th.

8 Q No. If I said it, I meant the 25th. So the
9 police would have received the letter and,
10 therefore, would have known exactly what
11 Mr. Brodsky, as well as anybody could understand
12 the exact request, they would have known the
13 exact request that Mr. Brodsky was making. They
14 had the letter?

15 A Yes.

16 Q Right. If you would turn to tab 37, please?
17 This is in response to paragraph 9 of
18 Mr. Brodsky's April 25th letter. I am referring
19 actually to paragraph 3 of that letter dated
20 April 29th at tab 37. It's in response to
21 paragraph 9 of Mr. Brodsky's letter. And in
22 fact, if you go back to tab 33, you will see
23 paragraph 9 of Mr. Brodsky's letter; right?

24 A Yes.

25 Q "What do the Winnipeg Police have on the

1 fire in Swift Current, Saskatchewan?"

2 And then there's another fire referred to on

3 Pacific Avenue and the fire at Kara's shop.

4 There's three fires that particulars are being
5 requested on, right?

6 A Yes.

7 Q Okay. If I understood Mr. Code's question to
8 you -- first of all, did you understand that
9 Mr. Brodsky's request in that paragraph had
10 anything to do with immunity?

11 A No.

12 Q No. And I understood when Mr. Code questioned
13 you, he was referring to the issue of immunity
14 and asked you specifically about whether you
15 checked with Miller before answering the
16 question in paragraph 9 of Brodsky's April 25th
17 letter. And my question is this: Did you get
18 your disclosure from the police or from
19 Mr. Miller?

20 A From the police.

21 Q Yes. At tab 43, there is a reference to
22 information about an informant, or informants,
23 and whether Zanidean had ever been an informant.
24 That's at number 23, tab 43, do you see that?
25 The last page actually, page 6, paragraph 23?

1 A Yes.

2 Q They are asking, or he's asking if Zanidean had
3 ever been an informant for the police. Do you
4 see that?

5 A I do.

6 Q Was it your understanding at the time that the
7 confidentiality attached to it was sacrosanct,
8 the courts protected the identity of informants,
9 police would not normally disclose the identity
10 of their informants?

11 A Yes.

12 Q If you turn to the next tab, please, tab 44, and
13 in particular paragraph you have been referred
14 to previously, and particularly by Mr. Code,
15 information provided to Mr. Brodsky that they,
16 the police,

17 "...are not prepared to involve themselves
18 in the Swift Current fire, that is another
19 police force. The RCMP were advised
20 according to Dangerfield and Lawlor (by
21 Lawlor) in Dangerfield's presence in the
22 office of Mr. Justice Morse that Zanidean
23 probably set this fire. RCMP chose to do
24 nothing about it. Any favour extended to
25 Zanidean?"

1 Those seem to be sort of questions Mr. Brodsky
2 is putting to himself.

3 In any event, the question was put to you,
4 how could Brodsky make use of this information
5 on cross-examination if it wasn't in writing?
6 Was there anything, as far as you know, stopping
7 Mr. Brodsky from asking you to confirm this in
8 writing?

9 A No.

10 Q No. And if he asked for that, I take it there
11 would be two ways, and you correct me if I'm
12 wrong. One would be you could confirm it in
13 writing, either you or Mr. Dangerfield or both
14 of you; or you could get the police to prepare a
15 special supplemental report, I think
16 Mr. Dangerfield referred to them as specials,
17 outlining exactly what you told Mr. Brodsky?

18 A It would have to be the police that prepared the
19 supp, that's where we're getting our information
20 to pass on.

21 Q So if he had asked for it in writing?

22 A He would have got it in writing.

23 Q From the police, based on a report prepared by
24 the police?

25 A Yes.

1 Q All right. You were then taken to Zanidean's
2 cross-examination by Mr. Brodsky, and you asked
3 him about the fire, witness protection and so
4 on. When Zanidean responded to those questions,
5 did Mr. Brodsky ask you or Mr. Dangerfield to
6 stipulate as to what you had told him at the
7 pretrial conference, namely that the RCMP chose
8 to do nothing about it?

9 A Brodsky never asked me.

10 Q No. But he wouldn't need anything in writing to
11 do that, would he? I mean, he could simply
12 stand up and say, well, the prosecution has told
13 me this, that. And you would have to confirm
14 that, would you not, or I suppose
15 Mr. Dangerfield would?

16 A I suppose Brodsky could have asked that.

17 Q Yes.

18 THE CHAIRMAN: Of whom?

19 THE WITNESS: Of Zanidean you mean?

20 BY MR. PROBER:

21 Q No. He could have asked the Crown, turned to
22 the Crown and said to the Crown, did you, would
23 you confirm that you told me the RCMP had
24 nothing to do with, chose to do nothing about
25 this matter?

1 A Sure, he could have.

2 Q Yes. It's fair to say that, and I think you
3 confirmed this, that you were not involved in
4 any way in terms of the witness protection
5 program negotiations, were you?

6 A No.

7 Q And in that, you made the point when you were
8 being questioned by Mr. Code, I for one thought
9 it was a good point, that you didn't link the
10 Saskatchewan charges with witness protection.
11 Do you recall indicating that?

12 A Yes.

13 Q Yes.

14 A I didn't.

15 Q No. And in fact, the witness protection matter,
16 as I understood it, based on your affidavit and
17 the direct, and to support the early expedited
18 trial date and the reason for the direct
19 indictment was because you had two witnesses
20 that feared for their safety because of Driskell
21 and Driskell's friends; right?

22 A That's the information we got from the police.

23 Q Exactly. And that's why protection was being
24 undertaken, as far as you knew, nothing to do
25 with the Saskatchewan charges?

- 1 A Right.
- 2 Q And if I may, witness protection may have two
3 components. One, sort of temporary protection
4 where a witness is protected, put in a safe
5 house, certain expenses, living expenses are
6 paid, and secondly, a witness protection
7 program; right?
- 8 A Yes.
- 9 Q Two different things, are they not?
- 10 A I suppose they are.
- 11 Q And witness protection, I would suggest to you,
12 is different than immunity; right?
- 13 A Yes.
- 14 Q I mean, you can have a witness going into a
15 witness protection program where immunity is not
16 an issue; right?
- 17 A Yes.
- 18 Q The witness has no outstanding charges; correct?
- 19 A Yes.
- 20 Q And you can have the issue of immunity and a
21 favour of staying of charges, or not being
22 prosecuted for charges, that has nothing to do
23 with the witness protection program. Separate
24 matters, correct?
- 25 A Right.

1 Q Then there is also the issue of monies paid to a
2 witness. I mean there are, I would suggest to
3 you, differences between monies paid or benefits
4 received directly by an individual witness into
5 his or her own pocket, such as \$20,000, and
6 getting money for living expenses paid on their
7 behalf. There's a difference, is there not?

8 A Yes.

9 Q Now, let me just refer you, if you would,
10 please, to tab 5 of volume 1 of your book of
11 documents, to Mr. Finlayson's statement at page
12 6. The second full paragraph, Mr. Lawlor,
13 second sentence, first, do you have that?

14 "First, there was a sense that prosecutors
15 generally...",

16 the second full paragraph?

17 A Yes, I have it.

18 Q "First, there was a sense that prosecutors
19 generally should not be involved in
20 negotiating benefits with a witness or a
21 witness's lawyer."

22 Well, that's what was happening here, correct,
23 in your matter with Driskell?

24 A Yes.

25 Q Then he goes on to say, Mr. Finlayson in his

1 interview with the commission.

2 "Accordingly, there would usually be a
3 Chinese wall of sorts erected between the
4 prosecutors and the negotiators."

5 Do you see that?

6 A I do.

7 Q Were you aware of that at the time?

8 A I know that we were not involved in the witness
9 negotiations.

10 Q Right. Now, if you turn as well to tab 59,
11 please, which is in volume 3, do you have that?

12 A I do.

13 Q White folder, it's entitled, Department of
14 Justice. Do you see on the second page,
15 "strictly confidential"?

16 A Yes.

17 Q "Informer protection, strictly
18 confidential."

19 At the bottom the name Gumieny and Zanidean,
20 "Public prosecution - directors only, very
21 confidential."

22 A Yes.

23 Q Were you a director?

24 A No.

25 Q Was Mr. Dangerfield a director?

1 A No.

2 Q Turn to the next page. We are advised on the
3 front of the file,
4 "Witness protection, B. Miller and S.
5 Whitley only."
6 Right?

7 A Yes.

8 Q Did you ever see that file?

9 A Not until I was given this book of documents a
10 few weeks ago.

11 Q Okay. At the time you were prosecuting this
12 matter --

13 A Yes.

14 Q -- you never saw that file?

15 A No.

16 Q You never saw what was on the file?

17 A No.

18 Q You never accessed the file?

19 A I didn't even know such a file existed.

20 Q Right. The Chinese wall that Mr. Finlayson
21 referred to, correct?

22 A I suppose so.

23 Q If we could go now, please, to what has been
24 referred to as the post-appeal period, in
25 particular, tab 72. These are the logbook notes

1 of Inspector Hall at the time, of his interview,
2 and Inspector Ewatski at the time, his interview
3 of you and Mr. Dangerfield. Do you have that?

4 A I do.

5 THE CHAIRMAN: Could I --

6 MR. PROBER: Yes.

7 THE CHAIRMAN: Thank you for your courtesy.

8 MR. PROBER: Thank you.

9 BY MR. PROBER:

10 Q We are at tab 72, Mr. Commissioner, please,
11 which is in volume 3. And these are the logbook
12 notes of Inspectors Hall and Ewatski.

13 We have been told, and there's confirmation
14 of this in Chief Ewatski's notes -- I don't need
15 to take you to it -- that the interview started
16 at about ten o'clock in the morning.

17 Unfortunately, his notes don't indicate the end
18 time of the interview. Do you have, and I know
19 it's 13 years ago, do you have any recollection
20 as to how long the interview might have been?

21 A I don't even remember the interview.

22 Q Okay. So you, if I could take you to part of
23 the notes, despite the fact that you don't have
24 an independent recollection, at the bottom of
25 the first page it indicates, and you were taken

1 to this, that they both emphatically state that
2 there were no deals made or proposed. And you
3 are still of that view, I take it, that there
4 were no deals that you were aware of that were
5 made or proposed?

6 A During this interview?

7 Q No. You say that at the time of the trial,
8 there were no deals that you were aware of?

9 A That's correct.

10 Q And is that your evidence today, still, just as
11 you told them in 1993, that there were no deals
12 made?

13 A Until I heard about it a couple years ago.

14 Q Right. Right.

15 A But at the time of this interview, I was still
16 of the same --

17 Q You were which?

18 A At the time of the interview, I was still of the
19 same view.

20 Q That's what I mean.

21 A That's what the notes reflect.

22 Q Okay. Now, there's no note of this in either
23 Inspector, what I am about to tell you, in
24 either Inspector Ewatski's, or Chief Ewatski
25 now, his notes, or in these sort of fuller notes

1 about the new information that they learned as a
2 result of their review. And let me indicate,
3 perhaps the best way, so there's no
4 misunderstanding of what I'm referring to. I
5 have asked the clerk to put on your desk Exhibit
6 28A, which is Chief Ewatski's book of documents.
7 And I'll wait until Mr. Commissioner has it in
8 front of him.

9 THE CHAIRMAN: I have it.

10 MR. PROBER: Thank you.

11 BY MR. PROBER:

12 Q We know there's no note that they discussed with
13 you what has been referred to as new information
14 that they learned as a result of their review.
15 Now, have you got it opened, please, at tab 1,
16 page 7? Do you see the heading "New Information
17 Discovered in Review"?

18 A Yes.

19 Q I know Ms. Carswell has some concern about the
20 title, but let's go to the body of the
21 interview, the next page?

22 MS. CARSWELL: I'm only going to rise to say
23 it's not my concern, it was the witness's
24 concern about the description.

25 THE CHAIRMAN: Yes, I can tell you when I did my

1 summaries of evidence, I noted what the Chief
2 had said about that.

3 MS. CARSWELL: Thank you.

4 MR. PROBER: I think it was said before the
5 Chief got here by Ms. Carswell, but that's fine,
6 she was speaking on behalf of the Chief.

7 BY MR. PROBER:

8 Q In any event, look at the next page.

9 "As far as Ewatski was aware...",
10 end of the first paragraph.

11 "As far as Ewatski was aware, the police
12 (with the possible exception of Sergeant
13 Williams) and the Crown had not previously
14 known about the Crime Stoppers payment to
15 Gumieny."

16 Do you recall that being discussed with you at
17 this interview in August, 1993?

18 A No, I don't.

19 Q Now, if you could turn the page, please, to page
20 9, and look at the paragraph,

21 "Immunity for Zanidean on the Swift Current
22 Arson.

23 On Sergeant Anderson and Bruce Miller's
24 accounts, there was no deal with Zanidean
25 for immunity on the Swift Current arson, at

1 least until after his testimony was
2 completed. However, when they examined the
3 Swift Current file and interviewed
4 Constable Burton, Ewatski and Hall learned
5 of Burton's very strong view that there had
6 been a deal. The existence of this dispute
7 between the RCMP on the one hand and the
8 Winnipeg Police Service and Manitoba
9 Justice on the other appeared to be a new
10 piece of information. Ewatski recognized
11 that this dispute raised issues about
12 whether Zanidean had perjured himself at
13 trial and understood that this was a
14 serious issue, although he was inclined to
15 give credence to Miller's statement there
16 was no immunity deal."

17 Was that new information, that dispute, the
18 difference between the two views discussed with
19 you that you can recall?

20 A No.

21 Q I mean, if I may suggest, Mr. Lawlor, that here
22 they are noting that you and Mr. Dangerfield
23 emphatically deny there was no deal; right?

24 A Right.

25 Q One would think you might have been surprised --

1 THE CHAIRMAN: You had a double negative there.

2 MR. PROBER: Okay.

3 THE CHAIRMAN: Emphatically denied there was a
4 deal.

5 MR. PROBER: Yes, I misspoke there.

6 BY MR. PROBER:

7 Q But one would think that you may remember --
8 that may have surprised you, is that fair?

9 A Yes.

10 Q So you have no recollection of these matters,
11 these new matters being discussed with you and
12 Mr. Dangerfield?

13 A No, I don't.

14 Q All right. If we could go to tab 73, please?
15 That would be in your volume 3?

16 A I have it.

17 Q The third page in, the so-called draft letter
18 with a couple of questions at the end of the
19 third paragraph,

20 "Check with Shermie, did they lead evidence
21 on witness protection deals? Everything
22 done through witness protection was lead in
23 evidence?"

24 Now, you can't lead evidence, can you, if
25 there's no deal? Can you lead evidence of a

1 deal if there is none?

2 A No.

3 Q No. And if there is a deal but you don't know
4 about it, it would be pretty tough to lead
5 evidence of it, wouldn't it?

6 A Yes.

7 Q Yes. Now let me make this observation, go back
8 to the first page, let me ask you this. It's
9 pretty obvious. When was this request made by
10 Ms. Duncan? This may have been what you were
11 trying to say yesterday, when I get to it, but
12 when was that made?

13 A January 2nd, '95.

14 Q And she's asking,

15 "What were the particulars of the deals
16 that were made in return for Ray Zanidean's
17 testimony against my client Jim Driskell?"

18 Right?

19 A Right.

20 Q All right, the particulars of the deals. Now,
21 it's my suggestion, Mr. Lawlor, that while the
22 transcripts of the trial might have been able to
23 answer Mr. Miller's questions, right?

24 A Right.

25 Q About what was lead in evidence, in effect, the

1 transcripts of the trial would have been able to
2 answer that, but my suggestion is that the
3 transcripts of the trial are not going to be
4 able to answer Ms. Duncan's question?

5 A That's the point I tried to make yesterday.
6 It's two different --

7 Q And in fact, we know, and you may recall that
8 you were shown documents that the witness
9 protection program, which Zanidean never quite
10 got into, was withdrawn from him after the
11 trial, after that flare-up with Sergeant Paul.
12 Do you recall that?

13 A Being shown the documents?

14 Q Yes?

15 A Yes.

16 Q And I mean, that happened after the trial. The
17 \$20,000 that was paid, you saw that yesterday,
18 was by way of letter dated June 21st, 1990 --
19 1991, after, after Zanidean testified?

20 A Right.

21 Q Tough to have the trial transcripts answer that
22 when this occurs after he's testified?

23 A Right.

24 MR. PROBER: Thank you. Those are my questions.

25 THE CHAIRMAN: Thank you, Mr. Prober.

1 MR. PROBER: Thank you, Mr. Commissioner.

2 MR. TAPPER: Mr. Commissioner, for Mr. Prober's
3 benefit, my name is Tapper. Mr. Whitley has no
4 questions of Mr. Lawlor.

5 THE CHAIRMAN: Thank you, Mr. Tapper.

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

7 THE CHAIRMAN: Good morning, Ms. Carswell.

8 MS. CARSWELL: Good morning, Mr. Lawlor.

9 THE WITNESS: Good morning.

10 BY MS. CARSWELL:

11 Q If I could ask the registrar if he could put
12 Exhibit 20D in front of the witness? And to
13 follow up on a question from Mr. Prober, if
14 Exhibit 28A could still be available as well?

15 Mr. Lawlor, you know at this inquiry I am
16 representing the Winnipeg Police Service?

17 A I do.

18 Q Thank you. The inquiry has heard much evidence
19 that negotiation for the benefits, both of
20 immunity requested by Mr. Zanidean and for the
21 financial benefits, were being conducted by
22 Mr. Miller. We've heard from you that you knew
23 that Mr. Miller was conducting some
24 negotiations. Could you explain, please, what
25 your understanding of what he was negotiating at

1 the time was?

2 A Witness protection.

3 Q And that witness protection would include

4 relocation of the witness?

5 A That can be part of it, yes.

6 Q Potential start-up costs?

7 A Yes.

8 Q Housing costs?

9 A Yes.

10 Q If a request had been made by Mr. Brodsky in

11 those areas, and I can take you to his three

12 requests, they would be in Exhibit 30B at tabs

13 28, 33 and 43, but you've seen them?

14 A I have.

15 Q If you need to, we'll go to them specifically.

16 Would it be logical for you to make a request of

17 Mr. Miller, as opposed to the Winnipeg Police

18 Service, in relation to the benefits that were

19 being provided and sought by the witness, given

20 that he was negotiating those?

21 A I suppose I assumed that the Police Service had

22 full knowledge of what was going on.

23 Q Well, we have heard evidence at this inquiry

24 that, in fact, the Police Service was out of the

25 loop in relation to the negotiations. But

1 certainly it was your understanding that those
2 were being lead by Mr. Miller; is that correct?

3 A Yes.

4 Q You spoke during your evidence, both with
5 Mr. Code and with Mr. Libman, about oral
6 briefings that you had been provided by police,
7 or oral briefings or oral discussions that might
8 have been conducted during the Crown's office in
9 this matter. Would that be correct? I've got
10 your evidence correctly?

11 A (Witness nodding.)

12 Q Would it be fair to say that during the period
13 of time we're talking about, when this
14 prosecution was going on, that it was more
15 common that briefings were conducted orally
16 between Crowns and police?

17 A Depending on the topic. What I was referring to
18 is, it seems that not all of the information
19 Brodsky requested, I got back in written form
20 from the police, so some I'm assuming was by way
21 of a phone call.

22 Q Correct. And my suggestion to you is a simple
23 one. We've heard some evidence that the
24 practice of telephone calls between Crowns and
25 police and the provision of information in that

1 way was more common at that time than it
2 certainly is now?

3 A Probably, yes.

4 Q Now, in your statement, if you need to refer to
5 it, it's at tab 2 of the material, Exhibit 30A,
6 you indicate at page 8 that you sent police
7 notes to Mr. Brodsky. But at this time you
8 don't recall which police notes you would have
9 sent?

10 A No, I don't.

11 Q All right. And if you take a look at Exhibit
12 30B, tab 45?

13 A Yes, I have it.

14 Q You'll see that two officers' notes were
15 included with that particular supplementary that
16 ultimately was passed on to Mr. Brodsky, that
17 being Pilot's notes and Happychuk's notes?

18 A Yes.

19 Q So those would have been two notes that you
20 would have passed on that?

21 A Yes.

22 Q And if you take a look at again Exhibit 30B, tab
23 36, in response to the request at tab 33, you'll
24 see at number 1 of that letter, if you're there,
25 there are notes on the interviews of Berens, R.

1 Driskell and B. Larkin that are sent?

2 A Yes.

3 Q Those would be police notes?

4 A Right.

5 Q And finally at tab 41, which is a police report
6 prepared, that you have already been referred
7 to, by Sergeant Anderson and concurred in by
8 Sergeant Paul, at item 1, number 3 you will see
9 they have attached a copy of Harrison's notes?

10 A Yes.

11 Q And further notes of Harrison at item number 3,
12 iii I should say, and then number 1, photocopy
13 of Harrison's notes on another incident?

14 A Um-hum.

15 Q And finally the bottom third of that page,
16 question number 5, that you have a transcribed
17 copy of Sergeant Osborne's notes that are
18 attached and sent?

19 A Yes.

20 Q And that's in response to the pretrial questions
21 asked by Mr. Brodsky?

22 A It is.

23 Q If I can take you now then to Exhibit 20D?
24 That's this chart. And you don't need to go to
25 it unless you disagree with something I've said.

1 But this is a list of material from
2 Mr. Brodsky's file, and you will note that on
3 page 3, it indicates the police officer's notes
4 that were available in his file when it was
5 turned over to Commission Counsel. And you'll
6 notice that none of the Winnipeg Police Service
7 officers's notes are listed as being available
8 in his file?

9 A I see that.

10 Q So clearly there's material that was sent to
11 Mr. Brodsky by you as disclosure that is no
12 longer in existence in his file?

13 A Disappeared from his file it appears, yes.

14 Q We also know from evidence we have heard at this
15 inquiry, as well as from a review of the Crown
16 file, that Sergeant Paul's notes were sent to
17 the Crown's office and were in the Crown file
18 sometime after May 17th of 1991. Do you recall
19 seeing those notes?

20 A I don't.

21 Q If they had been sent to you in the file and
22 were in the file, as we have now heard, is it
23 possible those were sent to Mr. Brodsky?

24 A If they were sent to us, they would have been
25 sent to Mr. Brodsky.

1 Q Now, you indicated earlier in your evidence that
2 there were requests that you may or may not have
3 passed on to the Winnipeg Police Service for
4 answers. I think that you were fair in that
5 there were some that you would discuss with
6 Mr. Dangerfield, there were some that you would
7 answer after a file review, and that there were
8 some that were passed to the Winnipeg Police
9 Service?

10 A Yes, we checked to see if we had it first. If
11 we didn't, then we passed it on to the police.

12 Q Now, in relation to that, the only record that I
13 can find, both in the Winnipeg Police Service
14 file and in the Crown file, of a request being
15 passed on in writing from you is the one that
16 you have referred to at tab 34, the fax cover
17 page. If I take you then to tab 28 of Exhibit
18 30B, and that's Mr. Brodsky's first request?

19 A Yes.

20 Q Again, I can find no record that this particular
21 letter exists, either in the police file or that
22 there's a fax cover in relation to it, to send
23 it to the police and the Crown file?

24 A No.

25 Q If we look at this particular document and your

1 notes on the side, we see that -- I take it when
2 you intended to check or asked the Winnipeg
3 Police Service to check, you would make a
4 specific note -- and we see that at item 1, item
5 3, 8, 9, 11, 13, 14, 20, 25, 29, 32 and 35. Do
6 you see at that?

7 A I do.

8 Q I hope I've caught them all. But at number 16,
9 which was brought to your attention, we don't
10 see that note. What we see is "has all
11 statements." And there's no indication that the
12 WPD, this has been referred as the WPD.

13 Is it possible, and I believe you indicated
14 this first in your evidence, that that was based
15 on your review of the file?

16 A Yes.

17 Q And I think that's consistent with the fact that
18 a response to that particular question goes out
19 the very next day, at tab 29, and that's at
20 number 16?

21 A Yes, I see it.

22 Q Page 4 of that letter, do you see that?

23 A Yes, yes.

24 Q In respect of the request that we know that was
25 passed on, and I just want to go to that one for

1 a minute, and that's at tab 33, Mr. Lawlor, in
2 that same book of documents?

3 A Yes.

4 Q You'll see that there's a request that's number
5 21 by Mr. Brodsky,

6 "Do you have an objection to my reviewing
7 the Winnipeg Police Department file, either
8 by myself, by the investigator I have
9 assisting me, or both?"

10 And then there's a note that's cut off, but I
11 believe it would be WPD; is that correct?

12 A Yes.

13 Q If you go to your fax cover at page 34, the very
14 next tab?

15 A Yes.

16 Q You'll note that that one was not referred to
17 the Winnipeg Police Department for a response?

18 A No, it wasn't.

19 Q You indicated, just to follow up on that, in
20 your statement, I think quite fairly at tab 2,
21 and you don't need to go to it unless you
22 disagree with what I'm saying, at page 15, that
23 you felt that the police would likely have given
24 the Crown access -- or the police would have
25 likely given the Crown Attorneys access to the

1 file if that had been requested?

2 A Yes.

3 Q I can't find any evidence that that request was
4 made. Do you recall if it was made?

5 A No, I don't. I don't recall making that
6 request.

7 Q Now, both in evidence with Mr. Code and with
8 Mr. Dangerfield, you indicated that you have no
9 recollection of meeting with now Chief Ewatski
10 and Inspector Hall? Is that fair?

11 A No, I don't.

12 Q And it would be fair to say that you don't have
13 a recollection then of what was said during that
14 meeting?

15 A That's fair.

16 Q And there may have been specific questions asked
17 of you in relation to disclosure issues, and
18 today you just don't recall because of the
19 passage of time?

20 A There may have.

21 Q And I just refer the commission to the one
22 question I discussed with Chief Ewatski, Exhibit
23 28A, Mr. Lawlor, if you want to look at it, tab
24 3, page 59, with respect to the allegations that
25 statements of Mr. Alan Moss were not passed

1 along that were discussed?

2 A I'm sorry, page?

3 Q 59, Mr. Lawlor, I'm sorry, Exhibit 28A?

4 A I'm sorry.

5 Q Tab 3, I probably spoke too quickly, tab 3, the
6 report at page 59, and it's in the middle of the
7 page. And you'll see that they spoke to you
8 about whether or not the statement of Mr. Moss
9 that was in question, there was some question
10 about whether there was one statement or two,
11 and they confirmed that it was one. And then
12 they confirmed with both you and Mr. Dangerfield
13 that that statement was provided to you. You
14 see that?

15 A I see it.

16 Q So there were some specific questions, this is
17 one that we are aware of from the report, that
18 were discussed with you during that meeting.
19 But at this time, you are unable to recall the
20 discussion at the meeting?

21 A That's right, yes.

22 MS. CARSWELL: Thank you very much, Mr. Lawlor.
23 Those are my questions.

24 THE CHAIRMAN: Yes, Mr. Wolson.

25

1 BY MR. WOLSON:

2 Q Good morning, Mr. Lawlor.

3 A Good morning.

4 Q You may be aware that I act for members of the
5 Winnipeg Police Association and I have some
6 questions to ask of you, please?

7 A Yes.

8 Q You knew that Mr. Miller was negotiating with
9 Zanidean's lawyer, Kovnats, on issues regarding
10 witness protection?

11 A Yes.

12 Q And clearly your understanding would be that
13 matters that involved disclosing things like
14 Zanidean's new location, Zanidean's new identity
15 would not be revealed to you, and that was the
16 understanding that you had?

17 A Yes.

18 Q But matters that may affect Zanidean's
19 credibility as a witness, like monetary
20 transactions between the Crown and Zanidean,
21 would be matters that may well and should well
22 have been disclosed to you, and then disclosed
23 to Mr. Brodsky?

24 A Yes.

25 Q Things like an ultimate cash settlement would be

1 significant?

2 A It would.

3 Q Things like the purchase of Zanidean's house
4 would be significant?

5 A Yes.

6 Q The purchase of his car?

7 A Yes.

8 Q And matters regarding requests by Zanidean's
9 counsel, Kovnats, with respect to outstanding
10 charges anywhere in the country, those are
11 matters that may affect Zanidean's credibility
12 and ought to have been disclosed to you?

13 A Yes.

14 Q None of these matters were disclosed to you?

15 A No.

16 Q Now, you said yesterday in response to some
17 questions that, I think they were regarding the
18 private investigator that Mr. Brodsky had
19 retained, that the transcripts of the trial had
20 gone missing and you had asked for them and they
21 weren't available?

22 A That's what my note says.

23 Q Yes. And that leads me to ask this question,
24 and you have just been asked questions by my
25 friend who asked you about Brodsky's file and

1 things that don't appear to be in the file, I
2 take it that the Crown file would be the same,
3 with the passage of time, things go missing?
4 A I suppose so, yes. That is an example, the
5 transcript.
6 Q Yes. That's a pretty significant example?
7 A Yes.
8 Q Now, you told the inquiry the other day that you
9 were made aware of regular meetings between
10 Sergeants Anderson and Paul and Mr. Miller?
11 A Yes.
12 Q Mr. Abra asked you questions yesterday and took
13 you to tab 20, so I'd like to take you there
14 please, of your materials. That's in book 1?
15 A Yes, I have it.
16 Q And he asked you questions like -- book 1 of tab
17 20, Mr. Commissioner.
18 THE CHAIRMAN: Okay.
19 MR. WOLSON: Of the materials for
20 Mr. Dangerfield, Mr. Lawlor and Mr. Whitley,
21 exhibit 30A.
22 THE CHAIRMAN: I'm sorry. Thank you.
23 BY MR. WOLSON:
24 Q Tab 20 is a document that we have seen at this
25 inquiry very frequently, Mr. Lawlor, and you

1 were referred to it yesterday by Mr. Abra. And
2 he asked you questions like these; one of the
3 questions he asked you, if you will recall, were
4 you made aware by the police of a disclosure
5 that Zanidean made early on, I think it was
6 October 10th, that he in fact had committed an
7 arson with Driskell? And you indicated you
8 weren't aware of that?

9 A That's right.

10 Q But if you look at this document, if you look at
11 page 1 of tab 20, and if you look at the fourth
12 paragraph, you will see it starts off, and I'll
13 just summarize it for you, that on the second
14 day of Anderson and Paul's involvement with
15 Zanidean, October 10th, he revealed to them that
16 his credibility as a witness may present as a
17 problem because he committed this arson in Swift
18 Current. Do you see that?

19 A I do.

20 Q And if you look at the bottom of that paragraph,
21 he says, and concurred with by Paul.

22 "Paul and I immediately notified division
23 23 Inspector Bell...",
24 you know Randy Bell?

25 A I do.

1 Q "...and the officer in charge of the,
2 investigation, Bill Vandergraaf...",
3 whom you know quite well. That's so?

4 A Yes.

5 Q And then he says later, Crown Attorney Bruce
6 Miller?

7 A Yes.

8 Q So it appears that the Crown, and you would
9 agree with me that the Crown, Mr. Miller was the
10 head of the department at the time?

11 A He was director.

12 Q Yes. And if you turn to the second page of that
13 document, Mr. Abra asked you about whether or
14 not you were aware of an arrangement with
15 Anderson and Swift Current Officer Burton that
16 there would be a -- that Swift Current was going
17 to withdraw their pursuit of Zanidean on this
18 arson. And if you look at the third paragraph,
19 that third paragraph in summary discusses
20 Anderson's discussions with Burton in which, if
21 you'll look at the middle of that paragraph,
22 Swift Current offers to withdraw their pursuit
23 of Zanidean. You see that?

24 A I see it.

25 Q And you were asked by Mr. Abra if you were aware

1 of it, and you indicated no?

2 A That's correct.

3 Q But if you look at the bottom of that paragraph,
4 "Following this conversation, Sergeant Paul
5 and I notified Inspector D. Johnson...",
6 that's D.K. Johnson, whom you knew?

7 A Yes.

8 Q "...Staff Sergeant Vandergraaf and Crown
9 Attorney Bruce Miller."

10 A Yes, I see that.

11 Q And then you were asked if you were aware of all
12 of the negotiations and discussions, and you
13 indicated that you weren't, and I accept that.
14 But if you go to page 4, I can explain to you
15 that page 4, the last paragraph or penultimate
16 paragraph on the page dealt with the issue of
17 that arrangement being in peril, and Sergeant
18 Anderson received a phone call to that effect.
19 If you look at the last paragraph on the 18th of
20 July, 1991,

21 "Paul and I briefed Inspector Johnson and
22 he instructed us to call contact the Crown
23 Attorney's office."

24 And if you turn the page to page 5, Mr. Lawlor,
25 "On the 24th of July, '91, Paul and I met

1 with senior Crown Attorney Bruce Miller.

2 We briefed him completely."

3 Do you see that?

4 A I see it.

5 Q So that would be consistent with the testimony
6 that you have given that there appear to be
7 frequent meetings between Anderson and Paul and
8 the head of the department, Mr. Miller?

9 A That's what I was told.

10 Q Yes. Now, without question, knowing the
11 personalities as I do, George Dangerfield was
12 the Crown in charge of the case. He was the
13 senior man?

14 A Yes.

15 Q And I am advised that during the relevant times
16 in 1990, late in 1990 and into '91, that you
17 were counsel who was frequently appearing in the
18 Court of Appeal for Manitoba?

19 A Very frequently.

20 Q And you had a full plate of work in terms of
21 your appeal responsibilities?

22 A That's correct.

23 Q You were responsible for preparing factums?

24 A Reading transcripts, doing research, preparing
25 factums, appearing in court, arguing cases.

- 1 Q And appearing on motions?
- 2 A Appearing on motions.
- 3 Q So you had a full plate, you were consumed by --
- 4 and there were, I take it, many appeals?
- 5 A There were many appeals. I was doing at least
- 6 80 per cent of criminal appeals at that time.
- 7 Q No reflection on Manitoba, Mr. Commissioner, but
- 8 there were days when you would do multiple
- 9 appeals?
- 10 A Yes.
- 11 Q And in that regard, the Driskell case was
- 12 Mr. Dangerfield's case?
- 13 A Yes.
- 14 Q You were asked on your first day of evidence by
- 15 my friend, Mr. Code, whether you knew that
- 16 Mr. Zanidean, a key witness in the Driskell
- 17 prosecution, you were asked whether you knew
- 18 that he had been arrested in Alberta and brought
- 19 back to Manitoba and ultimately became,
- 20 ultimately was charged as a material witness.
- 21 And you indicated you weren't aware of that?
- 22 A I don't remember hearing anything about that,
- 23 no.
- 24 Q And that would be, you indicated, a discloseable
- 25 fact to the defence?

1 A Yes.

2 Q But we've heard evidence that Mr. Dangerfield
3 and Mr. Miller were actually at the Safety
4 Building upon Zanidean's return in custody, and
5 there were negotiations about what would happen
6 to Zanidean, whether he would be detained in
7 custody or, as we know, ultimately released to
8 the protection of two police officers?

9 A Okay.

10 Q You didn't know any of that?

11 A No, I didn't.

12 Q So when you say that there weren't regular
13 meetings between you and Mr. Dangerfield, here a
14 discloseable fact wasn't given to you by the
15 Crowns who were actually there when Zanidean was
16 brought back in custody. You were unaware of
17 it?

18 A I don't recall ever being made aware of that.

19 Q Certainly. I'm going to come back to that
20 incident in a few moments, but you were asked
21 this question yesterday by Mr. Abra. He asked
22 you, and you answered as you did, that you were
23 not told that Zanidean admitted to setting the
24 fire in Swift Current. You indicated you
25 weren't told that?

1 A I don't think I was ever told that. I was told
2 it was under investigation. I don't recall
3 anybody ever telling me about any admissions.

4 Q Okay. And you were never advised that the
5 statement of the Winnipeg Police that they had
6 nothing on that arson and a couple of others,
7 that that was never corrected? You indicated
8 that?

9 A That's the information I had.

10 Q Okay. But I'm going to take you to tab 44, and
11 that will be in volume two of the materials.
12 Would I be correct in stating that you would
13 sort of, and I don't mean this in a derogatory
14 sense at all, but given your responsibilities in
15 the Court of Appeal, that you would sort of
16 float in and out of this case in terms of prior
17 to its coming to court?

18 A When I had time to spend on it, I spent that
19 time on it.

20 Q If you'd look at the first page of this
21 pretrial, this is Brodsky's recollection of the
22 pretrial?

23 A Yes.

24 Q He indicates,

25 "The RCMP were advised according to

1 Dangerfield and Lawlor in Dangerfield's
2 presence in the office of Mr. Justice
3 Morse, that Zanidean probably set this
4 fire."

5 A Yes.

6 Q "The RCMP chose to do nothing about it."

7 A Yes.

8 Q Now, that's information that you told Mr. Abra
9 yesterday came to you from the police?

10 A I can't see it coming from any other source.

11 Q Well, there are only two possible sources,
12 Mr. Miller, who we know was aware of it, and the
13 police?

14 A The police.

15 Q Yes. And you don't recall it coming from
16 Mr. Miller, so you answered Mr. Abra as best you
17 could yesterday that it was the police?

18 A It must have been the police.

19 Q And I assume, not knowing for sure who it came
20 from, you don't know exactly what they said to
21 you? You didn't put it down in writing and it
22 may have come to Mr. Dangerfield and not you?

23 A No. They may have used a certain wording to me,
24 I may have used a certain wording in pretrial,
25 and then we had Brodsky's, probably a third

1 wording. So, no.

2 Q But would you expect Mr. Dangerfield, who is a
3 very savvy Crown, you would agree with that
4 statement?

5 A Yes.

6 Q That when a statement like that is made, and
7 assuming it's made by the police, that questions
8 would likely come or should likely come from him
9 like, what do you mean that he probably set the
10 fire, and arson being a pretty serious charge,
11 why is it that the RCMP are doing nothing about
12 it? Were those questions asked in your
13 presence?

14 A No, they weren't, not that I recall. And
15 Brodsky has no note.

16 Q Because you would agree with me that arson is a
17 very serious allegation, is it not?

18 A It is.

19 Q And for the police to do nothing about it is, on
20 the face of it would evoke some questions?

21 A Yes.

22 Q And then if you'd look at the second memo of
23 Mr. Brodsky's, which is three pages in on tab
24 44, and it has at the top James Driskell from
25 GGB, May 27, '91?

1 A Yes, I have it.

2 Q Second paragraph,

3 "The Crown makes the point that the RCMP in
4 Swift Current were notified of the
5 involvement of Zanidean and it's up to them
6 to pursue or not pursue."

7 You see that?

8 A I see it.

9 Q Was a question asked in your presence by
10 Mr. Dangerfield to the police, well, what do you
11 mean by that?

12 A I wasn't at any meetings.

13 THE CHAIRMAN: I'm sorry, could you repeat the
14 question?

15 BY MR. WOLSON:

16 Q Was a question by Mr. Dangerfield asked of the
17 police, because the police disclosed this to
18 you, what do you mean by that? Our key witness,
19 the police, it's up to them to pursue or not
20 pursue. A question like, what are they going to
21 do, are they going to charge him or not? Do you
22 recall that question being asked?

23 A I don't know what discussions Mr. Dangerfield
24 had with the police.

25 Q And just a few days after this pretrial meeting,

1 the pretrial being the 22nd of May we believe,
2 on the 26th of May, there was this confrontation
3 between Mr. Dangerfield and Mr. Kovnats that you
4 don't know anything about?

5 A I can't remember hearing anything about it, no.

6 Q And that's, to put it in context, that's when
7 Mr. Dangerfield is at the Safety Building,
8 Mr. Zanidean having come back in custody from
9 Alberta, and Mr. Miller also coming down to the
10 Safety Building. You've heard about it --

11 A I've heard about that.

12 Q -- subsequently?

13 A Yes.

14 Q That is subsequent, in your preparations for
15 this inquiry, you've heard about it?

16 A Yes.

17 Q Not back then when you were junior counsel on
18 this case?

19 A I don't remember hearing anything about it at
20 that time.

21 Q And we were told that Mr. Kovnats and
22 Mr. Dangerfield were in this verbal altercation,
23 and that Kovnats told Dangerfield that unless
24 this client's demands are met, he would instruct
25 his client not to testify. You didn't hear any

1 of that?

2 A No.

3 Q And Mr. Dangerfield told this inquiry that he
4 took that to mean that if Zanidean, through his
5 counsel, didn't get what he wanted, that
6 Dangerfield would be in difficulty regarding
7 Zanidean. You didn't hear that?

8 A No.

9 Q No. You would agree with me that as senior
10 prosecutor, and Mr. Dangerfield was a veteran of
11 many, many murder cases?

12 A Yes, he was.

13 Q Yes. And probably the second most senior
14 prosecutor next to Mr. Montgomery?

15 A Yes.

16 Q That you would expect that a prosecutor would
17 ask these questions when those kinds of demands
18 are being -- when that kind of statement is
19 being made, sort of an ultimatum, what's this
20 all about, that type of question would be asked?

21 A I don't know what questions Mr. Dangerfield was
22 asking.

23 Q These are questions that you would ask if you
24 were there, if somebody told you that unless
25 demands are being made, you're not going to have

1 a cooperative witness. The obvious question to
2 ask is, what demands are you talking about?

3 A Yes.

4 Q You'd want to know whether or not your key
5 witness is a witness that you would have to
6 attempt to get at through the Evidence Act in
7 terms of attempting to cross-examine on previous
8 inconsistent statements, you'd want to know
9 that?

10 A I'd want to know that. I'd want to know whether
11 or not he was a reliable witness.

12 Q Yes. So you wouldn't sort of just look the
13 other way, you'd want to ask these questions --

14 A Yes.

15 Q -- obviously. Yet you weren't even aware of the
16 incident?

17 A Pardon me?

18 Q Yet you were not even aware of that incident?

19 A I can't recall anything about that incident, no.

20 Q Now, three days after that, that's the 26th of
21 May, on the 29th of May, we are told at this
22 inquiry, and there's evidence of it, that
23 Mr. Miller receives an ultimatum from Kovnats
24 Zanidean's counsel, that if he didn't get
25 immunity, his client would be a difficult

1 witness. Were you aware of that?

2 A No.

3 Q Did you know when Zanidean, when the trial
4 started, for instance, that Zanidean could be a
5 very difficult witness for the prosecution?
6 Were you aware of that?

7 A No, I wasn't. Zanidean was not my witness. I
8 don't think I was --

9 Q You weren't concerned about him?

10 A I was not told about him, I expect, because he
11 was not a witness that I would be dealing with.

12 Q Okay. You were aware that there was a witness
13 protection issue here? That's without question?

14 A Yes, yes.

15 Q And you were aware of that because the Crown
16 would have an obligation to protect the witness?

17 A Yes.

18 Q Yes. From harm?

19 A Yes.

20 Q And in terms of that, we are told that after
21 this ultimatum letter reaches Mr. Miller on the
22 29th of May, that a gentleman by the name of
23 Orr, you may not know him at all, was able to
24 secure from Swift Current that they would not
25 proceed against Zanidean if he were in the

1 witness protection program. And that, by
2 inference, was communicated to Mr. Miller. Did
3 Mr. Miller tell you that?

4 A No, he didn't.

5 Q Now, I want to take you to tab 61 of Exhibit
6 30C, please. Do you have that?

7 A I have it.

8 Q Have you seen it before in preparations for
9 today?

10 A Yes, I saw it a few weeks ago when I got this
11 booklet, yes.

12 Q If you'd look to the second page, this is also a
13 document that this inquiry is well familiar
14 with. There is in the second paragraph, in
15 summary form, Mr. Quinney, the author of the
16 letter from Saskatchewan Justice is advising the
17 head of Manitoba Justice, the head of
18 prosecutions that is, in the second paragraph,
19 that Zanidean in effect had made a recantation
20 threat?

21 A I see that.

22 Q As counsel on this case, and this being
23 January 16, '92, about 10 or 11 months prior to
24 Zanidean's appeal which took place in December
25 of -- I'm sorry, prior to Mr. Driskell's appeal

1 which took place in December of '92, as one of
2 the counsel on this case, were you advised of
3 this recantation by Mr. Miller?

4 A No, I wasn't. My involvement ended when the
5 trial ended. I had no involvement in the
6 appeal.

7 Q And then if you look at the last paragraph on
8 page 2, the same page that you are on --

9 A Yes, I have it.

10 Q -- it appears that Mr. Zanidean was of the view
11 that he was granted immunity. Do you see that?

12 A Yes.

13 Q You weren't told of that?

14 A No, I wasn't.

15 Q You weren't told of that when Mr. Miller
16 received this letter, or shortly thereafter?

17 A No.

18 Q Then I would like to take you to tab 69, please,
19 of the same book. This is a letter to
20 Mr. Quinney, Saskatchewan Justice, from the
21 director of prosecutions, Mr. Miller. And if
22 you look at the first paragraph -- and the date
23 of this letter, by the way, you'll see at the
24 top is the 16th of April of 1993?

25 A Yes.

1 Q First paragraph, Mr. Miller advises Mr. Quinney
2 in the last sentence,
3 "Ray Zanidean was a prosecution witness who
4 had been placed in the witness protection
5 program under the coordination of the
6 RCMP."
7 Tab 69, Mr. Commissioner.
8 THE CHAIRMAN: I have it. I was looking for
9 something else, actually. Go ahead.
10 THE WITNESS: I see that.
11 BY MR. WOLSON:
12 Q You see that. Now, let me stop there, and I'm
13 not going to get into whether or not that's so,
14 but let me ask you this question: What
15 Mr. Brodsky appeared to be getting at in terms
16 of his disclosure requests, he wanted to know,
17 in effect, in common parlance, whether Zanidean
18 had been bought by the Crown. That's what he
19 wanted to know, in effect, wasn't it?
20 A Yes.
21 Q And paying a witness or giving him some benefit
22 would, in effect, be considered in common
23 parlance to be buying the witness?
24 A Common parlance, sure.
25 Q Yes, as opposed to accommodating a witness in

1 witness protection and whatever that entailed,
2 that would be a different matter entirely?

3 A I suppose, yes.

4 Q Yes. And you'll recall when you were shown the
5 response to a question by Mr. Brodsky asking for
6 disclosure, and you will remember the response,
7 it was the favourable consideration response
8 that you were showed yesterday, you were given
9 yesterday by Mr. Abra. You will recall that?

10 A I do.

11 Q And you commented on the wording of it. And in
12 effect, what the wording was, is Sergeant
13 Anderson is saying that protection was what we
14 were providing this witness?

15 A Yes.

16 Q Now, I went from the letter of the 16th of
17 April, '93, which you have in front of you, I
18 read to you the first part of the first
19 paragraph. If you look at the second paragraph
20 of Mr. Miller's letter?

21 "Mr. Zanidean was investigated by the RCMP
22 in Saskatchewan for arson related offences.
23 Ultimately a decision was made by your
24 department not to prosecute him."

25 You see that?

1 A I see that, yes.

2 Q And then in summary form, Mr. Miller says there
3 was never immunity from, province-to-province
4 immunity, and he asked for a response to that.
5 Do you see that?

6 A Yes, third paragraph, yes, I see it.

7 Q Okay. And immunity is a dispensation by a
8 Justice Department, isn't it, in the true sense?
9 That is what immunity is?

10 A It is. Police can't grant immunity, no.

11 Q And then you were asked about the ethical
12 consideration of, and the ethical issue about
13 telling a witness after he testifies that he is
14 being given some kind of immunity, and not
15 telling him that before he testifies. And if
16 that were to happen, I take it -- you commented
17 that you felt that may not be ethical. That's
18 what you said, is it not?

19 A Yes.

20 Q Yes. If that were to happen, you would expect
21 Mr. Miller, if he were aware of it, to be upset?

22 A Yes, I would.

23 Q Yes. And to raise it with you or Dangerfield,
24 who were the two lawyers who were involved in
25 the prosecution of the case -- likely to raise

1 it with Mr. Dangerfield who was the lead
2 counsel; right?

3 A Right.

4 Q And we have also been told at this inquiry that
5 that instruction to do it that way came from
6 Mr. Miller. And I want to read to you the
7 response letter by Mr. Quinney, which is at the
8 same tab as that you're on now. It's a response
9 to the April 16th, '93 letter of Mr. Miller.
10 Three pages in is the response by Mr. Quinney.
11 Do you have that?

12 A I have it.

13 Q And the date is the 28th of April, '93, and the
14 receiving date is stamped the 4th of May, '93.
15 You see that?

16 A Yes.

17 Q And this is a letter by Quinney responding to
18 Mr. Miller. The first paragraph he indicates
19 there was no justice-to-justice immunity?

20 A Yes.

21 Q But if you look to the third paragraph, there is
22 a discussion there about the fact that
23 Mr. Zanidean was told that he wasn't going to be
24 prosecuted in Swift Current, and then if you
25 turn the page to the first -- to the page,

1 second page,

2 "The Winnipeg City Police investigator...",
3 first paragraph, Mr. Lawlor?

4 A I see it.

5 Q "The Winnipeg City Police investigator
6 maintained that he did not tell Zanidean
7 about the immunity until after Zanidean had
8 testified."

9 A Yes.

10 Q Which is in effect what we have been told at
11 this inquiry, and we had been told that it was
12 the direction of Mr. Miller. Given that
13 Mr. Miller -- it's put in writing by Quinney to
14 Miller?

15 A Um-hum.

16 Q Were you sought out by Mr. Miller regarding that
17 statement and Miller speaking to you about it?
18 You don't recall that, do you?

19 A No.

20 Q Do you know whether Mr. Dangerfield was, in your
21 presence?

22 A I don't know whether he was in or out of my
23 presence. No, I don't know.

24 Q Because if one weren't aware of that, the head
25 of the department would certainly take an

1 aggressive position in trying to get to the
2 bottom of it if he didn't know about it
3 beforehand. You would expect that?

4 A I would expect that.

5 MR. WOLSON: Those are my questions. Thank you
6 very much.

7 THE CHAIRMAN: Thank you, Mr. Wolson.

8 MR. WOLSON: I'm not used to being finished at
9 this hour.

10 THE CHAIRMAN: No, this is so unusual -- just
11 the time of day I meant.

12 MR. OLSON: Good morning, Mr. Commissioner

13 THE CHAIRMAN: Mr. Olson, good morning.

14 BY MR. OLSON:

15 Q Mr. Lawlor, there should be placed before you a
16 printout covered by my letter of September 14,
17 printout of QuickLaw which you had done to
18 assist this court in appreciating the workload
19 and the timing of that workload that you had in
20 the Court of Appeal during the relevant period.
21 Do you have that, sir?

22 A I have it.

23 Q And there are actually two documents in this
24 bundle. There is that printout, which I'll come
25 to in a moment, and attached to it, but

1 shouldn't be actually attached without a
2 separation, is a position description, which
3 I'll ask you about shortly. All right?

4 A Yes.

5 Q Can we deal with the last one, sir, the position
6 description which has been disclosed to the
7 parties, that is in respect of a Director of
8 Regional Prosecutions and Legal Education that
9 this Commission has heard about previously. Can
10 you identify that as the position description
11 that was created and filled since 2000, sir?

12 A It is, yes.

13 THE CHAIRMAN: Mr. Olson.

14 MR. OLSON: Yes.

15 THE CHAIRMAN: Perhaps we can file these as an
16 exhibit.

17 MR. OLSON: Yes.

18 THE CHAIRMAN: Exhibit 45.

19 THE CLERK: Yes, Mr. Commissioner, 45.

20 MR. OLSON: Thank you.

21 THE CHAIRMAN: That will be the letter and the
22 various attachments, including the position
23 description.

24 MR. OLSON: Right, thank you.

25

1

2

(EXHIBIT 45: Letter of September 14,
attached printout of QuickLaw and position
description)

4

5

BY MR. OLSON:

6

Q That's the position description that you were
referring to, I think, when you were responding
to Mr. Kennedy's, one of Mr. Kennedy's questions
yesterday; is that it, sir?

9

10

A That's the one, yes.

11

Q Now, coming back to the printout, just so that
we are aware what we're looking at. As I
understand what you did, sir, you just typed in
your name, and what kicked out was the matters
that you had handled in the Court of Appeal
during the period, I guess it's in reverse
order, the most recent, the period of time that
you were checking was October 15, 1990 through
to May 23 of 1991?

19

20

A Yes. These are the cases that QuickLaw actually
had reported.

21

22

Q With you as counsel?

23

A With me as counsel.

24

THE CHAIRMAN: I trust that some of those days
must have been sentence appeals, were they?

25

1 THE WITNESS: Oh, yes. Some you will see
2 there's three, four in one day.

3 THE CHAIRMAN: Yes.

4 THE WITNESS: And the decisions are one days or
5 two days.

6 THE CHAIRMAN: Right.

7 BY MR. OLSON:

8 Q And for some of the purposes, to assist this
9 Commission at least, one of the time periods
10 that may be of some assistance is the early
11 February, when the motion for the expedited
12 trial occurs. And if you, through this
13 document's assistance, turn to items 41 through
14 44, there appear to be four on February 8?

15 A Four sentence appeals I expect, yes.

16 Q And that can be correlated chronologically. We
17 know there is an attendance answer before Chief
18 Justice Hewak on February 6th, and actually
19 number 45 shows that you are also in the Court
20 of Appeal that day?

21 A Yes.

22 Q That's item 45. Do you recall actually being
23 before Chief Justice Hewak?

24 A No, I don't. And I've checked the transcript in
25 these books and my name does not appear as

1 counsel.

2 Q No, it doesn't appear. But you don't have a
3 current recollection now whether you were or
4 were not, other than it's apparent you were in
5 the Court of Appeal that day?

6 A No, I don't, no.

7 Q All right. And we know that there was the
8 February 7 letter in which you made notes along
9 the margin, Mr. Lawlor?

10 A Yes.

11 Q And several counsel have asked you questions
12 about that, and I won't take you back to that
13 for this purpose. And we know that you had four
14 cases or matters in the Court of Appeal on
15 February 8th, likely sentence appeals given that
16 you had four of them?

17 A Yes.

18 Q Is that fair? All right. And we also know that
19 it was Mr. Dangerfield's letter, I think dated
20 February 7 that responded to -- February 7 or
21 February 8 -- that responded to Mr. Brodsky's
22 letter of February 7, after he says he met with
23 you late in the day on the 6th, after having
24 been in court?

25 A Yes.

- 1 Q You also, I understand, checked your passport,
2 and what did you discover there, sir?
- 3 A I arrived in Cancun on February 9th of 1991.
- 4 Q All right. So after having attended to the four
5 matters in the Court of Appeal on the 8th,
6 between that and the arrival the next morning,
7 in Cancun, obviously you hopped a plane?
- 8 A Yes.
- 9 Q Now, do you know how long you were in Cancun,
10 sir?
- 11 A It was probably for two weeks.
- 12 Q Using this printout again, it appears the next
13 matters you had in the Court of Appeal were
14 items 37 through 40, again four matters that
15 day?
- 16 A Yes. So I assume I was gone two weeks, because
17 I would have been gone from the 9th to the 23rd
18 then, back in the Court of Appeal on the 26th.
- 19 Q Right. It's also relevant, if you have exhibits
20 30A, or if not, the registrar perhaps can put it
21 before you? Exhibit 30A.
- 22 A I have it, yes.
- 23 Q The tab is 10, sir?
- 24 A Yes.
- 25 Q And attached to that is that ledger sheet to

1 which reference has been made?

2 A Yes, I see it.

3 Q And there have been questions asked of several
4 witnesses about the four items starting on
5 November 27, and ending with apparently February
6 21, each of which refer to, or have the words
7 "received from Gregg Lawlor," and those being
8 four cheques I gather?

9 A Yes.

10 Q What you've been able to reconstruct is then you
11 weren't even in Manitoba or in the country on
12 February 21, despite this ledger?

13 A As far as I can tell, yes.

14 Q Do you have any recollection of receiving any of
15 those cheques, sir?

16 A No, I don't. I'm advised that by the person, by
17 Louise Beaudette, she does not recall giving me
18 any cheques. She always gave the cheques to
19 Bruce Miller.

20 MR. CODE: I don't think we should have his oral
21 conversation with Mr. Beaudette.

22 THE WITNESS: Well, I spoke to her --

23 MR. OLSON: Just a minute, Mr. Lawlor, please.

24 MR. CODE: There seems to be no record of it.

25 MR. OLSON: Well, it's not a big point,

1 Mr. Commissioner. However, I note for the
2 record that what has been adduced on behalf of
3 the Winnipeg Police Service is that in the case
4 of, for instance, Sergeant Paul, he told his
5 Inspector Johnson something and Johnson told him
6 that he was going to tell Miller. And all of
7 that was allowed in without any objection.

8 MR. CODE: But presumably because we have a
9 contemporaneous record of which gives it a
10 heightened degree of reliability, that is after
11 the fact, a 15 year later narrative of something
12 that happened back in 1991, that there's no
13 record of, is quite different qualities of
14 hearsay.

15 THE CHAIRMAN: Mr. Gates, you had a comment?

16 MR. GATES: My point, sir, is entirely
17 unrelated. I'm having a very hard time hearing
18 Mr. Lawlor.

19 THE CHAIRMAN: Thank you.

20 MR. OLSON: I'll move on.

21 THE CHAIRMAN: Okay, thank you. In any event, I
22 do want to get this clear here. On February
23 21st, you believe you were in Mexico?

24 THE WITNESS: Yes.

25 THE CHAIRMAN: And you have to go back to the

1 microphone.

2 THE WITNESS: Yes, I'm sorry.

3 THE CHAIRMAN: Just bear with me for a moment
4 here, I've got to make a note of this at the
5 appropriate place.

6 THE WITNESS: I can't say for sure that I was,
7 but I usually, when I went on winter holidays it
8 was usually for two weeks.

9 THE CHAIRMAN: Okay. Sorry to take so long.

10 MR. OLSON: Thank you, Mr. Commissioner.

11 THE CHAIRMAN: I guess I had already dictated
12 some notes yesterday and I want to make sure
13 that I have that.

14 BY MR. OLSON:

15 Q Also this time period is relevant, Mr. Lawlor,
16 and perhaps you can help us, the resumption of
17 the hearing before Chief Justice Hewak that
18 commenced on February 6th, for the expedited
19 trial, resumption occurred on February 13, we
20 know from the record?

21 A Yes.

22 Q And it is before this inquiry, the transcript of
23 what was said by Mr. Dangerfield. And
24 Mr. Dangerfield was asked whether or not you
25 were present. And I think he said he didn't

1 specifically recall, but you may have been
2 ungowned or something like that. Again, even if
3 you had just gone for one week, would you have
4 been in the country on February 13th, having
5 arrived in Cancun on the 9th?

6 A No, I wouldn't. And again, the transcript does
7 not show me being counsel at that hearing.

8 THE CHAIRMAN: Forgive me, my memory has failed
9 me a bit. Weren't you the affiant?

10 MR. OLSON: That's right, February 4.

11 THE CHAIRMAN: So it would I take it in the
12 normal course if you were the affiant --

13 THE WITNESS: I wouldn't be the one arguing the
14 motion.

15 THE CHAIRMAN: No. Just bear with me.

16 MR. OLSON: Yes.

17 THE CHAIRMAN: So the other date is --

18 MR. OLSON: February 13 is what I was asking.

19 THE CHAIRMAN: Yes, okay.

20 MR. CODE: I don't think there's any evidence
21 that Mr. Lawlor was at that February 13th
22 motion, it's the February 6th.

23 THE CHAIRMAN: I'm sorry, I was looking back at
24 the cheques. All right, go ahead Mr. Olson.

25 MR. OLSON: Thank you.

1 BY MR. OLSON:

2 Q If I can ask you about several matters that
3 other counsel have asked you about as well, sir,
4 and just get some clarification. Tab 9 in 30A,
5 you will recall Mr. Code and one or two other
6 counsel asking you about this report from
7 Anderson dated November 4, 1990 in which there
8 are set out some witness protection
9 considerations as of that date?

10 A Yes.

11 Q All right. And Mr. Code put to you and referred
12 you specifically to the long-term portion; do
13 you recall that?

14 A Yes.

15 Q If you look at the second last paragraph, sir,
16 which starts,

17 "Employment opportunities for Mr. Zanidean
18 and his wife...",

19 the next sentence,

20 "Consequently, costs related to his
21 protection will not endure beyond the
22 trial."

23 A I see that.

24 Q Yes. Now, do you recall anything that changed
25 that, to your knowledge, prior to participating

1 in the trial itself?

2 A No, I don't.

3 Q Thank you. Mr. Kennedy asked you about whether
4 there was a policy or practice relating to
5 memos, notes, letters, significant events and so
6 on. Do you recall that, sir?

7 A I do.

8 Q Perhaps if the registrar could place before you
9 Exhibit 27A, which was an additional book of
10 documents used in the cross-examination of
11 Mr. Brodsky? If you can just flip through this,
12 sir, and confirm that these are at least some of
13 the various notes and so on that you had made in
14 the course of your involvement in the matters
15 leading up to the trial, in the six months or so
16 before the trial in 1991?

17 A Yes, these are letters or memos authored by me.
18 There's other documents that have my handwriting
19 on it.

20 Q Now, in terms of the practice, which is one of
21 the matters you were asked about, and just
22 dealing with tab 1, is this your own practice,
23 or is this a template that the department used
24 at the time in terms of various things that had
25 to be dealt with?

1 A No, this is something I would have made up.

2 Q All right. And it will speak for itself, but
3 there is --

4 A These were issues that were going to arise at
5 the pretrial that we wanted to settle, so I had
6 this list made up so it will assist us during
7 the pretrial as to what was agreed to, what
8 wasn't, things like that.

9 Q All right. If you turn to tab 1 still, turn to
10 the second page, you have made a note there,
11 "handwritten notes to Brodsky." And it refers
12 to Harrison?

13 A Harrison's notes, yes.

14 Q And we know from earlier questions that's one of
15 the documents you ultimately give to Brodsky?

16 A Yes.

17 Q All right. And the next page, again MVB
18 records, "agreed, yes, copy to Brodsky." You
19 are recording what's being asked and what's
20 being done?

21 A Yes.

22 THE CHAIRMAN: What is MVB?

23 THE WITNESS: Motor vehicle branch.

24 BY MR. OLSON:

25 Q I won't go through each of these but they will

1 speak for themselves. This is your attempt at
2 recording, if you will, of things that have to
3 be done and things that you have done as a
4 result of discussions or determinations?

5 A Yes.

6 Q And just at tab 2, we won't go through these in
7 detail, sir, but I see there is a "required to
8 do," and you've got a list here, several pages
9 long?

10 A Yes.

11 Q Again, is this a practice that you followed?

12 A Yes.

13 Q They will speak for themselves again. If you
14 turn to tab 3, this section relates to
15 statements and other particulars, but the first
16 section here is statements. And you can perhaps
17 explain it better than I, sir, but it runs on
18 for some three pages, and there's 34. You've
19 numbered them 1 through 34?

20 A Yes.

21 Q And the first seven of those are R.Z. which I
22 take to be Zanidean?

23 A Yes.

24 Q With the dates?

25 A The dates the statements were made, I expect,

1 yes.

2 Q Right. And what's the purpose of keeping a list
3 of the statements that are involved?

4 A To make sure I knew what was passed on to
5 Brodsky.

6 Q And then what follows is some more of your
7 notes, fourth page is numbered again, but it
8 starts with "bullets consistent with." And
9 again, there is two pages of other matters you
10 were trying to record, to keep some record?

11 A Yes, it looks like it's things that I was going
12 to have to check out.

13 Q And then the next page after that, again, we're
14 back to statements?

15 A Yes.

16 Q You've got "wit's" which I take it is witnesses?

17 A Yes.

18 Q And this, I assume, goes back to previous
19 numbering?

20 A The 34 witness statements, yes.

21 Q And then you've got "given December 27/January
22 3"?

23 A Yes.

24 Q And this is your wording, "All given, 1 through
25 34 as of January 18"?

1 A Yes.

2 Q You've added 35 and 36, that will speak for
3 itself. A couple of pages further,
4 "particulars - ident" and again you've got
5 notes, not only as to what particulars are
6 required to be given, but also you've got notes
7 in the margins as to when various things were
8 being given?

9 A Yes. 1 to 6 were given to Brodsky,
10 January 14th, number 7 was given to him
11 February 8th.

12 Q Same thing with "forensic" on the next page?

13 A Yes.

14 Q And the page after that is "particulars of
15 arrest," again with a note as to when it was
16 given, and the "interviews with Harder"?

17 A All these dates on the right-hand side will be
18 the dates when they were disclosed to Brodsky.

19 Q All right. And "particulars - investigation,"
20 and that will speak for itself.

21 The third last page in this section, sir,
22 you've got headed up "further particulars to be
23 given," and up at the top of that you've got in
24 brackets "letter copies to WPD." What does that
25 mean?

1 THE CHAIRMAN: I'm sorry?

2 MR. OLSON: Third last page in this section.

3 THE CHAIRMAN: Last page, okay. I'm sorry, I'm
4 lost.

5 MR. OLSON: The last three pages are numbered 1,
6 2, 3.

7 THE CHAIRMAN: I went to the last page. My
8 fault, yes.

9 BY MR. OLSON:

10 Q And on that one that's numbered 1 on the top
11 right-hand corner, in brackets at the top,
12 "letter copies to WPD." What does that refer
13 to?

14 A I expect it refers to giving copies of Brodsky's
15 letters requesting disclosure to the police to
16 follow up on.

17 Q All right. Again, the rest of the notes, I
18 don't think the details are important, sir. Tab
19 4, you've got "particulars to give" and you've
20 got a list, again, with a note as to when they
21 were given?

22 A Yes.

23 Q Yes. Tab 5, you've got some notes of the
24 pretrial meeting. First page is "next meeting
25 May 22"?

1 A Yes.

2 Q And then the second page --

3 A I don't know if these are notes of the pretrial
4 or discussions we had with Brodsky after the
5 pretrial. I can't say exactly what these are in
6 relation to.

7 Q Okay. If one compares this with Brodsky's notes
8 of pretrial, you'll see there is some
9 correlation, but I don't think it's necessary
10 for the purposes of the exercise, sir.

11 And then the last few tabs are various
12 letters that you actually sent to Mr. Brodsky,
13 or he to you, with some notes on them that
14 hadn't been on other material.

15 So all that is some of the note keeping and
16 record keeping that you followed in your
17 practice, sir?

18 A Yes.

19 THE CHAIRMAN: Mr. Olson, if this is a
20 convenient time?

21 MR. OLSON: Yes, thank you.

22 THE CHAIRMAN: We'll take the morning break.

23 THE CLERK: All rise. This Commission of
24 Inquiry is adjourned for a 15 minute recess.

25

1 (Proceedings recessed at 11:15 a.m. and
2 reconvened at 11:23 a.m.)

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

5 THE CHAIRMAN: You can continue, Mr. Olson.

6 MR. OLSON: Thank you, Mr. Commissioner.

7 BY MR. OLSON:

8 Q Mr. Lawlor, you were also asked, I believe it
9 again was by Mr. Kennedy, about your involvement
10 in various initiatives and seminars and writing
11 papers and that sort of thing. And you referred
12 to having written a paper several years ago,
13 which you, as I have a note of your evidence,
14 you said you circulated internally and also to
15 others?

16 A Yes.

17 Q I wasn't aware of that fact, sir, and I asked
18 you for it yesterday, as you left the building.
19 You provided it to me and I have provided copies
20 to everyone, and I'd ask that that be made as
21 the next exhibit?

22 THE CHAIRMAN: Exhibit 46 is a paper, "Conduct
23 of the Crown, Abuse of Process and Related
24 Topics," written by Mr. Lawlor, and that will be
25 exhibit 46. And I'm glad to hear that you have

1 received release of the copyright for the
2 purpose of this.

3 MR. OLSON: For limited purpose of this inquiry,
4 of course, all counsel bound by the implied
5 undertaking rule, in any event.

6 (EXHIBIT 46: Paper "Conduct of the Crown,
7 Abuse of Process and Related Topics,"
8 written by Mr. Lawlor)

9 BY MR. OLSON:

10 Q Mr. Lawlor, we won't dwell on it, it will speak
11 for itself. But first of all, it is initially
12 compiled together in '96 and revised and updated
13 in 2003?

14 A Yes.

15 Q And you referred to having circulated internally
16 and to others. What other agencies did you
17 circulate it to?

18 A I had regular correspondence and contacts with
19 the Crowns doing appellant work in B.C. and
20 Alberta and Saskatchewan. And I sent it to
21 them. They circulated it throughout their
22 departments. I also sent a copy to an appellate
23 counsel in Toronto. I don't know whether or not
24 she circulated it further.

25 Q And what caused you to prepare this, sir?

1 A Two things. Some of these issues were arising
2 during the course of arguing appeals, the
3 conduct of the Crown at trial and pretrial. And
4 I was having to research those issues to answer
5 those grounds of appeal in court. So I started
6 keeping precedent files, obviously, over the
7 years as I was doing appeal work.

8 And secondly, younger Crown Attorneys were
9 coming in to seek advice on various topics, and
10 I had started keeping precedents on those. And
11 finally one day I decided, maybe I should get
12 something to all Crown Attorneys to remind them
13 of how they should conduct themselves in court,
14 to assist them in research on these various
15 topics they were concerned about, whether or not
16 it was the type of conduct that was expected of
17 a Crown Attorney. So that's why I put it
18 together.

19 Q And did you do that as part of your regular
20 duties as a Crown prosecutor, sir, or did you do
21 that on your own time?

22 A I did that on my own time. I just took it upon
23 myself to do this.

24 Q Let me come to post-trial, and I won't repeat
25 what others have asked of you, sir, but there

1 were a couple of questions asked of other
2 witnesses or suggestions put to other witnesses
3 that I wanted you to comment on, if you can,
4 sir.

5 First of all, there was a suggestion early
6 on in this inquiry made of one or more witnesses
7 that there may have been a culture in the
8 Department of Justice in '93 when media stories
9 broke about the Driskell matter, that the
10 Department of Justice might have or various
11 people might have got together and agreed to not
12 respond properly to any inquiries, or to put
13 things down, I think the reference was, to a
14 black hole and not respond at all.

15 Were you ever a participant in any such
16 discussions or thinking, sir?

17 A No, I wasn't.

18 Q Would you ever partake in such a discussion or
19 thought process, sir?

20 A No, I wouldn't.

21 Q There was also a suggestion made by a witness,
22 as I recall it, that perhaps Mr. Miller told
23 Mr. Ewatski -- yes, Mr. Ewatski at the time,
24 that he had passed on to Dangerfield the
25 information relating to Zanidean thinking that

1 he had immunity, and that Dangerfield was of the
2 opinion that there was no effect on the trial
3 conviction because of the corroboration of other
4 witnesses.

5 If that conversation or thought process
6 occurred, were you ever privy to that?

7 A No, I wasn't.

8 Q The homicide review, Ms. Carswell asked a couple
9 of questions about that, and put to you a
10 reference in Exhibit 28, tab 3, I think page 59,
11 which I gather is the homicide review report --
12 I didn't pull it out -- in which Chief Ewatski
13 apparently recorded that he asked you and
14 Dangerfield in that interview in August of '93
15 as to whether or not a statement of a witness
16 Moss had been given. Do you recall that?

17 A I don't recall that, no.

18 Q And your evidence was you don't recall it, but
19 do you recall being asked of that?

20 A No, I don't. I don't recall that meeting.

21 Q No, do you recall Ms. Carswell asking you?

22 A Oh, I'm sorry, yes.

23 Q And you don't recall any of that?

24 A No.

25 Q It has been the Chief's evidence before this

1 inquiry that he did not record all of the
2 important things that might have been said in
3 that meeting with you and Dangerfield. Would
4 you consider, if he asked you a question about a
5 statement by a potential witness, Moss, would
6 you consider that an important matter?

7 A Yes.

8 Q Was Moss ever called?

9 A I can't recall if there was a Moss called at
10 trial.

11 Q Do you have any explanation as to why, if he
12 records a question about whether a statement
13 from Moss was given by you as prosecutors, you
14 and Dangerfield, why he wouldn't record
15 something about the Crime Stoppers, or the
16 immunity, or the recantation, things that he had
17 discovered?

18 A I have no idea.

19 Q Former Police Officer Vandergraaf has testified
20 that he came in and spoke with Mr. Dangerfield
21 several days prior to trial, and essentially
22 disclosed everything he knew to him. If that
23 occurred, were you party to that meeting, sir?

24 A No, I wasn't.

25 Q Anderson and Paul, or one of them suggests that

1 they met with Miller shortly before trial and
2 were given certain instructions. If that
3 occurred, were you privy to that meeting, sir?

4 A No, I wasn't.

5 Q And were you ever advised by either Dangerfield
6 or Miller that either of those meetings had
7 occurred?

8 A No, not that I -- I have no recollection of
9 that.

10 Q Back to the meeting with Ewatski and Hall in
11 August of '93, which you don't have any specific
12 recollection of, sir, inspector Hall records
13 that, in the third line as I recall, "discuss
14 case" and then refers to you and Dangerfield
15 having no complaint with the disclosure made.
16 Do you recall that?

17 A Yes.

18 Q Chief Ewatski's notes are a little bit
19 different. They said "discuss case in general."
20 But you can't help us as to whether there was a
21 specific discussion about the case or a general
22 discussion?

23 A No, I can't.

24 Q And finally, sir, although you have no
25 recollection of the meeting, if there was any

1 discussion about the various things we have been
2 talking about, Crime Stoppers payment, Constable
3 Burton's version of immunity, the telephone call
4 with Brodsky on the 19th, the alleged
5 recantation on the 20th, and those sorts of
6 things, would you have ever said what Hall has
7 recorded, that you have absolutely no complaint
8 as to how the police handled the investigation
9 and disclosure issues?

10 A No.

11 MR. OLSON: Those are my questions. Thank you,
12 sir.

13 MR. CODE: I take it Mr. Gates has got no
14 questions?

15 MR. GATES: No, thank you.

16 BY MR. CODE:

17 Q Just a couple of questions in re-examination,
18 Mr. Lawlor, all of them from this morning's
19 examinations.

20 First of all, starting with Mr. Prober, he
21 referred you to Mr. Brodsky's pretrial questions
22 memo, which is at tab 43 of the second volume of
23 your documents, and suggested to you that the
24 last question on Mr. Brodsky's list that day,
25 item number 23, the very last page of tab 43

1 where he asks about Zanidean's history as an
2 informant, and Mr. Prober suggested to you and
3 you agreed that it may have raised issues of
4 informant privilege?

5 A It may have.

6 Q And of course, whether it did or didn't would
7 depend on all the circumstances that were known
8 about Zanidean at the time?

9 A Yes, the specifics.

10 Q In any event, what I want to take you to is the
11 reply at tab 41 that the police sent back to
12 you. You forwarded that request on to the
13 police?

14 A Yes.

15 Q And they sent you back a reply at tab 41, did
16 they not?

17 A Yes.

18 Q Tab 41, the very last item. And at no point was
19 informant privilege raised or claimed, was it,
20 as far as you can see from these records?

21 A Not unless you can direct me to it. At a quick
22 glance, I can't see it.

23 Q I can't find any documentation suggesting it was
24 raised or claimed and, indeed, a positive
25 response is given to the question. Police

1 respond to it, do they not? Question 23, second
2 page of their police report, it's a two sentence
3 response?

4 A Yes, I see it.

5 Q No claim of informant privilege?

6 A Yes.

7 Q And I take it, even if there was a claim of
8 informant privilege, would that entitle the
9 police to send back a misleading response?

10 A No.

11 Q The second question of Mr. Prober's that I
12 wanted to ask you about is, he took you to tab
13 73, which is in the third volume of documents,
14 the Janie Duncan letter of January 2nd, 1995,
15 tab 73?

16 A Yes, I have it.

17 Q And he suggested to you that the question
18 Ms. Duncan was asking was essentially, what was
19 the nature of the deals, what were the
20 particulars of the deals? Whereas three pages
21 into that tab, four pages into that tab, the
22 question that Mr. Miller was asking you was a
23 question about what was lead in evidence about
24 the deals?

25 A Yes.

1 Q And he suggested to you and you agreed that
2 those are two distinct questions. Do you recall
3 that?

4 A Yes, I think I said that yesterday. And in my
5 mind, they are.

6 Q And what I wanted to put to you in that regard,
7 Mr. Lawlor, is if you look at Mr. Miller's view
8 of the matter, Mr. Miller's draft response at
9 that same page, the fourth page of the tab,
10 immediately above his note to you, the proposed
11 response he's going to make is,

12 "We would direct you to the transcript of
13 the evidence of Zanidean which will contain
14 the answers to your question."

15 A Yes.

16 Q That's what he's proposing to say to Ms. Duncan?

17 A Yes.

18 Q And is it fair to say that Mr. Miller's proposed
19 answer to the question links the two separate
20 questions?

21 A Yes, I see that now, yes.

22 Q He's saying that the answer to Ms. Duncan's
23 question about what were the particulars of the
24 deal is to be found in the transcript of the
25 evidence?

1 A Yes.

2 Q In other words, he's assuming that they are
3 linked, the two separate questions?

4 A Yes.

5 Q And he's asking you to confirm that, is he not?

6 A Yes.

7 Q And you write back to him,

8 "I am sure this is accurate."

9 A Without having the benefit of the transcripts,
10 yes.

11 Q And those transcripts that you were having so
12 much trouble finding in your own office, did it
13 ever occur to you just to go across the street
14 to the Court of Appeal and get them out from the
15 registry?

16 A No.

17 Q Ms. Carswell asked you a question --

18 MR. OLSON: Excuse me, Mr. Commissioner, I'm not
19 sure that is a fair interpretation of these
20 documents. And I just rise because what
21 Mr. Code has not put to the witness is at the
22 top of Mr. Miller's note is "per B. Miller
23 January 6, '95," and that's what Mr. Lawlor was
24 referring to, and the draft letter is
25 January 12, '95. There's no suggestion he knew

1 what the proposed response was going to be.

2 MR. CODE: The tab I was just putting to the
3 witness, if we need to clarify this, I think
4 I've just clarified it for Mr. Olson, it's at
5 tab 73. The page I was putting to Mr. Lawlor is
6 the fourth page in.

7 THE CHAIRMAN: January 6th, in fact, is the
8 day --

9 MR. CODE: Which is the one that has the
10 handwritten note "per Bruce Miller." And as I
11 read that page, and I went through this with
12 Mr. Lawlor in chief, the first two paragraphs
13 there are the proposed draft response, and they
14 are essentially very similar to the letter that
15 ultimately goes out. And then the third
16 paragraph is to check with Shermie about the
17 accuracy of this.

18 THE CHAIRMAN: All right.

19 MR. CODE: So he does have the draft letter in
20 hand, the note is the draft letter.

21 BY MR. CODE:

22 Q Turning to Ms. Carswell's question that I wanted
23 to re-examine on, Mr. Lawlor, she put to you tab
24 28, which is the second volume of documents,
25 Mr. Brodsky's first disclosure request?

1 A I have it.

2 Q And she especially, she noted all of the matters
3 that you had referred on to the Winnipeg Police
4 Department, and then she took you to item 16,
5 asking about police contacts with Zanidean. And
6 she directed you to your note "has all
7 statements"?

8 A Yes.

9 Q Which you would have presumably made fairly
10 quickly at the time of the receipt of this
11 letter, on the 7th or the 8th, before you left
12 for Cancun; is that correct?

13 A Yes.

14 Q And she got you to agree that you likely wrote
15 that note on, simply based on your own file
16 review without referring the matter on to the
17 police; is that correct?

18 A Yes.

19 Q And the question I wanted to ask you in
20 re-examination is, however, if you turn to the
21 next tab, tab 29, Mr. Dangerfield's response the
22 next day to that question at tab 16 indicates
23 that you will do a follow-up with the police,
24 does it not, the last sentence of his response,
25 "to be absolutely certain however"?

1 A Yes.

2 Q He asserts, as you asserted, that you believe
3 he's got all the statements, but to be
4 absolutely certain you agree to do some
5 follow-up; is that correct?

6 A Yes, it appears Mr. Dangerfield has undertaken
7 to do follow up.

8 Q And if you flip forward to tab 35, you will get
9 the results of that follow-up, two and a half
10 months later on April 26th, you see the response
11 to paragraph 16 --

12 A Yes.

13 Q -- of the February 7th letter?

14 THE CHAIRMAN: I'm sorry, I'm a little bit
15 behind. What tab are we at now?

16 MR. CODE: 35.

17 THE WITNESS: Yes.

18 BY MR. CODE:

19 Q Is the response to the agreement to follow up --

20 A Yes.

21 Q -- with respect to paragraph 16 of the February
22 7th letter, do you have that, Mr. Lawlor?

23 A I do.

24 Q And you use the words "I am advised" that you
25 have all statements, conversations with

1 Zanidean, and the basis for that advice was?

2 A Winnipeg Police.

3 Q I'd like to note for the record I have no
4 re-examination of any of Mr. Wolson's
5 cross-examination.

6 Mr. Olson asked you a couple of questions,
7 based on exhibit 45, this new exhibit that we
8 just added with the QuickLaw printout?

9 A Yes.

10 Q And he noted you were very busy in the Court of
11 Appeal on February 8th with a number of sentence
12 appeals, and he also noted that on February 6th,
13 you had one matter in the Court of Appeal?

14 A Yes.

15 Q Item 45?

16 A Yes.

17 Q And it's that February 6th appearance in the
18 Court of Appeal that I'm interested in because,
19 of course, that's the same day as the appearance
20 before Justice Hewak?

21 A Yes.

22 Q You see the matter, Regina versus Smith?

23 A I do.

24 Q Page 3, it's stated as being approximately one
25 page?

1 A Yes.

2 Q And we looked it up on QuickLaw, and I can
3 advise you that it's a lot less than one page,
4 it's one line from Justice O'Sullivan, in which
5 all he says is that they are denying leave to
6 appeal and they are not calling on you. That
7 kind of an appearance, denial of leave to
8 appeal, in which the Crown isn't even called on,
9 approximately how much time would you likely be
10 in the Court of Appeal for that kind of a
11 matter?

12 A It would depend how long appellant's counsel
13 argued.

14 Q I appreciate that, but a leave to appeal in the
15 criminal context generally means a sentence
16 appeal, does it not?

17 A Generally, yes.

18 Q So assuming the appellant is seeking leave to
19 appeal on a sentence appeal, and you are called
20 on, are you going to be in there any more than a
21 half an hour or an hour?

22 A Sometimes, depending on defence counsel, as I
23 said.

24 Q What's the longest you've ever been in a Court
25 of Appeal for the denial of a leave to appeal on

1 a sentence appeal?

2 A I can't -- I have no idea.

3 Q Would you have been out of there in the morning,
4 Mr. Lawlor, in all likelihood?

5 A Oh, yes.

6 Q Turn to tab 28, Mr. Brodsky's memo to file about
7 the appearance before Justice Hewak, Chief
8 Justice Hewak. His memo states the appearance
9 was in the afternoon at 2:00 p.m --

10 A Yes.

11 Q -- does it not? And you don't dispute that?

12 A No, I don't.

13 Q And Mr. Dangerfield recalls that he believes you
14 were present, sitting ungowned in the body of
15 the court, and Mr. Brodsky recalls that you met
16 with him immediately after the appearance to try
17 to resolve the disclosure matters. Is any of
18 that inconsistent with your appearing on Regina
19 versus Smith in the morning?

20 A No.

21 Q And finally, the other matter Mr. Olson sought
22 to glean from the QuickLaw printout, or not so
23 much from the QuickLaw printout, but rather from
24 the Cancun holiday, is he asked you how long the
25 holiday lasted. And your --

1 A I assume it was two weeks, it could have been
2 one.

3 Q It could have been one week?

4 A Yes.

5 Q And that was the simple point I wanted to make.
6 We know you left on February 9th, the Saturday
7 when you arrived in Cancun; is that correct?

8 A Yes.

9 Q And if it was a one week holiday, you would have
10 been back on the 16th?

11 A On the 16th, yes.

12 Q In which case you would have been back five days
13 before Sergeant Paul makes a record of receiving
14 a cheque from you at tab 10; is that correct?

15 A Yes.

16 MR. CODE: On February 21st.

17 Thank you, those are all my questions.

18 THE CHAIRMAN: Thank you very much, Mr. Lawlor.

19 MR. CODE: The last order of business this
20 morning is, my colleagues Mr. Lockyer and
21 Mr. Olson wish to speak to the Dale Schille
22 matter now that we have a witness statement from
23 him.

24 Ms. Carswell reminds me that the antecedent
25 step should be the filing of the statements of

1 the witnesses. And could I ask that this be
2 marked as the next exhibit, I believe exhibit
3 46.

4 THE CHAIRMAN: 47.

5 MR. CODE: Exhibit 47.

6 THE CHAIRMAN: That's the witness statement of
7 Lerner and Schille.

8 (EXHIBIT 47: Witness statement of Lerner
9 and Schille)

10 MR. CODE: Would you allow me to say that I hope
11 that's the last exhibit that I enter in this
12 matter, without preempting any ruling that might
13 come.

14 THE CHAIRMAN: Is that a promise, Mr. Code?

15 MR. CODE: I think it's a promise from me
16 because Mr. Dawe is going to take over from here
17 on in.

18 THE CHAIRMAN: All right. Mr. Lockyer, as you
19 know when we last dealt with the matter of Dale
20 Schille being called -- did I pronounce it
21 correctly?

22 MR. LOCKYER: Schille, yes.

23 THE CHAIRMAN: -- being called as a witness, I
24 deferred my ruling until after we had a full
25 statement from him and it was circulated. And

1 then I indicated after that I would then hear
2 any further submissions. So I guess my question
3 to you is, does this, from your perspective,
4 does this statement make any difference? Does
5 it cover most, if not all of the areas that you
6 wanted to examine?

7 MR. LOCKYER: No, Mr. Commissioner. I'd like to
8 address you, if I may, for maybe 10 minutes on
9 the issue.

10 THE CHAIRMAN: Yes.

11 MR. LOCKYER: To some extent, I'm going back
12 over what I wrote, but not in any great detail.

13 The inquiry, Mr. Commissioner, has focused,
14 for good and understandable reasons, on the
15 pre-trial, trial, and pre-appellate periods,
16 with some focus on events that occurred
17 post-appeal that had commenced pre-appeal. By
18 that I'm referring, for example, to the
19 Saskatchewan correspondence.

20 The one post-conviction post-appeal issue
21 that has been explored in depth, or in some
22 depth is the non-disclosure of the homicide
23 review and its contents. And of course that
24 evidence has come primarily through Chief
25 Ewatski.

1 Of course, for Mr. Driskell, who I
2 represent, the post 1992 period, post-appeal in
3 other words, is as significant as any period for
4 him. Indeed, it was by far the longest period
5 for him in terms of the time he spent in prison.
6 And in my submission the same is true, that this
7 period is significant for the administration of
8 justice, both in the context of Mr. Driskell and
9 in a systemic context as well. Because for 13
10 more years, or perhaps 12 more years, things
11 just kept going wrong.

12 The pre 2001 years are not difficult, in my
13 submission, for you to review on the record.
14 Essentially it's a period when different people
15 were making requests of Manitoba Justice and the
16 police, in one form or another. And in essence,
17 Manitoba Justice did nothing in those years.

18 And that becomes particularly apparent when
19 you look at Mr. Schille's statement that he gave
20 Commission Counsel. If you look at page 2, in
21 explaining the 2000 review that he wrote,
22 Mr. Schille, that he conducted, he explains it,
23 and I'm looking about 10 lines down the page of
24 page 2 of his statement. He, meaning
25 Mr. Schille, explained,

1 "Manitoba Justice had committed to doing a
2 file review sometime previously, but the
3 Deputy had learned that no such review had
4 ever been done."

5 Well, the commitment made by Manitoba
6 Justice had been made seven years earlier, in
7 1993. So if Mr. Schille was indeed responding
8 to that commitment, it's a delay of seven years
9 in which essentially nothing happened. And that
10 doesn't need then to be addressed by the
11 evidence, and I say that because the suggestion
12 is made that this request ignores the '93 to
13 2000 period.

14 It's my submission really that 2000, in the
15 year 2000, that things become particularly
16 significant in terms of the administration of
17 justice issues and in terms of the issues
18 relating to Mr. Driskell himself occurs. It
19 certainly then, or perhaps more so the following
20 year in 2001, it becomes apparent, or should
21 have become apparent to Manitoba Justice that
22 there was going to be a continued and determined
23 assault on Mr. Driskell's conviction that was
24 going to carry on until such time as the matter
25 was decided one way or the other, in terms of

1 the validity of his conviction.

2 And thereafter, in my submission,
3 commencing in 2001, the evidence can demonstrate
4 to you in a way that Mr. Schille's statement
5 does not, that there was, if you will,
6 prosecutorial tunnel vision, that will be our
7 submission. That was particularly exemplified
8 by a series of assumptions that were made during
9 those years that always seemed to work against
10 Mr. Driskell's interests.

11 The Saskatchewan correspondence,
12 supposedly, it was believed had been disclosed.
13 That assumption was made in the absence of
14 evidence in the file of such disclosure, an
15 assumption made against Mr. Driskell's interest.
16 An assumption was made, and this appears, and
17 this is new, this appears at page 9 of
18 Mr. Schille's statement. He says he made an
19 assumption that this had never been raised by
20 Mr. Brodsky subsequent to the supposed
21 disclosure of the Saskatchewan correspondence
22 occurs, and I'm looking around line 8 or 9 mid
23 sentence.

24 THE CHAIRMAN: Yes.

25 MR. LOCKYER: "...Schille thought Brodsky might

1 have concluded that he could not meet the
2 due diligence fresh evidence threshold
3 since (as far as Schille knew) Brodsky had
4 not actively pursued this material prior to
5 the trial."

6 For someone who had reviewed the file, as
7 Mr. Schille had, it's difficult to see how he
8 could assume that Mr. Brodsky had not actively
9 pursued the issues that were contained within
10 the Saskatchewan correspondence. He only had to
11 read the letters that he had written pretrial
12 demanding disclosure of the very issues that
13 were related in the Saskatchewan correspondence.
14 Once again, an assumption is made by Manitoba
15 Justice that works against Mr. Driskell's
16 interests.

17 The non-disclosure of Kovnats materials
18 until after Mr. Driskell's bail application had
19 been argued and decided, Mr. Schille ultimately,
20 and this is at page 10 of his statement, falls
21 back on the position that this may simply have
22 been pure inadvertence. He says purely
23 inadvertent, that's at the end of that paragraph
24 under paragraph F.

25 THE CHAIRMAN: Yes.

1 MR. LOCKYER: Once again, things always seemed
2 to be working against Mr. Driskell's interests,
3 despite the determined assault that's being made
4 on his conviction.

5 The assumption made by Mr. Schille that the
6 decision of the Supreme Court of Canada in KGB
7 would in some way add to the Crown's case
8 against him, really in ignorance, or ignoring,
9 should I say, the other evidence that's
10 accumulating in the meantime, in my submission,
11 is once again another assumption, albeit a legal
12 assumption this time, on the part of Manitoba
13 Justice that works against Mr. Driskell's
14 interests.

15 The position with respect to the homicide
16 review, we've now heard Chief Ewatski's
17 evidence, and in his evidence he's testified
18 that in fact there really was no effort to ever
19 get the review from him, except in the context
20 of disclosing it to Mr. Driskell's counsel,
21 which he wasn't prepared to countenance.

22 The position of Manitoba Justice is very
23 different. Their claim now is that they did
24 indeed seek to get it from the Winnipeg Police
25 Service and the Winnipeg Police Service refused

1 to give it to them.

2 Page 6, I think I can point out
3 Mr. Schille's statement that -- I can correct a
4 claim that Mr. Schille has made, at least I hope
5 I can, where under D he says, after the DNA
6 results came back in '02, Lockyer wrote to
7 Finlayson and tried to persuade the Crown to
8 consent to the 696 application. Schille
9 believes that there were further meetings and
10 that Morrison became involved in the issue
11 ultimately -- I'm sorry I think I may be reading
12 the wrong part, sorry.

13 THE CHAIRMAN: Next paragraph, is it?

14 MR. LOCKYER: I'm sorry, it's not written where
15 I've marked it as being written. Could you just
16 give me a moment?

17 THE CHAIRMAN: Absolutely.

18 MR. LOCKYER: Yes, I'm sorry it's at page 8, my
19 mistake. This is the paragraph which begins at
20 the bottom of 7, where Mr. Schille has set out
21 the position that Manitoba Justice did not have
22 the review, that AIDWYC was demanding it. And
23 then five lines down on page 8.

24 "Schille reported this development to
25 Finlayson...",

1 that is the refusal to provide the material of
2 the review in April or May of 2003. Do you see
3 that?

4 THE CHAIRMAN: Yes.

5 MR. LOCKYER: "Schille reported this
6 development to Finlayson, who said he would
7 raise the matter at a higher level. At a
8 subsequent meeting with AIDWYC, which
9 became somewhat heated, Bob Morrison asked
10 how he could obtain the 1993 review in view
11 of Chief Ewatski's refusal to turn it
12 over."

13 I can simply advise there was no such meeting.
14 The meeting that Mr. Schille would be referring
15 to --

16 THE CHAIRMAN: Mr. Olson.

17 MR. LOCKYER: It's not a big deal, I am just
18 trying to correct it.

19 THE CHAIRMAN: The reason I am objecting,
20 Mr. Olson is objecting, is because I was going
21 to raise this myself. This is one of the
22 matters that Mr. Olson has raised in his
23 material. And if I do call Schille, you are
24 going to be in a very constrained position,
25 because I will not allow you to disagree with

1 him about matters with you. And if I do permit
2 him to testify, I don't want to get into a
3 situation which he says, I say, because you
4 can't say. You are a lawyer.

5 MR. LOCKYER: That's fine. I really think this
6 is a non-contentious point I am about to make.
7 I think everyone is unnecessarily suspicious of
8 me.

9 THE CHAIRMAN: Let's put it this way, as an
10 example, if you were to ask that question, it
11 would have to be a question, you know --

12 MR. LOCKYER: Of course.

13 THE CHAIRMAN: -- and nothing more. And if you
14 get an answer you don't like, you're going to
15 have to accept it.

16 MR. LOCKYER: I understand. The meeting, and
17 the only meeting that took place was the one in
18 February. There wasn't a meeting --

19 MR. OLSON: Same issue.

20 THE CHAIRMAN: I'm not taking this as evidence,
21 Mr. Olson.

22 MR. LOCKYER: If Mr. Olson could just go back to
23 Mr. Schille and refresh his memory, I think Mr.
24 Schille would likely accept this, that we had a
25 meeting in February of '03, and I thought it's

1 helpful to raise it and point it out, there
2 wasn't one subsequent to April or May of 2003.
3 Perhaps Mr. Olson can just take that under
4 advisement and check it with Mr. Schille. Not a
5 huge point, I just think it's helpful to have
6 the statement as correct.

7 The issue has also being raised as to why
8 Mr. Schille and not Mr. Finlayson? And I
9 suspect if we had said Mr. Finlayson, then we
10 might be claiming, why did we say Mr. Finlayson
11 and not Mr. Schille? Originally, we wanted
12 both, but it was our best judgment that, insofar
13 as we would likely only have time for one, that
14 Mr. Schille was the better choice because he was
15 the man closely connected to and most
16 responsible for the file, who would inevitably
17 have been a part, one would think, of any policy
18 decisions that were being made within Manitoba
19 Justice, and certainly could advise us, at a
20 minimum, insofar as he was given dictates by his
21 superiors, and I suspect would likely advise us
22 that he was privy to and a part of any meeting
23 which lead to such dictates. And in my
24 submission, he, or in our view, he would
25 certainly be the better witness than

1 Mr. Finlayson if one is to choose between the
2 two of them.

3 It's my submission in conclusion that
4 Mr. Schille's evidence is needed for the
5 following reasons -- needed, and I use the word
6 needed because that's the word which appears
7 within the rules that we're operating under for
8 this inquiry. But his evidence would deal with
9 important issues that should be in the public
10 domain, and that the public domain is much
11 better served, where possible, by hearing
12 evidence orally as opposed to expecting the
13 public to somehow access documents and find out
14 information that way.

15 His evidence would lead to an airing of
16 important systemic issues, and particularly an
17 airing of prosecutorial attitudes to
18 post-conviction claims of innocence, and to
19 prosecutorial reactions to post-conviction
20 claims of innocence, and whether Manitoba
21 Justice has any procedure, or has developed any
22 procedure in that regard to deal with those
23 kinds of concerns.

24 In my submission, Mr. Schille's statement
25 doesn't address these issues, doesn't address

1 the systemic issues as to what, if anything, has
2 taken place within Manitoba Justice as a
3 response to the concerns raised by
4 Mr. Driskell's case for some 12 years, from
5 1993 to 2005, and that they need to be explored
6 publicly and addressed publicly, in my
7 submission.

8 I have a fear that if Mr. Schille is not
9 asked to expand on and explain some of his
10 positions that he takes in his statement, that I
11 will be confronted during argument about an
12 absence of evidence in certain regards. In my
13 submission, we do have the time set aside next
14 week. Testimony always tends to focus the
15 issues, make us think about them more, and in my
16 submission, will leave us within a much better
17 position to make both factual findings, but more
18 importantly, factual findings in a systemic
19 context. And better enable you,
20 Mr. Commissioner, in my submission, to make
21 recommendations for the future, and it is also
22 more likely that whatever recommendations you
23 might make will be followed if the
24 post-conviction issues are addressed
25 testimonially, as well as just through the

1 documents that are placed before you.

2 Those are my submissions.

3 THE CHAIRMAN: Thank you, Mr. Lockyer.

4 MR. OLSON: Ms. Carswell reminds me, Mr. Kennedy
5 was in support of the application. I don't know
6 if he has anything to add.

7 MR. KENNEDY: I'm still in support of
8 Mr. Lockyer's submission, as outlined in the
9 earlier letter, but at this point I don't feel
10 there's anything further to that, unless you
11 have any questions obviously.

12 THE CHAIRMAN: No, I have your earlier letter
13 and I've heard Mr. Lockyer.

14 MR. OLSON: Mr. Commissioner, I'll be brief.
15 You asked the key question, in my respectful
16 submission, of Mr. Lockyer at the outset as to
17 whether or not the statement covered most, if
18 not all, of the areas that he wished to cover.
19 His answer was no, and then I heard his
20 submissions and I did not hear any new area that
21 was not covered in the questions asked by
22 Mr. Code and Mr. Dawe of Mr. Schille, and which
23 you now have before you by way of an exhibit.

24 The fact is, the matters that my learned
25 friend wishes to address can be addressed in

1 argument. He has argued before you that the
2 period of time post-appeal is the significant
3 period of time for Mr. Driskell. And I accept
4 that, in terms of the period of incarceration.
5 Eight of those years were years in which
6 Mr. Schille had absolutely no knowledge of the
7 case, and that's apparent from the summary
8 before you.

9 To the extent that Mr. Lockyer is asking
10 for Mr. Schille to appear in the application for
11 the purpose of pursuing with Mr. Schille why
12 decisions were made, policy decisions about both
13 pre and post 2000, it's clear from Mr. Schille's
14 statement that he was not involved in any
15 significant policy decisions and that they were
16 made by others, including Mr. Morrison's letter.
17 And that's clear from my earlier submissions.

18 I submit that what we had put in our
19 submissions to you, Mr. Commissioner, have been
20 materially and essentially in their entirety
21 verified by Mr. Schille's evidence. The various
22 assumptions that Mr. Lockyer has gone through
23 that he says Mr. Schille made have been in fact
24 commented upon and the reasons for it by
25 Mr. Schille and, therefore, that is of no

1 assistance. And in fact, some of the alleged
2 assumptions made by Schille were not in fact
3 assumptions made. Merely he said, Mr. Brodsky
4 might have included, or concluded certain things
5 and so on.

6 So it's my submission to you that this is
7 not an application to call Mr. Finlayson,
8 although Mr. Lockyer now seems to be reverting
9 back to giving you the reasons why they picked
10 Schille, but the application is Schille. He
11 can't help you with policy decisions, systemic
12 issues. All of those can be addressed in the
13 material, and we have the evidence now with his
14 summary statement. Those are my submissions.
15 THE CHAIRMAN: Thank you, Mr. Olson.

16 Mr. Code, do you have anything further?
17 MR. CODE: Nothing further, other than what was
18 set out in my original submissions. And I'd
19 simply state that from listening to Mr. Lockyer,
20 I think he has distilled the issue now as, in
21 terms of our rules and our terms of reference,
22 as you know the key test in paragraph 4(b) is
23 whether the witness's evidence is needed to
24 properly ensure cooperation and accountability
25 or to assess important issues of credibility.

1 Clearly cooperation is not an issue here now
2 that we have his statement, and I haven't heard
3 any suggestions that credibility is an issue.
4 But what Mr. Lockyer is raising, is this an
5 important issue of accountability in terms of
6 the additional time that Mr. Driskell languished
7 in custody as a result of non-disclosure of
8 certain materials and the difficulties in making
9 his 696 application? So I leave that in your
10 hands as I think what the issue is that's before
11 you.

12 THE CHAIRMAN: Okay. This application by
13 Mr. Lockyer on behalf of James Driskell to have
14 Dale Schille called as a witness is premised
15 upon our rules, and the order-in-council which
16 permits evidence to be adduced, either oral, in
17 testimony, as we've had for the past six weeks,
18 or in the form of a statement taken by
19 Commission Counsel. That was a very specific
20 and clear intention of the order-in-council so
21 that not everyone had to be called. And if a
22 statement would suffice, then that would be the
23 way in which the evidence was adduced at this
24 inquiry.

25 I have read and considered the submissions

1 of counsel, which are very good submissions I
2 might add, and as well had the benefit of the
3 additional oral submissions.

4 Mr. Olson does not agree that there is a
5 need that has been indicated, has been
6 sufficiently presented. Mr. Code, Commission
7 Counsel concurs in that view. Mr. Lockyer's
8 position is that it is needed.

9 Well, I guess when I think of the word
10 "need" or "needed," I think back a little bit of
11 the panel discussion we had yesterday and the
12 word "consistent." And it's not a word that's
13 easily defined.

14 I am not overwhelmed by Mr. Lockyer's
15 position on the issue of need, however, I cannot
16 lose site of the fact that this public inquiry
17 has been called to look into matters dealing
18 with the conviction and incarceration,
19 investigation, prosecution, conviction,
20 incarceration of James Driskell. He is a
21 person, I think, whose submissions I ought to
22 give some particular weight and significance to.
23 When I think of the -- perhaps if it is
24 unnecessary, if it is going to take more time,
25 it pales in significance to the 12 plus years

1 that he served.

2 On looking at the principles and the
3 purpose of this inquiry, although I am barely
4 persuaded that there is a need, but I am.
5 Because certainly when in doubt, I intend, and I
6 am ruling in favour of Mr. Driskell's request.
7 And so be it, Mr. Schille will be called as a
8 witness.

9 And I might add the time is really quite
10 frankly irrelevant. Even if we had no time
11 scheduled in the future, that would not affect
12 the decision. If it's something that I, on
13 slight balance, feel ought to be done, it will
14 be done. That is in the sense of time will be
15 made for it.

16 So Mr. Schille will be called. I trust
17 that he can be available, I think next Thursday
18 and Friday, I think everyone has that as
19 tentative dates. So we will have him here next
20 Thursday and Friday.

21 Is anyone of the view that those two days
22 would not be adequate?

23 MR. CODE: Your brief indulgence?

24 THE CHAIRMAN: Yes.

25 MR. OLSON: Mr. Commissioner, I can say I don't

1 know of Mr. Schille's availability. Obviously
2 I'll check it immediately.

3 THE CHAIRMAN: Okay.

4 MR. CODE: Canvassing my colleagues, it appears
5 it would be wise to keep the two days, both
6 Thursday and Friday. And I am not available
7 Thursday, but Mr. Dawe is, and he will -- there
8 is an issue when a rule 27 motion is granted as
9 to whether Commission Counsel leads the witness,
10 but we are certainly willing to conduct an
11 examination of him as the initial examination.

12 THE CHAIRMAN: That would be my preference in
13 this case.

14 MR. CODE: Mr. Dawe is willing and able to do
15 that. He knows this area of the evidence better
16 than I. And Mr. Lockyer and Mr. Olson, I
17 assume, will be the main proponents with the
18 witness, and I think it's wise we keep the two
19 days.

20 THE CHAIRMAN: Okay. It's 12:25 now. Do you
21 think you can get in touch with him in the next
22 20 minutes?

23 MR. OLSON: Well, I'll make the call. It is the
24 noon hour. I don't know if he's reachable or
25 not.

1 THE CHAIRMAN: Okay. Well, then what should we
2 do?

3 MR. CODE: As I understand it from Mr. Olson, he
4 is in town next week, he is available. It's
5 going to be a question of whether he's got a
6 court commitment that he can't get out of.

7 MR. OLSON: I think we should assume he will be
8 available unless I argue to the contrary.

9 THE CHAIRMAN: If that's agreeable with
10 everyone?

11 MR. CODE: I think if we simply adjourn to
12 Thursday, and subject to further order of the
13 Commission, if Mr. Olson calls us in the next
14 hour or so and says he's not available, we'll
15 have to make further arrangements and we can do
16 that in writing.

17 THE CHAIRMAN: Okay.

18 MR. CODE: That completes the matters I wanted
19 to address. I think we covered all the
20 scheduling issues and the scheduling memorandum,
21 and I haven't heard any further concerns from my
22 colleagues. We will leave it up to them to
23 schedule the order of their submissions on
24 October 31st.

25 My friend Mr. Gates advises that he has a

1 brief matter he wants to address you on.

2 THE CHAIRMAN: Okay. I think as well, Mr. Code,
3 we must keep in mind, maybe I don't need to
4 discuss this here, but there may be some people
5 that are served a notice who will not have, who
6 will not have counsel, so we're going to make a
7 place to that.

8 MR. CODE: I'll speak to that at the end.

9 THE CHAIRMAN: Okay.

10 MR. GATES: Thank you, Mr. Commissioner. I just
11 want to very briefly alert you, sir, to the fact
12 that flowing from Mr. Christianson's evidence
13 before you earlier this week, you may recall
14 Mr. Lockyer specifically asked me to produce a
15 list or a copy of a log entry that
16 Mr. Christianson had prepared and had used in
17 another matter. I have undertaken to
18 Mr. Lockyer that I will produce that. So that
19 will be forthcoming. That's the simple matter.

20 The more difficult matter has to do with a
21 line of questioning that Mr. Lockyer took during
22 his cross-examination of Mr. Christianson,
23 relating to the RCMP's response once the DNA
24 results were obtained in late 2002. I do not
25 know the answer to Mr. Lockyer's question. I

1 have asked my client to undertake a search of
2 their records to determine what review was
3 undertaken, and I hope to be in a position to
4 provide a response to you, sir, in the very near
5 future. So you can expect that I will most
6 certainly be providing you with the document
7 that Mr. Lockyer requested. And I am actively
8 pursuing a response on the other issue that he
9 raised, sir. Thank you.

10 THE CHAIRMAN: Thank you very much, Mr. Gates, I
11 appreciate that.

12 Yes, Mr. Lockyer?

13 MR. LOCKYER: Mr. Commissioner, I spoke to
14 Mr. Gates this morning, and he told me that he
15 perceived the manner in which I questioned the
16 panel yesterday as being a personal attack on
17 him, and that he was embarrassed by that. I
18 hasten to assure him that that was not my
19 intent. I have his permission to address you on
20 that and apologize to him, through you, that I
21 appeared to be doing such a thing. I had no
22 intention of doing such a thing. I hope that
23 makes him feel -- I hope that's good enough.

24 THE CHAIRMAN: Thank you. I appreciate that.
25 And I could imagine how he would come to that

1 conclusion, although I accept that it was not
2 intended and that you do apologize for it.

3 MR. LOCKYER: Well, I reflected on that when he
4 said it, and I can see how he could have come to
5 that conclusion, which is why I apologized.

6 THE CHAIRMAN: Okay.

7 MR. CODE: I had spoken to Mr. Lockyer about
8 that question and I asked him to frame it as a
9 hypothetical. And by the time it came out, it
10 was much too specific and I think he agrees with
11 that.

12 The one thing that I neglected to mention
13 that does arise in the scheduling memo, as a
14 result of your ruling in relation to Schille and
15 the adjournment to next week to hear
16 Mr. Schille's evidence, you will recall in the
17 scheduling memo, item 9 on page 2 of the
18 scheduling memo, if my colleagues have it handy,
19 stated that if the evidence is completed by
20 September 22nd, which is today, which it's now
21 not, the Commission will issue notices to those
22 persons against whom findings of misconduct
23 might be made during the week of September 25th.
24 So it was our intention to begin issuing notices
25 of potential misconduct, confidentially, to any

1 party who might be the subject of such a
2 finding. And the threshold and the case law for
3 such notices is a very, very low one.

4 But we had wanted to await the completion of the
5 evidence before preparing those notices and
6 sending them.

7 So I just had a brief discussion with my
8 colleague, Mr. Olson, and I can't see how the
9 evidence of Schille would impact in terms of a
10 potential notice of misconduct on any party
11 other than Mr. Olson, Mr. Olson's clients. So
12 subject to the views of my friends, I would
13 propose that we proceed, as suggested here, to
14 send out any notices to any parties, other than
15 Mr. Olson's clients, as planned, next week, but
16 await any notices in relation to Mr. Olson's
17 clients until after Schille's evidence has been
18 received.

19 So if I could have the views of my
20 colleagues, whether any of them feel that
21 Schille's evidence might impact on their clients
22 in any fashion? I suppose the one possible
23 other one is Ms. Carswell may have some concerns
24 in relation to the back and forth between
25 Schille and the police force about the release

1 of the Perry Harder review. So potentially it
2 might be wise to withhold any potential notices
3 to Ms. Carswell's clients as well. But if I
4 could have the views of my colleagues on that,
5 that would assist?

6 THE CHAIRMAN: Thank you.

7 MR. OLSON: Mr. Commissioner, Mr. Code has
8 accurately stated what he and I had a very brief
9 chat about subject to this. There will then be
10 two areas of examination of Mr. Schille that
11 ought to be verboten. One is any involvement of
12 Messrs Libman and Lockyer with Schille, because
13 it would be highly inappropriate to put their
14 personal knowledge to Schille. The second one
15 would be any notices of misconduct or
16 allegations made within those notices, because
17 normally Schille would not have to respond to
18 any questions about, are you aware of
19 allegations X, Y and Z about so and so, and
20 don't you think that's appropriate? And if that
21 type of examination is going to occur, I do
22 object.

23 THE CHAIRMAN: Yes, yes.

24 MR. CODE: I would hope, and I assume these
25 notices, assuming such notices are sent to one

1 or more parties, will remain entirely
2 confidential. They are not public documents.
3 They will not be released publicly. And
4 certainly we will not be making any use of them
5 whatsoever in any public proceedings. They are
6 given to a party in confidence solely for
7 natural justice reasons, and there is no need
8 whatsoever for any of them to be made public.
9 And certainly, lawyers who have not received a
10 notice on behalf of their client will not be
11 privy to a notice that's gone to some other
12 lawyer and their client. So I would hope that
13 the kind of cross-examinations Mr. Olson is
14 suggesting would not happen, unless somebody
15 starts leaking the notices, which we certainly
16 won't be doing.

17 THE CHAIRMAN: Does anybody have any comments on
18 this issue? Yes, Ms. Carswell.

19 MS. CARSWELL: I will be having some contact
20 with your counsel, Mr. Commissioner, about some
21 portions of the statement that, from my client,
22 may require us to make an application or to
23 suggest that further interviews be done. But
24 I'll discuss that with your client first, but
25 there may be some impact arising out of some of

1 Mr. Schille's statement for my client,
2 obviously.

3 THE CHAIRMAN: Okay. Then if there is nothing
4 further, I think then, Mr. Code, we can proceed
5 with the serving of the notices. And these
6 notices, as you know -- I didn't know until I
7 became involved in this -- go to individuals
8 whose conduct may be subject to adverse findings
9 and comment in the report. And it doesn't mean
10 that they will be, but it may be. So if there
11 is evidence from which it might reasonably --
12 I'm not even sure if that's the test -- that it
13 might be inferred that adverse comments might be
14 made about their conduct, then they will be
15 notified of that so that they may respond in
16 their submissions.

17 The notices are confidential to the
18 individual, and they will be sent to the
19 individual's counsel, if they have counsel. And
20 we will never disclose them, the contents of
21 them. And I trust that counsel will not
22 disclose them either, and that they would not
23 utilize them unfairly in the cross-examination
24 of Schille when he testifies. I must say at the
25 moment, I don't know how that might happen, but

1 it could. So I just ask you all to be cognizant
2 of that.

3 So if there are no further comments, we
4 will then adjourn until 9:30 or 9:00, what's the
5 consensus for next Thursday, the 28th of
6 September?

7 MR. PROBER: 9:30.

8 THE CHAIRMAN: 9:30, the 9:30's have it. It
9 will be 9:30 next Thursday. Thank you.

10 THE CLERK: All rise.

11 (Proceedings adjourned at 12:36 p.m.)

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CECELIA REID and DEBRA KOT, 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
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Debra Kot
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