

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

Thursday, September 28, 2006

Volume 26

INQUIRY PROCEEDINGS

<p style="text-align: right;">Page 5992</p> <p>COMMISSION STAFF:</p> <p>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</p> <p style="text-align: center;">APPEARANCES</p> <p>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</p>	<p style="text-align: right;">Page 5994</p> <p style="text-align: center;">INDEX OF EXHIBITS</p> <p>1A Series of memos from Mr. Burton, O 5997 Division</p> <p>48 Book of documents relating to 5998 evidence of Dale Schille</p> <p>49A Large book of documents, 6035 examination of Dale Schille</p> <p>49B Book of Supplemental Documents, 6035 examination of Mr. Schille</p> <p>49C Report of The Centre of Forensic 6035 Sciences in Toronto</p> <p>49D Paper written by the Deputy 6036 Minister of Justice, Bruce MacFarlane, the date of May 5, 2005</p>														
<p style="text-align: right;">Page 5993</p> <p style="text-align: center;">INDEX OF PROCEEDINGS</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">DESCRIPTION:</th> <th style="text-align: right;">PAGE</th> </tr> </thead> <tbody> <tr> <td>DALE SCHILLE</td> <td></td> </tr> <tr> <td>- BY MR. DAWE</td> <td style="text-align: right;">5999</td> </tr> <tr> <td>- BY MR. LOCKYER</td> <td style="text-align: right;">6036</td> </tr> <tr> <td>- BY MR. ABRA</td> <td style="text-align: right;">6236</td> </tr> <tr> <td>- BY MR. GATES</td> <td style="text-align: right;">6250</td> </tr> <tr> <td>- BY MR. PROBER</td> <td style="text-align: right;">6256</td> </tr> </tbody> </table>	DESCRIPTION:	PAGE	DALE SCHILLE		- BY MR. DAWE	5999	- BY MR. LOCKYER	6036	- BY MR. ABRA	6236	- BY MR. GATES	6250	- BY MR. PROBER	6256	<p style="text-align: right;">Page 5995</p> <p>1 Thursday, September 28, 2006 2 Upon commencing at 9:30 a.m. 3 THE CLERK: All rise. This Commission of 4 Inquiry is now in session. 5 THE COMMISSIONER: Good morning. 6 THE WITNESS: Good morning, Mr. Commissioner. 7 MR. DAWE: Good morning, Mr. Commissioner. 8 THE COMMISSIONER: Mr. Dawe. 9 MR. DAWE: Before we begin the next witness, 10 just a very minor administrative matter 11 Mr. Lockyer has just brought to my attention. 12 You will recall the file that was obtained from 13 Constable Burton back in the first week. It was 14 referred to but apparently it was never filed as 15 an exhibit. So let's perhaps just do that now. 16 THE COMMISSIONER: I wonder -- 17 MR. DAWE: For the benefit of counsel, you will 18 recall that Constable Burton mentioned I believe 19 in being cross-examined by Mr. Lockyer that he 20 had produced a series of memos and these were 21 all disclosed at the time. They were apparently 22 not made an exhibit Mr. Lockyer has pointed out 23 to me. 24 THE COMMISSIONER: Do you have the numbers? 25 Unfortunately I don't in this book. The numbers</p>
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1 of the Burton exhibits, as I would suggest that
 2 we make it an A or B to one of those so if
 3 someone is looking, there's some connection.
 4 Perhaps the last Burton exhibit.
 5 MR. GATES: Just for your information, Mr.
 6 Commissioner, this is what I had, for my
 7 purposes, described as the O Division file.
 8 This is the file from O Division which is
 9 Toronto.
 10 THE COMMISSIONER: Thanks, Mr. Gates.
 11 MR. DAWE: I believe the last Burton exhibit is
 12 exhibit 2. Perhaps this can be exhibit 2B.
 13 THE COMMISSIONER: Mr. Registrar, do you concur
 14 with that?
 15 THE CLERK: Sorry, Mr. Commissioner, I just have
 16 Mr. Thomas Burton having last testified on
 17 August 1st.
 18 THE COMMISSIONER: Yes.
 19 THE CLERK: And the exhibit numbers entered on
 20 that day were 10A, 10B, 10C.
 21 MR. DAWE: I'm sorry, that's Tom Anderson.
 22 Mr. Burton was the very first witness. We filed
 23 a book of documents as Exhibit 1. Mr. Lockyer
 24 filed some documents that are Exhibit 2.
 25 THE CLERK: Yes. Then that would be Exhibit 1A

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1 then.
 2 THE COMMISSIONER: All right. This will become
 3 Exhibit 1A. So these are some documents from O
 4 Division referred to by Burton commented on I
 5 suppose.
 6 (EXHIBIT 1A: Series of memos from Mr.
 7 Burton, O Division)
 8 MR. DAWE: Way, the next witness will be Dale
 9 Schille
 10 THE CLERK: Do you wish to swear on the Bible or
 11 make a solemn affirmation?
 12 THE WITNESS: I swear.
 13 THE CLERK: Would you please state and spell
 14 your full name for the record.
 15 THE WITNESS: Dale Schille, D-A-L-E
 16 S-C-H-I-L-L-E.
 17
 18 DALE SCHILLE, having been first duly sworn,
 19 testified as follows:
 20
 21 MR. DAWE: As we had done with every other
 22 witness, we have prepared a book of documents.
 23 I would ask that that be made the next exhibit.
 24 THE COMMISSIONER: Is it 48?
 25 THE CLERK: Yes, Mr. Commissioner.

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1 THE COMMISSIONER: Exhibit 48 will be the book
 2 of documents relating to the evidence of
 3 Schille.
 4 (EXHIBIT 48: Book of documents relating to
 5 evidence of Dale Schille)
 6 MR. DAWE: Mr. Libman brought to my attention
 7 which I assume was only in my copy but it's
 8 apparently in everybody's copy, the very last
 9 document in the book at tab 21 is a letter from
 10 Mr. Libman. Apparently in the photocopying
 11 process, the second page of the letter was
 12 missing. So I have provided my friends with
 13 copies of that page. And I will give some to
 14 Mr. Registrar and he can perhaps insert them and
 15 not make it a separate exhibit.
 16 THE COMMISSIONER: So that's exhibit 48, tab 21
 17 is what you're referring to?
 18 MR. DAWE: That's correct. It's tab 21.
 19 There's a number of documents at tab 21. This
 20 is the very last of those documents. The pages
 21 aren't numbered but this apparently should be
 22 page 2 of the letter.
 23 THE COMMISSIONER: Okay.
 24 BY MR. DAWE:
 25 Q Good morning, Mr. Schille.

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1 A Good morning, Mr. Dawe.
 2 Q You'll note that the first tab of the documents
 3 book is a summary of the interview that we
 4 conducted with you a couple of weeks ago. If I
 5 can just ask you this. Have you had a chance to
 6 review this?
 7 A I have.
 8 Q Are you satisfied that it's substantially
 9 accurate?
 10 A There are one or two issues that I raised with
 11 you this morning briefly.
 12 Q Right. And we'll deal with those as we go. But
 13 in any event, having filed that, it should
 14 substantially reduce the number of questions I
 15 have to ask you.
 16 The first matter I'd like to deal with is
 17 the matter of the file review that you conducted
 18 and that's discussed at pages 2 to 5 of the
 19 summary. It's a very small point and I don't
 20 think anything turns on this but in the interest
 21 of accuracy, just to clarify this one point
 22 about the date of the review. You'll note that
 23 at page 2 of the summary, you indicate that you
 24 finished the review, your memo setting out your
 25 conclusions in the review sometime before James

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1 Lockyer's February 14, 2001 letter?
 2 THE COMMISSIONER: Third line from the bottom,
 3 second page, yes.
 4 THE WITNESS: I have it.
 5 BY MR. DAWE:
 6 Q And if I can just take you now to tab 7, very
 7 last document, the last page in the tab?
 8 A That's the letter dated the 28th of June 2001?
 9 Q That's right. And if you note the first line,
 10 this is a letter from Mr. Lockyer to
 11 Mr. Finlayson and he says, "I enclose copies of
 12 correspondence that I have had with Chief
 13 Ewatski."
 14 THE COMMISSIONER: Just a little slower,
 15 Mr. Dawe.
 16 THE WITNESS: Yes.
 17 BY MR. DAWE:
 18 Q So does that help you refresh your memory as to
 19 when you first became aware of the
 20 February 14th, 2001 letter from Mr. Lockyer to
 21 Chief Ewatski?
 22 A Yes, it probably would have been right around
 23 that time.
 24 Q All right. You are nevertheless satisfied that
 25 you have completed your review sometime before

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1 you became aware of the February letter?
 2 A Yes. And my best recollection, it would have
 3 been late 2000, very early 2001.
 4 Q All right. Thanks. The next matter I'd just
 5 like to deal with is the matter of the
 6 Saskatchewan documents and the fact you came
 7 across them when you were conducting your
 8 review, as you indicated on page 3. If I can
 9 just ask you to turn to tab 5?
 10 A I have that.
 11 Q Thanks. Just to be clear on this, are these the
 12 documents that you are referring to as the
 13 Saskatchewan documents?
 14 A Correct.
 15 Q This is all dealt with in your interview
 16 summary. Perhaps you can just give us a brief
 17 overview of what your thinking was at the time
 18 when you first came across these documents in
 19 2000, 2001 when you were conducting your review?
 20 A Well, at the time that I was conducting the
 21 review, as I have indicated in the review
 22 itself, the focus of the review was to examine
 23 the file itself to see if the materials that
 24 were on the file were appropriately pressed to
 25 the logical strength of the Crown's case, that

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1 was the focus. In the context of doing that, I
 2 was asked to look at the file itself. And in
 3 the file itself, I did note the correspondence
 4 and me going through that given not only the
 5 correspondence but some of the internal
 6 documents or correspondence back and forth
 7 between various members of the department at the
 8 time, I concluded that the information in the
 9 Saskatchewan correspondence had been disclosed.
 10 Q All right. What was the state of the Driskell
 11 correspondence file when you first found it?
 12 A Well, I would describe the file itself, it was
 13 fairly large. It had documentation going all
 14 the way back. It wasn't -- I referred to it as
 15 the internal correspondence file. There are
 16 other things in there. There were newspaper
 17 articles in there, there was correspondence from
 18 third parties. There was a lot of
 19 correspondence back and forth between the
 20 department and private investigator Janie Duncan
 21 was on file. There was a lot of information in
 22 there. It was on two metal brads and I would
 23 describe it as being in disorder. It wasn't at
 24 all in chronological order. It seemed that
 25 things over the years simply had been thrown in

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1 there and it looked like it had been gone
 2 through on many occasions. And that was in
 3 contrast to most of the other file. The file
 4 was contained in four banker boxes which were in
 5 contrast in fairly good order.
 6 Q And did it occur to you at this point that
 7 notwithstanding the assertion in Bruce Miller's
 8 April 1993 memo to Stu Whitley that a draft
 9 disclosure letter had been prepared, did it
 10 occur to you that the materials nevertheless
 11 might not have been disclosed?
 12 A Given the magnitude of the issue and the fact it
 13 had never been identified and there was
 14 reference to a draft letter, the possibility
 15 really wasn't entertained by me at the time.
 16 Q Okay. If I can just move now to a different
 17 area. This is what I am going to refer to as
 18 the pre DNA test period, the point after you
 19 filed your review up to the point that the
 20 mitochondrial DNA test results come back from
 21 the U.K. You discussed your involvement in the
 22 file at this point, it's pages 5 and 6 of the
 23 interview summary. You recall you talk about
 24 how a consensus emerged that the Department of
 25 Justice should fund the DNA testing. I'd just

Page 6004	<p>1 like to take you to some of the documents to 2 flush this out a little bit. If I can first 3 take you to tab 11, first document? 4 A Yes. 5 Q I'm sorry, tab 10? 6 A Is this a letter dated 7th of September 2001? 7 Q I'm sorry, the tab that has the handwritten 8 notes? 9 A Right. I have that at tab 10, okay. 10 Q The first question I have for you is just if you 11 are able to identify whose notes these are? 12 A I can't. I presume that those would be a police 13 officer's notes in relation to a meeting that 14 took place. 15 Q In any event, you recall this meeting that took 16 place on February 6, 2002? 17 A I do. 18 Q It was attended it appears by you and Rob 19 Finlayson, Chief of Police and a number of other 20 police officials. Would it be fair to say that 21 what emerged out of this meeting is some 22 scepticism as to whether the proposal that these 23 hairs be tested, whether it would be worthwhile? 24 A I think that's a fair description. 25 Q If you turn over two pages further, there's a</p>	Page 6006	<p>1 paying for the mitochondrial DNA testing? 2 A It does. As I say, I don't recollect that 3 meeting. I recollect certainly discussions 4 being had among more senior members of the 5 department itself. I recall in particular a 6 meeting with the assistant deputy and myself 7 where that was discussed and I think Bob 8 Morrison may have been involved in that. 9 Q Okay. So if we can just move forward in time 10 now. The hairs are sent to the U.K. for 11 mitochondrial DNA testing. And as I understand, 12 the test results come back in early December of 13 2002? 14 THE COMMISSIONER: Mr. Dawe, just a little bit 15 slower. 16 BY MR. DAWE: 17 Q My understanding is that at this point, the 18 focus really now shifts to dealing with the 19 section 696 application that everybody now 20 expects will be forthcoming in light of the test 21 results. As I understand from our interview, 22 you in particular get assigned the task of 23 managing the requests that are now being made 24 for disclosure? 25 A That's accurate.</p>
Page 6005	<p>1 memo from you dated February 20, 2002 to 2 Mr. Finlayson? 3 A Correct. 4 Q In the memo it appears you are summarizing the 5 use that was made by Mr. Dangerfield of the hair 6 evidence at the trial? 7 A That's right. 8 Q Following that, if you turn to the next page, 9 two pages further, there's some more notes and 10 it appears to be by the same person who did the 11 first set of notes of a meeting on February 12 22nd? 13 A Correct. 14 Q Again, do you recall that meeting? 15 A I don't recall that meeting, but -- 16 Q Not specifically? 17 A No. 18 Q If I can just take you to the bottom of that 19 first page, page 1230 down at the bottom corner, 20 it says. 21 "Regardless we have an obligation not as 22 insignificant as we thought at first 23 blush." 24 Does that accord, to your recollection, of the 25 consensus that was reached with respect to</p>	Page 6007	<p>1 Q And your involvement in this disclosure process 2 is set out at pages 6 to 8 of the interview 3 summary. If I can just take you just to one 4 document, if you turn to tab 12? 5 A Go ahead. 6 Q The very last document in the tab, it's a letter 7 from Rob Finlayson to Mr. Lockyer dated 8 February 18, 2003? 9 A Correct. 10 Q Second paragraph begins by saying, 11 "I also wish to confirm that Manitoba 12 Justice will co-operate with respect to all 13 requests for disclosure in regards to the 14 original investigation of the murder of 15 Perry Dean Harder." 16 Does that accord with your recollection of what 17 Crown's position was with respect to 18 disclosure? 19 A Well, I was copied on the letter but it was not 20 my understanding that anything that was asked 21 for would be provided, if I can put it that way. 22 Q That that was your understanding? 23 A That was not my understanding. 24 Q Perhaps you can just explain what your 25 understanding was, what position you took?</p>

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1 THE COMMISSIONER: I wonder, I'm not sure what
 2 the document is you are referring to, tab 12?
 3 MR. DAWE: It's the last page of tab 12. It's a
 4 letter dated February 18, 2003.
 5 THE COMMISSIONER: Just bear with me for a
 6 moment. All right. So it's the first sentence
 7 in the second paragraph.
 8 "I wish to confirm that Manitoba Justice
 9 will cooperate with respect to all requests
 10 for disclosure in regards to the original
 11 investigation,"
 12 et cetera, okay. And then I think the question
 13 was, was that your understanding?
 14 MR. DAWE: That's right.
 15 BY MR. DAWE:
 16 Q And the next question was what was your
 17 understanding? Perhaps you can explain.
 18 A My understanding in terms of what was discussed
 19 is that we would provide, with limited
 20 exceptions, what was on our file at that time
 21 and there were obviously things from my review
 22 that were missing from the file. Officers'
 23 notes would be a quick example that springs to
 24 mind. And around the time from probably 2001
 25 onwards, around that time, I had been involved

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1 in another prosecution involving a dated
 2 homicide and we had encountered all kinds of
 3 problems getting things such as officers' notes
 4 from retired officers.
 5 My understanding, the nature of it sprang
 6 from the fact that the Winnipeg Police Service
 7 did not have arrangement with their members back
 8 then, that the officer's notes were in fact the
 9 property of the WPS. And when they retired,
 10 they took these things with them. And in many
 11 cases, they disappeared or in some isolated
 12 cases the officers weren't willing to hand them
 13 over.
 14 So in terms of giving an undertaking that
 15 we would provide these things, through my
 16 involvement in this when I was consulted, I was
 17 urging strong caution on those sorts of things
 18 as well as some of the things that would be
 19 beyond the scope of what was in the file at the
 20 time.
 21 Q Right. So in terms of the documents that were
 22 in the file, you indicated there were some
 23 exceptions. Perhaps you can just indicate what
 24 the exceptions were of documents that were in
 25 the file that wouldn't be disclosed?

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1 A Well, this is jumping ahead to after all of the
 2 DNA testing, because for the most part, the
 3 documentation that's been filed shows most of
 4 the disclosure requests were held in abeyance
 5 until the results of the DNA testing came back.
 6 And that was pursuant to an agreement that had
 7 been worked out between the assistant deputy and
 8 representatives from AIDWYC.
 9 Q Right. What I'm now asking about is disclosure
 10 in the post-DNA phase after the test results
 11 have come back?
 12 A So when we're getting into 2003, this really
 13 goes to a meeting that I had with Mr. Libman,
 14 disclosing the Crown's files or earmarking it
 15 for disclosure. At that time, we were
 16 disclosing what we had in the files. We were
 17 essentially throwing them open with the
 18 exception of the internal correspondence file
 19 and my internal review at the time.
 20 Q This may not be a term that's in currency in
 21 Manitoba but certainly in Ontario, it's
 22 sometimes referred to of the Crown giving open
 23 box disclosure where the defence is allowed to
 24 come through, come in and sift through the
 25 Crown's files. Is that fair to characterize

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1 what happened here?
 2 A I think that's a fair description.
 3 Q And you will recall from looking at the book of
 4 documents, there are a number of documents that
 5 set out in some detail what the process was and
 6 they also deal with this dispute that arose
 7 in 2004 as to whether certain documents from the
 8 administrative file were not disclosed. If I
 9 can just ask you first of all what was the
 10 administrative file?
 11 A The administrative file was something that
 12 surfaced after I did my review in 2000 and 2001.
 13 I couldn't pinpoint the date but it was well in
 14 advance of the meeting that I had with
 15 Mr. Libman in 2003. And the administrative file
 16 was titled -- well, the document is in evidence.
 17 I don't have it in front of me. But it was in
 18 relation to the witnesses Zanidean/Gumieny. And
 19 it was I think documented to be highly
 20 confidential. And in that, there were documents
 21 that related to monies that were paid out to
 22 both of those witnesses. At the time I reviewed
 23 the file after it was given to me, the bulk of
 24 the documentation in the file related to
 25 Mr. Zanidean although there were some on the

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1 file in relation to Mr. Gumieny. It was more
 2 comprehensive as it related to Mr. Zanidean.
 3 MR. DAWE: If I can just have you,
 4 Mr. Registrar, show the witness Exhibit 30. I'm
 5 not sure which 30A, B or C this particular
 6 document is in?
 7 MR. PROBER: 30C.
 8 MR. DAWE: Thank you, Mr. Prober. I think it's
 9 tab 59.
 10 BY MR. DAWE:
 11 Q The cover of the file --
 12 A Yeah, the second page with the Department of
 13 Justice file cover with the heading "Strictly
 14 Confidential" see also 100 witness relocation
 15 and former protection. And it's labelled
 16 Gumieny John, Zanidean Reith and public
 17 prosecutions directors only.
 18 Q When this file first turned up, was it larger or
 19 smaller than those documents that are there now?
 20 A It would have been larger than the documents
 21 that were there now.
 22 Q I will perhaps maybe simplify it, explain what
 23 my understanding is from discussions with
 24 Mr. Olson. Apparently the documents in the
 25 file, most of them were produced as part of a

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1 main disclosure brief from the Department of
 2 Justice. And what was left over, there's some
 3 documents where Mr. Olson had some questions as
 4 to whether or not they had been already
 5 provided. They were disclosed separately. This
 6 is essentially the administrative file with all
 7 the documents that were previously disclosed
 8 taken out.
 9 If you can turn to tab 21 of your own book
 10 of documents.
 11 A Go ahead.
 12 Q If I can just take you five pages in, there is a
 13 memo dated November 9, 2004 from you to
 14 Mr. Finlayson?
 15 A Correct.
 16 Q This memo sets out your recollection of what
 17 happened with respect to the disclosure. I'll
 18 just ask you this. Is the memo accurate? Do
 19 you have anything to add to it?
 20 A No.
 21 Q Sorry, yes to the first, no to the second?
 22 A Yes to the first, no to the second.
 23 Q Thanks. Turning down to another matter. This
 24 is the issue of the production of the Winnipeg
 25 Police Harder homicide review. I have three

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1 main questions arising out of this. Before I
 2 ask them, I'd like to take you through some of
 3 the documents that bear on this. If I can take
 4 you first to tab 13?
 5 A Yes.
 6 Q It's a letter from Mr. Lockyer to Mr. Finlayson
 7 dated February 24, 2003?
 8 A Correct.
 9 Q Which refers to Mr. Finlayson's February 18th
 10 letter. And it goes on to say in the second
 11 paragraph that,
 12 "I note that your letter only refers to
 13 disclosure requests 'in regards to the
 14 original investigation of the murder of
 15 Perry Dean Harder.' I trust you do not
 16 mean this literally so as to exclude
 17 requests in regard to the post-conviction
 18 investigation conducted by the Winnipeg
 19 Police Service and Manitoba Justice in 1992
 20 - 1993."
 21 And following this, there's a long series
 22 of documents. I'll deal with the issue that
 23 arises as to whether or not police will or will
 24 not produce this report to the Department of
 25 Justice that you can, in turn, turn it over to

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1 Mr. Lockyer; is that fair?
 2 A Correct.
 3 Q If you turn to tab 14, first document, and I
 4 won't take you through this in detail. It's a
 5 letter from Mr. Lockyer to Bruce MacFarlane
 6 which he sets out in some length his argument
 7 for why the Department of Justice should compel
 8 the Winnipeg Police to turn over the 1993
 9 review?
 10 A Correct.
 11 Q And then there's another copy of the same
 12 letter. The next document after, this is now if
 13 you will look at the bottom right-hand corner,
 14 it's page 4325, it's about halfway through the
 15 tab?
 16 MS. CARSWELL: Sorry, what tab are you on?
 17 MR. DAWE: Tab 14, halfway through the tab, page
 18 4325.
 19 THE WITNESS: Where are you getting the numbers
 20 from, Mr. Dawe?
 21 BY MR. DAWE:
 22 Q Down at the bottom right-hand corner of the
 23 page, there's numbers in bold.
 24 A Yes, I have that.
 25 Q It's a letter dated April 11, 2003 from Chief

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1 Ewatski to Mr. Lockyer?
 2 A Correct.
 3 Q Second sentence of the second paragraph. It
 4 says.
 5 "Simply put the Winnipeg Police Service is
 6 prepared to cooperate in the process that's
 7 available to Mr. Driskell under section 696
 8 of the Criminal Code to review his
 9 conviction."
 10 A Yes.
 11 Q Have I read that correctly?
 12 A Yes.
 13 Q And the last document I will take you to, this
 14 is the second last document in the tab. It's
 15 the memo from Inspector McCorrister to you dated
 16 April 22nd?
 17 A Yes.
 18 Q If you can turn to page 3 of that document. The
 19 numbers are at the top of the page?
 20 A Yes.
 21 Q Last paragraph, Inspector McCorrister says.
 22 "With respect to the post conviction review
 23 of the case conducted by the Service in
 24 1993..."
 25 THE COMMISSIONER: Not too fast.

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1 BY MR. DAWE:
 2 Q "...Chief Jack Ewatski has stated that he is not
 3 willing to release all of the material in the
 4 review."
 5 And he goes on to say that they will be prepared
 6 to release edited versions. I understand that
 7 you proceeded to obtain edited copies; is that
 8 correct?
 9 A That's correct.
 10 MR. LOCKYER: Mr. Commissioner, can I just say
 11 something in that context. The edited review,
 12 the edited version, I don't think it's been
 13 filed with you.
 14 THE COMMISSIONER: I don't think it has.
 15 MR. LOCKYER: Pardon?
 16 THE COMMISSIONER: No, I don't think it has.
 17 MR. LOCKYER: And we can arrange to file it
 18 unless other counsel will simply agree that it
 19 was edited to the point of extinction. I think
 20 ultimately five pages of the whole thing, maybe
 21 six pages of the whole thing were provided. And
 22 I'm aware that you may think that an edited
 23 version may have had a substantial part of the
 24 contents of the review.
 25 It was provided to Ms. Duncan and all it

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1 contained in it were passages that referred to
 2 her, which were few and far between. And the
 3 essence of the report wasn't disclosed at all,
 4 not a sentence really of anything significant
 5 was disclosed.
 6 But if other counsel think there was
 7 something significant in that edited version,
 8 then perhaps we should file it. You're going to
 9 get a whole bunch of blank pages is what you're
 10 going to get. You're going to get about 100
 11 blank pages. Actually more than that, 117 blank
 12 pages.
 13 THE COMMISSIONER: I think Ms. Carswell has
 14 something to comment on.
 15 MS. CARSWELL: I think the document will speak
 16 for itself. Whether it's edited, as my learned
 17 friend puts it, to the point of extinction is
 18 apparent from the document and you will draw
 19 your own conclusions and everyone in the room
 20 can draw their own. I think the more important
 21 thing is to put the document in the context that
 22 it was supplied under an application under the
 23 Freedom of Information Privacy Protection Act
 24 and that release was then sanctioned by the
 25 Ombudsman of Manitoba and reviewed in additional

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1 material. The Chief spoke to this.
 2 The edited review is available in the
 3 material for all of us. It certainly can be
 4 filed. But for Mr. Lockyer to suggest that it
 5 was sort of part of a disclosure process, it was
 6 outside of that process and then ultimately
 7 provided.
 8 So if you put it into context, I think the
 9 document speaks for itself and I personally see
 10 no need to file it, but I don't object to it.
 11 MR. LOCKYER: If you're thinking that a large
 12 bulk of it and helpful parts of it were
 13 available, they weren't.
 14 THE COMMISSIONER: Forgive me, I wasn't thinking
 15 at all one way or another.
 16 MR. LOCKYER: Okay.
 17 THE COMMISSIONER: But I have not specifically
 18 seen it and so I will make a point of looking at
 19 it. It's in the disclosure material. I will
 20 make a point of looking at it.
 21 MR. LOCKYER: Okay. And then we'll have to file
 22 it as an exhibit.
 23 THE COMMISSIONER: Is that agreeable with
 24 everyone?
 25 MR. OLSON: Yes.

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1 MR. DAWE: Certainly my recollection when this
 2 issue was raised very early on, the
 3 understanding that I think was reached was that
 4 documents that were in the sort of bulk of
 5 material that hadn't been specifically made an
 6 exhibit but still something that could be
 7 referred to by the commission in preparing its
 8 report as long as everybody had appropriate
 9 notice.
 10 THE COMMISSIONER: I now have notice. Everyone
 11 has notice.
 12 BY MR. DAWE:
 13 Q Sorry, the last document I will take you to
 14 before I ask my questions is the last document
 15 at tab 14.
 16 A Yes.
 17 Q This is a letter that Mr. Lockyer writes to you
 18 dated April 28, 2003 which he refers to Chief
 19 Ewatski's April 11th letter. If you'd look at
 20 the last paragraph on the first page, Mr.
 21 Lockyer says,
 22 "Chief Ewatski has suggested that his
 23 position..."
 24 he's talking here about his position with
 25 respect to releasing the 1993 Winnipeg Police

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1 Harder homicide review,
 2 "...may change if Mr. Driskell commences a
 3 section 696.1 application to the Minister
 4 of Justice."
 5 A That's correct.
 6 Q And certainly based on my review of the
 7 documents, this seems, as I have read them, this
 8 seems to be the first suggestion that's made
 9 that the -- that once section 696.1 review is
 10 filed, the Winnipeg Police will produce a copy
 11 of the review to the federal Department of
 12 Justice.
 13 So my first question for you arising out of
 14 this is having reviewed these documents, does
 15 that assist you in recalling when you first
 16 became aware of the Winnipeg Police position
 17 that they would provide a copy of the review to
 18 the federal Department of Justice once a section
 19 696.1 application has been filed?
 20 A That sounds about right.
 21 Q My second question, you will recall that in the
 22 memo that you wrote after the fact in November
 23 of 2003, and that tab number is at tab 20. If I
 24 can take you to page 1121. It's the third page
 25 of the document. There's a duplication of

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1 pages. It's actually the second page of the
 2 memo, third page in, tab 20?
 3 A Okay.
 4 Q The top of the page. Do you have it?
 5 A Yes, I have that. Thank you.
 6 Q You say in your memo at the top of the page.
 7 "The police were not willing to provide the
 8 document..."
 9 that's the document being the Harder homicide
 10 review,
 11 "...to the Crown. I attempted to mediate
 12 so the process could proceed. And
 13 eventually it was agreed that once the
 14 accused filed a formal 696 application, a
 15 report would be supplied to the federal
 16 Justice Department."
 17 If I can just ask you to explain what you meant
 18 when you said you tried to mediate this issue?
 19 A Well, I wrote that in my memo of '03 and I think
 20 I repeated that in my interview that I had with
 21 commission counsel and I think it's perhaps an
 22 unfortunate turn of phrase. I'm not suggesting
 23 that I was dealing with the police executive in
 24 relation to disclosure of that document.
 25 However, I did continue to make inquiries. As

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1 far as I was concerned, we had a firm and
 2 unequivocal position from the police that it
 3 would simply not be handed over to Justice. And
 4 the position that representatives of AIDWYC were
 5 taking was that as already evidenced in the
 6 documentation you have taken me to, that the
 7 obligation for disclosure lay with the Crown and
 8 we recognize that. But we were really at an
 9 impasse given that the police weren't willing to
 10 provide that.
 11 I continued through my police contact which
 12 would have been John Burchill Sergeant John
 13 Burchill at the time to make inquiries as to the
 14 status of that to see if there was any movement.
 15 And I would have been made aware around that
 16 time in the documentation that you just referred
 17 to, that that was an accommodation that had been
 18 reached. I wasn't meaning to suggest that I was
 19 instrumental in any way in that and I think
 20 notwithstanding Mr. Lockyer's position, that he
 21 was going to deal with Justice as opposed to the
 22 police, I think he continued to advance his
 23 cause on both fronts.
 24 Q Just to be clear on this, when you say their
 25 position was they wouldn't turn it over to

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1 Justice, you mean Manitoba Justice?
 2 A Well, that was my understanding.
 3 Q As opposed to the federal Department of Justice?
 4 A No, to Manitoba Justice.
 5 Q As I recall from our interview, your position
 6 Manitoba Justice was taking with respect to the
 7 internal correspondence file is that those were
 8 documents that Manitoba Justice wouldn't produce
 9 directly to Mr. Driskell's counsel but would
 10 produce to the federal Department of Justice; is
 11 that fair?
 12 A Sorry, could you repeat that?
 13 Q Sorry, I think I mangled that. As I recall what
 14 you told us during the interview is that with
 15 respect to the Manitoba Justice internal
 16 correspondence file, the position Manitoba
 17 Justice was taking was that you would not
 18 disclose that directly to Mr. Lockyer at first
 19 instance but that once the 696.1 application was
 20 filed, you would turn the entire file over to
 21 the federal Department of Justice?
 22 A What we were hoping to do from the outset is
 23 simply turn everything over to Federal Justice,
 24 the criminal conviction review group, and have
 25 them deal with that. And representatives from

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1 AIDWYC were saying well, that's really not a
 2 palatable course of action for us because we
 3 have to perfect our application and we can't do
 4 that without having access to the file. And
 5 based on that, we agreed to cooperate in the
 6 manner that I've already described. But it was,
 7 as I have indicated in terms of the internal
 8 correspondence file, there were things in that
 9 file for my review of it back when I did my
 10 review which in no way would have related, in my
 11 view, to Mr. Driskell's cause in terms of the
 12 allegation of a wrongful conviction. And in the
 13 process itself, to go through there, and that as
 14 I have described it previously, the internal
 15 correspondence file is fairly voluminous, it
 16 would have necessitated an item by item review.
 17 And for us to do the process, we would have been
 18 forced to make a determination as to the
 19 appropriateness of disclosure. It would have
 20 been a daunting task and it would have required
 21 a thorough up-to-date comprehension of the law
 22 of Crown privilege and other things which I
 23 didn't have at the time and I didn't
 24 particularly have the time to conduct that
 25 review.

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1 So when I met in '03 with Mr. Libman, I
 2 simply said at this point, we're not handing
 3 that over and the internal review. Although
 4 from the outset, it was always Manitoba
 5 Justice's position that all of our materials
 6 would be photocopied lock, stock and barrel and
 7 go down to Justice. We were hoping to do that
 8 sooner rather than later but that's not what
 9 transpired.
 10 Q The third area, the third question I had
 11 relating to the Harder homicide review, as you
 12 may know from Mr. Olson, when Chief Ewatski
 13 testified at the inquiry last week, he
 14 indicated, and I'm paraphrasing here for the
 15 benefit of my friends, the transcript reference
 16 is volume 22, pages 5269 to 5283. But in
 17 essence what Chief Ewatski testified is that his
 18 refusal to provide a copy of the Harder homicide
 19 review to you was premised on his understanding
 20 that you were seeking the report only as a
 21 facilitator for Mr. Lockyer. That's the term he
 22 used. And what he said, this is a direct quote:
 23 "It certainly wasn't a request coming from
 24 Manitoba Justice asking specifically for a
 25 copy of that report for their purposes."

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1 He went on to suggest that had you received a
 2 request from the Crown, he might have dealt with
 3 it differently but that he didn't interpret your
 4 request as being a request that emanated from
 5 the Crown
 6 So several questions for you arising out of
 7 that. First is how would you characterize your
 8 own request? As you saw it, were you requesting
 9 the document on behalf of the Crown?
 10 A I was.
 11 Q And as one of the Crown attorneys who is now
 12 responsible for the file, did you have an
 13 independent interest in seeing the review to see
 14 what was in it?
 15 THE COMMISSIONER: I'm sorry, I didn't hear the
 16 question.
 17 BY MR. DAWE:
 18 Q Sorry, as one of the Crown attorneys who is now
 19 involved in the Driskell file, did Mr. Schille
 20 have an independent interest in seeing the
 21 review in order to know what was in it?
 22 A Well, the way that the document was described
 23 early on, if you go through the correspondence,
 24 there is Mr. Lockyer's letter 14th of February
 25 of '01 and there is a series of correspondence

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1 between the Chief of Police and Mr. Lockyer at
 2 that time. And in one of those letters, the
 3 Chief describes the homicide review as being
 4 initiated by information that came to light,
 5 post-conviction. So that description, short as
 6 it may be, is not something that would really
 7 spring to mind a conclusion that it wouldn't be
 8 relevant. And given what was going on, we were
 9 certainly interested as well in seeing what was
 10 in the full content of the document.

11 Q My next question is what was your understanding
 12 at the time this was all going on in the spring
 13 of 2003? How did you understand -- what was
 14 your understanding of the police position as --
 15 did you understand that they might disclose it
 16 to you if you requested it for your own
 17 purposes?

18 A Well, I didn't have that understanding and I
 19 certainly would not have accepted it on that
 20 basis, that Manitoba Justice could have it on
 21 the basis that it not be turned over. I suppose
 22 it's not inconceivable that there was nothing in
 23 the internal review that would trigger a
 24 disclosure obligation. But that's not
 25 necessarily how it appeared from the description

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1 of the document. And my last question then is
 2 ultimately you eventually do get a chance to see
 3 the review sometime later after the section
 4 696.1 application is filed and after it's been
 5 produced to Mr. Driskell's counsel? At that
 6 point when you finally did get the chance to
 7 read the review, did you find information in the
 8 review that would have triggered your
 9 Stinchcombe disclosure obligations if you had
 10 seen it back in the spring of 2003?

11 A Yes, and I think that's detailed to some extent
 12 in some of my correspondence has been filed.

13 Q And in particular, there's a memo that you write
 14 about this at tab 20. I don't need to take it
 15 to you but I'll just put it on the record.

16 Turning now to the last area I want to deal
 17 with, and that's the sequence of events that
 18 leads to your discovery in November of 2003 that
 19 contrary to what you believed previously, the
 20 Saskatchewan materials had not in fact been
 21 disclosed to the defence back in 1993. And this
 22 is discussed at pages 8 to 10 of your interview
 23 summary. And as noted in the summary, it's also
 24 dealt with in some detail in the interview that
 25 you gave to Dan Lett in December 2003. It's at

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1 tab 19. So it's already covered in some detail
 2 in the paper record. What I'd just like to ask
 3 you is if you can just briefly explain how it
 4 was you came to realize in November 2003 this
 5 material hadn't been disclosed?

6 A During the time that we were dealing with
 7 Mr. Driskell's request for disclosure from 2001
 8 onwards, given that I had already conducted a
 9 review, I was probably the person within the
 10 department that was most conversant with what
 11 was on the file because I had done the review.
 12 By the time we get to preparing for
 13 Mr. Driskell's bail review in November of 2003,
 14 it's at that point, I'm more than two years away
 15 from being fully conversant with the file,
 16 although I would certainly be the person in the
 17 department who is the most conversant with it.
 18 The time frame was that I received AIDWYC's
 19 material in support of his application for bail
 20 on a Friday. They were fairly voluminous. I
 21 took those materials home with me and started
 22 working on the Crown's position in relation to
 23 bail. And again --

24 Q Sorry, just to stop you there for a moment. You
 25 were actually the person who was assigned to

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1 deal with the bail hearings, that you were going
 2 to appear for the Crown?

3 A Sorry, I should have stated that. Yes, I was
 4 tasked to respond to the bail application. So
 5 what I was attempting to do over the weekend is
 6 immerse myself again in the file and become
 7 again fully conversant with the facts of the
 8 case in a way that I wasn't at that point. And
 9 there were a number of issues that had been
 10 raised at that time by AIDWYC that would, in
 11 their view, undermine the strength of the
 12 Crown's case. And I was attempting to go
 13 through those to respond item by item. Some, in
 14 my view, were more significant than others. But
 15 it's in the course of going through that process
 16 that I recognized that something that was
 17 glaringly absent was the fact that there had
 18 been delayed disclosure in relation to the
 19 Saskatchewan materials. And at that point, in
 20 very short order, and contingent from the
 21 Crown's office made their way over to the
 22 deputy's office to inform the deputy of what had
 23 happened in that same day the materials were
 24 forwarded to Mr. Lockyer on behalf of
 25 Mr. Driskell.

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1 MR. DAWE: Thank you very much, Mr. Schille,
 2 those are my questions.
 3 MR. LOCKYER: I'm happy to go next,
 4 Mr. Commissioner, if no one else wants to.
 5 THE COMMISSIONER: I don't think anybody is
 6 going to fight you on that.
 7 MR. LOCKYER: I haven't had a lot of fighting on
 8 that. It's a bit of a consensus on it.
 9 MR. LOCKYER: Mr. Commissioner, the main volume
 10 of our documents, I don't have copies for the
 11 press. I undertake to provide them. I do have
 12 them for all parties, yourself, the witness.
 13 THE COMMISSIONER: Thank you. That will be
 14 exhibit 49, Mr. Lockyer's documents.
 15 MR. ABRA: Sorry, what exhibit number, sir?
 16 THE COMMISSIONER: 49, Lockyer's document 3,
 17 witness Schille.
 18 MR. LIBMAN: Mr. Commissioner, I can tell my
 19 friends these copies were put on their chairs
 20 this morning.
 21 THE COMMISSIONER: All right. 49A will be the
 22 book of documents, 49B will be the additional
 23 documents. Actually, are there two packages of
 24 additional? Okay, 49A will be the book of
 25 documents, the large book of documents, the blue

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1 cover and then the sort of beige covered
 2 documents will be exhibit 49B. And they are
 3 referred to on the face as supplemental
 4 documents. And then 49C will be some pages, the
 5 first of which is a memo January 27, 1988 from
 6 Dangerfield to Miller. They will be 49C. There
 7 are actually about six or seven pages of those.
 8 And then there appears to be a paper written by
 9 the Deputy Minister of Justice, Bruce
 10 MacFarlane, the date of May 5, 2005 will be
 11 exhibit 49D.
 12 MR. LOCKYER: Mr. Commissioner, I'm not going to
 13 refer to C in questioning Mr. Schille. It was
 14 more simply -- it was actually a series of
 15 documents from another case where we see once
 16 again the same part is obtaining a preferred
 17 indictment on a really identical basis to
 18 Mr. Driskell's case. And it was just really for
 19 information purposes for systemic issues for the
 20 future. I wasn't going to question Mr. Schille
 21 about that material at all.
 22 MR. OLSON: Yes, Mr. Commissioner, I just rise
 23 to say that it's unfair to Mr. Schille, in my
 24 respectful submission, to put two volumes of
 25 documents that he wasn't even aware that he was

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1 going to be a witness here until a week ago and
 2 he certainly hasn't been conversant with the
 3 full disclosure of documents. I understood that
 4 all of the relevant materials to the application
 5 to have him called was put in in support of the
 6 application in Mr. Lockyer's written
 7 submissions. And in fairness, I haven't had an
 8 opportunity to go through this volume of
 9 additional documents with Mr. Schille and he
 10 certainly hasn't had an opportunity to review
 11 it.
 12 MR. LOCKYER: I've been doing this with every
 13 single witness up till now.
 14 MR. OLSON: He didn't know he was going to be a
 15 witness and, therefore, we certainly have not
 16 gone through materials.
 17 THE COMMISSIONER: I will certainly take that
 18 into consideration and, Mr. Schille, if you have
 19 some difficulty, you want to take some time to
 20 examine any document, feel absolutely free to do
 21 so if and when you are referred to it. And if
 22 you think that it would be appropriate to have a
 23 break for five minutes or half an hour or 45
 24 minutes, let me know. But I would suggest that
 25 you not do this at this time but wait until

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1 there is a specific reference. But I am
 2 cognizant of the fact that you have not been
 3 alerted specifically to some of these documents.
 4 MR. DAWE: Thank you.
 5 MR. LOCKYER: The majority of the documents were
 6 pulled from the materials that were filed with
 7 you anyway, Mr. Commissioner.
 8 THE COMMISSIONER: That's fine. I would say the
 9 same to any witness anyways.
 10 MR. LOCKYER: So C doesn't need to be C. It's
 11 more for informational purposes.
 12 THE COMMISSIONER: C will not be --
 13 MR. LOCKYER: But there is one other document we
 14 can make C instead and that's the report of The
 15 Centre of Forensic Sciences in Toronto.
 16 THE COMMISSIONER: 49C will be the report of the
 17 Centre of Forensic Sciences.
 18 (EXHIBIT 49A: Large book of documents,
 19 examination of Dale Schille)
 20 (EXHIBIT 49B: Book of Supplemental
 21 Documents, examination of Mr. Schille)
 22 (EXHIBIT 49C: Report of The Centre of
 23 Forensic Sciences in Toronto)
 24 (EXHIBIT 49D: Paper written by the Deputy
 25 Minister of Justice, Bruce MacFarlane, the

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1 date of May 5, 2005)

2 MR. LOCKYER: I found the MacFarlane documents a

3 couple of days ago, Mr. Commissioner, and I

4 called him up and I have his permission to file

5 them. So he gave me his consent.

6 THE COMMISSIONER: Okay, thank you.

7 MR. LOCKYER: And one other thing,

8 Mr. Commissioner, further to what you said on

9 Friday at one point during submissions to you,

10 I'm going to do my utmost to depersonalize

11 myself in this questioning of Mr. Schille by

12 referring to counsel to Mr. Driskell. Where it

13 says I, I might say we and so on and so forth.

14 THE COMMISSIONER: There will be many of us

15 watching.

16 MR. LOCKYER: Me depersonalize myself? Easy

17 thing to do.

18 BY MR. LOCKYER:

19 Q Mr. Schille, just by way of introduction, I may

20 be wrong but I sort of felt that when we were

21 considering, on Mr. Driskell's behalf, whether

22 we should argue you should be called as a

23 witness, we sort of felt, rightly or wrongly, it

24 was a choice between you or Mr. Finlayson and

25 ultimately chose you. And perhaps the reason

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1 why, and I want to ask you if you agree with

2 this, could you go to my friend's materials at

3 tab 19. And what you're going to run into there

4 is an interview that you and Mr. MacFarlane,

5 then the Deputy Attorney General, had with Dan

6 Lett of the Winnipeg Free Press on December 11th

7 of 2003. Do you remember that encounter?

8 A I do.

9 Q And if you go to page 2 of that, sir, you will

10 see Mr. MacFarlane describes your role. And

11 I'll ask you if you agree with it. You are

12 saying you didn't disagree with it at the time

13 you said it. He said in the middle of that

14 page.

15 "You're talking to the two right people on

16 this. I also wanted to add that on that in

17 terms of department's handling of the case,

18 Dale has been sort of the man handling this

19 case from the beginning."

20 And I think from the beginning, he obviously

21 means since 2000, right?

22 A Yes.

23 Q

24 "He has a detailed understanding of the

25 case and is intimately involved in many of

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1 the decisions. I've been intimately

2 involved in the non-case stuff and also on

3 some of the case stuff. You're looking at

4 the two key players. Rob Finlayson has

5 been involved in a general supervisory role

6 and Bob Morrison was drawn in on a couple

7 of points. For all intents and purposes

8 you're with the people who have been

9 running on this. And on both of those

10 issues, you've really outlined two points:

11 The Dangerfield memo and the withdraw of

12 counsel. I'd like to go through both in

13 detail."

14 Is that a fair summary, sir, of your role post

15 2000 by the Deputy Minister?

16 A Well, not to make too fine a distinction, but I

17 think an important distinction is to be made. I

18 certainly had the bulk of the involvement in

19 this matter and I was certainly the point man.

20 But it was the point man in terms of disclosure

21 in relation to this matter.

22 This matter has always been as one of the

23 first applications in the province of this kind.

24 It had policy ramifications. And in my

25 position, I am not a member of the senior

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1 management of prosecutions. So to say I was in

2 charge of the case, I would say is not accurate.

3 Because when I am in charge of a case, I

4 prosecute many matters, I make all of the

5 decisions in relation to that. And in relation

6 to this matter, all of the decisions were made

7 with my input but I wasn't making the decisions.

8 And the majority of those decisions involved the

9 most senior members of the department, of the

10 management, of prosecutions, that would be Rob

11 Finlayson and the deputy. The directors, for

12 the most part, weren't involved with the

13 exception of Don Slough who was, at the time, a

14 director. But he was brought into this from

15 time to time as he was in the capacity of acting

16 as assistant deputy in Mr. Finlayson's absence.

17 So that having been said, I would agree

18 with it generally. But in terms of being in

19 charge of the case, I was not because I was not

20 making the decisions in relation to the majority

21 of the issues that we were dealing with.

22 Q And your role began, as we've seen, in 2000 when

23 you were assigned to review the case; is that

24 right, sir?

25 A That's correct.

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1 Q And you were assigned to review it, as I
 2 understand it from your statement to commission
 3 counsel, because of the continuing media
 4 interest in it, and in particular, because of
 5 the requests that have been made in the previous
 6 years by Ms. Duncan and others with respect to
 7 the case; is that right?
 8 A Well, I think the most important point was that
 9 the department had indicated they would do a
 10 review at some point. And I think after
 11 Mr. MacFarlane became the deputy and all of this
 12 was coming to the fore again, it was determined
 13 that the department had never followed through
 14 and done any sort of a review. So I think that
 15 was the main factor. But all of the factors you
 16 have alluded to certainly would have been
 17 considerations I would imagine at the time.
 18 Q Page 2 of your statement, sir, tab 1 of my
 19 friend's materials, about eight lines down, you
 20 say --
 21 A Tab 1?
 22 Q Yes, this is your statement to commission
 23 counsel, page 2, eight lines down?
 24 A Yes.
 25 Q "Finlayson told Schille that he wanted the.

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1 File reviewed because of media interest in
 2 the case and Janie Duncan's letters. He
 3 explained that Manitoba Justice had
 4 committed to doing a file review some time
 5 previously, but that the Deputy learned
 6 that no such review had ever been done."
 7 And then you say that consideration had been
 8 given to using Mr. Abra as outside counsel but
 9 ultimately you were assigned; is that right?
 10 A That's correct.
 11 Q In fact we have seen, and I think we might refer
 12 to it again briefly, that in fact there was a
 13 file review done supposedly by Mr. Miller back
 14 in 1993. Were you aware of that?
 15 A No.
 16 Q And then a subsequent one done by Mr. Finlayson
 17 in 1997, which presumably you would have seen in
 18 the file when you went through it?
 19 A I don't recall that. But if it was in the file,
 20 I would have seen it.
 21 Q I'll show that to you as we go along, sir. It's
 22 a point I'm going to come back to later. I'm
 23 just more interested in your understanding of
 24 why you were doing your review in 2000.
 25 And of course the media interest in Janie

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1 Duncan's letters were focused on their claims or
 2 beliefs, perhaps it's not necessarily true, the
 3 media, their beliefs as such, the concerns where
 4 the media were concerned and the beliefs where
 5 Ms. Duncan was concerned that Mr. Driskell had
 6 been convicted of a crime that he hadn't
 7 committed?
 8 A That's my recollection.
 9 Q So that was obviously your primary or one of
 10 your primary concerns when you did your review
 11 in 2000?
 12 A No, I wouldn't agree with that.
 13 Q You wouldn't?
 14 A No.
 15 Q You weren't focused on the issue of whether
 16 perhaps an innocent man had been convicted of a
 17 crime in 2000?
 18 A That was certainly one of the issues I was
 19 focusing on but I took your question to be
 20 asking whether or not I was focused on
 21 Ms. Duncan's concerns.
 22 Q No, you misunderstood the question.
 23 A Okay. That was a concern.
 24 Q Whether an innocent man had been convicted of a
 25 crime he hadn't committed? That was one of your

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1 concerns?
 2 A Yes.
 3 Q If not your primary concern in 2000, I would
 4 think, in 2000. I would hope. Maybe I'm wrong.
 5 A That was a question?
 6 Q Yes. I would hope. Am I right?
 7 A Yes.
 8 Q Good, thank you. If we then go to the review,
 9 sir, at tab 2. If you look at the bottom, and
 10 I'm still in the same book, I'll tell you if I
 11 move out of it. If you look at page 2, you are
 12 making a list of materials that you reviewed.
 13 And at the top of page 3, you refer specifically
 14 to internal correspondence. Do you see that?
 15 A I see that.
 16 Q And you seem to discriminate that from
 17 correspondence between Manitoba Justice and
 18 Saskatchewan Justice?
 19 A I do.
 20 Q So presumably it's a different type of
 21 correspondence. Is it in the internal
 22 correspondence file or not?
 23 A It was in the internal correspondence file.
 24 Q But you immediately saw the difference between
 25 the two things?

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1 A Well, I think if anyone looking at that saw
 2 internal correspondence, they would take that to
 3 mean interdepartmental within the province. And
 4 there was some correspondence that was not
 5 interdepartmental. So that's the reason I made
 6 the distinction.
 7 Q And of course, the correspondence between
 8 Manitoba Justice and Saskatchewan Justice is the
 9 '92/'93 correspondence that's played such a big
 10 role in this inquiry?
 11 A I don't recall if there was others but it
 12 certainly included those letters which I would
 13 call the Quinney letters.
 14 Q I think I'm right in saying that you got '92 and
 15 '93 and then you do have at least one post '93
 16 letter from Mr. Quinney in '95 in reference to
 17 Janie Duncan's request?
 18 A I'm not conversant with the file to that extent.
 19 I wouldn't disagree with that suggestion.
 20 Q And then you say, if you look down a few lines,
 21 sir.
 22 "The police officer's notes were not on
 23 file at the time of the review, otherwise
 24 the file appeared to be intact and
 25 well-organized."

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1 file? Is that what you're saying?
 2 A That's correct.
 3 Q You don't say that, you just say the file which
 4 the reader might assume would include all the
 5 materials that you just listed as being in the
 6 file. If you look back a page, you say.
 7 "The file contained the police report
 8 consisting of..."
 9 and then you proceed to list all the items
 10 including internal correspondence. Do you see
 11 that?
 12 A I see that.
 13 Q Nevertheless, you do say now there's no
 14 reference to it in your 2000 report that the
 15 correspondence file was in disorder; is that
 16 right?
 17 A It was.
 18 Q What does that mean, it was out of order? Is
 19 that what you're saying? It wasn't in
 20 chronological?
 21 A All of the materials in it weren't on the brads
 22 and it was not in chronological order
 23 whatsoever.
 24 Q I'm not sure why that would cause you to say to
 25 yourself well then, I can just assume that a key

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1 Do you see that?
 2 A That's correct.
 3 Q And I have to point out to you, sir, that in
 4 your statement at page 4, and I think my friend
 5 has made some reference to this this morning as
 6 well, you say that in explaining why you would
 7 have assumed that Brodsky had got the
 8 Saskatchewan correspondence disclosed to him,
 9 you said at the top of 4,
 10 "The absence of a letter to Brodsky in the
 11 file confirming the disclosure of this
 12 material did not trouble Schille given the
 13 poor condition of the correspondence file
 14 and the fact that other material Schille
 15 expected to find were not there such as
 16 officer's notes."
 17 And if you go back to your review, sir, your
 18 only comment about the condition of the file is
 19 that it appeared to be intact and
 20 well-organized; fair?
 21 A I was referring to the prosecution file and I
 22 wouldn't, in using that terminology, be
 23 referring to the internal correspondence.
 24 Q Sorry, when you use the word "the file" at page
 25 3 of your report, you meant the prosecution

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1 letter to Brodsky is missing. I don't quite
 2 follow that?
 3 A Well, that wasn't one of the material
 4 considerations, that was certainly
 5 consideration. But my --
 6 Q I don't understand what you just said. Can you
 7 explain that? I don't know what you meant.
 8 A In reaching the conclusion that I did that the
 9 material had been sent, it was based in part on
 10 the state of the file, that that was very much a
 11 secondary consideration. And two, the
 12 correspondence which was actually still on the
 13 file.
 14 Q But there was no other obvious correspondence
 15 that you were missing, am I right, except this
 16 one key piece of correspondence?
 17 A I would have no way of knowing if correspondence
 18 was missing.
 19 Q Well, you could tell from your review of the
 20 correspondence file that is supposedly a letter
 21 that had gone out to Brodsky in 1993 was
 22 missing. You knew that wasn't there?
 23 A That's correct.
 24 Q Even though you had every reason to think it
 25 ought to be there. Is there any other item of

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1 correspondence that had occurred to you at the
 2 time was missing, apart from that key document?
 3 A From the correspondence file, there is nothing
 4 from the correspondence file. As I state from
 5 the file as a whole, there was certainly things
 6 missing.
 7 Q That you can remember of significance?
 8 A Well, officer's notes would be a major example
 9 of that.
 10 Q Okay. I don't think of that as correspondence.
 11 Officer's notes, I don't know when you started,
 12 I forget when you started practising law. Were
 13 you a pre-Stinchcombe lawyer?
 14 A Yes.
 15 Q So you would have known that pre-Stinchcombe
 16 would be I would imagine at that time from a
 17 different province. Pre-Stinchcombe officer's
 18 notes were not routinely disclosed to Crowns or
 19 defence. It was post-Stinchcombe that happened?
 20 A I was aware of that.
 21 Q So it wouldn't have surprised you to see police
 22 notes weren't in the file given this was a
 23 pre-Stinchcombe trial?
 24 A Well, given my review of the transcript, it
 25 appeared that Mr. Brodsky did have the notes.

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1 As I say, there wasn't an inventory of
 2 disclosure on there. So I couldn't say
 3 conclusively, and I say that in my report. But
 4 given that Mr. Brodsky was cross-examining some
 5 of the officers on the notes, I drew the
 6 inference that he had at least some of the notes
 7 relating to some of the officers that he was
 8 cross-examining.
 9 Q I don't recall him cross-examining officers on
 10 their notes at all let alone in a way that would
 11 lead to that inference, but you seem to remember
 12 that? There was very little police evidence
 13 called at all at the trial actually?
 14 A Well, there were police officers called. I
 15 remember that specifically.
 16 Q I say I'm not denying there were, there weren't
 17 many. It wasn't a police-oriented trial so to
 18 speak?
 19 A No, that's correct.
 20 Q Anyway, that's your best explanation that you
 21 gave to commission counsel, the absence of the
 22 police notes from the file and the disorder you
 23 say of the correspondence file; is that right?
 24 A As I have indicated to you already, that was
 25 very much a secondary consideration. My primary

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1 consideration in arriving at the conclusion that
 2 I did was the existing correspondence that was
 3 still on the file.
 4 Q Where there seemed to be a suggestion that the
 5 items should be disclosed to Mr. Brodsky; is
 6 that what you mean?
 7 A That's correct. And also not only that it
 8 should be disclosed but they had drafted a
 9 letter that was going out to Mr. Brodsky.
 10 Q Well, they said they had. The draft wasn't in
 11 there?
 12 A Correct. But there was certainly indication
 13 that had been drafted and was going to be sent
 14 out.
 15 Q Because in reviewing the file back in 2000, it
 16 would surely had been apparent to you the
 17 significance of the Saskatchewan correspondence?
 18 A Well, it was immediately apparent to me.
 19 Q Fair enough.
 20 A And in support of the conclusion that I made,
 21 given the magnitude of the issue, I could not
 22 conceive that that would not have been done
 23 given the correspondence that was still on the
 24 file.
 25 Q You also had in the file, sir, although I must

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1 say in the review that you wrote, I don't fully
 2 understand what you're saying. If you go to
 3 page 16, would you, under the heading
 4 "Disclosure." So we are at tab 2 again. You
 5 say under the heading "Disclosure," do you see
 6 where I am?
 7 A If I can just have a moment.
 8 Q I'm watching. I'm not going to ask questions
 9 until I can see you've got it.
 10 A Page 16, right.
 11 Q Yes. You start by saying.
 12 "There is no record in the prosecution file
 13 of what particulars were provided to the
 14 defence."
 15 But then at the bottom of the same page, you
 16 say,
 17 "The file does contain correspondence in
 18 which the defence requests dozens of
 19 additional items of disclosure together
 20 with the Crown response listed item by
 21 item."
 22 So you did have access to a number of letters
 23 going to and fro that we have seen a great deal
 24 of at this inquiry from Mr. Brodsky to
 25 Mr. Dangerfield and/or Mr. Lawlor and their

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1 responses; is that right?
 2 A Correct.
 3 Q So you knew then that one of the things that
 4 Mr. Brodsky was particularly interested in was
 5 information about Zanidean in terms of potential
 6 immunity from prosecution and about Mr. Zanidean
 7 in terms of any consideration that had been
 8 given to him for the giving of his testimony; is
 9 that right?
 10 A I don't recall that specifically at this point
 11 in time. But no doubt it was in there.
 12 Q It was. It was in his letters and we've seen it
 13 at this inquiry a lot. So you would have read
 14 those letters and appreciated how Mr. Brodsky
 15 saw this as an important matter at the time?
 16 A At the time, I probably would have, yes.
 17 Q Yes, fair enough. And then at page 17, sir, you
 18 make one reference to what came out of the
 19 Saskatchewan material. That is a reference to
 20 the motivation for Mr. Zanidean having burnt
 21 down the house?
 22 A That's correct.
 23 Q Do you see that?
 24 A Yes.
 25 Q And then you say.

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1 "The new information was disclosed to the
 2 accused's counsel after the trial."
 3 Do you see that?
 4 A I see that.
 5 Q And that presumably is a statement based on your
 6 assumption that the draft letter had turned into
 7 a real letter that had gone to Mr. Brodsky?
 8 A Correct.
 9 Q I see. That is clearly, what it seems to me
 10 what you're saying there on page 17, is a direct
 11 reference, perhaps an indirect reference to the
 12 Saskatchewan letters; am I right?
 13 A That's correct.
 14 Q But for some reason in this review, sir, you do
 15 not make reference to the other aspects of the
 16 Saskatchewan letters. You don't make reference
 17 to either Mr. Zanidean's threats to go to the
 18 media that are reported in the Saskatchewan
 19 correspondence, which I can take you to if you'd
 20 like but we are all very familiar with them and
 21 I suspect you are, too?
 22 A I am as well, yes.
 23 Q And also you don't make any reference to the
 24 suggestion by Mr. Quinney in his correspondence
 25 that at the very least, Zanidean thought he got

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1 immunity from the arson charges in Swift
 2 Current, whether or not it had actually been to
 3 him by anyone?
 4 A No, I don't refer to those aspects of the
 5 correspondence.
 6 Q You didn't think they were significant enough to
 7 refer to at the time?
 8 A What I was doing was flagging the correspondence
 9 itself by this reference.
 10 Q I'm sorry?
 11 A I was flagging the correspondence by this
 12 reference.
 13 Q No, you were. But I'm wondering why you only
 14 considered in your review the one aspect of that
 15 material which might be viewed by some as the
 16 least significant of the three items in the
 17 material as opposed to the other two items which
 18 one might consider to be more significant?
 19 A Well, in relation to my task in terms of
 20 assessing the evidence at this point,
 21 Mr. Brodsky's claim, as I outlined at the
 22 beginning of the review, was that the evidence
 23 did not support a conviction. And the fact that
 24 Mr. Zanidean may have perjured himself, to my
 25 mind, was the most significant of the three

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1 points that are raised in that letter.
 2 I would agree that in retrospect, the fact
 3 that he threatened to recant probably bore
 4 mention as well as the fact that Mr. Zanidean
 5 thought that he had an immunity deal. But in
 6 terms of the immunity deal of the three points,
 7 I saw that at the time, it struck me as being
 8 the least significant given the level of
 9 disagreement among the two respective police
 10 agencies involved.
 11 Q If you look at page 9 of your statement, sir, to
 12 commission counsel, you provide a further
 13 explanation as to why you didn't appreciate
 14 sooner that Mr. Driskell's counsel had never
 15 received the Saskatchewan material. You suggest
 16 at page 9, tab 1 in other words, starting at the
 17 top,
 18 "As noted above, when Schille reviewed the
 19 Driskell file in 2000 and saw Miller's
 20 April 19, 1993 memo to Whitley he had
 21 assumed that the Saskatchewan material had
 22 been disclosed. The fact that Brodsky had
 23 not brought an application to reopen the
 24 appeal and adduce the Saskatchewan material
 25 as fresh evidence did not cause Schille to

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1 question this assumption. Brodsky would
 2 have known from Driskell that Zanidean's
 3 evidence regarding the arson was false, and
 4 while Brodsky would not have had the
 5 independent evidence contradicting Zanidean
 6 that was in the Saskatchewan file, Schille
 7 thought that Brodsky might have concluded
 8 that he could not meet the 'due diligence'
 9 fresh evidence threshold since (as far as
 10 Schille knew) Brodsky had not actively
 11 pursued this material prior to trial."
 12 I must say I don't understand what you're saying
 13 there, sir. Let me explain why I don't
 14 understand. First of all, you have seen
 15 Brodsky's letters to Manitoba Justice back in
 16 '91, maybe even as far back as '90. I guess
 17 '91. And how Brodsky could have met the due
 18 diligence threshold regarding material that
 19 wasn't even available prior to trial but only
 20 became available through Saskatchewan after
 21 trial, I don't understand what you're saying,
 22 how Brodsky's failure to raise it at the appeal
 23 could draw you to conclude that he hadn't done
 24 it because of a failure to exercise due
 25 diligence.

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1 A Well, at the time that I authored my report in
 2 terms of -- and looked at that, I was aware the
 3 Saskatchewan correspondence includes a
 4 reference, and Mr. Driskell went in and made his
 5 statement in relation to the Swift Current
 6 arson, it's contained in the correspondence
 7 itself, that that was with Mr. Brodsky's
 8 blessing. So presumably, Mr. Brodsky was well
 9 aware of the fact, at least in relation to the
 10 arson, that the motive for the arson was profit,
 11 not revenge. And that Mr. Zanidean's sister's
 12 house was actually insured. The insurance
 13 hadn't lapsed as Mr. Zanidean was indicating in
 14 his evidence. And in terms of being made aware
 15 of that later, I considered that might be
 16 something of an impediment to later attempt to
 17 reopen and describe that as fresh evidence that
 18 was not otherwise available.
 19 Q Sorry, so does this statement of yours to
 20 commission counsel at the top of page 9 relate
 21 exclusively to that one issue in the
 22 Saskatchewan material?
 23 A It does.
 24 Q It doesn't include the issues of immunity?
 25 You're not suggesting immunity or that you have

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1 justified in your mind that he must have known
 2 about the immunity issues and the recantation
 3 issues, if I can use that word as a quick
 4 summary? You didn't conclude that he must have
 5 known about those issues and his failure to
 6 raise them at the Court of Appeal level could be
 7 accountable to his lack of due diligence?
 8 A No.
 9 Q It wouldn't make any sense to me. And I imagine
 10 maybe when you spoke to commission counsel you
 11 didn't know this because a long time had passed.
 12 But back in 2000, you would have read the trial
 13 transcripts, correct?
 14 A I did read the trial transcripts.
 15 Q And you would have then known that Mr. Brodsky
 16 in fact had challenged Mr. Zanidean on the issue
 17 of motivation for the setting of the fire?
 18 A No, I recall that.
 19 Q Right. Now, until you came to the stand today,
 20 sir, our knowledge of what the ins and outs of
 21 what was going on in Manitoba Justice about the
 22 Saskatchewan correspondence, that has sort of
 23 come to a bit of an end in 1993, there has been
 24 some reference to what happened thereafter. I
 25 want to take you through a little bit of what

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1 happened in between '93 and 2000 when you came
 2 on the scene which is when Mr. Finlayson started
 3 to get involved in this file. You knew he got
 4 involved in the file in that period, right?
 5 A I assume he would have in the capacity he was
 6 in, yes.
 7 Q And if you look at 49B, sir, it's the buff
 8 coloured material, you will see correspondence
 9 from Janie Duncan. And I have only produced one
 10 letter in this regard but there are four or five
 11 letters from her, if not more than that, dealing
 12 with the Quinney issue, if I can call it that.
 13 And this March 20th letter is really the last
 14 substantive letter that she wrote that I want to
 15 refer to. And you will see that. And this
 16 would have been in the file presumably when you
 17 looked at it in 2000?
 18 A It was there.
 19 Q March 20th of '95, she's writing to
 20 Mr. Finlayson and she's saying, second
 21 paragraph,
 22 "Based on our information it would appear
 23 Mr. Bruce Miller is covering up a deal.
 24 Ray Zanidean was offered immunity by
 25 Manitoba Justice in return for his

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1 testimony against Jim Driskell."
 2 She then proceeds to recite her evidence for
 3 that claim. Do you see that on the next
 4 paragraph? I wasn't going to read it.
 5 A I see that, right.
 6 Q And she's done that, I can tell you, in some
 7 previous letters that were introduced through
 8 Mr. Whitley when he was a witness here. And she
 9 makes direct reference to Mr. Quinney by name as
 10 to how she spoke to him and indeed there was
 11 some correspondence between her and Mr. Quinney
 12 which Mr. Quinney in turn had forwarded to
 13 Mr. Finlayson. And that's all in the materials,
 14 all right? So Mr. Quinney had sent to
 15 Mr. Finlayson his exchange of correspondence
 16 with Ms. Duncan wherein she had tried to
 17 encapsulate a phone conversation she had had
 18 with him. If you can just accept that as a
 19 fact?
 20 A Yes.
 21 Q You may even remember it. And if you can move
 22 on in the same set of documents, March 28th, we
 23 have Mr. Lerner responding to her letter of
 24 March 20th in which he says.
 25 "...I would simply repeat the advice

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1 offered to you by Mr. Finlayson in his
 2 letter of March 9, 1995,"
 3 which I haven't produced to you,
 4 "...we would encourage you to forward the
 5 specifics of any allegations of misconduct
 6 so that the appropriate enquiries can be
 7 made."
 8 Turning to the next document. Janie Duncan is
 9 not to be put off at April 24th of '95. She
 10 writes again to Mr. Finlayson referring to a
 11 letter of March 20th saying I want a reply in
 12 essence. Do you see that?
 13 A I see that.
 14 Q Now, the next document hasn't been referred to
 15 up till now, sir, and I appreciate this is
 16 before you are on the case, but it seems to me
 17 you are probably the best person to raise this
 18 with.
 19 On May 4th of 1995, it would seem that
 20 Mr. Finlayson called Mr. Quinney in
 21 Saskatchewan. And what you're looking at here
 22 is Mr. Quinney's notes of that conversation.
 23 A Sorry, I don't think I have that, Mr. Lockyer.
 24 Q Look at the handwritten notes. Just turn on a
 25 few pages and you'll run into two pages of

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1 handwritten notes. Keep going forwards.
 2 A Oh, I have that.
 3 Q Right. What you're looking at here, sir, is
 4 Mr. Quinney's notes of his conversation with
 5 Mr. Finlayson on May 4th of 1995. And this is
 6 as a consequence, as we'll see, of Ms. Duncan's
 7 request. I thought it would be helpful if we
 8 just read through this document as recorded by
 9 Mr. Quinney, who incidentally is now deceased.
 10 What Mr. Quinney recorded is as follows:
 11 "Spoke with Rob Finlayson who is acting
 12 director of Public Prosecutions Manitoba.
 13 Indicates..."
 14 meaning Finlayson indicates,
 15 "...Janie Duncan private investigator is
 16 making all kinds of allegations on the
 17 Driskell case."
 18 And I'm going to put the he's into names
 19 sometimes.
 20 "Finlayson wanted to know from me, Quinney,
 21 about prior activities I might have had
 22 with Bruce Miller. I told Finlayson about
 23 my visit from Duncan and how I had to ask
 24 her to leave my office. I told
 25 Finlayson..."

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1 I think that's "I had not" although it looks
 2 like "h/m", I'm going to read it as,
 3 "...had not reviewed file for some time but
 4 recalled police RCMP had asked us about
 5 charges versus Ray Zanidean. We had
 6 concluded that we could not proceed against
 7 him because either the Winnipeg City Police
 8 or the RCMP had improperly granted him
 9 immunity on the Swift Current arson charge
 10 and we would, should charges be brought,
 11 face a successful motion for abuse of
 12 process."
 13 So you see he's sort of going through, to some
 14 extent, the content of his letters. Although
 15 it's interesting when he says either the
 16 Winnipeg City Police or the RCMP had improperly
 17 granted him immunity. That may be a slight
 18 quirk on the content of his letters. Carrying
 19 on.
 20 "We could not go against Driskell because
 21 he had been granted immunity by police.
 22 That we thought police investigation
 23 established Driskell's version of the trip
 24 to Swift Current to burn down Zanidean's
 25 sister's house was correct and Zanidean's

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1 version as apparently told on Driskell's
 2 trial was probably not. That I wrote Bruce
 3 Miller advising him as above and suggesting
 4 that he immediately disclose this to
 5 defence counsel to Driskell. That I either
 6 received a letter or call from Bruce Miller
 7 asking for supporting evidence confirming
 8 Driskell's version and it was sent. That I
 9 had taken position all along with Duncan
 10 that we do not provide information on
 11 prosecution files to anyone including
 12 private investigators.
 13 I advised Finlayson could tell Duncan that
 14 I had never gone to Winnipeg or Bruce here
 15 to discuss granting immunity for Zanidean."
 16 If I can interpolate, that arises out of
 17 suggestion in some of Ms. Duncan's letters. She
 18 had come to believe that either Mr. Miller had
 19 gone to Saskatchewan or vice versa for actual
 20 meeting, all right.
 21 Going back to the notes,
 22 "And that we never had made a decision re
 23 immunity together. And that in reality,
 24 the immunity Zanidean obtained came
 25 improperly from either Winnipeg City Police

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1 or RCMP. Finlayson indicated if any
 2 developments, he would let me know.
 3 May 4/95, Richard Quinney."
 4 So having gone through that, sir, it would be
 5 fair to say, would it not, that Mr. Finlayson
 6 has in essence heard from the horse's mouth, so
 7 to speak, once again the essential contents of
 8 the Saskatchewan letters of '92, '93. And
 9 indeed is reminded -- I mean assuming Quinney
 10 has got it right, and one would think he did --
 11 he is even being reminded that Quinney had
 12 suggested there be immediate disclosure to the
 13 defence counsel to Driskell, one might have
 14 hoped. Do you think it's fair to say that that
 15 conversation could have inspired Mr. Finlayson
 16 to finally do what hadn't yet been done?
 17 A In fairness, Mr. Lockyer, I think that that's a
 18 question that would have more appropriately been
 19 asked of Mr. Finlayson. I think --
 20 Q I've only got one of you, sir. I suggest --
 21 MR. OLSON: Let him answer the question. You
 22 asked him and he's answering it.
 23 THE WITNESS: I think that the letter speaks for
 24 itself, assuming it's accurate.
 25

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1 BY MR. LOCKYER:
 2 Q The notes, it's not a letter.
 3 A The notes.
 4 Q The notes of the phone conversation. Because
 5 when we turn the page, sir, and you likely would
 6 have seen this or would have seen this document,
 7 the May 9th, '95 letter, which is written five
 8 days later to Ms. Duncan in response to, if we
 9 go back to it, her March 20, '95 letter, we'll
 10 see that it might be fair to say Mr. Finlayson
 11 does not give a fulsome account of what he's
 12 just been told by Mr. Quinney. Mr. Finlayson,
 13 and you would have seen this in the file, sir,
 14 wrote on May 9th of '95 to Ms. Duncan.
 15 "I have had the opportunity of speaking to
 16 Mr. Richard Quinney who, as I understand,
 17 was the Crown attorney who refused to
 18 authorize a criminal charge of arson
 19 against Mr. Zanidean in Swift Current,
 20 Saskatchewan. Mr. Quinney informs me that
 21 he made his decision after consultation
 22 with the police but before he had any
 23 discussions with Mr. Bruce Miller about
 24 this matter. In fact, according to
 25 Mr. Quinney, he did not speak to Mr. Miller

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1 until after Mr. Quinney decided that he
 2 could not authorize a criminal charge for
 3 arson. Given Mr. Quinney's explanation, I
 4 am at a loss as to what, if anything,
 5 Mr. Bruce Miller covered up in regards to
 6 this matter or for that matter what I can
 7 do assist you further."
 8 I mean really Mr. Finlayson, it might fairly
 9 been said, has missed a golden opportunity
 10 there, hasn't he, sir? He hasn't related the
 11 conversation with Mr. Quinney where it matters.
 12 He hasn't related the contents of the letters of
 13 '92, '93 to Ms. Duncan. Really, just taking
 14 into account the letters of '92, '93, sir, and
 15 you've had a chance to read this in 2000, this
 16 letter. You've certainly had those letters
 17 then, the '92, '93 letters.
 18 A Mr. Lockyer, I haven't been through the
 19 correspondence file since 2003 when I was
 20 starting to get into the file to review it, to
 21 respond to Mr. Driskell's bail application. So
 22 if you're saying that the source of these
 23 documents that have just been produced to me
 24 this morning is the correspondence file, I'm not
 25 going to disagree with you, but I do not

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1 recollect seeing these documents at this point
 2 in time.
 3 Q I'm sorry, I think you're misunderstanding me,
 4 sir. I'm now saying when you had the file in
 5 2000, you had the benefit of the documents at
 6 tab 5 of commission counsel's book, which is the
 7 Saskatchewan letters?
 8 A Correct, Mr. Lockyer.
 9 Q Right. That was in my question.
 10 A Yes.
 11 Q You obviously did not have the benefit of
 12 Quinney's notes of his conversation with
 13 Finlayson which are largely repetitive of the
 14 letters of '92, '93, right?
 15 A Well these have been produced to me,
 16 Mr. Lockyer. I'm not sure what the source of
 17 these documents are, if they were actually in
 18 the correspondence file or the source of
 19 Mr. Quinney's notes is elsewhere.
 20 Q You're off on a track, sir, that you don't need
 21 to be off, all right. I'm suggesting to you,
 22 sir, that in 2000, you had in the file the
 23 documents in tab 5 of commission counsel's
 24 collection of materials; am I right?
 25 A I agree with that.

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1 Q You also had in the file the correspondence
 2 going to and fro with Ms. Duncan; am I right?
 3 A It was on there.
 4 Q From your knowledge, sir, in 2000 when you
 5 reviewed the file, did you appreciate that the
 6 May 9th, '95 letter of Mr. Finlayson to
 7 Ms. Duncan, based on your knowledge of the '92,
 8 '93 Saskatchewan correspondence that you also
 9 had in the file might be fairly described as
 10 leading Ms. Duncan up the garden path?
 11 A Well, Mr. Lockyer, the Janie Duncan
 12 correspondence was on the file and there was a
 13 significant volume of correspondence from
 14 Ms. Duncan on the file. As I have indicated to
 15 you that the file was not in chronological
 16 order, I recall one of the documents of
 17 Ms. Duncan. I don't recall this document. One
 18 of the documents -- there are a series of
 19 correspondence that I did look at concerning
 20 Ms. Duncan and Ms. Duncan was writing the
 21 Department of Justice to indicate, through her
 22 investigation, she had located the true killer.
 23 And at that point, some representative from our
 24 department asked her to kindly pass the name
 25 along so we can take appropriate action and she

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1 declined to do so. And quite candidly, I lost
 2 interest in reviewing her correspondence in any
 3 depth although, if you say this was on there, I
 4 would not disagree with that. I don't recall
 5 seeing the document, sir.
 6 Q If you had read it carefully, sir, the May 9th,
 7 '95 document of Mr. Finlayson, the letter here
 8 he wrote to Ms. Duncan, do you not think you'd
 9 have picked up on how he was leading her astray
 10 to say the least in this letter, given the
 11 Saskatchewan correspondence in the file?
 12 A If I had read it in detail, I may have made that
 13 connection, yes.
 14 Q That conclusion, not connection, that
 15 conclusion.
 16 A That conclusion, yes.
 17 THE COMMISSIONER: Mr. Lockyer, whenever it's
 18 convenient.
 19 MR. LOCKYER: It's a good time.
 20 THE COMMISSIONER: All right. We'll take 15
 21 minutes.
 22 THE CLERK: All rise. This Commission of
 23 Inquiry is adjourned for a 15 minute recess.
 24 (Proceedings recessed at 11:09 a.m. and
 25 reconvened at 11:25 a.m.)

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1 THE CLERK: All rise. This Commission of
 2 Inquiry is now in session.
 3 MR. LOCKYER: I'm told the press copies are
 4 available now, 49A.
 5 BY MR. LOCKYER:
 6 Q If you could just turn to tab 5 of commission
 7 counsel's book of documents, sir, the first
 8 page.
 9 A Go ahead.
 10 Q Whose handwriting is that?
 11 A I am not sure. I can say it's not mine.
 12 Q If you go back to 49B, sir, and just flip on if
 13 you would to the next document after that
 14 May 9th letter of Mr. Finlayson's to Janie
 15 Duncan?
 16 A Okay.
 17 Q You then have a memo that would, I imagine, have
 18 been in her internal correspondence file when
 19 you came to look at it in 2000. And I say that
 20 because it's from Mr. Finlayson and his then
 21 office to Mr. Les Kee, the A.D.M. And it's
 22 about the Driskell case and the investigation by
 23 Ms. Janie Duncan. Do you see that?
 24 A I see that.
 25 Q That's the Re. And he sets out how Ms. Duncan

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1 has been writing a lot of letters. He says in
 2 the second paragraph at the end of it.
 3 "I spoke to Ms. Duncan on a number of
 4 occasions and assured her that our
 5 Department was satisfied that our
 6 prosecutors had conducted themselves in a
 7 proper fashion in the prosecution of this
 8 case."
 9 Do you see that?
 10 A Yes.
 11 Q And the last main paragraph, sir.
 12 "Despite her assertions..."
 13 said Mr. Finlayson,
 14 "...I am advised that any and all
 15 agreements between Mr. Zanidean and the
 16 Crown were put on the record of proceedings
 17 in Mr. Driskell's trial and that no one in
 18 our office made any other deals with
 19 Mr. Zanidean."
 20 Now reading that, sir, and this is written three
 21 months after that letter that we talked about
 22 before the break from Mr. Finlayson to
 23 Ms. Duncan, did you pick up on that at the time,
 24 sir, that what can Mr. Finlayson be talking
 25 about there, that I am advised that any and all

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1 A Certainly, yes.
 2 Q Mr. Miller, agreed?
 3 A Yes.
 4 Q Mr. Whitley, agreed?
 5 A Agreed.
 6 Q Mr. Lerner, agreed?
 7 A Yes.
 8 Q Mr. Finlayson, agreed?
 9 A Yes.
 10 Q That's five senior members of Manitoba Justice,
 11 extremely senior members of the Manitoba
 12 Justice, right?
 13 A Yes.
 14 Q And then you come along in 2000 and you really
 15 become number six?
 16 A That's correct.
 17 Q Who misses the ball so to speak?
 18 A In retrospect, I think that's a fair comment.
 19 Q And if you had read the correspondence with
 20 Ms. Duncan carefully, particularly that letter
 21 of Mr. Finlayson's to her of May '95, it should
 22 have been apparent to you that Ms. Duncan didn't
 23 know about the Saskatchewan material?
 24 A That was the connection that could be made from
 25 there, yes.

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1 agreements between Mr. Zanidean and the Crown
 2 were put on the record of proceedings of
 3 Mr. Zanidean's trial?
 4 A I don't recall seeing that but I would certainly
 5 not disagree with your suggestion that the
 6 source of that document is the correspondence
 7 file.
 8 Q And note that he says, "No one in our office
 9 made any other deals with Mr. Zanidean." I
 10 suppose it might have helped if Mr. Finlayson
 11 had said that there's certainly a suggestion
 12 that others made deals with Mr. Zanidean. He
 13 doesn't say that?
 14 A That's not there, no.
 15 Q And you didn't pick up on this when you read
 16 through the file in 2000, sir?
 17 A No.
 18 Q Because by the time the file comes to you, sir,
 19 in 2000, I think it can fairly be said, and you
 20 would have had enough information -- you'd have
 21 been privy to enough information from your
 22 review of the file to have seen this and to see
 23 it now, that the Saskatchewan material has
 24 clearly come directly to the attention by 2000
 25 of Mr. Dangerfield, agreed?

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1 Q Yes. You say that you assumed from the draft
 2 letter note that Mr. Brodsky had got the
 3 materials, you never telephoned him to find out?
 4 A Well, what I was asked to do was simply look at
 5 the file. As I understood my mandate, it was to
 6 review what was in the file, as I have already
 7 said, and report back as to whether or not the
 8 case appeared to have been appropriately
 9 prosecuted. So that was my mandate.
 10 I can say that if I had entertained any
 11 doubt that that Saskatchewan correspondence had
 12 been sent, I would have gone back to Rob
 13 Finlayson and said to him notwithstanding my
 14 mandate, I think some inquiries are warranted
 15 given that there may be some doubt as to whether
 16 or not that was sent. But for the reasons I
 17 have already indicated, I didn't entertain any
 18 doubt whether or not that correspondence had
 19 actually been sent.
 20 Q You see, Mr. Schille, that the trouble is what
 21 we're discovering now is that one after another,
 22 we have senior members of Manitoba Justice, and
 23 I appreciate in 2000, you weren't a senior
 24 member. More so now perhaps than you were then.
 25 But, sir, we seem to be getting just one person

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1 after another making assumptions that things are
 2 being done. That's the reason we're getting
 3 presented to us anyway. And here is you saying
 4 you made the same assumption. And in the
 5 meantime, that doesn't really solve the problem,
 6 does it, sir? What went wrong here? Why have
 7 we got one Crown after another missing the boat?
 8 A Mr. Lockyer, I can only --
 9 Q Is there a systemic problem here of some sort or
 10 what?
 11 MR. OLSON: Which question would you like the
 12 witness to answer? There's been four so far.
 13 MR. LOCKYER: I'm sure you can handle what I
 14 just asked you, Mr. Schille.
 15 MR. OLSON: Well, I would prefer if he asked one
 16 question at a time.
 17 THE COMMISSIONER: Yes, it would help.
 18 THE WITNESS: Mr. Lockyer, I can only answer for
 19 my own involvement in this matter. As you are
 20 aware, I wasn't even in the province when most
 21 of this took place. So in fairness, if your
 22 suggestion is that I was one person who failed
 23 to make the connection, that that correspondence
 24 had not been sent, that's a fair comment.
 25

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1 BY MR. LOCKYER:
 2 Q I mean if you look at tab 3, sir, in terms of
 3 what you saw as your mandate, it's interesting
 4 that Mr. Abra, on his brief review of the file,
 5 noticed just looking at page 1 of tab 3. Sorry,
 6 this is my friend's material, not mine.
 7 Mr. Abra says the last sentence of the third
 8 paragraph of his letter of April 25, 2000 that.
 9 "It will be necessary to interview the
 10 various Crown Attorneys that were involved
 11 in the conduct of the prosecution."
 12 Do you see that?
 13 A I see that.
 14 Q But you didn't see that as necessary.
 15 A I wasn't asked to do that. I specifically was
 16 not asked to do that.
 17 Q All right. Presumably you would apply your own
 18 initiative as to the best way to set about
 19 conducting a review of the file?
 20 A Well, I think at the time, part of the concern
 21 is that given the delay, the Crown had indicated
 22 years ago or the department had indicated years
 23 ago that they were going to do a review and it
 24 had not been done. So there was some urgency,
 25 as I understood it, to do the review. They were

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1 anxious to get things started at the time and
 2 get it done. It was on that basis that they
 3 said look, here is what we want you to do. And
 4 I was given a certain mandate and that did not
 5 include reinterviewing witnesses which would
 6 almost amount to a reinvestigation of the
 7 matter.
 8 Q I'm not talking about reinterviewing witnesses,
 9 I'm just talking about interviewing the Crown
 10 Attorneys, just to take Mr. Abra's point. You
 11 didn't feel that was necessary?
 12 A I wasn't asked to do that.
 13 Q So that's why you didn't do it?
 14 A Correct.
 15 Q I see. And as we've seen, you didn't feel that
 16 the immunity deal that is sitting there in the
 17 Saskatchewan material or Mr. Zanidean's threats
 18 were of sufficient significance to refer to even
 19 in your 2000 review?
 20 A I didn't refer to them as I have already
 21 indicated.
 22 Q And in the process, did it dawn on you, sir, in
 23 2000, while you're looking at those Saskatchewan
 24 letters and considering their import, did it
 25 occur to you that beyond this simple question of

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1 the motivation for the arson, there may be
 2 reason to believe Mr. Zanidean had lied in other
 3 regards in his trial testimony?
 4 A Apart from the arson?
 5 Q No, apart from the motivation for the arson.
 6 Leaving aside the motivation for the arson, did
 7 it occur to you that there are other reasons for
 8 you to say to yourself, it looks like
 9 Mr. Zanidean has perjured himself potentially in
 10 other regards?
 11 A No, that wasn't going through my mind at the
 12 time that I recollect.
 13 Q At page 4, sir, of your statement to commission
 14 counsel, if I could refer you back to tab 1 of
 15 commission counsel's material?
 16 A Page 4, yes.
 17 Q Do you see the paragraph "Schille referred"?
 18 A Yes.
 19 Q Perhaps I'll read the whole paragraph.
 20 "Schille referred to some of the content of
 21 the Quinney materials at page 17 of his
 22 report, without specifically explaining
 23 that this information had been sent to
 24 Manitoba Justice by Saskatchewan Justice.
 25 He referred only to the issue Quinney had

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1 raised in his letters concerning Zanidean's
 2 alleged perjury about the motive for the
 3 Swift Current arson, without mentioning the
 4 discussion in the correspondence of
 5 Zanidean's belief that he had immunity on
 6 the Swift Current arson, and Zanidean's
 7 threats to go to the media if he was
 8 charged with this offence."
 9 We had just been through that.
 10 "Schille explains that he probably did not
 11 regard these two related issues as being of
 12 the same magnitude as the alleged perjury,
 13 since he understood that the Manitoba
 14 authorities disputed the suggestion that
 15 there had been any immunity deal with
 16 Zanidean."
 17 Where did you understand that from, sir?
 18 A From the correspondence itself.
 19 Q I don't recall Manitoba Justice, in its
 20 correspondence with Saskatchewan Justice, sort
 21 of challenging what Saskatchewan Justice was
 22 saying?
 23 A Well, in the Quinney letters, he is
 24 indicating -- the essence of it is there's a
 25 disagreement between the two police forces where

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1 likely it doesn't sound like we're going to get
 2 to the bottom of it. And the distillation that
 3 Mr. Quinney comes to on the issue is that
 4 regardless of whether or not he actually had
 5 immunity granted to him, he was certainly of the
 6 view that that was the case and Mr. Quinney's
 7 view that an abuse of process would likely be
 8 successful in the circumstances. So he
 9 certainly, I think, is saying that in the
 10 correspondence to my mind.
 11 Q Had you received that information from Manitoba
 12 Justice, sir, as opposed to assuming it about
 13 the police from what you've read on the
 14 Saskatchewan material?
 15 A My recollection in the review of the file is
 16 that there was something in there indicating
 17 that I think at the time, there was -- on the
 18 internal correspondence file, there is a whole
 19 series of correspondence where one of the RCMP
 20 officers from Saskatchewan had actually
 21 commented publicly about the issue and was
 22 reprimanded and I recall seeing all of that.
 23 And the distillation of all of that
 24 correspondence that I recall seeing was that
 25 there was a material disagreement between the

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1 two law enforcement agencies as to what had
 2 occurred.
 3 Q So did you think to yourself that you perhaps
 4 should follow up on this, sir, in the course of
 5 your review, or was the urgency such that you
 6 wouldn't have time?
 7 A That's not what I was asked to do. In terms of
 8 mentioning those, the issues, the other two
 9 items arising out of the Saskatchewan
 10 correspondence, I didn't do that. It might have
 11 been done certainly. But by mentioning the
 12 issue of the perjury, which to my mind was the
 13 paramount issue coming out of that
 14 correspondence, I was flagging that
 15 correspondence in my report.
 16 Q Is it fair to say, Mr. Schille, that you didn't
 17 approach this review with an investigative mind?
 18 A No, I did not because I did not understand that
 19 to be my mandate to investigate whatsoever.
 20 Q Despite the concern about the possibility of an
 21 innocent man being imprisoned for a crime he
 22 hadn't committed?
 23 A That's correct, I wasn't asked to investigate.
 24 Q I see. And you didn't go back to your master,
 25 so to speak, and say maybe we should take this a

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1 bit further? On the contrary, you provided a
 2 report saying everything was fine.
 3 A And the answer to both of those questions is
 4 that's correct.
 5 Q If we move on, sir, then to 2001. So you now
 6 have a comprehension of the case. And given the
 7 recency of your review of it, likely better than
 8 anyone else by this time. It's at tab 7, sir,
 9 that things begin February 14th of 2001, a
 10 letter on Mr. Driskell's behalf to the Chief of
 11 Police which subsequently, I think commission
 12 counsel took you through this, you obtained a
 13 few months later by way of the June letter at
 14 the end of tab 7, correct?
 15 A Correct.
 16 Q And if you look at that letter, sir, back in
 17 February 14th of '01, right from the beginning,
 18 requests are made that you might view as being
 19 unbeknownst to the author of the letter perhaps.
 20 But you, knowing the file might have considered,
 21 would bring to your mind the Saskatchewan
 22 materials. Let me refer you to page 2, item 2,
 23 Access to the Internal Review Documents and
 24 Findings. I appreciate this is addressed to
 25 Chief Ewatski but it's now in your hands by

Page 6084	<p>1 June.</p> <p>2 "I understand that you played an important</p> <p>3 part in the 1993 internal review of this</p> <p>4 case. We need access to the documents and</p> <p>5 interviews which formed part of the review,</p> <p>6 and its findings. In order to properly</p> <p>7 prepare and present a case for</p> <p>8 Mr. Driskell, we need complete access to</p> <p>9 the internal review."</p> <p>10 Now that's with reference to the Ewatski report,</p> <p>11 so to speak, the '93 work, but then combine that</p> <p>12 with item 4 in the letter. Police Negotiations</p> <p>13 with Zanidean and Gumieny.</p> <p>14 "Since Mr. Driskell's trial, the law has</p> <p>15 expanded the prosecution's obligations to</p> <p>16 disclose any and all negotiations (deals)</p> <p>17 between the authorities and unsavoury</p> <p>18 witnesses. I am therefore requesting full</p> <p>19 disclosure of any and all negotiations</p> <p>20 between the police and Reith Zanidean and</p> <p>21 John Gumieny (ph) which related to their</p> <p>22 testimony at Mr. Driskell's trial, both</p> <p>23 before and after they gave their evidence</p> <p>24 at the trial."</p> <p>25 So you would have been alerted, sir, and this</p>	Page 6086	<p>1 familiar with these letters of September 7th, is</p> <p>2 that right, the two letters?</p> <p>3 A Well, I was somewhat unclear of that</p> <p>4 September 7th letter that's addressed to Rob</p> <p>5 Finlayson, the pages -- the second page</p> <p>6 referencing other disclosure items to be</p> <p>7 requested in the future, there are two items</p> <p>8 listed. And the next page I have in the</p> <p>9 materials I was --</p> <p>10 Q Sorry, what are you looking at? I'm sorry, I'm</p> <p>11 not with you.</p> <p>12 A It's page 1566.</p> <p>13 Q Okay. I'm with you, carry on.</p> <p>14 A The next page appears not to match that and</p> <p>15 again picks up with number 2. I don't know if</p> <p>16 there's a problem with the materials that I</p> <p>17 have.</p> <p>18 Q No, it's just a second reproduction of the same</p> <p>19 letter so to speak. You'll see item 2 at the</p> <p>20 top is identical to item 2 at the bottom.</p> <p>21 A Right, and there's no heading so I was a little</p> <p>22 confused by that.</p> <p>23 Q Just treat it as a continuing letter if you</p> <p>24 would.</p> <p>25 A All right.</p>
Page 6085	<p>1 might have taken you back to some of the Brodsky</p> <p>2 pretrial letters, that this was still very much</p> <p>3 a part of the focus of Mr. Driskell's approach</p> <p>4 to trying to set aside his conviction; is that</p> <p>5 fair?</p> <p>6 A That's fair.</p> <p>7 Q If you move on to tab 9, sir, there's two</p> <p>8 September 7th letters, and I want to refer you</p> <p>9 to the second one at that tab, if you would,</p> <p>10 four pages into it. And just to get the history</p> <p>11 right, by this time, sir, there's been a meeting</p> <p>12 on August 30th of 2001 between Mr. Finlayson,</p> <p>13 Chief Ewatski, Mr. Libman and myself -- sorry,</p> <p>14 I'm trying to depersonalize myself but I didn't</p> <p>15 there -- that you became aware of; is that</p> <p>16 right?</p> <p>17 A Yes.</p> <p>18 Q And you do suggest in your statement to</p> <p>19 commission counsel or you say in your statement</p> <p>20 to commission counsel you can't remember if you</p> <p>21 were at that meeting? I think you now accept</p> <p>22 that you were not at it; is that right?</p> <p>23 A If your suggestion is I wasn't there, I would</p> <p>24 accept that.</p> <p>25 Q Right, okay. But on September 7th, and you are</p>	Page 6087	<p>1 Q Just to clarify, the first letter of</p> <p>2 September 7th, '01, sir, is to move the DNA, the</p> <p>3 idea of testing the hairs, moving that forward.</p> <p>4 And I think you are aware that Manitoba Justice</p> <p>5 sought sort of an understanding that disclosure</p> <p>6 requests would cease until that testing had been</p> <p>7 completed. And this second letter is more of a</p> <p>8 letter for the future after the testing has been</p> <p>9 completed. Do you understand that? It begins</p> <p>10 by saying.</p> <p>11 "Further to my letter regarding</p> <p>12 post-conviction DNA testing, I am writing</p> <p>13 to explain outstanding disclosure issues on</p> <p>14 the case. We agreed these requests would</p> <p>15 be put on hold with one exception, until</p> <p>16 the DNA testing has been completed."</p> <p>17 Do you see that?</p> <p>18 A I see that.</p> <p>19 Q But item 2, sir, once again refers to, on the</p> <p>20 same page.</p> <p>21 "All information and documentation which</p> <p>22 relate to negotiations between police and</p> <p>23 the witnesses Mr. Zanidean and Mr. Gumieny</p> <p>24 for favours or monetary consideration or</p> <p>25 compensation as a result of their becoming</p>

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1 witnesses at Mr. Driskell's trial."
 2 Do you see that?
 3 A I see that.
 4 Q So this keeps getting thrown at you, so to
 5 speak, in the letters that we want to know more
 6 and more about this. And it harkens back to
 7 what Mr. Brodsky had been saying in his letters
 8 back in 1991; fair?
 9 A Yes.
 10 Q At tab 10, sir, you prepared a memo and my
 11 friend is taking you to it and I want to take
 12 you to it, February 20, 2002. It's three pages
 13 in. Do you see that?
 14 A Yes.
 15 Q And something you say here, sir, that's of
 16 interest is on the second page. The last
 17 substantial paragraph, you say. Just to give us
 18 our time frame, we are still pre DNA, right,
 19 we're still 10 months before the DNA results?
 20 A Right.
 21 Q "I note from reviewing the correspondence.
 22 On. File that counsel is requesting
 23 disclosure beyond the scope of what is
 24 currently contained in the Crown file. We
 25 may want to consider providing counsel with

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1 items that are on the file which would have
 2 been provided to the accused in normal
 3 course in any event. Providing such
 4 disclosure is a simple matter and in
 5 keeping with the co-operative approach we
 6 wish to maintain in this manner. A
 7 different tact might be considered relating
 8 to materials no longer on file which might
 9 not be currently available (i.e. police
 10 notes and working notes of forensic
 11 experts). Indicating a willingness to
 12 provide any particulars that are not on
 13 file or any internal correspondence should
 14 be scrutinized with caution in my view."
 15 Do you remember writing that, sir?
 16 A I do.
 17 Q And of course the internal correspondence that
 18 you are referring to there, just focusing on
 19 that last line, would really include within the
 20 scope, if you are thinking in terms of the file
 21 anyway, the Saskatchewan correspondence?
 22 A I certainly wasn't thinking of the Saskatchewan
 23 correspondence when I wrote that. But the
 24 practical implication, that would include the
 25 Saskatchewan correspondence, that's correct.

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1 Q And it seems to me, carrying on the thought,
 2 that that decision of yours or that view of
 3 yours, should I say, not to disclose internal
 4 correspondence, would that explain why, when you
 5 finally met Mr. Libman a year later, 13 months
 6 later, you did not give him the Saskatchewan
 7 material?
 8 A Well, I didn't give him the Saskatchewan
 9 material but I didn't give anything in the
 10 correspondence file for the reasons I have
 11 already indicated.
 12 Q So internal correspondence came to include some
 13 external correspondence you didn't disclose as
 14 well.
 15 A Well, as I've said, I have used the terminology
 16 "correspondence" but there were a lot of things
 17 on that internal correspondence file that
 18 technically weren't correspondence such as
 19 newspaper clippings. And as I have already
 20 said, we are attempting to cooperate prior to
 21 you perfecting your application. And it was
 22 always our intention, as a department, to
 23 forward everything lock, stock and barrel to the
 24 criminal conviction review group and have them
 25 disclose it as they saw fit. That would have

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1 been, in our view, that would have been our
 2 preference as the correspondence sets out.
 3 Q Well, okay. My silence in that regard isn't
 4 meant to mean that I agree. You say the
 5 correspondence sets out, back in these days,
 6 that you only want to deal with the Federal
 7 Department of Justice and not counsel?
 8 A Well, the correspondence between our department
 9 and AIDWYC sets out we would prefer that you
 10 file your application. And the correspondence,
 11 your response to that, was that we can't really
 12 bring an application alleging a wrongful review
 13 if we haven't had access to the file to review
 14 it fully to perfect our application.
 15 Q Catch 22?
 16 A Yes.
 17 Q And not an unreasonable catch 22?
 18 A I don't disagree with you, Mr. Lockyer, but
 19 you're asking me why this was withheld. And it
 20 wasn't withheld in the sense you were never
 21 getting it. Our preference would have been to
 22 have you file your application and we could have
 23 simply -- it would have been a simple matter for
 24 us to send all the matter down to the criminal
 25 conviction review group for reasons which I

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1 agree are not unreasonable. You were not
 2 prepared to do that. We were attempting to
 3 cooperate. And again, at the end of the day,
 4 everything was going to go down there for the
 5 criminal conviction review group. The only
 6 thing that was not granted access to was the
 7 internal correspondence file and my review at
 8 the time.
 9 Q From a systemic point of view, Mr. Schille,
 10 would you agree that that's not a satisfactory
 11 way to deal with a claim for wrongful
 12 conviction, to simply tell the claimant that
 13 file your application and we'll send the stuff
 14 to Justice. That's not a satisfactory way of
 15 dealing with a claim?
 16 A Well, I don't set policy, Mr. Lockyer. But one
 17 of the concerns we had, and that's part of the
 18 reason why the most senior members of our
 19 department were involved in this, as one of the
 20 initial allegations of wrongful conviction, it
 21 posed questions of policy on a larger scale. I
 22 appreciate AIDWYC takes the position that they
 23 are fairly discriminating given you are an
 24 unfunded organization, that you're very
 25 discriminating about which cases you accept.

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1 But in terms of what approach might be taken
 2 with other individuals, our concern very much
 3 was whether or not we had an obligation to
 4 reconstitute modern Stinchcombe era disclosure
 5 in cases that were pre-Stinchcombe such as this
 6 one. So I appreciate your consideration is
 7 particular to your client at the time. Our
 8 considerations were on more global scale.
 9 Q All right. I'm going to come back to all of
 10 those issues. But just moving along with the
 11 non-disclosure of the Saskatchewan materials.
 12 At tab 11, we're now post DNA results. On
 13 January 20, 2003, a letter of some considerable
 14 length was sent to Mr. Finlayson in which there
 15 was an attempt by counsel for Mr. Driskell to
 16 satisfy Manitoba Justice that it should
 17 acknowledge that Mr. Driskell may well have been
 18 the victim of a miscarriage of justice; is that
 19 fair?
 20 A That's fair.
 21 Q And it was an attempt to expedite the process,
 22 fair, by counsel for Mr. Driskell?
 23 A To have us simply agree to his application?
 24 Q Yes.
 25 A Yes, I think that's a fair characterization.

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1 Q And the letter included, sir, it was a lengthy
 2 letter and the letter included the reasons why,
 3 and it's an 18 page letter, the reasons why
 4 counsel for Mr. Driskell was of the view that it
 5 could now be said that Mr. Driskell was the
 6 victim of miscarriage of justice; is that right?
 7 A Fair to say.
 8 Q And as you read it, you can say it was an
 9 attempt by AIDWYC to -- counsel for
 10 Mr. Driskell, AIDWYC, to encapsulate everything
 11 within the letter that could tend to show that?
 12 A I think that's a fair characterization.
 13 Q And of course, once again, no reference to the
 14 Saskatchewan materials which one might have
 15 expected if they had been in the possession of
 16 Mr. Driskell's counsel?
 17 A Well, if you are attempting to be exhaustive,
 18 yes.
 19 Q February 6, sir, tab 12, there is a letter here.
 20 This is, and just to get the scenario right. By
 21 February 6, a meeting has been arranged for
 22 February 9th that you are to attend between
 23 Mr. Driskell's counsel and yourself and other
 24 Crowns; is that right?
 25 A It appears to be the case.

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1 Q Yes. The February 6th letter doesn't refer to
 2 it, it just comes three days before it. So
 3 apparently, the last page does refer to it.
 4 Yes, it does. The last paragraph does refer to
 5 it. But the letter of February 6th from
 6 Mr. Libman, once again, look at page 2, item 6.
 7 "Agreement between the Department of Public
 8 Prosecutions and Reith Zanidean including
 9 any immunity agreement formal or informal."
 10 A Correct.
 11 Q Item 11,
 12 "All correspondence between Manitoba
 13 Justice and Saskatchewan Justice with
 14 regards to Reith Zanidean."
 15 Now that's pretty on point to say the least, but
 16 you didn't pick up on it?
 17 A Well, we had at that point, as I said, I had
 18 suggested that the internal correspondence file
 19 not be -- nobody has to go through it item by
 20 item. And that was something that was agreed
 21 with, we were simply going to send it down to
 22 Ottawa. So as to whether or not that was a
 23 specific mention at the correspondence, it is.
 24 Q I'm very sorry, I don't understand what you just
 25 said.

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1 A You were simply asking me if that was a specific
 2 reference to Manitoba Justice and Saskatchewan
 3 Justice correspondence in relation to
 4 Mr. Zanidean, it is. But in terms of our
 5 position in relation to that, we had, as I've
 6 said before, taken the position that we were
 7 going to leave it to the Department of Justice
 8 to leaf through that and decide what was
 9 appropriate to disclose.
 10 Q I see. But the point, Mr. Schille, I'm trying
 11 to suggest, is that that didn't twig you to the
 12 fact that that material that you had concluded
 13 in 2000 as being disclosed had not been
 14 disclosed?
 15 A Given the conclusion that I reached, I didn't
 16 appreciate the significance of it until the
 17 non-disclosure came to light. So given the fact
 18 that I had assumed it had been disclosed, it
 19 wasn't something, it was obviously significant
 20 information but I didn't appreciate the full
 21 significance of it until I came to the
 22 realization that it most likely hadn't been
 23 disclosed. And as of February '03, we're more
 24 than two years from the date of my review.
 25 So if your ultimate question is did I make

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1 the connection? I did not.
 2 Q And would this letter have likely been seen by
 3 Mr. Finlayson as well, sir?
 4 A I think it would have, yes.
 5 Q You would have got it just before the meeting of
 6 February 9th, right?
 7 A Right.
 8 Q All right. And he didn't say anything about it,
 9 bearing in mind his involvement in '95 with
 10 Ms. Duncan. He didn't pick up on it either?
 11 A I don't recall that he did, no.
 12 Q And I think it's worth pointing out, sir, your
 13 position that you were going to give this stuff
 14 to Justice after a 696 application is not
 15 reflected in any of the correspondence around
 16 this period. You don't say that to counsel for
 17 Mr. Driskell anywhere. Indeed rather to the
 18 contrary, you arranged disclosure meetings and
 19 provided disclosure; am I right?
 20 A That's correct.
 21 Q And by the time you discover in November, your
 22 position by the time you discover in November or
 23 appreciate or come to realize in November the
 24 Saskatchewan material hasn't been disclosed, you
 25 still had not, as of that date, provided it to

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1 the Department of Justice in Ottawa either, had
 2 you?
 3 A The file in its totality didn't go to the
 4 Department of Justice until sometime much later
 5 than that, after it came back from Judge Enns I
 6 think.
 7 Q Mr. Driskell's application to the Minister by
 8 the end of November of 2003 had been extended
 9 for almost six months by that time?
 10 A I wouldn't disagree with that.
 11 Q June 3rd was the date of the originating
 12 application, the 696.1 application to the
 13 Minister, which I will come to in just a moment.
 14 So almost six months had gone by, five and
 15 three-quarter months you might say by the end of
 16 November, right?
 17 A Correct.
 18 Q The item 6, sir, the agreement between the
 19 Department of Public Prosecutions and Reith
 20 Zanidean including any immunity agreement,
 21 formal or informal.
 22 A Sorry, where are you at, Mr. Lockyer?
 23 Q Same document. You may have moved on, I hadn't.
 24 Item 12, tab 12 of commission counsel's book.
 25 I'm reading to you from the letter of Mr. Libman

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1 February 6, '03. Do you see that, second page.
 2 And I read to you item 6.
 3 A Yes.
 4 Q I am coming back to something I had already read
 5 to you. That agreement, sir, I'm going to
 6 suggest to you, was something that you never saw
 7 back in 2000 right through to the end of 2004;
 8 am I right -- 2003 rather.
 9 A Well, I don't recall seeing an agreement. And
 10 as I've said in my interview notes, and as I
 11 have indicated, I indicated to Mr. Libman at the
 12 time around the time that the administrative
 13 file was found and I have described the
 14 administrative file, I'm using that phrase, but
 15 the administrative file would be as the
 16 document, I forget what the exhibit number is,
 17 but I've already been referred to that. It's a
 18 confidential file in relation to a witness
 19 protection file for both the witnesses Zanidean
 20 and Gumieny. And that was located after my
 21 review of the file. So if there was any
 22 agreement, it would have been in there.
 23 And I should say, if you're going to ask me
 24 questions about the specifics of what's in that
 25 file, I have seen the contents of the file and I

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1 have perused them but I don't have any
 2 particular familiarity with what's in them. As
 3 I've said, I flagged those documents to be
 4 copied in their entirety.
 5 THE COMMISSIONER: Just for the record, the
 6 witness was referring to Exhibit 30C, tab 59.
 7 THE WITNESS: Thank you, Mr. Commissioner.
 8 BY MR. LOCKYER:
 9 Q You had that file, just for your information,
 10 sir, as I understand it in March '03 when you
 11 met with Mr. Libman because you disclosed
 12 substantial portions of it to him then?
 13 A The administrative file?
 14 Q Yes.
 15 A Well, I take the position the whole thing was
 16 disclosed, Mr. Lockyer.
 17 Q Now, could you just focus on timing.
 18 A Did I --
 19 Q I'm saying you did disclose substantial portions
 20 of it. I am just saying March '03 you had the
 21 administrative file, by March '03?
 22 A If the question is did I have the administration
 23 file?
 24 Q Yes.
 25 A I did have it by March '03.

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1 Q I want to get back to this agreement that I'm
 2 talking about or that Mr. Libman was talking
 3 about, sir, the agreement. I'm going to suggest
 4 to you, sir, that the agreement was not in that
 5 file.
 6 A I wouldn't be able to itemize what was or wasn't
 7 in that file.
 8 Q Do you remember ever seeing, sir, we've got it
 9 here, it's a 30 or 40 page document which is an
 10 agreement that was never ultimately executed but
 11 was filled in by the police between Mr. Zanidean
 12 and the police?
 13 MR. DAWE: I'm a little puzzled as to what
 14 Mr. Lockyer is referring to. I think he may be
 15 now referring to the application.
 16 MR. LOCKYER: Yes.
 17 MR. DAWE: Which is somewhat different from an
 18 agreement.
 19 MR. LOCKYER: I said it was never executed.
 20 MR. DAWE: Well, the evidence as I recall had
 21 the process gone further, there would have been
 22 an entirely different document that would have
 23 been executed. It wasn't the same document.
 24 MR. LOCKYER: I don't think it matters to the
 25 point I'm trying to make.

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1 THE COMMISSIONER: This is an application that
 2 was at least partially filled in, and maybe more
 3 than partially, to the RCMP to place Zanidean in
 4 the witness protection program, a formal witness
 5 protection program. That's the one you're
 6 referring to, isn't it?
 7 MR. LOCKYER: Yes, it is.
 8 THE WITNESS: I don't recall seeing that. But
 9 as I said, I didn't review that administrative
 10 file in any detail at all.
 11 BY MR. LOCKYER:
 12 Q And my concern about that, Mr. Schille, that it
 13 wasn't in the file and that you never got it and
 14 consequently it never got passed on to
 15 Mr. Driskell's counsel indeed. The first we
 16 ever saw of it was at this inquiry. Does it
 17 suggest to you, sir, some kind of breakdown in
 18 communication between Manitoba Justice and the
 19 police?
 20 A Well, not necessarily, Mr. Lockyer. If you look
 21 at --
 22 Q Because that's where it was, I should add.
 23 That's where it was.
 24 A It was where?
 25 Q The police had it in their files.

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1 A Well, the police, if you look at the disclosure
 2 letters going back, you're asking the police
 3 very early on for I think it's point 8 in one of
 4 the correspondence letters. Point 8 is WPS
 5 materials that relate to payments to witnesses,
 6 et cetera. And I was furnished documentation at
 7 that point from the Winnipeg Police and there's
 8 a letter from myself to Mr. Libman passing that
 9 on. The materials that I was furnished then
 10 later on, after your application or
 11 Mr. Driskell's application was filed with
 12 Ottawa, the Winnipeg Police preferred to make
 13 their disclosure directly to them.
 14 And it would appear, from what I've been
 15 able to ascertain from going back, that there is
 16 a second source of documents. And some of those
 17 documents are Justice documents that appear to
 18 have come from the police that aren't on our
 19 files at all.
 20 So is there a breakdown in the process as
 21 it relates to the 696? I'm not necessarily sure
 22 that there is. But was there a breakdown in
 23 communication back then that resulted in
 24 Manitoba Justice not having some of its own
 25 documents retained on file? I think that that's

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1 a fair statement.

2 Q All right. Again, I'm going to come back to

3 that, too. Let me move on from there. In the

4 meantime, sir, on February 9th, a meeting was

5 held and you were present, Mr. Morrison,

6 Mr. Finlayson, Mr. McCloskey, Mr. Libman?

7 A I remember that meeting, yes.

8 Q Me, all right. And that's again reflecting back

9 on your statement to commission counsel, sir,

10 just to clear it up. That was the only meeting

11 between all counsel, so to speak, that took

12 place; am I right?

13 A The thing that sticks in my mind is that Bob

14 Morrison was there, because I don't recall him

15 being present for other meetings involving

16 Driskell's lawyers.

17 Q All right. Because at one point in your

18 statement, sir, to commission counsel, I'm sorry

19 I can't find it quickly, you had suggested --

20 here we are, it's on page 8. Yes, you talked

21 about a meeting. If you look at page 8, sir,

22 six lines down. You talk about a subsequent

23 meeting with AIDWYC counsel which in your

24 statement would be subsequent to April or May

25 of 2003. Do you see that, in context, do you

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1 see that?

2 A Right.

3 Q And in fact, the only meeting of that nature

4 that took place was the one on February 9th; is

5 that right?

6 A I think that's the case.

7 Q I'm just getting the chronology right. So that

8 you should have said if anything at a previous

9 meeting with AIDWYC counsel?

10 A Right.

11 Q Okay. At that meeting, sir, Mr. Driskell's

12 counsel were advised that Manitoba Justice would

13 not concede that Mr. Driskell had been the

14 victim of miscarriage of justice; is that right?

15 A That's correct.

16 Q In any form either by way of a reference to the

17 Manitoba Court of Appeal or by way of the

18 Minister ordering a new trial; am I right?

19 A That's correct.

20 Q And then, sir, we come to the disclosure

21 requests that happened thereafter. There's a

22 letter of February 24th. Could we go to the

23 second page, please, or third page actually but

24 it's a letter of February 24th to you?

25 A Where are you at? Which tab?

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1 Q Tab 13, sorry, I didn't say that. My mistake.

2 A And what letter?

3 Q There are two February 24th letters. I'm

4 referring to the second one. There's a second

5 page and then go to the second page of the

6 letter, which brings you to the third page of

7 the tab. Are you with me?

8 A Right.

9 Q And in item 8, you have.

10 "All information and documentation which

11 relate to negotiations between police and

12 the two witnesses Zanidean and Gumieny for

13 favours, or monetary consideration..."

14 THE COMMISSIONER: Not too fast.

15 BY MR. LOCKYER:

16 Q I know.

17 "...as a result of their becoming witnesses

18 at Mr. Driskell's trial."

19 Another thing that might have made you question

20 to yourself the Saskatchewan correspondence

21 issue; is that fair?

22 A I don't think even if it was fresh in my mind I

23 would have connected it to the Saskatchewan

24 correspondence. But we are two years from my

25 review of that documentation. And as I had

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1 indicated earlier, given the import I attached

2 to that document, I didn't make the connection.

3 And if it was at the front of my mind, I'm not

4 sure I would have made the connection based on

5 that point.

6 Q Your meeting with Mr. Libman, sir, was on March

7 7th of 2003; is that right?

8 A I had initially indicated my recollection was it

9 was in the summer of '03. I know Mr. Libman has

10 indicated it was March 7th of '03. And the

11 process that, I would certainly defer to

12 Mr. Libman on the point, the process that I

13 employed was to disclose the materials as we

14 went through the boxes. I dated the boxes. And

15 when I got the brief back from Judge Enns, it

16 was not in the same form. I had taken some care

17 to the extent I was able to leave the file in

18 the same shape that I found it, it did not come

19 back from Judge Enns in the same shape. And in

20 fact, the boxes that bore the date of that

21 meeting were gone. So if Mr. Libman says it was

22 March 7th of '03, I would accept that.

23 Q Just to avoid confusion, Judge Enns doesn't come

24 into the picture for some considerable time

25 after March 7th, '03?

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1 A No, that's correct. But when the suggestion was
 2 made later that certain materials out of the
 3 administrative file hadn't been received, I was
 4 asked to respond to the concerns that were
 5 raised. And one of the things I was attempting
 6 to go do was ascertain the date of that meeting
 7 with Mr. Libman and I wasn't able to do that
 8 because the boxes were gone.
 9 Q I see, because judge Enns got in there in '04
 10 was his first look at the file; is that right?
 11 A That's right.
 12 Q You are accepting then that that meeting was
 13 March 7th, and I don't think anything turns on
 14 whether it was in the spring or summer but it's
 15 helpful to have a chronology that's accurate.
 16 And presumably in preparation for that meeting
 17 you reviewed the file and --
 18 A Right. I didn't review the file at all in
 19 preparation for that meeting. As I said, our
 20 position or my position, and I think I had run
 21 that past the Assistant Deputy at the time, and
 22 he was comfortable with that, that we would
 23 simply, as you and someone else has referred to,
 24 I think Mr. Dawe used the expression an open box
 25 disclosure that we would throw open our files

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1 else might have been a problem in this case?
 2 A Correct.
 3 Q And you weren't directed to either obviously?
 4 A Correct.
 5 Q Or you'd have done it. On June 3rd, sir, the
 6 696 application was made to the Department of
 7 Justice. And just for your benefit, sir, it's
 8 at tab, if you go to the blue book, which is 49A
 9 and look at tab 3, page 29, you'll see that
 10 there is the application addressed to
 11 Mr. Scullion. And it's quite lengthy, sir. I
 12 don't know how many pages it is but perhaps in
 13 the vicinity of 20 pages, 21 actually. And
 14 again, sir, you would have read that. You would
 15 have read that presumably?
 16 A I think I would have read that.
 17 Q Yes. And once again, no reference to
 18 Saskatchewan materials obviously. There were
 19 none?
 20 A Yeah.
 21 Q All right. And then, sir, October 14, '03, tab
 22 17 of --
 23 A We're back to?
 24 Q Yes, we are, we're back to --
 25 THE COMMISSIONER: Exhibit 48.

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1 with the exception of the things I have already
 2 referenced, internal correspondence and my
 3 report of 2000, 2001.
 4 Q It wasn't thought at this point, sir, the DNA
 5 results would indicate a need for another
 6 consideration of the file? That didn't happen?
 7 A That wasn't discussed.
 8 Q And that didn't happen between December '02 and
 9 the February 9th, '03 meeting with counsel?
 10 A Correct.
 11 Q I'm kind of surprised. I must say I had thought
 12 that the February 9th meeting would have
 13 involved a pre-assessment by one or more of
 14 Manitoba Justice members who were at that
 15 meeting of the case as a whole and a rereview of
 16 the file?
 17 A Well, maybe I misunderstood your question.
 18 There was certainly a discussion as the impact
 19 of the things as they now stood, given that the
 20 DNA results were back, but I understood your
 21 question to be asking whether or not there was
 22 another formal review of some sort. There was
 23 no formal review but there was certainly
 24 discussions.
 25 Q You didn't go back through the file to see what

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1 BY MR. LOCKYER:
 2 Q Sorry to go backwards and forwards like that.
 3 A That's the September 5th letter?
 4 Q No. Move into October 14, would you. This is a
 5 letter to you, Mr. Schille, from Mr. Driskell's
 6 counsel?
 7 A Yes.
 8 Q The fourth doc, you will see, and this is
 9 another disclosure letter and it really
 10 logically obviously is coming off the disclosure
 11 that you have already provided and now this is a
 12 further disclosure request. Do you see that?
 13 A That's correct.
 14 Q You had long had your meeting with Mr. Libman
 15 some six months earlier. And there was other
 16 correspondence in the meantime that I hadn't
 17 referred to. This correspondence is of some
 18 interest, October 14th, '03, the fourth doc
 19 down, perhaps I'll read the third paragraph.
 20 "There are other documents and files
 21 referred to in the review because by this
 22 time -- "
 23 Sorry, I haven't quite got the chronology in
 24 here. I think I'm right in saying it was in
 25 September, sir, that Mr. Driskell's counsel

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1 finally gained access to the Perry Dean Harder
 2 homicide review. So this letter is also written
 3 out of contents of the Perry Dean Harder
 4 homicide review. Do you understand that?
 5 A Yes.
 6 Q And you'll see it said in the letter.
 7 "There are other documents and files
 8 referred to in the homicide review that
 9 relate primarily to Mr. Zanidean and are
 10 essential disclosure. They are as
 11 follows:"
 12 And then look four dots down, sir.
 13 "All exchanges of correspondence in
 14 whatever form they appear, letters, faxes,
 15 notes of meetings and telephone calls, et
 16 cetera, between members of the Winnipeg
 17 Police Service and the Swift Current
 18 detachment and between Manitoba Justice and
 19 Saskatchewan Justice and/or the RCMP and
 20 between the Source Witness Protection
 21 Program and all agencies and individuals
 22 with whom the program dealt."
 23 Do you see that, sir?
 24 A I see that.
 25 Q So you can see that Mr. Driskell's counsel are

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1 slowly sort of getting to what exists more and
 2 more accurately as they get more material. But
 3 they still haven't got the documents that they
 4 are looking for. Do you follow me? They still
 5 haven't got the Saskatchewan Justice materials.
 6 But by review of the homicide review, they are
 7 getting warm. They are getting hotter and
 8 hotter, you might say, as to their potential
 9 existence. Do you see that?
 10 A Is that a question or a suggestion? I don't
 11 disagree with that.
 12 Q Yes.
 13 A If you are suggesting that, I would agree with
 14 that.
 15 Q Yes. You can see the chronology of how this is
 16 coming about. You might say each disclosure
 17 letter is getting closer to the truth you might
 18 say; is that fair?
 19 A I wouldn't disagree with that.
 20 Q I guess you're saying it's fair. And this, sir,
 21 this letter didn't twig you to the Saskatchewan
 22 correspondence issue? It's pretty direct. It's
 23 right on you might say.
 24 A Well, my answer, Mr. Lockyer, would be the same
 25 as I have indicated before. This is October of

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1 '03. At the time, I didn't appreciate the
 2 import of that letter and the fact that it
 3 hadn't been disclosed. And we're now almost
 4 three years from the time that I did my review.
 5 So could I have made the connection? Yes, I
 6 could have. Did I? No.
 7 Q But surely now, you are taking the file very
 8 seriously at Manitoba Justice. You have had an
 9 organization involved in the case, if I can
 10 preface the question with this, for two years
 11 plus. You have got correspondence almost coming
 12 out of your ears from the organization. You
 13 have got the DNA testing and results which have
 14 cost a substantial amount of money for Manitoba
 15 Justice. You have got the Minister directly
 16 involved as well. Surely in this six month
 17 period, shall we say between March, when you met
 18 Mr. Libman, and October, now, you had gone back
 19 over that file and addressed it very seriously
 20 in your mind; had you not?
 21 A No.
 22 Q You hadn't, all right.
 23 A Well, I think I should indicate to you,
 24 Mr. Lockyer, I'm not sure what your commitments
 25 were at the time but I think the documentation

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1 that's in the file makes it clear that this is
 2 something I was doing in addition to my regular
 3 duties. And I think not to belabour the point,
 4 but my regular duties constitute a full-time job
 5 away from this. So to go back and review it in
 6 the manner that you're suggesting would have
 7 been a significant undertaking. I didn't do
 8 that.
 9 Q Looking back on it, sir, then from a systemic
 10 point of view more than anything, it might be
 11 said that it was unfortunate that Manitoba
 12 Justice didn't see it appropriate to devote more
 13 resources to this case in 2003; is that fair?
 14 A I would put it a different way. It's
 15 unfortunate that we don't have the resources to
 16 devote to things like this.
 17 Q Mr. MacFarlane, sir, and I know I only showed
 18 you this this morning and I doubt you had a
 19 chance to read it, but he wrote a paper on some
 20 of these issues which he, and I can just tell
 21 you this in passing, he delivered to the British
 22 Columbia Crown Attorney's Association in 2005
 23 for the benefit of everyone else. We have
 24 actually heard a little bit about that
 25 conference. It's the one that, I am sorry, I

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1 had forgotten his name, the chap from B.C. on
 2 the panel referred to when Mr. Sophonow was
 3 present?
 4 MR. DAWE: Geoff Gaul.
 5 BY MR. LOCKYER:
 6 Q Mr. Gaul, right, right. We've heard some
 7 reference to it. I just want to read to you,
 8 sir, do you have the paper?
 9 A I have the document in front of me, although I
 10 have never seen it before I should indicate.
 11 Q No, I've already said that. I only just came
 12 across it. I had forgotten about its existence.
 13 49D, sir, go to page 3, would you. And this is
 14 what he says under heading. At the top of page
 15 3, you will see the main heading "When a
 16 Wrongful Conviction Claim is First Advanced,
 17 page 3?"
 18 A I have that.
 19 Q And then under heading A, Assignment of Crown
 20 Counsel. And he says.
 21 "While all remedies lie in federal hands,
 22 experience suggests that the province will
 23 need to assign counsel to manage the review
 24 process from a provincial perspective.
 25 Amongst other things, that will involve

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1 liaison with the federal Department of
 2 Justice as well as providing information
 3 and documents to the applicant. It may
 4 also mean dealing with an enquiring if not
 5 aggressive media.
 6 The conduct and decisions taken by trial
 7 and appellate counsel will often come under
 8 scrutiny during a review. From a purely
 9 practical standpoint, therefore, it will
 10 often be necessary to appoint new counsel
 11 unfamiliar with the case to manage the
 12 review process. That means that a Crown
 13 attorney completely unfamiliar with the
 14 case will need to review the file (often
 15 measured by the number of boxes) and
 16 attempt to piece the case together decades
 17 after the trial. For this reason, senior
 18 Crown counsel should be appointed to ensure
 19 that the full context of the case is
 20 appreciated - right down to how individual
 21 documents or pieces fit into the case.
 22 There are compelling reasons for this
 23 approach. The internal review by
 24 departmental counsel could, itself, be the
 25 subject of later review in a public

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1 inquiry."
 2 It's almost prescient you might say what
 3 Mr. MacFarlane wrote.
 4 "Incomplete internal reviews or ones where
 5 key pieces of evidence were missed or the
 6 significance of them was not appreciated,
 7 can later be viewed as an attempt by the
 8 department to cover up the probability that
 9 a miscarriage of justice occurred.
 10 It goes without saying that the amount of
 11 time required to review these cases
 12 internally by senior department counsel has
 13 serious resource implications for the
 14 Crown."
 15 Anything in there you would take issue with,
 16 sir?
 17 A No.
 18 Q Tell me, if we moved Mr. Driskell's case, the
 19 DNA results let's say, let's take it at that
 20 stage, if we moved December 2002 forward to
 21 September 2006, would anything be different?
 22 A Well, I would imagine there were things that
 23 would be done differently because this was one
 24 of the first things that we were, one of the
 25 first applications of this sort that we were

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1 dealing with. And I think in part,
 2 Mr. MacFarlane's paper would be premised on some
 3 of the lessons learned in our dealings with this
 4 particular matter.
 5 Q Are you aware of any policy within Manitoba
 6 Justice, sir, that would ensure that in
 7 September 2006, things would be different?
 8 A Well, I know that a policy was being worked on.
 9 I wasn't tasked to do that but I was aware of it
 10 because I was present when it was discussed at
 11 different meetings.
 12 Q But you don't know what the policy is?
 13 A Well, I'm not sure it's been completed at this
 14 point. That in and of itself would be a pretty
 15 daunting exercise.
 16 Q So you're not sure. That means it may or may
 17 not have been? You really don't know?
 18 A I really don't know. I'm not dealing with any
 19 allegations of wrongful conviction at this
 20 point.
 21 Q But if a policy was developed, would the policy
 22 not be circulated to all members of Manitoba
 23 Justice?
 24 A A lot of the circulation at this point in time
 25 is electronic and there's a lot of dissemination

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1 of information. It's voluminous at this time
 2 and it's difficult to keep up. I am not in a
 3 position to advise you whether or not that's
 4 been formulated and I'm not dealing with any of
 5 these matters at this point.
 6 So as to whether or not the policies had
 7 changed -- and as you are aware, I follow
 8 policy, I don't set policy. So as to where we
 9 are at on that, I am not quite sure.
 10 Q I do understand you follow it, you don't set it,
 11 but you can only follow it if you know what it
 12 is and you don't know what it is?
 13 A As I've said, right.
 14 Q Okay. In your statement, sir, it's page 9. So
 15 we're back at tab 1 of commission counsel's
 16 interview book of materials.
 17 A Page 9?
 18 Q Yes, the bottom of page 9, you say.
 19 "When Schille recused himself from the bail
 20 hearing in November 2003, it was not clear
 21 whether, or when, he would be able to
 22 resume his involvement in the case. He
 23 does not recall the exact circumstances --"
 24 I'm sorry, I'm reading the wrong part. Can we
 25 go back to the paragraph before where I started

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1 and just read the last two lines of the previous
 2 paragraph. That's what I meant to read to you.
 3 "Schille has never heard any explanation as
 4 to why the Saskatchewan material was not
 5 disclosed in 1993 by Miller, Dangerfield
 6 and/or Whitley."
 7 A Correct.
 8 Q And I guess you should add in that or Finlayson
 9 or Lerner; is that fair?
 10 A Correct.
 11 Q Have you ever asked any of those who were
 12 available for you to be asked, sir, post
 13 November 2003 what explanation, if any, they
 14 had?
 15 A Well, no.
 16 Q Finlayson for example?
 17 A I haven't.
 18 Q You could have asked Finlayson easily?
 19 A I haven't asked any of those individuals.
 20 Q Why not, Mr. Schille? Do you not want to know
 21 the answer to the question?
 22 A Well, I don't think it would be my place to ask
 23 the Assistant Deputy Minister, who is my direct
 24 superior, why he didn't do something at the
 25 time. Bruce Miller was the Associate Chief

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1 Judge of the Provincial Court. Similarly, I
 2 would not see it my place to go and ask him as
 3 to why he did or didn't do things or what he
 4 might have done. I just didn't see it as my
 5 place and I certainly wasn't asked to do that.
 6 And my answer would be the same in relation to
 7 everyone.
 8 Q The meeting that you had after your discovery in
 9 November of '03 at Mr. MacFarlane's office, sir,
 10 you talked about briefly to commission counsel
 11 this morning?
 12 A Right.
 13 Q Mr. Finlayson was at that; was he not?
 14 A No, he was absent. It was actually Don Slough
 15 who was the Acting Assistant Deputy at that time
 16 stood in.
 17 Q Was he at any of the subsequent meetings, sir,
 18 to do with this whole --
 19 A Well, he would have -- at what point he came
 20 back into it, he was away for an extended period
 21 of time is my recollection of it at that time.
 22 So this was obviously an emergency at the time.
 23 And by the time he was back, I think the
 24 emergency in terms of getting the material out
 25 had passed.

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1 Q So the bottom line is from January of 1992, when
 2 Mr. Quinney first wrote to Manitoba Justice with
 3 his, I don't know if direction would be the
 4 right word, but I guess his statement that the
 5 content of the letter -- his plea, his
 6 statement, whatever word you want to use -- that
 7 it be disclosed to Mr. Driskell, it turned out
 8 to be two months short of 14 -- sorry, two
 9 months short of 12 years before that request
 10 came to be fulfilled; is that right, sir?
 11 A That's correct.
 12 Q Two months short of 12 years. In the meantime,
 13 six Crown attorneys, including yourself, had had
 14 countless opportunities to make that disclosure,
 15 correct?
 16 A As a practical matter, the disclosure could have
 17 been made at any time.
 18 Q And really, certainly insofar as you are aware,
 19 sir, particularly related to your involvement,
 20 the best it can be described as is what, a
 21 comedy of errors?
 22 A Well, I'm not sure that I would use that
 23 expression. But I don't think it is our
 24 department's finest hour. I would certainly
 25 agree with that.

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1 Q Do you know, sir, if Manitoba Justice has ever
 2 taken a public position in this regard?
 3 A In how they would characterize the handling of
 4 the Driskell prosecution?
 5 Q Yes.
 6 A I'm not aware that they had ever taken a public
 7 stance in relation to that.
 8 Q I want to move on from the Saskatchewan
 9 correspondence, sir, into more general issues of
 10 post-conviction disclosure by looking at what
 11 happened in this case and perhaps looking at it
 12 a little broader as to what might happen in
 13 future cases. So looking at both the level of
 14 this case, Mr. Driskell's case, and also the
 15 more systemic level as well.
 16 A Mr. Lockyer, before you move on, you can ask me
 17 the questions, I'll do my best to respond. But
 18 as I have indicated earlier, I don't set policy
 19 and I think what you're doing at this point is
 20 venturing into the area of policy. And I can
 21 give you my own personal impressions but in
 22 terms of the policies of the department and
 23 where we're likely to go as a department, I
 24 certainly don't speak for the department.
 25 Q I don't think anyone would ever think you do,

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1 sir. But I think your opinions about what
 2 happened with Mr. Driskell and also your
 3 opinions as to what might have happened with
 4 Mr. Driskell will be not unhelpful to the
 5 inquiry. That, after all, is what a public
 6 inquiry is all about in many ways, all right?
 7 A Certainly. With that caveat, go ahead.
 8 Q Of course. First of all, sir, going to your
 9 statement to commission counsel, if you would,
 10 you said at page 6, a little more than halfway
 11 down.
 12 "With respect to documents in the Crown's
 13 actual possession, the Manitoba Justice
 14 position was that everything would be
 15 disclosed to Driskell's counsel except the
 16 correspondence file. There was a concern
 17 that some documents in the correspondence
 18 file would be privileged, and that
 19 reviewing the file document by document to
 20 determine issues of relevance,
 21 confidentiality and privilege would be a
 22 lengthy undertaking."
 23 Is that true, sir?
 24 A That's true.
 25 Q At page 7, the next page if you would, you said

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1 at line 15, sorry middle of the page is what I
 2 mean. I always think of a page as 30 lines.
 3 You say in the middle of the page.
 4 "The more difficult disclosure issues that
 5 arose involved material that was not in the
 6 Crown's possession. AIDWYC took the
 7 position that Manitoba Justice was obliged
 8 to make full disclosure according to
 9 Stinchcombe standards even though
 10 Driskell's trial had taken place in the
 11 pre-Stinchcombe era. This raised a broad
 12 policy issue with respect whether all other
 13 pre-Stinchcombe 696 cases would be entitled
 14 to the same level of disclosure. There
 15 were also serious practical impediments to
 16 making full Stinchcombe disclosure, in that
 17 the Winnipeg Police still took the view
 18 that officers' notes were their own
 19 personal property, and some officers were
 20 refusing requests that they produce their
 21 notes to the Crown."
 22 Is that true, sir?
 23 A Yes.
 24 Q Were those the positions, sir, from the outset?
 25 In other words from 2001 on, or were those

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1 positions that were applied really commencing
 2 December '02 after the DNA results or were those
 3 positions that you have described at those two
 4 pages and those two paragraphs that developed in
 5 the period thereafter during 2003?
 6 A Well, I would say that those things crystallized
 7 post-DNA testing.
 8 Q Yes?
 9 A Because I noted one of the documents you
 10 referred me to very early in the process was
 11 Mr. Finlayson saying that we'll be happy to give
 12 you -- comply with your disclosure request which
 13 seems to be a carte blanche statement that
 14 you'll get everything you want. And as this
 15 went on, I was quite leery of agreeing to
 16 something that we weren't able to comply with.
 17 Q That takes us back, sir, to tab 10, if you
 18 would, your memo of December -- sorry,
 19 February 20th, 2002. If you can just work your
 20 way through the tab until you come to that. And
 21 on the second page, this is pre-DNA.
 22 A What was the date of that again?
 23 Q February 20, '02, sir. Second page of it. This
 24 is where, if you will remember, towards the
 25 bottom of that 1224 is the number I've got on

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1 mine, is where you are talking of providing
 2 counsel with what's in the Crown file but not
 3 necessarily applying the same rules to materials
 4 which aren't or which might not be currently
 5 available, i.e. police notes and working notes
 6 of forensic experts. Do you see that?
 7 A Correct.
 8 Q So certainly as of February '02, you are
 9 cautioning, as this is addressed to the ADM,
 10 Mr. Finlayson, that maybe different tacts, to
 11 use your words, should be taken with regard to
 12 these two categories of disclosure; am I right?
 13 A That's correct.
 14 Q All right. On February 18th, '03, sir, if you
 15 move on to tab 12. Yes, the last page, all
 16 right.
 17 A Last page of tab?
 18 Q Tab 12. It's a letter from Finlayson to
 19 Mr. Driskell's counsel of February 18, 2003.
 20 And this was read out by my friend to you this
 21 morning and I want to come back to it quickly
 22 where he says.
 23 "I also wish to confirm that Manitoba
 24 Justice will co-operate with respect to all
 25 requests for disclosure in regards to the

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1 original investigation of the murder of
 2 Mr. Harder. Mr. Schille will act as a
 3 contact for Prosecutions in this regard. I
 4 have spoken to Chief Ewatski and I expect
 5 that the police will also be appointing a
 6 senior police officer to help ensure that
 7 such disclosure can occur in a timely way."
 8 Now this letter was written nine days after the
 9 meeting with counsel, you, Morrison, Finlayson,
 10 with Mr. Driskell's counsel including
 11 Mr. McCloskey; is that right?
 12 A Yeah, I'd agree with that.
 13 Q And presumably, it was written with your
 14 concurrence? I mean you were aware of what was
 15 going out.
 16 A I saw it after it went out. I don't recall
 17 being consulted. I am not sure that the
 18 Assistant Deputy would normally consult me
 19 before he composed his correspondence.
 20 Q Am I right, sir, that's carefully worded, at
 21 least would you agree it's a reasonable
 22 interpretation of the letter, that Mr. Finlayson
 23 has carefully worded his letter such that he is
 24 only offering disclosure with respect to the
 25 original investigation of the murder of

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1 Mr. Harder which reflects back on your memo of
 2 February '02.
 3 A That appears to be the case.
 4 Q Right. So that seems to be a follow-through of
 5 the policy that you have suggested might be the
 6 good policy back in February '02?
 7 A Correct.
 8 Q And Mr. Driskell's counsel picked up on this,
 9 sir. Look at tab 13, the first page of tab 13.
 10 In a response to this letter to Mr. Finlayson,
 11 Mr. Driskell's counsel on February 24th, '03
 12 writes.
 13 "However, I note that your letter only
 14 refers to disclosure requests 'in regards
 15 to the original investigation of the murder
 16 of Perry Dean Harder.' I trust you do not
 17 mean this literally so as to exclude
 18 requests in regard to the post-conviction
 19 investigation conducted by the Winnipeg
 20 Police Service and Manitoba Justice in
 21 1992-1993. Could you clarify this?"
 22 And there's a note there, it's Mr. Finlayson's
 23 handwriting obviously to Dale Schille.
 24 "Dale, so what do you think our response
 25 should be? Rob."

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1 Do you see that?
 2 A Right.
 3 Q So this issue then of the form or the categories
 4 of disclosure that should and should not be
 5 given to Mr. Driskell's counsel, and we are
 6 post-DNA now, was now sort of out in the open so
 7 to speak; is that fair?
 8 A Well, I wouldn't categorize it as what should or
 9 shouldn't be given. The indication initially,
 10 it was a progression of an approach, if I can
 11 refer to it in that sense. Initially
 12 Mr. Finlayson had said we will cooperate with
 13 all of the disclosure requests. And I was
 14 concerned that that would be interpreted as an
 15 undertaking that we'll get you whatever you
 16 want. And a lot of those things were beyond our
 17 control.
 18 And as you know, as things transpired in
 19 this matter, we got you disclosure of many
 20 things that weren't part of the original
 21 investigation. Our concern is that we would not
 22 be seen as undertaking to provide things that at
 23 the end we simply couldn't deliver for whatever
 24 reason. And it may have been a situation -- we
 25 were trying to feel our way through this

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1 process. I don't think -- with certain
 2 exceptions, I think your letter of October of
 3 '03 asking us, that's right around the time that
 4 we deferred to -- referred you rather to Federal
 5 Justice because he had filed his application at
 6 that time, with the exception of that, most of
 7 the disclosure requests were reasonable ones.
 8 Whether or not we could comply with them was
 9 probably a different matter. But I'm not sure
 10 that I would necessarily regard the October
 11 letter of '03 where you were asking us to get
 12 investigative reports from another province. I
 13 think that that appropriately, more
 14 appropriately would have been dealt with by the
 15 Criminal Conviction Review Group because I'm not
 16 sure how that would have been received, our
 17 request of another police agency in another
 18 province that they forward their investigative
 19 reports or a portion of their reports.
 20 Q As it turns out, Mr. Schille, I think we now
 21 know that the substantial post-trial materials
 22 related to or were covered by the Saskatchewan
 23 correspondence and by the homicide review
 24 conducted by the police. Would you agree?
 25 A I'm not sure I understand the question.

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1 Q The post-trial developments, because we're
 2 talking here about a line, a barrier being
 3 potentially created between all you can get, all
 4 you'll give up by way of disclosure is original
 5 investigation materials and nothing thereafter,
 6 that's the implication of what's going on here,
 7 is that the post-trial materials of substance
 8 fell into two categories. One category was the
 9 Saskatchewan Justice materials or
 10 correspondence, the other category was really
 11 the homicide review prepared by the police and
 12 everything that that entailed; is that right?
 13 A I didn't understand that to be the case. You
 14 have linked the document, your letter of the
 15 24th of February to my memorandum where I'm
 16 saying I would urge caution in relation to
 17 undertakings to get anything that isn't on file.
 18 I think when you say Mr. Finlayson's
 19 correspondence was carefully crafted, I would
 20 agree with that. I'm not Mr. Finlayson so I
 21 can't speak to what was in his mind, but I think
 22 he was carefully crafting it to address the
 23 issue I have referred to that we would not be
 24 able to get certain information that, albeit a
 25 reasonable request, we were unable to deliver

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1 such as officers' notes which is a routine
 2 thing.
 3 I would not agree with the suggestion that
 4 that was or appeared to have been drafted in
 5 such a way to exclude the Saskatchewan
 6 correspondence in those things, because that's
 7 not the concern I raised. And I don't think
 8 Mr. Finlayson was attempting to draft his letter
 9 in such a way that those things would be
 10 excluded.
 11 Q There was no real response, I think it's fair to
 12 say, sir. In fact, there was no response to
 13 this letter of February 24th, '03 from
 14 Mr. Driskell's counsel to Mr. Finlayson?
 15 A Well, I'm not sure. I certainly don't see
 16 anything on there. I'll take your word for
 17 that. But I know I saw in the letter and I know
 18 that pursuant to the note, it would appear that
 19 Mr. Finlayson would have spoken to me in
 20 relation to that.
 21 Q And interestingly --
 22 THE COMMISSIONER: Whenever it's convenient.
 23 BY : May I just do one more thing?
 24 THE COMMISSIONER: Yes.
 25

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1 BY MR. LOCKYER:
 2 Q Interestingly enough, sir, some months later, an
 3 assignment was given out within Manitoba Justice
 4 to review what disclosure obligations, if any,
 5 there were on Manitoba Justice in a
 6 post-conviction application for relief?
 7 A That's correct.
 8 MR. LOCKYER: That's a good place to stop,
 9 Mr. Commissioner.
 10 THE COMMISSIONER: Okay. Two o'clock.
 11 THE CLERK: All rise. This Commission of
 12 Inquiry is adjourned until 2:00 p.m.
 13 (Proceedings recessed at 12:50 p.m. and
 14 reconvened at 2:00 p.m.)
 15 UPON COMMENCING AT 2:00 P.M.
 16 THE CLERK: All rise. This commission of
 17 inquiry is now in session.
 18 THE COMMISSIONER: Good afternoon, Mr. Lockyer.
 19 BY MR. LOCKYER:
 20 Q Thank you. Mr. Schille, there is just one
 21 aspect of the Saskatchewan correspondence that I
 22 omitted to cover this morning. I just want to
 23 cover it briefly now. When you reviewed the
 24 material in 2000 and came to the conclusion that
 25 the disclosure had, in fact, taken place; in

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1 other words, that the draft letter had become a
 2 real letter with enclosures, did you appreciate
 3 at that time, sir, that this meant that the
 4 disclosure had been made post-appeal, albeit the
 5 information had been provided a long time before
 6 the appeal?
 7 A Well, and I would take it that I did appreciate
 8 that it was provided post-appeal, although I
 9 didn't particularize that in my review at the
 10 time.
 11 Q Right. And I ask you that because in your
 12 statement to Commission Counsel, sir, at tab 1,
 13 page 4, you sort of suggest otherwise, if you
 14 look at the last paragraph on page 4?
 15 A Page 4.
 16 Q "In his memo, Schille stated that the new
 17 information was disclosed to the accused's
 18 counsel after the trial. He did not
 19 specifically mention that the file
 20 documents suggested this material was not
 21 disclosed until April '93, several months
 22 after Driskell's appeal to the Manitoba
 23 Court of Appeal was dismissed. Schille
 24 thinks that the significance of the time of
 25 the slip of the supposed disclosure

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1 A No, I recall that.
 2 Q You remember saying that?
 3 A I do.
 4 Q And I'm quoting:
 5 "That defence should have had that prior to
 6 the hearing of the appeal. It looked like,
 7 at this point, it was crying over spilled
 8 milk because it had been done, albeit
 9 belatedly."
 10 Do you remember saying that?
 11 A I remember saying that. But I would say that
 12 that is -- I certainly, by using that turn of
 13 phrase, that certainly was not my intention to
 14 trivialize what had happened. And I think
 15 reading that, that certainly might be the
 16 inference, and that was very much not my
 17 intention.
 18 Q All right. Just before we broke, I had referred
 19 to you, and you remembered this, the assignment
 20 to a student, I think it was two students,
 21 actually, to do a memo on the Crown's
 22 post-conviction disclosure obligations. Do you
 23 remember that?
 24 A I remember that. What tab is that at,
 25 Mr. Lockyer?

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1 vis-a-vis the appeal may simply have not
 2 registered with him at this point."
 3 And you are now saying that it registered
 4 with you, but you just didn't make a note of it
 5 in your report; is that right?
 6 A It could be either. I don't remember at this
 7 point one way or the other. So I certainly had
 8 the --
 9 Q Well --
 10 A Sorry to interrupt you. But I certainly had the
 11 information at the time of the appeal. And I
 12 know another Crown at one point was tasked to do
 13 a timeline which was sort of a easy reference
 14 document. I think it may have been in the
 15 timeline, and that's something I would have
 16 alluded to in terms of what took place.
 17 Obviously, there would be no reference to the
 18 Saskatchewan correspondence. But as to when the
 19 appeal took place, it would have been
 20 particularized on that sort of ease of reference
 21 document.
 22 Q You refer to it as crying over spilled milk,
 23 actually, when you spoke to Mr. Lett on
 24 December 11, '03, if you go to tab 19 of the
 25 same book?

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1 Q If you go to the blue book, which is --
 2 THE COURT: 49A.
 3 BY MR. LOCKYER:
 4 Q The blue book, 49A, go to page 3, tab 65, would
 5 you? And you'll see there, I believe the
 6 authors of this are or were both students at the
 7 time, correct me if I'm wrong. And they were
 8 asked by you and Mr. Finlayson, it seems, to
 9 provide a memo:
 10 "On whether the Crown owes a
 11 post-conviction duty of disclosure."
 12 Right?
 13 A Right.
 14 Q And speaking lawyer to lawyer, if I may,
 15 Mr. Schille, I think it could be fairly said
 16 that there is really a complete dearth of case
 17 law on post-conviction disclosure obligations,
 18 these post-conviction, post-appeal disclosure
 19 obligations, is that your understanding?
 20 A I would agree with that.
 21 Q Yes. And this memo, sir, which is not unhelpful
 22 at all, at page, I am not saying I agree with
 23 its conclusions, but some thought was put into
 24 it at page 70, the students come to their
 25 conclusion:

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1 "an overview of the material referred to in
 2 Mr. Lockyer's letter, as well as a search
 3 of other relevant sources is being
 4 conducted. It is our opinion that there is
 5 no specific duty which requires the Crown
 6 to disclose all information obtained after
 7 a conviction. However, the sources do seem
 8 to indicate that the Crown should disclose
 9 post-conviction information in their
 10 possession that qualifies as new evidence
 11 that shows an accused is innocent or raises
 12 a doubt as to guilt. Therefore, if the
 13 Crown possesses information from the 1992
 14 post-conviction review of Mr. Driskell's
 15 case that qualifies his evidence that shows
 16 Mr. Driskell is innocent or raises a doubt
 17 as to Mr. Driskell's guilt, then this
 18 should be disclosed."
 19 Now, I think that the fact of this memo
 20 written July 30, 200 -- July 31st, rather, 2003,
 21 sir. And so we are now seven or eight months
 22 passed the DNA results -- actually, eight or
 23 nine months, if I think it through, eight or
 24 nine months passed the DNA results, is
 25 reflective of yourself and Mr. Finlayson really

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1 if not three. And, in fact, I can think of
 2 three. And are you aware, sir, as to whether
 3 there is any policy now, within Manitoba
 4 Justice, as to post-conviction, post-appeal
 5 disclosure obligations?
 6 A I think we covered that this morning. And I am
 7 not aware of a policy at this point.
 8 Q No, that is a different question.
 9 A Sorry.
 10 Q We discussed the policy.
 11 A Maybe I misunderstood your question, then.
 12 Q We discussed policy earlier this morning, but
 13 not in the same context. It was a different
 14 context.
 15 A All right.
 16 Q But you are not aware of any post-conviction
 17 disclosure policy within Manitoba Justice?
 18 A No. I would take that as being sort of a subset
 19 of the more global issue of Crown's policies in
 20 dealing with these matters in general.
 21 Q I see. All right. And another issue, of
 22 course, that's arisen in Mr. Driskell's case,
 23 sir, is the Crown's obligation post-conviction,
 24 pre-appeal their disclosure obligations at that
 25 point in time, fair?

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1 trying to determine what disclosure obligations,
 2 if any, you had at this point in time; is that
 3 right?
 4 A Well, I think it's addressed to both of us
 5 because I was certainly primarily involved in
 6 this matter. But I think the memorandum itself
 7 was written at Mr. Finlayson's request. And I'm
 8 not sure what precipitated it at that specific
 9 point in time, because I think a lot of the
 10 discussions about our obligation was, as the
 11 correspondence indicates, were somewhat earlier
 12 in time. So I am not sure what was going on
 13 right about that time that would have
 14 precipitated the request.
 15 Q Now, you're aware, sir, that there are other
 16 cases that are presently -- that Manitoba
 17 Justice has been advised are -- that the --
 18 sorry, let me start this sentence again because
 19 I am not doing very well. There are other
 20 individuals, sir, you're aware in Manitoba who
 21 are putting forward claims of wrongful
 22 conviction in homicides; is that right? You are
 23 aware of that?
 24 A I am aware of at least one or two I know.
 25 Q Yes. I can certainly think of two off the top,

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1 A Fair.
 2 Q Okay. And are you aware of any policy in that
 3 regard now, sir, that exists within Manitoba
 4 Justice?
 5 A No. But I think you've made the point in some
 6 of the correspondence that there isn't a dearth
 7 of case law in that particular area. And we are
 8 certainly assisted, to some extent, with some
 9 cases in that area. Your specific question, I
 10 know, is whether or not I'm aware of a policy
 11 internally. I'm not.
 12 Q Well, there is the Trotter case out of the
 13 Ontario Court of Appeal?
 14 A Right. And you reference that in some of your
 15 correspondence.
 16 Q Tell me this, Mr. Schille, if you take, just
 17 take a case like Mr. Driskell's, where you
 18 have -- put us at the stage we are at in
 19 December '02, where we suddenly have some new
 20 evidence that certainly strikes at and, indeed,
 21 contradicts a significant aspect of the Crown's
 22 case, all right? Can we at least agree on that?
 23 A I don't think we can. Because I'm on record and
 24 I think that some of my own views as to the
 25 significance of that evidence are included in

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1 the materials that's before this. At the end of
 2 the day, I think the hairs relating to
 3 Mr. Driskell's van, if they were, in fact,
 4 Mr. Harder's hairs, I would question the
 5 strength of the inference that could be drawn
 6 that they came from Mr. Harder's dead body.
 7 Given that the evidence was clear that
 8 Mr. Driskell and Mr. Harder were friends and an
 9 equally attractive inference would arise that
 10 those hairs were in Mr. Driskell's van because
 11 of their association and friendship. So I know
 12 that -- I appreciate the point, but that's not
 13 how that was presented at trial.
 14 But in terms of the overall strength of
 15 that evidence and the significance of that
 16 evidence, I would not regard that as
 17 significant. But that having been said, given
 18 the nature of the comments that the Crown made
 19 in its closing to the jury, it's obviously
 20 something that the Crown relied on. And what
 21 significance the jury placed on that, we will
 22 never know. So I don't think -- conversely, I
 23 don't think it could be said that it's to be
 24 dismissed outright, but I would question the
 25 significance of that personally, if that's the

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1 question.
 2 Q No, it really wasn't. I was trying to use it as
 3 a predicate. If we assume for a moment, sir,
 4 let's do it this way, that the DNA results
 5 contradicted a significant aspect of the Crown's
 6 case, let's just assume that, all right?
 7 A Fair enough.
 8 Q For the present purposes.
 9 A Right.
 10 Q Can you think of any reason, sir, why the
 11 disclosure obligations, at that point, shouldn't
 12 be full and complete as they are expressed on a
 13 pre-trial basis in Stinchcombe?
 14 A Well, again, that's a matter of policy. But for
 15 the reasons I've articulated earlier, I think
 16 that there are practical problems arising from
 17 that in dated cases. And I think I've gone
 18 through that in some detail already in my
 19 testimony.
 20 Q I guess the question includes or incorporates
 21 within it the notion that the Justice
 22 Department, in those circumstances, would do
 23 everything it can to get around any practical
 24 problems that may arise, and that's just a part
 25 of the disclosure obligation?

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1 A And I think that this case is a good example of
 2 that because I think, for the most part, that is
 3 exactly what we did. Without saying that you
 4 can have everything that you asked for, I think
 5 we attempted to work our way through this and
 6 provide -- in the spirit of cooperation, provide
 7 the things that you are asking for. And, you
 8 know, we focused on some of the things that we
 9 weren't able to provide.
 10 Q The question, then, going back to the question,
 11 do you see any problem, sir, you, yourself, I
 12 know you are not talking on behalf of Manitoba
 13 Justice, with a disclosure obligation
 14 crystallizing in circumstances such as those of
 15 Mr. Driskell, which obligate the Crown to
 16 essentially provide full disclosure within the
 17 spirit and within the perimeters of the Supreme
 18 Court of Canada's decision in Stinchcombe?
 19 A Well, if there is a situation, and the premise
 20 of this question to me, was that the significant
 21 aspect of the Crown's case was undermined or
 22 contradicted by a DNA findings, certainly that's
 23 something that should be of particular interest
 24 to the Crown, and I would expect that the Crown
 25 would be doing everything it could to assess it,

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1 so I think I would generally agree with that
 2 proposition.
 3 Q And further, sir, I'm sure you have come to
 4 realize, just by virtue of your profession, that
 5 there are some, what you might call serial
 6 causes of wrongful convictions? There are some
 7 well known causes of wrongful convictions that
 8 arise again and again in these cases; you are
 9 aware of that?
 10 A I'm aware of that.
 11 Q Right. And would you also agree, sir, then,
 12 that in cases where those kinds of dangers exist
 13 or existed in all cases, the same kind of
 14 crystallization should occur in those cases if
 15 the individual has continued to maintain his
 16 innocence?
 17 A Well, I'm not sure. I think we would be taking
 18 that on a case-by-case basis, given what the
 19 nature of the particular problem was.
 20 Q Well, why don't we take a simple one of a case
 21 that was dependent on the evidence of a
 22 jailhouse informant as an example?
 23 A That is something that would certainly raise
 24 concerns, given what we now know in terms of the
 25 reliability of that kind of evidence.

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<p>1 Q And should legitimately precipitate a full 2 disclosure obligation on the part of Manitoba 3 Justice if a claim of wrongful conviction is 4 made by an individual convicted on that basis? 5 A Again, predicated on your assumption that that 6 was the major plank in the Crown's case against 7 the person, I would agree with that. 8 Q Perhaps significant as opposed to major? 9 A I would use them interchangeably. 10 Q In the case of information that comes in the 11 possession of the authorities, sir, 12 post-conviction, whether it's pre-appeal or 13 post-appeal, in whatever manner it comes into 14 the possession of the authorities, do you see 15 any reason, sir, why that information shouldn't 16 invariably be automatically discloseable? 17 A Well, assuming you mean to the Stinchcombe 18 material, no, I wouldn't see why it isn't 19 disclosure. 20 Q Assuming its disclosure isn't prohibited by one 21 of the rules, that you might say, that might 22 reveal them being an informant, am I right? And 23 you would agree with that during the 24 post-conviction pre-appeal period and the 25 post-conviction post-appeal period?</p>	<p>1 sir? 2 A I would think that that's the case. I don't 3 recollect seeing anything. 4 Q Believe me, I would be bringing it to your 5 attention like Jack Robinson. 6 A I expect you would be. 7 Q So Manitoba Justice acted on a premise, an 8 absolute premise, commencing December 2, 2002, 9 that the DNA results proved that those weren't 10 Perry Dean Harder's hair? 11 A Correct. 12 Q Did you know, sir, did you, yourself, or did you 13 ever hear from anyone else that there was any 14 challenge to those results, either generated 15 through Mr. Christianson, generated through the 16 RCMP lab in Winnipeg, or generated through the 17 RCMP lab in Ottawa? Did you ever hear an 18 inkling of that kind of suggestion from any of 19 those quarters? 20 A I'm not sure that I did, no. 21 Q Do you think you might have retained it in your 22 mind if you had? 23 A I know I had several conversations with 24 Mr. Christianson. 25 Q Yes.</p>
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<p>1 A I think so, yes. 2 Q So just to take an example from Mr. Driskell's 3 case, the Saskatchewan correspondence should 4 have been immediately discloseable, whether it 5 had first come to the attention of Manitoba 6 Justice before the appeal was heard or it had 7 not come to their attention until after the 8 appeal had been dismissed? 9 A I agree with that. 10 Q I want to talk for a moment, sir, about the DNA 11 testing and its impact, if any, at Manitoba 12 Justice within the corridors of power, so to 13 speak. First of all, sir, did it ever occur to 14 Manitoba Justice, after the DNA results came in, 15 that their validity could be challenged? 16 A Sorry, could you repeat that? 17 Q I am not surprised. Did it ever occur to 18 Manitoba Justice, sir, to challenge the validity 19 of the DNA results? 20 A No. 21 Q Not even for an instant? 22 A No. 23 Q Good. And there is nothing, I think it's fair 24 to say, in any of the materials that we have 25 that even hints of that suggestion, am I right,</p>	<p>1 A I've spoken to him about the reliability of 2 mitochondrial DNA in relation not only to this 3 case, but another case that I was doing, so I am 4 having some difficulty at the same time 5 separating the two. 6 Q All right. Do you recall at least in the, say, 7 2002 to 2005 period, Mr. Christianson ever 8 suggesting to you that maybe he was right and 9 they were wrong, in any form? 10 A No. I don't recall him saying that. But I 11 think there is information before this court 12 that has been filed in relation to another 13 prosecution. The accused's name was Zurowski. 14 And that's a case I have alluded to earlier that 15 Mr. Christianson gave testimony in that matter 16 and was cross-examined in relation to his 17 findings in other matters, including this one. 18 And I think, in the context of preparation for 19 that case, we had certainly discussed the 20 reliability of mitochondrial DNA. And I 21 think -- in preparation of that matter, I think 22 he expressed the view that it was not as 23 reliable as nuclear DNA testing. 24 Q You were counsel on Zurowski, so I didn't bring 25 it with me, unfortunately. But it is pointed</p>

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1 out to Mr. Christianson, in his evidence on
 2 Zurowski, he never purported to challenge the
 3 validity of the results in the Driskell case.
 4 Do you remember that?
 5 A I don't recall that. And I don't think he ever
 6 did that.
 7 Q No. I'm suggesting to you he didn't.
 8 A That would accord with my recollection at this
 9 point.
 10 Q Now, you've told us, sir, sort of a few minutes
 11 ago, your views as to the significance of the
 12 hair evidence. And I want to take you to
 13 something that you wrote shortly after the
 14 results came out. Could you go to the blue
 15 book, 49A, tab 2, page 10, please? And what
 16 we're looking at here, if you look at the bottom
 17 of the page, is an e-mail from Bruce MacFarlane
 18 to you dated December 5th. As I recall, the
 19 results came in December 2nd. Mr. MacFarlane
 20 has written to you:
 21 "Thank you for letting me know so quickly."
 22 That is about the DNA results in the
 23 previous page, you giving them to him. It
 24 doesn't matter.
 25 "If I recall correctly, this conclusion,

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1 while favourable to the accused, is not
 2 depositive to the case. Nonetheless, I
 3 expect that Crown for Mr. Driskell would
 4 intensify his impassioned plea. I would be
 5 most grateful if you could give me some
 6 ideas of the implications of this finding.
 7 What does it mean in terms of whether a
 8 miscarriage of justice has occurred? Are
 9 there any further steps we should be taking
 10 to assess whether Mr. Driskell was wrongly
 11 convicted? Is this the point on which we
 12 draw on the Federal Government? Any other
 13 points would be most appreciated. Signed
 14 Bruce."
 15 And then your reply is above there, do you
 16 see that? And you wrote -- and you wrote this
 17 on December 6th, the next day:
 18 "In a nutshell, the hairs came from a van
 19 that had belonged to the accused at the
 20 time of the murder. According to one
 21 witness, Mr. Driskell had talked about
 22 killing the deceased and using the van to
 23 transport the body. Given that the
 24 deceased and Mr. Driskell were close
 25 associates, the probative value of finding

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1 his hair in the van is not that high. As
 2 you will recall, the expert who did the
 3 microscopic hair analysis stated his
 4 opinion that there was a high probability
 5 that the hairs came from the deceased. The
 6 Crown closed to the jury, restating that
 7 evidence. The expert could not have been
 8 more wrong. Not only were the hairs not a
 9 much match to the deceased, the three hairs
 10 came from three different people."
 11 That's a pretty clear, definitive statement
 12 by you that you accept the DNA results for what
 13 they are, right? Carrying on:
 14 "The problem is further compounded by the
 15 fact that the Crown's main evidence came
 16 from two witnesses of unsavoury character.
 17 And the judge gave the Vetrovic warning to
 18 be careful to look for confirmatory
 19 evidence before placing reliance on their
 20 testimony. Although there was other more
 21 compelling confirmatory testimony, this
 22 evidence also..."
 23 And by that I think you mean the hair
 24 evidence,
 25 "...would also constitute confirmatory

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1 evidence. As you observed at our last
 2 meeting, regardless of the strength of the
 3 Crown's case otherwise, it would be
 4 impossible for any review in court to
 5 determine what degree of reliance the jury
 6 placed on the impugned evidence on
 7 convicting the accused, Mr. Driskell. I
 8 have spoken to counsel for Mr. Driskell.
 9 And he wants to know what our position
 10 would be on a 690 application and whether
 11 we would resist a new trial if the matter
 12 was referred back to the Court of Appeal.
 13 I will speak to Rob early next week when he
 14 gets back."
 15 Do you remember writing that e-mail, sir?
 16 A I do now.
 17 Q And it seems to me -- maybe I am misinterpreting
 18 it, but it certainly seems to me that what
 19 you're saying there is, we have got a lot of
 20 problems here with these DNA results?
 21 A It was certainly -- it was certainly
 22 problematic.
 23 Q Yes.
 24 A I would agree with that.
 25 Q I mean, it certainly seems what you are saying

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1 there about the probative value of the
 2 mitochondrial results is a lot stronger than
 3 what you were actually saying to us just 10 or
 4 15 minutes ago.
 5 A Well, I don't think that --
 6 Q Maybe I misunderstood you.
 7 A I think you did.
 8 Q All right. Because do you think -- put
 9 yourself -- I mean, you are writing for
 10 Mr. MacFarlane. So put yourself in
 11 Mr. MacFarlane's shoes reading that. Could you
 12 think, sir, that the message that you get from
 13 that is it may well be that we are going to have
 14 to consent to some kind of remedy for
 15 Mr. Driskell, in light of these results?
 16 A That was not my intention, no.
 17 Q So you don't think when you say:
 18 "As you observed at our last meeting,
 19 regardless of the strength of the Crown's
 20 case otherwise, it would be impossible for
 21 any reviewing court to determine what
 22 reliance the jury placed on the evidence
 23 when convicting the accused."
 24 I read that as you were, in effect, saying
 25 that, therefore, we really have no -- really the

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1 only thing that can be left to be said is that
 2 there is a substantial likelihood of a
 3 miscarriage of justice in this case. Since we
 4 can't tell what the jury did, then we have got a
 5 problem.
 6 A Well --
 7 Q That's how I read it. Maybe you meant it to be
 8 read differently. Can you help us out?
 9 A Well, I think I can, as to what was going on in
 10 my mind when I was addressing these issues. As
 11 to a miscarriage of justice, I know
 12 historically, and this inquiry has delved into
 13 this at some length, so I am giving my fairly
 14 rudimentary understanding of all of this, given
 15 that I do not deal with these matters in the
 16 same volume, obviously, that the Association in
 17 Aid of the Wrongfully Convicted does. But my
 18 understanding is that the former 690 section was
 19 the statutory response that replaced the
 20 Minister's discretion. And the Minister's
 21 discretion was historically exercised in cases
 22 where there was a compelling basis to conclude
 23 that the wrong person was in custody for the
 24 crime. And if miscarriage of justice is being
 25 used in the context of the evidence indicates

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1 that you do not have the right person, I am not
 2 sure that the DNA results are indicative of a
 3 miscarriage of justice in that sense. If the
 4 miscarriage of justice is used in the sense that
 5 the process whereby the accused was convicted
 6 was inherently flawed then, yes, I agree that
 7 the results of the mitochondrial testing
 8 indicated a miscarriage of justice in that
 9 sense.
 10 Q Because whatever decision was to be made by
 11 Manitoba Justice, in the context of the DNA
 12 results, was going -- you surely realized, all
 13 of you, you, Mr. Morrison, Mr. Finlayson, I
 14 suppose Mr. MacFarlane as well, you all realized
 15 was going to have a very significant impact on
 16 Mr. Driskell's future?
 17 A Obviously, yes.
 18 Q Yes. In fact, at this point in time, in January
 19 or December '02, January, February, '03, there
 20 had been no case that had ever acknowledged a
 21 person's right to seek bail pending an
 22 application for a ministerial review, right?
 23 That didn't happen until July '03, which is the
 24 first case that that happened on?
 25 A Right. That was Phillion?

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1 Q Right.
 2 A Yes.
 3 Q So you must have realized, as a member of
 4 Manitoba Justice, that your decision to continue
 5 to try to sustain Mr. Driskell's conviction in
 6 December '02 and following was, as far as you
 7 were all concerned, going to mean that
 8 Mr. Driskell was going to spend a significant
 9 period more time in prison, regardless of what
 10 happened thereafter?
 11 A Well, if I can just correct something that
 12 you've just said, you referred to it as my
 13 decision. It was not my decision, sir, as I've
 14 pointed out. The decisions in relation to this
 15 matter were made at the highest levels of the
 16 department, at the senior management level. The
 17 most senior members being the Deputy Minister
 18 and the Assistant Deputy Minister. And I think,
 19 although Mr. Morrison was involved as general
 20 counsel, as well, the decision would not have
 21 been his. He would have been furnishing advice
 22 in much the same way that I was. So to answer
 23 your question, did we appreciate that? I
 24 would -- I certainly appreciated that. And I
 25 take it that my superiors in the department

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1 would have appreciated that. So I would
 2 generally agree with that, although I point out
 3 that it wasn't my decision.
 4 Q And you were one of those present at the meeting
 5 when this information was imparted to
 6 Mr. Driskell's counsel on February 9, 2003?
 7 A I was, yes.
 8 Q And to sort of complete the picture, sir, that
 9 led to AIDWYC getting in direct contact or
 10 commencing direct contact with the Minister.
 11 You were aware of that?
 12 A Yes.
 13 Q And if I could ask you to go to Tab 3 of the
 14 blue book, please, 49A. If you look at page 8,
 15 sir. Page 7, rather, you will see the letter
 16 addressed to the Minister by counsel for
 17 Mr. Driskell dated February 13, 2003?
 18 A I see that.
 19 Q Some four days after you have been one of the
 20 three to impart the decision to Mr. Driskell's
 21 counsel, is that right?
 22 A That's correct.
 23 Q Right. And at page 8, the second page of that,
 24 sir, you will see a reference in the third
 25 paragraph. There is actually a mistake there.

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1 It says on February 3rd. It should be
 2 February 9th. There was a meeting held with you
 3 and others.
 4 "At the outset of the meeting..."
 5 it says -- do you see where I am?
 6 A Yes.
 7 Q "Before we had a chance to make further
 8 representations, Mr. Finlayson told that
 9 you say Manitoba Justice intended to
 10 maintain their position that Mr. Driskell's
 11 conviction should stand. As far as they
 12 were concerned, the new evidence was
 13 insufficient to warrant any further action
 14 on their part, did not affect the safety of
 15 his conviction. In our opinion, this is a
 16 dreadful decision which will have
 17 far-reaching repercussions for Mr. Driskell
 18 and for the cause of justice in Manitoba.
 19 Mr. Driskell, it condemns him to a further
 20 two or three years in prison while we
 21 prepare our section 696 brief to explain
 22 this miscarriage of justice to the Federal
 23 Minister. For the cause of justice in
 24 Manitoba, Mr. Driskell's case is destined
 25 to become yet another example in cases of

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1 wrongful conviction in Canada where
 2 intransigent prosecutors and unbending
 3 justice departments refuse to concede that
 4 a miscarriage of justice has confirmed in
 5 the face of overwhelming evidence that it,
 6 in fact, has."
 7 And there is then a plea to the Minister to
 8 reconsider the decision of his officials. Do
 9 you see that?
 10 A I see that.
 11 Q "We ask you to join us in acknowledging
 12 that Mr. Driskell must have a new trial
 13 before a new jury which will not be misled
 14 by forensic evidence now proved entirely
 15 wrong."
 16 And the reply to that, sir, I imagine you
 17 have seen that? Maybe not recently, but you
 18 have seen it over time. Sorry, you have to move
 19 to the buff. And if you work into page 9 of the
 20 buff.
 21 THE COMMISSIONER: He buff is Exhibit 49B.
 22 MR. LOCKYER: Sorry, 49B is that what you said?
 23 THE COMMISSIONER: B as in Bob. And page 9, did
 24 you say?
 25

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1 BY MR. LOCKYER:
 2 Q I did, yes, Mr. Commissioner. You will see
 3 there the reply of, I guess as of last week, the
 4 former Minister of Justice of the Province,
 5 Mr. Mackintosh --
 6 A Yes.
 7 Q -- who advised, on March 10 of 2003, the second
 8 paragraph:
 9 "The short answer to your letter is that we
 10 welcome, if not urge, an independent third
 11 party review of this case in accordance
 12 with the law. As early as 1995, my
 13 department urged Ms. Duncan to commence a
 14 review pursuant to Section 690. The
 15 result: None was taken, for reasons best
 16 known to Mr. Driskell."
 17 Kind of an odd line, but anyway:
 18 "The results of the recent DNA testing are
 19 unsettling. But in light of the trial
 20 judge's charge to the jury on the probative
 21 value of that evidence, we have not been
 22 able to conclude that the decision of the
 23 jury would probably have been different.
 24 Having said that, the advantage of a 696
 25 review is that it is independent from the

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1 original prosecuting agency and, at the
 2 same time, has newly established coercive
 3 powers to permit a complete re-evaluation
 4 to the factual underpinning to the
 5 conviction. My department will cooperate
 6 fully in any such review, making available
 7 all documents and staff that were
 8 involved."
 9 And in a sense, it might be said that as of
 10 then the dye was cast. Mr. Driskell was going
 11 to have to take the 696 avenue of relief; is
 12 that right?
 13 A Well, I can't comment on that. I am not sure I
 14 ever saw the response to your letter. I recall
 15 seeing your letter, a copy of your letter to the
 16 Minister. I am not sure I was ever shown a copy
 17 or ever saw a copy of this letter. So in terms
 18 of the dye being cast, I really can't answer
 19 that question.
 20 Q Certainly there was several attempts. Well, I
 21 guess attempts, when I say several attempts,
 22 made to the two places that they could be made
 23 by AIDWYC to try and deal with this case, then
 24 and there, in light of the DNA results?
 25 A I agree with that, yes.

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1 Q And they were, obviously, unsuccessful?
 2 A That's correct.
 3 Q Which meant, as it turned out, in fact, the
 4 first letter the Minister was wrong. It
 5 actually meant Mr. Driskell spent a further nine
 6 or ten months in jail because he got released on
 7 bail after the Phillion case, right? I think it
 8 said two or three years in a letter to the
 9 Minister, that the suggestion was made.
 10 A M'hm.
 11 Q Now, when you did your review in 2000, sir, you
 12 referred, did you not, to the possibility of
 13 using new science to ascertain whether those
 14 hairs really did come from Mr. Harder. Do you
 15 remember that?
 16 A That's something I commented on.
 17 Q Yes. Did you give any consideration, sir, to
 18 following through on that and suggesting that
 19 the scientific testing be done?
 20 A That wouldn't have been something that I would
 21 have done on my own initiative. I was bringing
 22 that to the attention of the Assistant Deputy
 23 Minister of the time. And that's a decision
 24 that he would have been making in relation to
 25 this case.

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1 Q Okay. There is no documentation that he ever
 2 considered the matter. Did you ever approach
 3 him verbally and say: What do you think,
 4 Mr. Finlayson? Do you think we should
 5 undertake, given all of the hoofers that has
 6 been on this case for the last seven years at
 7 this point? Do you think it might be a good
 8 idea if we do this to see what happens? Did you
 9 ever speak to him about it, in other words?
 10 A I didn't. I had no reason, in particular, to
 11 question the findings. Other than one of the
 12 things I also commented on in my review is that
 13 I was struck by the strength of the opinion that
 14 Mr. Christianson expressed, given my
 15 understanding of the underlying science.
 16 Q Namely, that he had gone overboard in expressing
 17 the strength of his opinion?
 18 A Well, the opinion -- I'm not a scientist,
 19 obviously, and I've dealt with hair cases
 20 previously. And in my experience, the opinion
 21 wasn't expressed in those terms. I followed up
 22 with the RCMP, which was the same agency,
 23 obviously, that Mr. Christianson was with. And
 24 I think they were -- they described it to me
 25 that, in the present time, the opinion would not

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1 have been expressed in those terms.
 2 Q Who did you speak to, sir?
 3 A I don't recall. It would have been the
 4 Centre -- sorry, not the Centre for Forensic
 5 Sciences, the RCMP lab here.
 6 Q Mr. Cadieux, likely?
 7 A I think that's likely at the time.
 8 Q You are talking about back in 2000?
 9 A Right. In my review there is a reference to
 10 that.
 11 Q And do you recall that that point was made quite
 12 forcefully with you on February 9th by
 13 Mr. Driskell's representatives at that meeting
 14 that Mr. Christianson had gone way beyond the
 15 limits of his science?
 16 A That is one of the things that's indelibly
 17 stamped in my memory, yes, I remember that.
 18 Q You remember that point being made. And I think
 19 it was made in the letter that was sent to
 20 Mr. Finlayson before that meeting in preparation
 21 for it, as well.
 22 A It may very well have been. I don't recall.
 23 Q We have been to that letter.
 24 A Okay.
 25 Q And I won't take you to the actual reference. I

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1 may do it after the break. I haven't got a
 2 reference of it on paper at this point in time.
 3 A We are breaking before you finish?
 4 MR. LOCKYER: Sorry. Well, I will do it at the
 5 end of the day before I carry on tomorrow, maybe
 6 that's what I should have said, or perhaps next
 7 week.
 8 THE COMMISSIONER: Over the weekend.
 9 BY MR. LOCKYER:
 10 Q Now, as well, sir, after this meeting in
 11 February and the exchange of correspondence with
 12 the Minister in February and March, there was
 13 further testing of exhibits arranged at
 14 Mr. Driskell's instigation that was carried out
 15 at the Centre of Forensic Science. Do you
 16 remember that?
 17 A That was the cigarette butt and the --
 18 Q A number of different things, right.
 19 A I recall that, yes.
 20 Q And did the determination of Mr. Driskell to
 21 have anything that moved tested, so to speak,
 22 sir, have an impression on you at all?
 23 A Well, I wasn't drawing any conclusions from
 24 that.
 25 Q You weren't?

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1 A No.
 2 Q And the musk oil wrapper, do you recall that
 3 Mr. Driskell's counsel got that, in fact,
 4 forwarded to Ontario to have another examination
 5 of it for prints, do you remember that?
 6 A I recall that, yes.
 7 Q And, Mr. Commissioner, I won't take you through
 8 this documentation. But the documentation in
 9 this regard is all at tab 6 of the blue book,
 10 you'll see the fingerprint examination results.
 11 I actually thought it was the last -- it's three
 12 pages from the end, 324 of that tab. Staff
 13 Inspector Ed Stuart rearranged to have a look at
 14 the musk oil wrapper again for fingerprints.
 15 The other documents were all to do with
 16 negotiating with Mr. Schille for the testing at
 17 the Centre. And Exhibit 49C is the Centre's
 18 results. The top man, so to speak, the head of
 19 the biology of the Centre did the testing for us
 20 and, unfortunately, was unable to obtain any
 21 meaningful result.
 22 Now, of course, these issues, sir, or the
 23 issue of the probative value of the DNA testing
 24 was raised -- I know you weren't there, but I
 25 imagine you've read the judgment -- that was

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1 raised during the release hearing before
 2 Mr. Justice Scurfield?
 3 A I recall him commenting on that.
 4 Q And I have his comments on it, sir. If you
 5 could go to tab 4 of the blue book, please, at
 6 page 45.
 7 A What tab again, Mr. Lockyer?
 8 Q Tab 4, sir.
 9 THE COMMISSIONER: Of the blue book, I think.
 10 MR. LOCKYER: Yes, the blue book.
 11 THE COMMISSIONER: Exhibit 49B. 49A, sorry.
 12 THE WITNESS: Page 45?
 13 BY MR. LOCKYER:
 14 Q Page 45 of tab 4. We're in the midst here -- it
 15 is at the top right-hand corner of each page.
 16 And what we are looking at here, sir, is page 13
 17 of Mr. Justice Scurfield's judgment wherein or
 18 whereby he ordered Mr. Driskell's release
 19 pending his application to the Minister. And
 20 the judgment was handed down on November 20
 21 something.
 22 MR. LIBMAN: 28th.
 23 BY MR. LOCKYER:
 24 Q November 28th, 2003. At paragraph 37, sir,
 25 Mr. Justice Scurfield had this to say:

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1 "Surprisingly, indeed perhaps shockingly,
 2 the DNA evidence indicates that the three
 3 hairs, which Mr. Christianson examined were
 4 from three different people, and none of
 5 those people were Mr. Harder. Whether this
 6 is a comment on Mr. Christianson's skill,
 7 or on the science itself, does not matter
 8 for my purposes. Suffice it to say that
 9 his testimony was invested with the aura of
 10 science. Moreover, it was used by the
 11 Crown attorney in his final address to the
 12 jury in a very skillful manner to support
 13 the evidence of Mr. Zanidean and
 14 Mr. Gumieny. Conclusion: When the
 15 evidence is viewed as a whole, including
 16 the new trial and new evidence, I am driven
 17 to conclude that Mr. Driskell has met the
 18 very high standard for release. The new
 19 evidence does not simply identify
 20 procedural irregularities, as suggested by
 21 the Crown. It goes to the heart of the
 22 Crown's case. Further, the evidence itself
 23 is not contentious. No credibility finding
 24 is required to give it weight."
 25 Skip down, if you would, to the last three

<p style="text-align: right;">Page 6172</p> <p>1 lines of paragraph 40, having cited the Dixon 2 decision, he says: 3 "In that regard, the DNA evidence alone is 4 sufficient to lead me to this conclusion. 5 It proves that a material piece of evidence 6 upon which the jury may have relied was 7 wrong." 8 So that's just focusing on the DNA 9 evidence. It is a bit of a dangerous question 10 for you, sir, or perhaps the answer is a bit 11 dangerous, but do you take issue with anything 12 that Mr. Justice Scurfield said there? 13 A I don't. But I think Justice Scurfield was 14 approaching the task of determining the standard 15 on the standard of normal appellate review. And 16 I think that that's something that this hearing 17 is focused on. And hopefully there is going to 18 be something coming out of this inquiry relating 19 to that. 20 Q Well, he makes it clear that he is considering 21 it from the point of view of a very high 22 standard for release, right? I just read that 23 to you. 24 A Right. 25 Q Yes.</p>	<p style="text-align: right;">Page 6174</p> <p>1 correspondence, I really bowed out at that 2 point. And to the extent that they were able to 3 do that, I was being kept out of it at that 4 point. 5 Q No. The question was in December '02, January, 6 February '03 was the question. 7 A Oh, okay, yes. 8 Q Was there any consideration given, sir, to 9 retaining outside counsel, and by that I mean 10 counsel outside Manitoba Justice, to assess the 11 merits of Mr. Driskell's claim? 12 A Not that I'm aware of, no. And I think I would 13 have been aware of that, if that would have been 14 the case. 15 Q I think you would, too. It makes sense to me. 16 A Right. 17 Q You are aware, sir, are you, maybe not, that 18 certainly some times when cases go into the 19 Justice Department under section 696 that 20 sometimes the Minister of Justice will appoint 21 outside counsel to review the issue, to review 22 the case? 23 A I have -- this is my one experience with these 24 applications, so I wasn't aware of that. 25 Q All right. I want to talk, sir, about the issue</p>
<p style="text-align: right;">Page 6173</p> <p>1 A But I think in terms of assessing whether or not 2 there has been a likely miscarriage of justice, 3 he appears to be applying the standard of normal 4 appellate review. And that goes back to my 5 memorandum to the Deputy Minister that you put 6 to me earlier. You had suggested that I seemed 7 to be suggesting that we needed to do something, 8 and that there has likely been a miscarriage. 9 And I said, well, it depends on what sense that 10 phrase is being used. And I take it from all of 11 the reasons of Mr. Justice Scurfield that he was 12 using the phraseology of miscarriage of justice 13 in the sense that the process that underlied the 14 conviction was inherently flawed versus there is 15 some indication that someone else is responsible 16 for the crime. 17 Q Was there any consideration given, sir -- in 18 December '02, January, February '03, was there 19 any consideration given to retaining counsel 20 outside Manitoba Justice to form an opinion as 21 to the merits of Mr. Driskell's claim of 22 wrongful conviction? 23 A Well, as you are aware, as of that point, prior 24 to the bail hearing when I discovered the 25 non-disclosure of the Saskatchewan</p>	<p style="text-align: right;">Page 6175</p> <p>1 of the homicide review and, in a sense, 2 relations between Manitoba Justice and the 3 Winnipeg Police Service, and take you through 4 sort of the history briefly of how this issue of 5 the disclosure, non-disclosure of the homicide 6 review came to be dealt with subsequent to the 7 DNA results. You may remember that right from 8 the outset, both going back, in fact, into 1993 9 and thereafter, first Ms. Duncan, there was one 10 or two others got involved as well, and then 11 subsequently AIDWYC, when they became involved, 12 were all trying to get a copy of the homicide 13 review. You knew that, right? 14 A I don't recall that from Ms. Duncan's 15 correspondence. As I indicated earlier, I 16 wasn't particularly mindful of that fact. 17 Q We have seen it. It is here. 18 A If it is in there, I take your word for it. 19 Q But let's not spend time so much on the pre-DNA 20 period. Because, it seems to me, that the 21 strongest case for Mr. Driskell to get access to 22 that homicide review, it got stronger, 23 obviously, once he had the DNA results. Would 24 you agree with that? 25 A Oh, I would agree with that.</p>

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1 Q It is a matter of common sense. So I want to
 2 start at that period. And perhaps ask you to go
 3 to Tab 3, sir, of the blue book, 49A.
 4 A I have that.
 5 Q And go to page 19. Start at 18, so you can see
 6 what you are looking at, of Tab 3. And this is
 7 AIDWYC's reply to Minister Mackintosh, to his
 8 early March letter. I forget -- I think it is
 9 March 10th letter. I may be wrong. We just
 10 looked at it, the letter of '03, when he said he
 11 found the DNA results unsettling, but Manitoba
 12 wasn't prepared to take things further than
 13 that.
 14 And this is the response, in a sense, to
 15 that letter. And at page 19, in other words
 16 page 2 of the letter, the following is said to
 17 the Minister -- and I imagine you would have
 18 seen this letter, is that fair, just before I
 19 read the passage to you?
 20 A That was one of the gaps. I didn't always see
 21 the correspondence that you were having with the
 22 Deputy. I can't recall if the --
 23 Q No. This is with the Minister.
 24 A With the Minister, sorry. I am not sure if I
 25 saw that.

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1 Q Well, let me just read to you. It sets out the
 2 problem, I guess at page 2. Whether you saw it
 3 or not, I think you were aware of the problem.
 4 "Mr. Driskell's trial was held before the
 5 Supreme Court of Canada handed down its
 6 decision in Stinchcombe. Consequently, our
 7 first task is to seek and obtain
 8 disclosure. We could have begun this task
 9 in August of 2001, but it was your ministry
 10 officials who insisted that any agreement
 11 to release exhibits for DNA testing was
 12 predicated on our agreement to weigh all
 13 disclosure requests..."
 14 Except one, I should have said in brackets.
 15 "...until the DNA results were in. Now
 16 that we have the DNA results, we have begun
 17 this task. Already we have run into a
 18 roadblock. It seems your Minister will be
 19 refusing to disclose the fruits of the
 20 1992, '93 post-conviction investigation."
 21 It shouldn't say '92. It didn't start
 22 until '93, so that's a mistake.
 23 "Which includes tape-recorded police
 24 interviews of the majority of the witnesses
 25 relevant to the homicide on the grounds

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1 that the materials are in the hands of the
 2 police and not Manitoba Justice. Hiding
 3 behind the coattails of the police is not
 4 indicative of full cooperation. Perhaps
 5 this is an area where you could intervene
 6 quickly and make it clear that artificial
 7 barriers to full disclosure will not be
 8 tolerated. The alternative is unnecessary,
 9 time-consuming work involving court
 10 applications, jurisdictional issues,
 11 factor, intervenors and the like. The
 12 timing of our receiving full disclosure is,
 13 then, exclusively up to your Ministry.
 14 Once Mr. Driskell has full disclosure,
 15 which I must note will be more than 12
 16 years after he was charged, we can assess
 17 what further investigation needs to be
 18 done. After our investigations are
 19 completed, we can begin drafting a 696
 20 application."
 21 Do you remember that, if not word for word,
 22 do you remember that essentially being the
 23 position being taken in regards to the homicide
 24 reviews?
 25 A That we were hiding behind the coattails of the

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1 police?
 2 Q That that was the position being taken by
 3 AIDWYC, yes.
 4 A Well, that was your position. I recall that
 5 being your position.
 6 Q Yes, indeed, that's the question. And whether
 7 or not you were is something I am coming into,
 8 all right? Bear with me a bit if you would. If
 9 you now go to Commission Counsel's book, sir.
 10 At tab 14 you have a letter to Mr. MacFarlane,
 11 the Deputy Minister, dated March 28, 2003.
 12 You've seen this letter, I imagine? In fact, I
 13 think you refer to this --
 14 A Yes.
 15 Q -- letter specifically?
 16 A Yes.
 17 Q Later on in this letter that I am referring
 18 to -- oh, it's copied to you, I'm told, sir, so
 19 that sort of sorts that out. Yes, it was. And
 20 it begins:
 21 "As I understand Manitoba Justice's
 22 position, is that it doesn't have the
 23 necessary authority over the Winnipeg
 24 Police Service to obtain the work product
 25 of their 1993 post-conviction investigation

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1 from him so that it can, in turn, be
 2 disclosed to us. I must question this
 3 position. Firstly, it's our understanding
 4 the investigations being conducted on
 5 behalf of Manitoba Justice, as well as the
 6 WPS, as both advised in '92 they will be
 7 conducting a review of the case. Secondly,
 8 the Minister has stated that he finds the
 9 recent DNA results to be unsettling, but
 10 not such as to cause him to join with
 11 AIDWYC in conceding to set aside
 12 Mr. Driskell's conviction, at least not
 13 yet. Is it not incumbent on the Minister
 14 to ensure he has all possible information
 15 available to him before making a decision
 16 on such an important question, including
 17 the work product of the Winnipeg Police
 18 Service's post-conviction investigation?"
 19 And then the letter continues to cite three
 20 decisions of three Courts of Appeal. The first
 21 one being from Manitoba Court of Appeal, where
 22 they make it clear, I think it's italicized:
 23 "There can be no doubt there exists a duty
 24 on the part of a Crown in a criminal case
 25 involving an indictable offence to make

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1 full, timely disclosure for all relevant
 2 facts. For these purposes, the Crown
 3 includes the police."
 4 Over the page, you have the Ontario Court
 5 of Appeal making the same point, in the decision
 6 of TLA where Mr. Justice Lecoursier, am I right?
 7 A Yes.
 8 Q He says:
 9 "That the duty rests upon Crown Counsel to
 10 obtain from the police all material that
 11 should be properly disclosed to defence
 12 counsel. It is not for the court to direct
 13 what should pass between the police and
 14 Crown, but both should be aware that if the
 15 Crown is unable to make proper disclosure
 16 because he or she has not obtained it from
 17 the police -- has not obtained from the
 18 police all such material, a new trial may
 19 be ordered."
 20 This is a particularly interesting comment:
 21 "It is, once again, a matter of common
 22 sense."
 23 And then a decision of the B.C. Court of
 24 Appeal in italics:
 25 "This court has confirmed that the scope of

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1 the Crown's possession extends to
 2 information which is in the hands of the
 3 police."
 4 And do you remember this letter, sir?
 5 A I do.
 6 Q And it was sent, if you look at Tab 3 of the
 7 blue book, a letter of the same date. Page 21
 8 of Tab 3, the letter requesting the review is
 9 sent directly, as well, to Chief Ewatski. Do
 10 you see that at page 21?
 11 A Yes, I see that.
 12 Q "As you probably know, we have been trying
 13 to obtain access to the work coming out of
 14 your post-conviction police investigation
 15 into Mr. Driskell's conviction. Manitoba
 16 Justice has told us verbally that all
 17 materials are in the possession of the WPS
 18 and that the police service is not prepared
 19 to release them to Manitoba Justice or
 20 AIDWYC until ordered to do so as part of a
 21 696 application to the Minister."
 22 And then it is suggested that there is no
 23 decent reasoning behind this position, and that
 24 the material should be disclosed forthwith. And
 25 then concludes:

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1 "You have recently publicly stated your
 2 personal belief in Mr. Driskell's guilt.
 3 Presumably that belief, in part, results
 4 from your knowledge of the '93
 5 investigation that you conducted, so why
 6 not enable all of us to review your
 7 investigation?"
 8 Mr. MacFarlane replies, sir, sorry at the
 9 same tab, page 16 of the same tab, on April 7th.
 10 And I'm just trying to set out sort of the
 11 history of the process here, sir, you probably
 12 appreciate that. I'm sorry, not appreciate but
 13 understand that.
 14 A Did you say page 18?
 15 Q 16. It starts at 14, sir, it's a letter from
 16 Mr. MacFarlane to Mr. Driskell's counsel
 17 April 7, '03, do you see that?
 18 A I have that.
 19 Q And it deals with several matters. But in
 20 particular, page 3 or 16, Mr. MacFarlane, the
 21 Deputy Minister, says that, and I am looking:
 22 "At this point, I would simply make one
 23 observation. I recognize the courts have
 24 endeavoured to place a disclosure
 25 obligation on the Crown, which includes

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1 documents and information in the possession
 2 of both the Crown and the police. An
 3 obligation to disclose something that is
 4 not under your control is, at best, a
 5 difficult concept."
 6 And then he says:
 7 "Government control over police is the
 8 first step to a police state, so we have
 9 traditionally been extremely careful not to
 10 blur the roles, responsibilities and
 11 functions of Crown and police in this
 12 Province."
 13 And then he advises that he has:
 14 "...taken the liberty of forwarding a copy
 15 of his letter to Chief Ewatski for his
 16 information."
 17 So we can see how, over these few weeks,
 18 this issue is sort of coming to a head. Do you
 19 see that, sir?
 20 A I do.
 21 Q And you recall it, as well?
 22 A Yes.
 23 Q At tab 14 of the Commission Counsel's material,
 24 sir, we have your view, a letter of April 13th,
 25 which you have to work your way through the tab

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1 disclosure you have requested in this case.
 2 Manitoba Justice is not opposed to you
 3 receiving the requested disclosure with
 4 limited exceptions. As we have discussed,
 5 to date the requested disclosure has not
 6 been received from the police. In the
 7 letter to the Deputy Minister dated
 8 March 28, '03, it is clear that you view
 9 the existing case law related to disclosure
 10 being applicable to post-conviction cases.
 11 Manitoba Justice does not share the view
 12 that disclosure rules apply in toto to
 13 post-conviction cases. Despite the
 14 difference of opinion, we are optimistic a
 15 cooperative approach can continue to move
 16 this matter forward."
 17 And then at the next, keep going, you will
 18 find another letter by you of April 17th, four
 19 days later. Three paragraphs down, are you
 20 there? Do you see where I am?
 21 A Yes. The 17th, I have that.
 22 Q Correct.
 23 "It is the intention of Manitoba Justice,
 24 as previously indicated, that full
 25 disclosure of the pre-conviction evidence

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1 a bit to find. I might say you have a letter of
 2 April 11th from Chief Ewatski?
 3 A Right.
 4 Q Perhaps I will stop there for a minute. The
 5 same tab, do you see that?
 6 A Right.
 7 Q Where he has responded to the letter written to
 8 him, saying:
 9 "It's been apparent that you do not agree
 10 with the position taken by the Winnipeg
 11 Police Service. You have made your
 12 position clear and known to us on a number
 13 of occasions. This time it should be
 14 apparent that we are not going to be able
 15 to agree. We would appreciate if any of
 16 your requests for additional disclosure
 17 could be directed through Crown Attorney
 18 Dale Schille."
 19 So Chief Ewatski has kind of closed the
 20 door there and passed the buck to you, you might
 21 say.
 22 And the next page of that tab, sir, is your
 23 letter to Mr. Driskell's counsel. The third
 24 paragraph:
 25 "To date, you have not received the

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1 be made."
 2 So we again have this divorce, so to speak,
 3 between pre and post-conviction evidence.
 4 "To date the Crown has provided access to
 5 the Crown brief and the requested materials
 6 from the file. The remaining disclosure
 7 requested is in the possession of the
 8 police. The Chief has requested that you
 9 deal with me in relation to the outstanding
 10 requests. The police have confirmed to me
 11 that the requested particulars will be
 12 provided to the Crown relating to the
 13 pre-conviction evidence. The police have
 14 indicated to both Crown and defence
 15 previously that the post-conviction
 16 materials will not be provided at this
 17 time. Manitoba Justice is not in
 18 possession of the post-conviction
 19 disclosure that has been requested, nor has
 20 the department had access to the
 21 materials."
 22 Now, having read all of that to you, sir, I
 23 think that sort of sets the scenario for a
 24 number of questions, both particular to
 25 Mr. Driskell's case and also, really, systemic.

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1 First of all, sir, I must say I don't understand
 2 why Manitoba Justice could not have written a
 3 letter to Chief Ewatski ordering him to provide
 4 the necessary material to them. What reason is
 5 there for not doing that?
 6 A Well, we wouldn't presume to order the police to
 7 do anything. I think the full weight of our
 8 office is behind the request that we make. And
 9 I know at one of the original meetings that we
 10 had in relation to this, that was the
 11 February 9, 2003 meeting, I remember that
 12 meeting, in particular, because, as I said in my
 13 interview notes, that that topic of
 14 conversation, whether or not the Crown was
 15 making best efforts to secure the homicide
 16 review, was a hot topic of conversation. And in
 17 our view, I think not only in my view, but the
 18 most senior members of the department would take
 19 the position that we were doing everything we
 20 reasonably could. Given the position that we
 21 had, in my view, regardless of what language was
 22 used or how we approached it, it was my
 23 understanding we had a firm position from the
 24 police that they were not prepared to disclose
 25 that to Manitoba Justice.

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1 correspondence that relates to your
 2 February 14th, '03 letter, it is described as a
 3 document that had its origin in information
 4 received post-conviction.
 5 And as I indicated earlier, that really
 6 doesn't sound like something that could be
 7 dismissed out of hand as not triggering a
 8 disclosure obligation in the Crown. And given
 9 the fact that the DNA results were in, we had an
 10 interest in finding this. So, again, I guess
 11 beauty is in the eye of the beholder, but we
 12 were making our best efforts to obtain that.
 13 I'm not sure who got the word first that we
 14 weren't getting it.
 15 I know that after my interview, Detective
 16 Sergeant Burchill, or Sergeant Burchill, who was
 17 my main contact for disclosure, had indicated
 18 that his recollection is that there would have
 19 been no indication to me, prior to Inspector
 20 McCorrister's memo to me, indicating that it
 21 would not be disclosed.
 22 But someone had certainly indicated that to
 23 the Crown prior -- to the Crown prior to that
 24 date because it was, as I was saying, as you are
 25 aware, it was a hot topic of conversation

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1 Q We might, first of all, be a little more
 2 comforted by that, Mr. Schille, if we weren't
 3 reading in your letter of April 13th how
 4 Manitoba Justice questions whether the
 5 obligations pre-trial are the same
 6 post-conviction. Remember how you said that the
 7 obligations, we are not necessarily prepared to
 8 agree that they are the same. Do you remember
 9 that?
 10 A I saw that, yes.
 11 Q Yes. And so that does not suggest to me that
 12 you were necessarily pursuing, with a great deal
 13 of effort, obtaining these documents from the
 14 police, given that you are already setting up an
 15 excuse in your April 13th letter as to how you
 16 could justify the police not providing those
 17 documents to you. Do you see my point?
 18 A Well, as I've indicated earlier, Mr. Lockyer, I
 19 wouldn't -- I wouldn't agree with your
 20 suggestion that the Crown was setting up an
 21 excuse for not providing it. As I indicated
 22 earlier, in response to Commission Counsel's
 23 questions, we had our own interests in seeing
 24 that document. Given the description of the
 25 document early on, I think, in the course of the

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1 February 9, '03. So we already had a firm
 2 position from them, from the police, right
 3 around that time. And that's the time frame in
 4 and about we were attempting to make disclosure
 5 to you of what we had.
 6 Q Any reason, sir, that you can think of why you
 7 wouldn't write a letter to the Chief of Police,
 8 who has and had his own legal counsel, referring
 9 to those three same Court of Appeal decisions
 10 which make it perfectly clear that the police
 11 are not entitled to withhold material from the
 12 Crown?
 13 A Well, I don't know why a letter wouldn't have
 14 been written to the Chief. I think that likely
 15 that letter would have been written, not by me,
 16 but by Rob Finlayson at the time. And I know,
 17 based on the discussions that I had with
 18 Mr. Finlayson, it was my understanding that he
 19 came in contact with the Chief in relation to
 20 his duties as the Assistant Deputy Minister on
 21 an ongoing basis. I have no contact whatsoever
 22 with the Chief. I can certainly phone him. But
 23 Mr. Finlayson, in his capacity, saw him
 24 regularly as part of his duties. And when he
 25 became aware that the police were taking the

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1 position that they weren't going to disclose, my
 2 understanding is that he was going to pursue
 3 that directly with the Chief.
 4 Q But this is surely, Mr. Schille, or should have
 5 been, if it wasn't, should have been seen as a
 6 matter of enormous importance. There is a man
 7 sitting in prison day after day after day where
 8 there is information in the hands of the police
 9 force that it seems to me, if Manitoba Justice
 10 does its job properly, it can get from them. It
 11 can say to the Chief of Police that: The Court
 12 of Appeal in three provinces, including our own,
 13 require you to disclose this information to us,
 14 kindly do so. But there is no such document.
 15 No one wrote to Ewatski and said that. No one
 16 said: This is your legal obligation. It just
 17 sort of seemed: Oh, you won't give it to us.
 18 Sorry, but you can't have it. That was
 19 really -- wasn't that really the attitude that
 20 was going on here, sir?
 21 A Well, I think, again, there are probably six or
 22 seven questions in there. And to answer some of
 23 them --
 24 Q It is all the same thing.
 25 A Well, I don't see it as the same thing,

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1 Mr. Lockyer. In relation to the suggestion that
 2 the magnitude of the issue was readily apparent,
 3 again, we would part company on that. It is
 4 difficult to engage at all the significance of
 5 the refusal to disclose without knowing what's
 6 in the document. So I appreciate at some point
 7 that you have suggested, as a last resort,
 8 AIDWYC and the Crown could join hands and go to
 9 court and make an application for that document.
 10 It is difficult for the Crown to assess whether
 11 or not that's appropriate, without having any
 12 idea at all what's in the document. And you
 13 have referred to the edited version that was
 14 available as containing fairly scant
 15 information. It's difficult -- there was
 16 certainly nothing in that, as you've already
 17 indicated in your comments to this inquiry, that
 18 would indicate that there was something in the
 19 document that was available that would trigger
 20 disclosure obligations. We were interested in
 21 seeing it. To be able to appreciate the
 22 significance of it, that it was an enormous
 23 issue, I don't think that's a fair statement,
 24 given that we had no idea whatsoever as to what
 25 was in it.

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1 And we weren't, as you have suggested,
 2 simply shrugging our shoulders and making
 3 excuses for not providing it. We were making
 4 our best efforts to secure the document. And as
 5 the Minister, I think, pointed out in one of his
 6 letters to you in the correspondence, had you
 7 filed the application itself, there would have
 8 been greater powers in the Criminal Conviction
 9 Review Group to get their hands on that
 10 documentation.
 11 Q Mr. Schille, it all sounds very good. But I'm
 12 simply suggesting to you at the moment that we
 13 don't even have, coming out of Manitoba Justice,
 14 a pointed letter to the Winnipeg Police Service
 15 saying: Kindly give us this material forthwith
 16 pursuant to your legal obligations. There is no
 17 such document, and I can't understand why there
 18 isn't.
 19 A Well, and there is no such document.
 20 Q Right.
 21 A I think I would be the person to write that
 22 letter to the Chief of Police, but there is
 23 certainly no such document.
 24 Q Well, and I suggest, sir, that the absence of
 25 such a document, which seems such an obvious

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1 thing to me, anyway, to do, suggests really a
 2 lack of interest on the part of Manitoba Justice
 3 to get the documents from the Winnipeg Police
 4 Service?
 5 A Again, we part company because I disagree with
 6 that.
 7 MR. OLSON: Mr. Commissioner, he has been around
 8 this question three different times now, and it
 9 seems to me that we should move on.
 10 MR. DAWE: And, as well, I have some difficulty
 11 with the premise of the question. And it is an
 12 obvious point of law that there is an obligation
 13 on the police in the post-conviction stage to
 14 make this disclosure. And, as I understand it,
 15 the issue of whether the three pre-conviction
 16 authorities that Mr. Lockyer refers to apply in
 17 this context is the point of first impression.
 18 And so I am not sure that there -- well, I think
 19 this is a point that was referred to in some of
 20 the other documents that the ministry may have
 21 taken a position on as to their
 22 applicability.
 23 BY MR. LOCKYER:
 24 Q Well, Chief Ewatski, sir, as you heard, has
 25 taken the position here that Manitoba Justice,

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1 as far as he could tell, only wanted the report
 2 or the review so that they could pass it on to
 3 Mr. Driskell. Have you ever heard that
 4 suggested to you or asked to you? Were you
 5 asked about that?
 6 THE COMMISSIONER: That was my impression of his
 7 evidence.
 8 BY MR. LOCKYER:
 9 Q Yes. And Commission Counsel asked about that
 10 this morning, as I recall. Do you remember
 11 being asked about that this morning, sir?
 12 A Yes. I recall that being said, yes.
 13 Q Right. And you say that that's simply not
 14 right. That's simply not true; is that right?
 15 You wanted it for your own purpose, Manitoba
 16 Justice?
 17 A Well, we had our own interest in the document.
 18 But, obviously, we were looking to cooperate
 19 with disclosure. As I said earlier, it's not
 20 inconceivable that there might have been nothing
 21 in there that triggered a disclosure obligation.
 22 We now know that not to be the case. But in
 23 terms of, if that was Stinchcombe disclosure,
 24 something that could have been relied on
 25 potentially by Mr. Driskell to advance his claim

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1 of a wrongful conviction, we certainly would
 2 have passed that on. So it is not a situation
 3 where we wanted it for our own devices and had
 4 no interest in it in terms of disclosure
 5 obligations. It was both.
 6 Q Did Manitoba Justice, sir, you, Mr. Morrison,
 7 Mr. Finlayson, in preparation for the
 8 February 9th meeting with Mr. Driskell's
 9 counsel, February 9, '03, did you not say to
 10 yourselves that before we take a disparate
 11 position on our view of whether there has been a
 12 miscarriage of justice or not, we need to see
 13 that 1993 review? Did you not say that to
 14 yourselves?
 15 A I don't recall what the discussions were.
 16 Q Do you not think, sir, that, at least in that
 17 regard, there might have been a letter to the
 18 Chief saying: Please send us your review
 19 because we have been asked to take a position on
 20 whether or not we feel Mr. Driskell has been the
 21 victim of a miscarriage of justice and we can't
 22 adequately answer that without seeing your
 23 review. There is no paper to that effect, is
 24 there?
 25 A There is no paper to that effect.

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1 Q There is nothing papered. No request in writing
 2 to Chief Ewatski, it's that simple, or the
 3 Winnipeg Police Service by Manitoba Justice; is
 4 that right?
 5 A As far as I'm aware, that's accurate.
 6 Q And really what we end up with, Mr. Schille, I
 7 am going to suggest to you, is we end up with
 8 what might be considered the antithesis of our
 9 system, where the Crown acts as a sort of
 10 watchdog over the police and is sort of a --
 11 well, I think a watchdog is as good a word as
 12 any -- over police conduct, insofar as it may
 13 affect a person who is alleged to have committed
 14 a crime, especially a serious crime, don't you
 15 think?
 16 A I'm not sure I understand the question.
 17 Q Well, the Crown is sort of in the middle there,
 18 between the police and the criminal process, if
 19 I can put it that way. And you have a
 20 supervisory role of sorts, do you not think,
 21 over police investigations? And, ultimately,
 22 they always come through your hands for
 23 prosecution purposes, it gives you that kind of
 24 a role?
 25 A I don't see the Crown's role as a role

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1 supervising the police.
 2 Q I don't mean supervising. I mean supervising
 3 their investigations, sir, before they get to
 4 prosecution. By definition, prosecution does
 5 that?
 6 A Well, I see that as one of the material
 7 distinctions between the American district
 8 attorney's system where they actually go out
 9 hand in hand and supervise the investigation.
 10 That's not the same as what we have.
 11 Q No. But the system we have is the police do the
 12 investigation. Then it comes to the Crown, who
 13 decide whether or not the police investigation
 14 merits whatever it is the police suggested
 15 happened next, right?
 16 A I agree with that, yes.
 17 Q Right, okay. But here we have a circumstance
 18 that has really been gone on for ten years, but
 19 really gets particularly crystallized in late
 20 2002, where the police are just saying to
 21 Manitoba Justice: We're not going to let you do
 22 it in this case, right, because we are not going
 23 to let you see what we've got?
 24 A That's correct.
 25 Q And this is in a case, sir, where there has

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1 been -- and I hate to keep saying this, but I
 2 think it's worth making the point again, where
 3 there have been cries from Mr. Driskell for
 4 many, many years, ten years, eleven years, cries
 5 from the media, and cries from people on behalf
 6 of Mr. Driskell, claiming that he is the victim
 7 of a miscarriage of justice. That's the context
 8 in which this has happened?
 9 A That's the context, yes.
 10 Q And leaving aside who's at fault or who tried,
 11 who didn't try hard enough, who did try hard
 12 enough, back in the Driskell time, sir, in 2003,
 13 just move us into 2006, would you agree with me
 14 that what happened then was unacceptable, and
 15 would be unacceptable for it to happen again
 16 today?
 17 A Well, in light of what we now know, that there
 18 was disclosure issues, that there was material
 19 in there that should have been disclosed, it was
 20 unacceptable that that wasn't forwarded pursuant
 21 to requests, in my view.
 22 Q Have there been, that you are aware of,
 23 Mr. Schille, any changes in policy in terms of
 24 Manitoba Justice's relations with the Winnipeg
 25 Police Service? And one would imagine the

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1 police services across the province,
 2 potentially, in terms of preventing a police
 3 service from saying, no, you can't have what
 4 we've got?
 5 A Again, I'm not aware of any. But I am probably
 6 not the best person to ask because I don't set
 7 the policies in relation to that.
 8 Q Presumably, as a Crown prosecutor, sir, you
 9 would like to be in a system where, if the Crown
 10 demands information from the police, they get
 11 it?
 12 A Well, I would say that this case is very much
 13 the exception. Because normally when we make
 14 the requests, we receive the necessary
 15 disclosure.
 16 Q You know, I hate to say it, but that's not a lot
 17 of comfort for Mr. Driskell.
 18 A No, I appreciate that.
 19 THE COMMISSIONER: Mr. Lockyer?
 20 MR. LOCKYER: I am going on to a new area,
 21 Mr. Commissioner.
 22 THE COMMISSIONER: Yes.
 23 MR. LOCKYER: Thank you.
 24 THE COMMISSIONER: We will break for 15 minutes.
 25 THE CLERK: All rise. This commission of

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1 inquiry is adjourned for a 15-minute recess.
 2 (Proceedings recessed at 3:20 and reconvened at
 3 3:35 p.m.)
 4 THE CLERK: All rise. This commission of
 5 inquiry is now in session.
 6 BY MR. LOCKYER:
 7 Q Another problem, Mr. Schille, in the context of
 8 obtaining disclosure from the police, was
 9 obtaining the notes of some of the officers; is
 10 that right?
 11 A I don't recall. I'm having some difficulty here
 12 because, as I indicated earlier, I was dealing
 13 with Zurowski, which was the dated case, and
 14 this matter around the same time. And we were
 15 trying to get officers' notes from retired
 16 officers in relation to both matters.
 17 Q All right. Well, you said in your statement to
 18 Commission Counsel that that was a problem in
 19 this case. Do you remember saying that?
 20 A I think I said that that was a concern in the
 21 context of the global concerns. And I had
 22 first-hand experience, given that I was dealing
 23 with that other matter at the time. I am not
 24 sure it was a particular problem in relation to
 25 this matter.

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1 Q Well, it's at page 7 of your statement, sir.
 2 You had this to say, at the end of the third
 3 paragraph, you say:
 4 "There were also serious practical
 5 impediments to making full Stinchcombe
 6 disclosure, and that the Winnipeg Police
 7 still took the view that officers' notes
 8 were their own personal property and some
 9 officers were refusing requests that they
 10 produce their notes to the Crown."
 11 I have read that in the context of this
 12 case. Was I wrong to do that?
 13 A Yes. I think that if you got that impression, I
 14 didn't intend that. It was in the context of
 15 overriding concerns on a policy basis. But I
 16 have had that problem in other cases, and I
 17 don't recollect that this was one of those
 18 cases.
 19 Q I mean, police officers in no circumstances,
 20 sir, are refusing to cooperate as witnesses. I
 21 mean, their notes are being sought from them as
 22 witnesses, correct?
 23 A Correct.
 24 Q To a case?
 25 A Correct.

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1 Q Is there some kind of difficulty, sir, between
 2 the Winnipeg Police Service and Manitoba
 3 Justice?
 4 THE COMMISSIONER: Well, Mr. Lockyer, you may
 5 also recall Chief Ewatski spoke of that very
 6 issue.
 7 MR. LOCKYER: Right.
 8 THE COMMISSIONER: When they were doing their
 9 report, the Hall and Ewatski report.
 10 MR. LOCKYER: That was a union issue, though, if
 11 you remember. I don't think it would be a union
 12 issue with Manitoba Justice.
 13 THE COMMISSIONER: But it still had to do with
 14 what was sort of a non-policy, non-issue with
 15 very unclear guidelines at the time.
 16 MS. CARSWELL: You'll recall that in the
 17 material I filed in relation to notebook policy,
 18 even though the policy at the time of these
 19 investigations was clearly that notebooks were
 20 the property of the Winnipeg Police Service,
 21 members were expected to maintain their own
 22 notebooks upon retirement.
 23 THE COMMISSIONER: That's right.
 24 MS. CARSWELL: And that policy changed prior to
 25 the Sophonow matter being decided and the

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1 recommendations of Commissioner Corey. So it
 2 has never been the case that the notes were "the
 3 property of the individual officer". They were
 4 always the property of the service. But there
 5 was an expectation that the officer, upon
 6 retirement, would store and maintain the notes.
 7 And that's confirmed in the exhibit that was
 8 filed with Chief Ewatski that contained, I
 9 believe it was tab 2, that had all of the
 10 notebook policy in it. So that may assist the
 11 Commission. It's not a function of ownership of
 12 the notes. That's always been the service's
 13 position. It is maintenance of the books.
 14 THE COMMISSIONER: Well, I remember him saying
 15 that very thing. Because I believe I asked him
 16 then that, no, we had ownership of them, but
 17 that didn't mean we always had them at our call
 18 when we wanted them.
 19 MS. CARSWELL: Right. And he also spoke about
 20 in those days they were not scanned. And now
 21 they are scanned into the computerized system in
 22 an incident and are available in that way or,
 23 according to policy, they are to be scanned.
 24 Thank you. And I'm sorry to interrupt.
 25 THE COMMISSIONER: Thank you. I am not saying

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1 that you can't ask the question.
 2 BY MR. LOCKYER:
 3 Q No. I realize that that's a helpful
 4 intervention.
 5 I was just going to say to Mr. Schille that
 6 that's -- presumably, as a Crown, you would like
 7 that problem to be cleared up as soon as
 8 possible in the future?
 9 A Correct.
 10 Q Right. And there is just one point I wanted to
 11 raise with you, sir. And I only raise it now
 12 because it's in the context of police officers'
 13 notes. There has been a suggestion at the
 14 inquiry that the trial Crowns in this case may
 15 have had Detective Paul's notes in their
 16 possession at the time of the trial, and it
 17 would seem that that's not an accurate
 18 observation. I am going to take you to the blue
 19 book. Could you have a look at Tab 3, sir, page
 20 26, which seems to meet that question at the
 21 inquiry. You see page 6 there is an
 22 inter-office memo from the Winnipeg Police
 23 Service. Do you see that?
 24 A Yes, I see that.
 25 Q And it is from Mr. McCorrister?

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1 MR. LIBMAN: Mr. Burchill.
 2 BY MR. LOCKYER:
 3 Q Mr. Burchill, sorry, to you. And it says:
 4 "Dale, with respect to our first disclosure
 5 package of April 22, 2003, please find the
 6 following documents that were not
 7 originally available, copies of notes or
 8 notebooks for the following officers
 9 involved in the investigation to the murder
 10 of Perry Harder."
 11 And the first name there is Detective Paul.
 12 Do you see that?
 13 A Right. And your suggestion is that that means
 14 they were there originally on the file?
 15 Q No. On the contrary, the suggestion is that
 16 they were there. And I'm suggesting that that
 17 tends to establish that they weren't there in
 18 the possession of the trial Crowns?
 19 A That could be. But it could also be that they
 20 went missing in the interim.
 21 Q I suppose that that's a possibility. But
 22 suffice to say that they weren't in the Crown
 23 file when you got it, put it that way?
 24 A Fair to say, right.
 25 Q Okay. Let me just go through, sir, with you the

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1 various reviews of one sort or another that were
 2 conducted into this case, which might, I think,
 3 be fairly ascribed now as missed opportunities
 4 to see the miscarriage of justice in this case.
 5 First of all, were you aware, do you remember
 6 reading in the file, I think it would have been
 7 there in your file in 2000, that Mr. Dangerfield
 8 conducted a review of sorts in 1993 when the
 9 case broke in the media in early 1993? Do you
 10 remember reading his report about the case back
 11 then?
 12 A Well, I wouldn't call that a review. But I
 13 remember seeing something that Mr. Dangerfield
 14 had written that was in response to media
 15 concerns.
 16 Q Yes. I call it a sort of review. I think it
 17 was a four or five page document in which he
 18 said that the case had been properly prosecuted
 19 and a man had been rightfully convicted, in
 20 essence?
 21 A Yes. I certainly saw that document. I think I
 22 know the exact document that you are referring
 23 to.
 24 Q Yes. Then, sir, Manitoba Justice publicly said
 25 it was going to conduct its own review. And the

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1 one note we have got of that, if you go to the
 2 buff colour, please.
 3 A Right.
 4 Q We are looking at a briefing paper here prepared
 5 by Mr. Finlayson with the assistance, we know,
 6 of a student called Dave Mann. Is that name
 7 familiar to you?
 8 A Yes. That's what I would -- I was referring to
 9 earlier when I said one of my colleagues had
 10 done a quick timeline. And that would have been
 11 Mr. Mann's document.
 12 Q And you will see at page four of that document
 13 prepared by Mr. Finlayson.
 14 A Sorry, where are you at, Mr. Lockyer?
 15 THE COMMISSIONER: Page 11.
 16 MR. LOCKYER: Look at 14.
 17 THE COMMISSIONER: It starts at 11 and goes to
 18 14 or 15, rather.
 19 BY MR. LOCKYER:
 20 Q And you will see Mr. Finlayson says there, right
 21 at the bottom page. Have you got it?
 22 A Right.
 23 Q "I have had our administrative file the
 24 ministerial file and all documents relating
 25 to the Driskell case reviewed. There is no

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1 documentation that a formal review of the
 2 Crown's conduct into this file was ever
 3 ordered by any Minister of Justice.
 4 However, it appears that the former DPP,
 5 Bruce Miller, did informally go through the
 6 file in his capacity as a director and was
 7 satisfied that the file was handled
 8 properly by the Crown's office."
 9 So that would be with reference,
 10 presumably, to 1993. Do you see that?
 11 A I see that.
 12 Q And then this document itself is a review
 13 conducted at the instance of and by
 14 Mr. Finlayson in 1997? If you turn to the last
 15 page, you will see the date there. Do you see
 16 that?
 17 A Right, yes.
 18 Q And that would have been in the file when you
 19 looked at it in 2000?
 20 A I don't recall seeing that. But it likely would
 21 have been on the file, on the correspondence
 22 file.
 23 Q And this is prepared, if you go to the first
 24 page of it, this briefing paper is prepared:
 25 "Subject: Janie Duncan, investigator.

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1 Accused: James Driskell."
 2 Do you see that?
 3 A Right.
 4 Q Then there was your review in 2000, sir?
 5 A Correct.
 6 Q And then there was a review of sorts, albeit
 7 without the benefit of the homicide review, in
 8 2003 after the DNA results? A review of sorts
 9 by the three of you to come to the decision that
 10 you did in February 9th?
 11 A Well, again, we have been through that. I
 12 wouldn't call it a review. But there was
 13 certainly some discussion in relation to where
 14 we go from here.
 15 Q A consideration of the -- of whether or not
 16 there had been a mission carriage of justice,
 17 perhaps that's the best way of putting it?
 18 A Correct.
 19 Q Is that fair?
 20 And then, sir, on November 26, 2003, you
 21 prepared a memo that's -- on the case that's at
 22 tab 20 of Commission Counsel's materials. Do
 23 you remember this document?
 24 A I do.
 25 Q Now, this is just after you have decided you are

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1 going to leave the case. I think it is, isn't
 2 it?
 3 A It would have been. I think that's the timing
 4 of that.
 5 Q So eight days after I hear. Because
 6 November 18th you apparently backed out of the
 7 case. So on eight days later you are preparing
 8 a memorandum to Mr. Finlayson. And, of course,
 9 by the time you prepare this memorandum, you do
 10 have the -- you have read the contents of the
 11 homicide review, is that right, sir?
 12 A That's correct.
 13 Q In fact, by the time you write this document,
 14 you have the DNA results?
 15 A That's correct.
 16 Q You have the benefit of the Saskatchewan
 17 correspondence?
 18 A That's correct.
 19 Q The importance of which has now become quite
 20 apparent?
 21 A Correct.
 22 Q Right, if it hadn't before? You know about
 23 Mr. Zanidean's recantations?
 24 A Correct.
 25 Q You know about Mr. Gumieny's recantations?

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1 A Correct.
 2 Q You know all of the contents of the homicide
 3 review?
 4 A Correct.
 5 Q You know about the payments of very significant
 6 sums of money to Mr. Zanidean?
 7 A Correct.
 8 Q You referred to it as being \$80,000 in this
 9 memorandum. You know about some payments,
 10 although an undetermined quantity of payments,
 11 to Mr. Gumieny?
 12 A Correct.
 13 Q And with all of that, your conclusion at page
 14 1123, sir, is, and I quote:
 15 "The problems identified clearly impact on
 16 the fairness of the trial and the appeal
 17 process, but the available evidence on
 18 whole is likely more compelling than the
 19 evidence that led to the conviction at
 20 trial."
 21 Do you remember coming to that conclusion,
 22 sir?
 23 A That's what I wrote at the time, correct.
 24 Q There was a meeting, sir, that you had with new
 25 counsel, which included Mr. Olson and

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1 Mr. Weinstein, do you remember that?
 2 A I remember meeting with them. I may have met
 3 with them more than once after they came on
 4 board.
 5 Q Could you go to tab 4, sir, of the blue book?
 6 A I'm there, yes.
 7 Q At page 26, this occurred, actually, the day
 8 before your memorandum, that we just looked at,
 9 was completed?
 10 A Yes.
 11 Q There is a meeting on November 25, '03. Do you
 12 see that?
 13 A That's the handwritten note?
 14 Q Yes.
 15 A Right.
 16 MR. LOCKYER: Do you have that,
 17 Mr. Commissioner?
 18 THE COMMISSIONER: 26 did you say?
 19 MR. LOCKYER: Yes. Page 26 at tab four of the
 20 blue book.
 21 THE COMMISSIONER: I am just a little behind
 22 here. Okay, I am there now.
 23 BY MR. LOCKYER:
 24 Q And present at the meeting, sir, was Bruce
 25 MacFarlane, Bill Olson, Hymie Weinstein and Rob,

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1 which would presumably be Rob Morrison, would it
 2 be?
 3 MR. LIBMAN: No, Rob Finlayson.
 4 BY MR. LOCKYER:
 5 Q Okay, Rob Finlayson, my mistake, of course.
 6 Yes, of course. Dale, yourself. And Bob, which
 7 would be Bob Morrison, correct?
 8 A Yes.
 9 Q And just looking through the notes, sir, there
 10 does seem to be one person that certainly does
 11 seem to be taking the view that this case had
 12 become something of a lost cause for Manitoba
 13 Justice. Look at the bottom of page 26, would
 14 you? It says:
 15 "Hymie: Evidence of Zanidean totally
 16 worthless. Gumieny is in much the same
 17 position."
 18 And then if you turn over the page, sir,
 19 you again see about halfway down:
 20 "Hymie: Opportunity for collusion as a
 21 result of interview on October 6th with
 22 Gumieny."
 23 And to translate that, he is suggesting an
 24 opportunity of collusion between Mr. Zanidean
 25 and Mr. Gumieny before they gave their

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1 statements as a result of the interview of
 2 October 6th with Gumieny. That was one of the
 3 interviews -- that was the interview that was
 4 referred to in the brief on the bail on
 5 Mr. Driskell's behalf as being a previously
 6 undisclosed statement of Mr. Gumieny. Do you
 7 remember that?
 8 A M'hm.
 9 Q Yes?
 10 A Yes.
 11 Q Do you remember, sir, Mr. Weinstein seemingly
 12 not at all comfortable with the position that
 13 Manitoba Justice was trying to sustain the
 14 conviction at this time?
 15 A Well, I --
 16 Q That is an interpretation from what he is saying
 17 here. And it is not an unreasonable
 18 interpretation, I don't think.
 19 A Well, I don't think any decision -- that was
 20 simply a discussion at that point. And as I
 21 have indicated during the interview, I was
 22 present at that. And I was certainly making my
 23 views known in the November memorandum that
 24 you've referred to. I am not sure what
 25 precipitated the request for that memo to

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1 Mr. Finlayson. But I take it that would have
 2 been for whoever was coming on board at that
 3 point. But there was no -- at that point, I
 4 don't recall any concrete position being taken
 5 by anyone. It was simply a discussion at that
 6 point.
 7 Q Well, it was Justice Scurfield, was it not, sir,
 8 who finally satisfied Manitoba Justice officials
 9 that enough was enough in this case, isn't that
 10 right?
 11 A Well, again, I didn't make the decision. So in
 12 terms of --
 13 Q I know that.
 14 A I can't speak to that, Mr. Lockyer.
 15 Q Well, let me take you through, first of all,
 16 what Justice Scurfield said, at tab 4, page
 17 14 -- or page 46 at tab 4. I have already read
 18 part of that page. And I am going to just carry
 19 on reading it at paragraph 41, at the bottom of
 20 46?
 21 A Page 46?
 22 Q 46. Handwritten 46, do you have that?
 23 A Right, I have that.
 24 Q Paragraph 41 of the judgement. And I have
 25 already read to you 39 and part of 40.

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1 A Right.
 2 Q And justice Scurfield said:
 3 "Further, I do not accept the Crown's
 4 argument that the failure to disclose
 5 evidence of the payments made to Zanidean
 6 and Gumieny, and Zanidean's belief that in
 7 exchange for his testimony he would receive
 8 immunity on the serious charge of arson,
 9 and Mr. Zanidean's attempted recantation
 10 could not have changed the outcome of the
 11 trial. And so finding, I reject the
 12 Crown's argument that the new evidence is
 13 immaterial because the jury already knew
 14 that these individuals were doubtful
 15 characters who were prone to lying. I
 16 acknowledge that the trial judge instructed
 17 the jury to be very careful with their
 18 evidence because of their general bad
 19 character. However, the fallacy in the
 20 Crown's argument is that a credibility
 21 decision and the weight attributed to
 22 suspect witnesses is often assessed
 23 cumulatively after weighing all of the
 24 evidence that impacts on their
 25 trustworthiness. It is reasonable to

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1 conclude that the evidence of payment to
 2 these witnesses, together with
 3 Mr. Zanidean's belief that he was obtaining
 4 immunity in respect of a serious arson
 5 charge, could have constituted the straw
 6 that broke the jury's confidence in these
 7 witnesses. Certainly, it would have been a
 8 factor in their proper deliberations. In
 9 order to convict Mr. Driskell, the jury
 10 must have placed significant weight on the
 11 evidence of Mr. Zanidean and Mr. Gumieny.
 12 That was the conclusion of the homicide
 13 review. I agree. Therefore, the evidence
 14 that might reasonably have altered that
 15 credibility assessment cannot be dismissed
 16 as inconsequential."
 17 And really it took -- I am going to suggest
 18 to you, Mr. Schille, it took Mr. Justice's
 19 Scurfield's comments in releasing Mr. Driskell
 20 on bail to, in a sense, be the straw that broke
 21 Manitoba Justice's back. And that if you look
 22 at the first page of tab 5, it's two days later
 23 that -- in fact, it's the Monday following on
 24 the Friday of Mr. Justice Scurfield's decision.
 25 He gave his decision on Friday, November 28th.

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1 On Monday, December 1st, we finally have the
 2 Minister, Mr. MacIntosh, writing a letter to his
 3 counterpart in Ottawa advising that Manitoba
 4 Justice is no longer opposing Mr. Driskell's 696
 5 application, right?
 6 A Right.
 7 Q You see that at the bottom there where he says:
 8 "Fundamentally, the 696 procedure is
 9 intended to authorize the executive to
 10 consider whether the matter ought to be
 11 referred back to the judiciary for
 12 reassessment. In the circumstances of this
 13 case, given Justice Scurfield's
 14 conclusions, I am persuaded the case ought
 15 to be referred back to the courts. While
 16 the Criminal Code empowers the Minister of
 17 Justice for Canada to make that final
 18 determination, I thought it important for
 19 me to express my view to you so that you
 20 may take it into consideration in your
 21 assessment of the case."
 22 Looking back, Mr. Schille, now hindsight,
 23 if you will, where could things -- how do you
 24 think things might have changed so that
 25 Mr. Driskell didn't have to wait so long for

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1 that decision by Manitoba Justice?
 2 A Well, there were certainly some points in the
 3 process that I think we have gone through this
 4 at length today. It was a long process getting
 5 the criminal or the homicide review into your
 6 hands. The DNA testing, in itself, took quite a
 7 while to orchestrate. There are a number of
 8 things. And the cumulative effect of that is
 9 that it all takes time.
 10 Q But we have got review, after review, after
 11 review, sir, commencing in 1993.
 12 A Well --
 13 Q And it is not finally until December 1, 2003,
 14 more than ten years later, that Mr. Driskell
 15 spent every day, but two of those days, in
 16 prison in the meantime. Don't you think there
 17 was a breakdown somewhere of the system, sir,
 18 that it simply wasn't good enough to have
 19 members of Manitoba Justice reviewing the case
 20 again and again? At a minimum should have gone
 21 outside?
 22 A Well, I take some exception to your
 23 characterization of some of these things
 24 constituting reviews. They weren't reviews in
 25 the sense that you seem to be suggesting. I

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1 think I certainly take responsibility for doing
 2 a review. And we have gone through that at
 3 length. To suggest that Dave Mann comparing a
 4 timeline constitutes a review, I think that
 5 that, with the greatest of respect, is reaching.
 6 Other people have certainly looked at the file,
 7 whether or not that constitutes a comprehensive
 8 review. Are there things that could have been
 9 done differently, absolutely, I would agree with
 10 that.
 11 Q I want to ask you this almost sort of in
 12 passing, sir. At tab 5 of the blue book, there
 13 has been some reference to this already in this
 14 inquiry, we have a claim or a letter, should I
 15 say, first of all, from Mr. Finlayson addressed
 16 to Mr. McNan which responds to -- it is a bit
 17 convoluted because it is responding to things
 18 that are responding to other things.
 19 Let me start at the beginning. There is an
 20 application made under 696. There is an
 21 investigative summary released by Mr. McNan on
 22 part of the Department of Justice. There is a
 23 response to that, first of all, by
 24 Mr. Finlayson. There is then a response to that
 25 on behalf of Mr. Driskell. And then

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1 Mr. Finlayson responds to Mr. Driskell's
 2 response. Do you follow me? And that's what we
 3 are looking at now, okay?
 4 A Okay.
 5 Q This document of November 19th of 2004. And for
 6 the first time, we have Manitoba Justice
 7 claiming, in the third paragraph, on page 7, do
 8 you see where I am?
 9 A Starting "first"?
 10 Q Yes, indeed.
 11 A Yes.
 12 Q "That the existence of a Chinese wall
 13 between the handlers of the witnesses and
 14 the prosecutors at the trial."
 15 Do you see that?
 16 A Yes.
 17 Q Did you hear any discussion about this, sir, at
 18 any time?
 19 A I didn't. And I wouldn't be familiar with the
 20 practices. I wasn't in the province at the
 21 time.
 22 Q Did Mr. Finlayson consult you before, do you
 23 remember, before writing this letter and taking
 24 that opinion or expressing that or making that
 25 statement?

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1 A I don't recall. But I think it would have been
 2 analytically that he would consult me before
 3 authoring correspondence.
 4 Q And then, as well, it was discovered, as a
 5 result of the review conducted by Mr. McNan,
 6 that there was even more substantial disclosure
 7 that had still not been provided to
 8 Mr. Driskell's counsel. Do you remember that?
 9 Primarily the Kovnats' document.
 10 A Right. And I'm not sure how that came about. I
 11 don't think we will ever resolve that. I think
 12 our respective positions are on record in the
 13 correspondence that's been filed.
 14 Q I wasn't going to go into it, sir, you will be
 15 pleased to know. But I was going to take you to
 16 page 13, which I have done -- asked a couple of
 17 witnesses about from Manitoba Justice. At page
 18 13 of tab 5, we have the Minister's reasons for
 19 ordering the new trial, in which he expresses --
 20 have you read these before?
 21 A No, I haven't.
 22 Q A little more than halfway down, sir, he says --
 23 and this is his press release.
 24 A Yes.
 25 Q "For 11 years after Mr. Driskell's trial,

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1 the Crown failed to disclose information
 2 that Mr. Zanidean likely committed perjury
 3 at the trial. For 10 years, Winnipeg
 4 Police failed to disclose an investigative
 5 report regarding the murder, which included
 6 important and relevant information that
 7 would have been helpful to Mr. Driskell's
 8 defence. The Crown's two key witnesses,
 9 Zanidean and Gumieny, have, since
 10 Mr. Driskell's trial, either recanted or
 11 threatened to recant their trial testimony
 12 regarding Mr. Driskell's involvement in the
 13 murder. The failure to disclose this
 14 information to the defence was not only a
 15 serious breach of the constitutional duty
 16 to disclose, but the information also
 17 significantly undermined the credibility of
 18 these key witnesses."
 19 Were you aware that Minister Cottler had
 20 said words to that effect, sir?
 21 A No, I wasn't.
 22 Q You weren't. Were there any repercussions in
 23 Manitoba Justice, it doesn't seem there were, as
 24 a result of what the Minister said? I mean,
 25 were you involved in anything, any discussion?

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1 A I am not sure what you --
 2 Q Well, they are pretty serious statements the
 3 Minister is making there, to say the least. Is
 4 there any discussion that you were privy to
 5 about these comments of the Minister?
 6 A No.
 7 Q And, in fact, sir, the response of Manitoba
 8 Justice to, first, what the Minister did, and I
 9 suppose what the Minister said, on March 3rd of
 10 2005, and he did and said -- he did what he did
 11 and he said what he said on the morning of
 12 March 3, 2005, was that on the afternoon of
 13 March 3, 2005 Mr. Morrison filed his document
 14 with the Queen's Bench entering a stay of
 15 proceedings all on the same day. You are aware
 16 of that, are you?
 17 A I am aware of that. I hadn't actually seen his
 18 reasons for entering the stay until I was
 19 preparing to come here to testify.
 20 Q In light of what the Minister said that very
 21 morning, sir, did you find them disquieting at
 22 all, the reasons expressed for the stay by
 23 Mr. Morrison? They are on page 16 of tab 5,
 24 that's where they commence. For example,
 25 Mr. Morrison decided he wanted the court to

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1 know -- look at the bottom of 16.
 2 A Yes.
 3 Q "The stay of proceedings that's been
 4 directed is not..."
 5 emphasized,
 6 "...a recognition of factual innocence. It
 7 is simply a recognition that our ethical
 8 standards for proceeding is no longer met."
 9 So he felt it necessary, after everything
 10 that had happened, after what the Minister had
 11 said that very morning about Manitoba Justice,
 12 to sort of keep making the point. They are not
 13 giving Driskell a whole lot of satisfaction. Do
 14 you see that?
 15 A Well, I am not sure why that was said, but I
 16 don't find that disquieting. And I don't think
 17 that that was -- and I can't speak for
 18 Mr. Morrison. But I do know Mr. Morrison
 19 personally and professionally. I don't think
 20 that that would have been the intention was in
 21 any way to deprive Mr. Driskell of any
 22 satisfaction.
 23 Q At page 17, sir, Mr. Morrison stresses how Crown
 24 attorneys have obligations of objectivity and
 25 fairness. Do you see that?

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1 A Yes.
 2 Q And how:
 3 "My role in the case for some time has been
 4 as potential trial counsel. And as a part
 5 of my trial preparations, I have engaged in
 6 a critical and practical analysis of the
 7 available admissible evidence in order to
 8 answer the question: Is there still a
 9 reasonable likelihood of conviction in this
 10 case?"
 11 And then says:
 12 "Usually the answer to this question is a
 13 relatively simple one."
 14 But he goes on to say:
 15 "It wasn't that simple in this case."
 16 Do you remember that?
 17 A I remember that.
 18 Q And Mr. Driskell's counsel, sir, at page 21,
 19 subsequently wrote to Mr. Morrison with regards
 20 to this letter. Which, of course you would
 21 appreciate Mr. Driskell can't respond to. He
 22 didn't even get a day in court, you realize
 23 that? He didn't even go to a courtroom on
 24 March 3, 2005. He is just told by word of
 25 mouth, you know what the Crown's done. They

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1 have just entered a stay of proceedings in the
 2 Court of Queen's Bench. He doesn't even get the
 3 satisfaction of going into a court and hearing a
 4 judge say: Mr. Driskell, you are free to go.
 5 There is none of that. You understand that, do
 6 you?
 7 A I wasn't aware of that until you just told me.
 8 Q Well, that's what happened. I mean, it is
 9 hardly a satisfactory conclusion for a man who
 10 has been 12, 13 years in prison protesting his
 11 innocence to sort of get advised, actually, by
 12 his own counsel: By the way, they have entered
 13 a stay of proceedings in the Court of Queen's
 14 Bench, I have just been told. It is not a
 15 satisfactory way to end things, do you think,
 16 sir? Especially with this letter of
 17 Mr. Morrison saying: We are not saying he is
 18 innocent. We are just saying we haven't got a
 19 good enough case to proceed. Do you see the
 20 point, sir? Put yourself in Mr. Driskell's
 21 position, sir. It is just so unsatisfactory,
 22 isn't it?
 23 A I imagine it would be.
 24 Q At page 21, sir, Mr. Driskell's counsel wrote to
 25 Mr. Morrison in this regard. Of course, it was

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1 a private letter. Mr. Driskell's counsel could
 2 hardly file this in the Court of Queen's Bench
 3 in response to what Mr. Morrison had written:
 4 "I'm surprised that you felt it appropriate
 5 to write such a self-serving letter to the
 6 court. Imagine, if you would, Mr. Driskell
 7 writing his own version of the events of
 8 the last 15 years to the court explaining
 9 how Manitoba Justice has violated his
 10 rights year after year, and yet still
 11 refuses to acknowledge his innocence. I
 12 note that your letter to the court fails to
 13 address any of the issues raised by
 14 Minister Cottler in his press release."
 15 Which, indeed, it does, right? It fails to
 16 address any of the issues raised by Mr. Cottler
 17 in his press release.
 18 A Well, if you're asking me, again, I have been
 19 presented these documents for the first time
 20 today.
 21 Q I thought you had read the stay a few days ago?
 22 A A few days ago, yes.
 23 Q Right.
 24 A Yes. And I haven't seen this document at page
 25 21 before today. So if you're suggesting it

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1 doesn't respond, I would --
 2 MR. LOCKYER: No, I'm saying -- I'm sorry.
 3 MR. DAWE: I must say I have some reservations
 4 about the appropriateness of this witness being
 5 asked about a letter that he didn't write and
 6 the failure to respond to points that were
 7 raised in the press release that he has never
 8 read. I am really just not sure of where this
 9 is going in terms of any evidence that is of
 10 assistance to the commission.
 11 MR. LOCKYER: My submission has been quite
 12 helpful. And Mr. Schille has already commented
 13 that from Mr. Driskell's point of view, it is
 14 hardly a satisfactory conclusion to the
 15 proceedings. And it relates directly to the
 16 systemic issues that the panel discussed just
 17 last week.
 18 THE COMMISSIONER: You may continue.
 19 BY MR. LOCKYER:
 20 Q Thank you. And then the letter concludes, sir:
 21 "In short, your contents of your letter to
 22 the court are most disappointing. I would
 23 have hoped for something different from
 24 Manitoba Justice. It would have been
 25 better if you had simply entered the stay

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1 of proceedings without a self-serving
 2 explanation that exacerbates the
 3 miscarriage of justice that Mr. Driskell
 4 has had to live with for so long."
 5 Do you think those are fair sentiments,
 6 sir, on reflection? It is a bit of a one-sided
 7 thing, this stay of proceedings, isn't it?
 8 Where the Crown can provide sort of a
 9 self-justifying explanation as to why they are
 10 doing something, ignoring what the Justice
 11 Minister for the country has said hours earlier,
 12 when there is no right of reply of not even a
 13 day in court for Mr. Driskell. Do you see the
 14 point?
 15 A Well, are you asking me if I agree with that
 16 sentiment?
 17 Q Yes.
 18 A I don't, no.
 19 Q You don't think it's a reflection, sir, of
 20 systemic problems in Manitoba Justice, its
 21 inability to get to grips with a wrongful
 22 conviction?
 23 A Well, it raises difficult issues, Mr. Lockyer.
 24 I know, from Mr. Driskell's perspective,
 25 anything short of a finding that he was

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1 factually innocent would be unsatisfactory. But
 2 the position that we've taken, based on the
 3 analysis, or the position that Mr. Morrison
 4 took, is that he is someone who is the victim of
 5 a miscarriage of justice in the sense that he
 6 didn't get a fair trial. And I know a number of
 7 people have come to this inquiry and said that.
 8 I would add my name to that list.
 9 However, that is not to say, as
 10 Mr. Morrison said in his remarks to the court,
 11 that in the view -- our view of the evidence,
 12 and again that's not my decision, Mr. Morrison
 13 came to that view independent of myself, but I
 14 subscribe to that view as well, and it's an
 15 important distinction. When you say there is
 16 something unfair about the system, there has
 17 been considerable publicity in relation to this
 18 matter. And I make no apologies for what's gone
 19 on in relation to the internal problems that we
 20 have been examining at length here today. It is
 21 a dark day for our office, as I've said earlier.
 22 And we take full responsibility for that.
 23 But to go further, as the media has
 24 suggested, at length, that a person who did not
 25 commit this crime was in custody, I think that

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1 that is doing a further disservice that may not
 2 be warranted. I don't know if James Driskell
 3 committed this crime. But I know at the end of
 4 the day, in terms of our test to prosecute, and
 5 that is a reasonable likelihood of conviction,
 6 which is one of the higher tests employed by
 7 Prosecution Services, people have agonized with
 8 that.
 9 Mr. Morrison I know wrestled with that
 10 before coming to his ultimate conclusion. He
 11 took the unusual step of retaining outside
 12 counsel, our department did, to get their
 13 opinion as well. And I certainly didn't
 14 participate in that when Mr. Weinstein was
 15 retained, but I have certainly spoken to him
 16 about that afterwards. And I am aware of his
 17 views in relation to our test to prosecute.
 18 So at the end of the day, is it unfair? I
 19 am not sure that it was unfair for the Crown
 20 finally to have an opportunity to comment when,
 21 to a large extent, we are muzzled from
 22 responding in the media.
 23 Q Muzzled from responding in the media, sir,
 24 it's -- I guess, even to this day, you've really
 25 acknowledged today that Manitoba Justice cannot

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1 explain a number of things that happened over
 2 all of the years that Mr. Driskell was in
 3 prison?
 4 A That's beyond any dispute, that's correct.
 5 Q And tell me, sir, have you received any advice
 6 from Manitoba Justice as to anything that
 7 Manitoba Justice would wish to say to
 8 Mr. Driskell today?
 9 A No, I have not.
 10 Q You haven't. Is there anything you want to say
 11 to him yourself?
 12 A Well, I think I have already acknowledged adding
 13 my name to the list. I don't think he got a
 14 fair trial. And everyone's entitled to a fair
 15 trial. And in that respect, he was done a
 16 disservice by the system and by Manitoba
 17 Justice.
 18 Q But as far as you're aware, sir, Manitoba
 19 Justice, the best that is done as an
 20 organization, at least to date, I suppose, would
 21 be this letter of March 3rd that Mr. Morrison
 22 wrote to the Court of Queen's Bench?
 23 A As far as I'm aware, that's the case.
 24 MR. LOCKYER: All right. Well, that's all.
 25 Thank you.

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1 MR. KENNEDY: Mr. Commissioner, I had many
 2 questions when the witness started this morning,
 3 but because of Mr. Lockyer's thorough
 4 questioning, I have no further questions.
 5 THE COMMISSIONER: Thank you, Mr. Kennedy.
 6 MR. ABRA: I just have a couple,
 7 Mr. Commissioner.
 8 THE COMMISSIONER: Certainly.
 9 MR. ABRA: I don't mean to scare you, Dale, with
 10 all of these books.
 11 I wonder if Mr. Schille might be given,
 12 please, Exhibits 30A and C?
 13 THE COMMISSIONER: 30A is volume 1 and 30C is
 14 volume 2, Mr. Schille.
 15 BY MR. ABRA:
 16 Q Mr. Schille, as I am sure you are aware, I am
 17 acting for the estate of the late Bruce Miller.
 18 And you didn't work with Bruce, I gather. He
 19 was gone from the department by the time you
 20 came, initially on your secondment, and then
 21 when you became a permanent member of the
 22 department?
 23 A That's correct.
 24 Q So you didn't work with him as a Crown attorney
 25 at all?

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1 A That's correct.
 2 Q But you did appear in front of him as a judge?
 3 A I did.
 4 Q Many times?
 5 A Many, many times.
 6 Q And I suggest to you that as a judge he had a
 7 reputation of bending over backwards to be fair,
 8 would you agree with that?
 9 A I certainly would agree with that.
 10 Q He was extremely fair and impartial and, to the
 11 best of your recollection, gave everyone a fair
 12 hearing before him?
 13 A He was someone I would describe as having a
 14 favourable reputation on both sides of the bar,
 15 both Crown and defence.
 16 Q Okay. And as you say, both Crown and defence,
 17 to your information or to your knowledge,
 18 regarded him highly?
 19 A I would agree with that.
 20 Q Okay. Now, I would like to take you, firstly,
 21 to your own book of documents that Mr. Dawe
 22 prepared, Exhibit 40A. And I would ask you to
 23 go, please, Dale, to tab 20?
 24 A I have that.
 25 Q And the third page, sir, is, I gather, the same

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1 as the second page, but it's -- the obliterated
 2 portion has been removed, so your entire memo,
 3 page 1121 is there?
 4 A Correct.
 5 Q On my reading of it, page 1120 is the same page,
 6 but part of it has been obliterated, as far as
 7 the third paragraph, or the fourth paragraph is
 8 concerned?
 9 A That appears to be the case.
 10 Q Yes. Now, in the fourth paragraph of page 1121,
 11 you lay out three matters that came to your
 12 attention, only as a result of reading the
 13 Winnipeg Police Service investigation --
 14 re-investigation of the Zanidean matter, am I
 15 correct?
 16 A That's correct.
 17 Q And the three matters were, as you've said,
 18 that, firstly, Zanidean had contacted
 19 Mr. Brodsky within days of the trial to recant
 20 his testimony?
 21 A That's correct.
 22 Q The second was that the -- excuse me, that you
 23 say the second main point is that Zanidean
 24 threatened, some time after the conviction, but
 25 prior to the appeal, to recant his evidence in

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1 the media if he was charged with the
 2 Saskatchewan arson?
 3 A That's correct.
 4 Q Again, this information would have triggered the
 5 disclosure obligation of the Crown had the
 6 police disclosed it?
 7 A Correct.
 8 Q And the third one is related to the Crime
 9 Stoppers payments that both Zanidean and Gumieny
 10 had paid or had been paid, excuse me. So these
 11 were three items that, from your entire review
 12 of the entire Manitoba Justice file, you were
 13 not aware of, and that you didn't become aware
 14 of them, until you read the Winnipeg Police
 15 Service re-investigation in 2003 is when you got
 16 it?
 17 A That's correct.
 18 Q So is it fair to say that from your review of
 19 the entire Manitoba Justice file, you weren't
 20 aware of any of these three points? And there
 21 was no indication of any of these three points
 22 anywhere in the Manitoba Justice file?
 23 A These three points, correct.
 24 Q Yes.
 25 A Yes.

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1 Q And, again, I read that these were all points
 2 that apparently the Winnipeg Police Service had
 3 knowledge of that they did not pass on to the
 4 Crown?
 5 A That's correct.
 6 Q And you only became aware of this, as you say,
 7 in 2003?
 8 A That's correct.
 9 Q Is it fair to say that it changed your attitude
 10 somewhat to the whole issue of disclosure, as
 11 far as the trial was concerned, to Mr. Brodsky
 12 as Mr. Driskell's counsel?
 13 A It did.
 14 Q And it made you realize that many significant
 15 points that had not been disclosed to
 16 Mr. Brodsky should have been, at least those
 17 three?
 18 A That's correct.
 19 Q Now, I would like to now take you to the binder
 20 that's just been given to you, Dale, Exhibit
 21 30C. It's volume 3 of the book of documents for
 22 George Dangerfield, Gregg Lawlor and Stuart
 23 Whitley.
 24 A Yes.
 25 Q And I would ask you to go to tab 69, please?

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1 A Yes.
 2 MR. ABRA: Do you have it, Mr. Commissioner?
 3 THE COMMISSIONER: Yes, I do.
 4 BY MR. ABRA:
 5 Q Now, at the bottom of that -- and this is a
 6 letter that Bruce Miller sent to Mr. Quinney,
 7 who was the Assistant Deputy Minister of
 8 Saskatchewan Justice. This was a letter that
 9 you saw during the course of your
 10 investigation -- during the course of your
 11 review of the Justice file?
 12 A Yes.
 13 Q And in the last paragraph, Mr. Miller has said:
 14 "While it is clear that no such meeting
 15 ever took place, and no immunity agreement
 16 was made with or for Mr. Zanidean ..."
 17 And then he goes on to ask Mr. Quinney to
 18 write to him and let him know why he thought
 19 that there might have been an immunity
 20 agreement. Would you agree with me that clearly
 21 from that paragraph, it was Mr. Miller's view
 22 that he did not think that there was any
 23 immunity agreement that had ever been made with
 24 Mr. Zanidean as far as Manitoba Justice was
 25 concerned?

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1 A That appears to be the case, yes.
 2 Q And from your review of the file, was there
 3 any -- did you see any other documentation that
 4 supported the view that Mr. Miller, in fact, did
 5 not think there was ever an immunity agreement
 6 from Mr. Zanidean?
 7 A No.
 8 Q Okay. But from this letter, at least, was it
 9 your impression, on reading the entire file and
 10 this letter, in particular, that as far as
 11 Mr. Miller was concerned, there was no immunity
 12 agreement with Mr. Zanidean?
 13 A That's correct.
 14 Q That was your impression?
 15 A Yes.
 16 Q Okay. Now, I would like you to go now, please,
 17 to Exhibit 30A, which is volume 1,
 18 Mr. Commissioner, again of the book of documents
 19 of George Dangerfield, Gregg Lawlor and Stuart
 20 Whitley. And, Dale, I would like you to go,
 21 please, to tab 20? It's tab 20,
 22 Mr. Commissioner.
 23 A I have that.
 24 Q Now, this is a memorandum that we have heard
 25 evidence that was prepared by Sergeant Tom

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1 Anderson of the Winnipeg Police Service to
 2 Inspector Ray Johns of the Winnipeg Police
 3 Service. And you will see a note, the date
 4 October 8 of 1991, so it's within a couple of
 5 months of Mr. Zanidean's -- or, excuse me,
 6 Mr. Driskell's trial?
 7 A Right.
 8 Q During the -- have you ever seen this memorandum
 9 before?
 10 A I don't think I've ever seen that.
 11 Q Okay. Based on the disclosure to this inquiry
 12 by the various parties, I can tell that you
 13 there is no record of this memorandum in
 14 Manitoba Justice's file. And you have no
 15 recollection of ever having seen this memorandum
 16 during the course of your review?
 17 A No. But I really haven't had an opportunity to
 18 review it. And I was doing that as you were
 19 asking the question, but I don't think I have
 20 seen it.
 21 Q Well, I would like you, in particular, to read
 22 the fourth paragraph on page 1. Take as long as
 23 you need.
 24 A Thank you. No, I don't think I've ever seen
 25 that.

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1 Q Okay.
 2 A I think I would have remembered that.
 3 Q Okay. Now, you will see that in that -- you
 4 will note within that paragraph, and if you have
 5 to re-read it, but effectively what it says is
 6 that as early as October 10th of 1990,
 7 Mr. Zanidean admitted to Sergeant Anderson and
 8 Sergeant Paul that he had set that fire in Swift
 9 Current.
 10 A That that's the gist of it, right.
 11 Q Yes.
 12 A Yes.
 13 Q And it was again disclosed to them, according to
 14 the evidence we have heard, on October 28th of
 15 1990, although it is not referred to there. I
 16 suggest to you that in your review of the entire
 17 Manitoba Justice file, which included all of the
 18 police reports that have been provided to the
 19 Crown, did they not?
 20 A Yes.
 21 Q And there was nothing anywhere that indicated
 22 that the Crown attorneys, including Mr. Miller,
 23 had been told anything about Zanidean admitting
 24 to Paul and Anderson, as early as October of
 25 1990, that he had set that fire in Swift

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1 conversations that he had with Constable Burton
 2 of the RCMP in Swift Current?
 3 MR. WOLSON: Anderson, not Paul.
 4 BY MR. ABRA:
 5 Q I'm sorry, Anderson, thank you. I wonder if you
 6 could read that paragraph, please?
 7 A Yes.
 8 MR. ABRA: Mr. Libman has to correct my
 9 statements periodically.
 10 MR. LIBMAN: It was Mr. Wolson.
 11 MR. ABRA: Mr. Wolson, thank you.
 12 MR. LOCKYER: The good looking one.
 13 MR. ABRA: I didn't think Mr. Wolson would want
 14 to correct me.
 15 MR. WOLSON: I have always liked Mr. Lockyer.
 16 THE WITNESS: I've read that.
 17 BY MR. ABRA:
 18 Q Did you get the gist of it?
 19 A Yes.
 20 Q Would you agree with me that the essence of
 21 what's contained in that paragraph is that there
 22 was an agreement between Burton and Paul that
 23 Zanidean was not going to be prosecute for that
 24 Swift Current arson?
 25 A That's the gist of it.

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1 Current?
 2 A I think that's true, yes.
 3 Q You certainly had no knowledge of it. And you,
 4 back in 2000, had significant knowledge about
 5 this case, as a result of your review of the
 6 file?
 7 A Right. I think that's the case. But as I said,
 8 it's been quite a while since --
 9 Q I realize that.
 10 A -- since I went through the correspondence in
 11 the file.
 12 Q I realize that. But the admission of Zanidean
 13 admitting to Paul and Anderson nine months
 14 before the trial that he had set that fire is
 15 something that would stick out in your mind,
 16 even now?
 17 A I would expect that I would remember that, yes.
 18 Q Yes. And you had no knowledge of it, to the
 19 best of your recollection?
 20 A No.
 21 Q Until today?
 22 A Correct.
 23 Q Now, I would ask you to go to page 2, please,
 24 the third paragraph. And in this particular
 25 paragraph, Sergeant Paul is describing telephone

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1 Q Did you have any knowledge of that before you
 2 read it today?
 3 A No. And, again, I expect that that would stick
 4 in my mind, given what seems to be generally a
 5 he said, he said position taken by the two
 6 respective forces, based on what's in the
 7 material I have reviewed.
 8 Q Okay. But there was nothing in the Crown's
 9 file, that you reviewed carefully back in 2000,
 10 that gave any indication of the fact that the
 11 Crown was aware of the fact that an agreement
 12 had been reached between Constable Burton and
 13 Sergeant Anderson with respect to the fact that
 14 Zanidean would not be charged with the Swift
 15 Current arson?
 16 A That's correct.
 17 Q Now, there is also, at the end of the sentence,
 18 it says that:
 19 "Crown Attorney Bruce Miller was notified
 20 of this arrangement."
 21 Now, was there anything on the Crown's file
 22 anywhere, including notes of Miller's or
 23 correspondence of Miller's or whatever, that
 24 indicated that he had ever been told anything
 25 about that so-called arrangement between

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1 Anderson and Burton?
 2 A No.
 3 Q And this is the first time you've become aware
 4 of it?
 5 A Yes.
 6 Q So is it fair to say that if you had been aware
 7 of that when you wrote the memo to Finlayson,
 8 that we went over a few minutes ago at tab 20 in
 9 your book of documents, November 26 of 2003,
 10 that that issue of the agreement between
 11 Zanidean and Burton was something that you would
 12 have commented on as being another matter that
 13 the police did not seem to have disclosed to the
 14 Crown, or would you have remained quiet about
 15 it?
 16 A I may have commented. But again, at the end of
 17 the day, I think, based on all of the additional
 18 information, it's difficult to get to the bottom
 19 of what happened. I may have.
 20 Q Let me ask you this, again, I recognize that it
 21 is six years ago, but when you were preparing
 22 your report in 2000 -- it was 2000, wasn't it,
 23 that you prepared it?
 24 A I started working it in 2000 and turned it in
 25 late 2000 and early 2001.

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1 Q But if this information had come to your
 2 knowledge during the review of the Crown file,
 3 you would have indicated it in your report,
 4 would you not?
 5 A I may have. I don't think I could say
 6 exclusively one way or the other. At the end of
 7 the day, I still don't think, based on
 8 everything, that it's clear exactly what
 9 happened.
 10 Q All right. But there was nothing, to your
 11 information, because that -- because, as you
 12 know, there was no indication in the Crown's
 13 file of any immunity having been granted to
 14 Zanidean?
 15 A That is true.
 16 Q And yet here there is an indication that there
 17 might have been?
 18 A Correct.
 19 Q Surely, you would have commented on that in your
 20 review? You would have commented on that in
 21 your review if it had been drawn to your
 22 attention?
 23 A I very well may have.
 24 MR. ABRA: Okay, that's fine. Thank you,
 25 Mr. Schille. Thank you, Mr. Commissioner.

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1 THE COMMISSIONER: Thank you, Mr. Abra.
 2 MR. GATES: Good afternoon, Mr. Commissioner.
 3 THE COMMISSIONER: Good afternoon, Mr. Gates.
 4 BY MR. GATES:
 5 Q Mr. Schille, my name is David Gates. I am with
 6 the Federal Department of Justice, and I am
 7 appearing on behalf of the RCMP.
 8 A Yes.
 9 Q And I just have a couple of questions for you
 10 because I am confused about a few things. The
 11 first one relates to what your role was during
 12 this time frame? I mean, it appears to be
 13 clear, if I can start at the beginning, that in
 14 2000 you were asked to conduct a review of the
 15 file that Manitoba Justice had relating to the
 16 Perry Harder homicide?
 17 A Correct.
 18 Q In 2000, were you a line prosecutor within
 19 Manitoba Justice?
 20 A I still am.
 21 Q And who did you report to in 2000?
 22 A Well, the organization of the office, I would
 23 have had -- at that point, I would have had a
 24 supervising Crown, who would supervise a group
 25 of Crowns who were line Crowns.

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1 Q Okay. And then going forward, and Mr. Lockyer
 2 took you to this this morning, or this
 3 afternoon, I'm sorry, I can't recall when it
 4 was, but in tab 13 of your materials is a letter
 5 that Mr. Finlayson sent to Mr. Lockyer on
 6 February 18, 2003 with a copy to you. And it
 7 suggests that you will be the point of
 8 conduct -- contact, rather, with respect to
 9 disclosure requests.
 10 A What tab is that at, sorry?
 11 Q Sorry, tab 12.
 12 A Okay, 12.
 13 Q I think I said 13. It's tab 12.
 14 A Right.
 15 Q Can you help me as to what role, if any, you had
 16 relative to this file after you finished the
 17 review, and before Mr. Finlayson appears to have
 18 appointed you as the contact person for
 19 disclosure, vis-a-vis Mr. Driskell and his
 20 counsel, Mr. Lockyer?
 21 A Well, none in the intervening period of time.
 22 And since I have finished my review to the time
 23 I have become the contact person for
 24 disclosure --
 25 Q Correct.

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1 A -- I didn't have any responsibilities relative
 2 to this file.
 3 Q And after February 18, 2003, Mr. Finlayson's
 4 apparent appointment of you to be the contact
 5 person for disclosure, what was your role
 6 relative to this file? Did you have conduct of
 7 this file?
 8 A Well, no. And that was the distinction I was
 9 attempting to make this morning during some of
 10 my testimony. If I have conduct of a file, I am
 11 making all of the decisions in relation to this
 12 file. And that was not the case. And given the
 13 nature of the matter and the -- what we saw as
 14 some fairly far-reaching policy implications,
 15 that I was simply the liaison person and the
 16 contact person for disclosure. So I was to
 17 liaise with Mr. Driskell's lawyers, as well as
 18 the Winnipeg Police Service. I think the
 19 description of me as the point man for
 20 disclosure is a pretty apt description.
 21 Q And please correct me if I'm wrong, Mr. Schille,
 22 but I'm left with the impression from your
 23 evidence today, Mr. Schille, with the idea that,
 24 other than a period of time when you were
 25 working full-time on your review of the Manitoba

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1 Justice file, this was not your full-time
 2 employment?
 3 A No. This was part of other duties, as assigned.
 4 I had carried a full caseload otherwise.
 5 Q Okay. the second area where I'm confused relates
 6 to the very lengthy exchange between you and
 7 Mr. Lockyer, over the course of the day, with
 8 respect to the Hall and Ewatski review of the
 9 Perry Harder homicide. If I understood your
 10 evidence correctly, there is no record of any
 11 written request from Manitoba Justice to the
 12 Winnipeg Police Service for a copy of that
 13 report?
 14 A Correct.
 15 Q My confusion is I am left wondering if there was
 16 ever any request for a copy of that report?
 17 A Well, there certainly was. And, as I've said,
 18 as early as the meeting between AIDWYC and the
 19 Crown's office, February 9, 2003, we had
 20 received information at that point. In terms of
 21 who received it, I am not sure, at this point.
 22 But I know around the time of the
 23 McCorrister memo, the -- we had passed on that
 24 information to AIDWYC. And that, I think, is
 25 what precipitated their request requesting

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1 access to that. And Inspector McCorrister's
 2 response back to me indicating that: We are
 3 taking the position you are not going to receive
 4 it.
 5 Q Did you, Mr. Schille, ever ask Inspector
 6 McCorrister for a copy of the review?
 7 A No. And I would have dealt with Sergeant
 8 Burchill as my contact in the department. And
 9 as I've indicated earlier, in terms of my use of
 10 the term "negotiating for that" or "mediating",
 11 what that really consisted of was making
 12 inquiries through my contact person, Sergeant
 13 Burchill, as to whether or not there was any
 14 movement in the position, a fairly firm
 15 position, that the Winnipeg Police Service was
 16 taking.
 17 Q Did you ever ask Detective Burchill for a copy
 18 of the review?
 19 A Around that time, I certainly would have asked
 20 him. I know that Sergeant Burchill --
 21 Q Sorry, Sergeant Burchill.
 22 A Sergeant Burchill takes the position that that
 23 wouldn't have been until later around the time
 24 of the McCorrister memo, and I certainly would
 25 have had discussions with him about that. But

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1 either myself, or someone, had certainly
 2 received information from the Winnipeg Police
 3 Service much earlier than that. Because in
 4 February -- at that February meeting it was the
 5 subject of a heated conversation between AIDWYC
 6 representatives and the Crown's office as to
 7 whether or not we were taking adequate steps to
 8 attempt to secure the document. And so if I
 9 was -- if that information came to me, I am not
 10 sure who I would have been dealing with.
 11 Prior to Sergeant Burchill being appointed
 12 to liaise with Manitoba Justice, I had been
 13 dealing with a member of the identification
 14 unit, Sergeant Pearson, who really was -- my
 15 contact with him was specific to getting the
 16 hairs to England for testing. So I don't think
 17 I would have been having any conversation with
 18 him relative to that. It's possible that that
 19 might have come to Mr. Finlayson.
 20 Q Do you recall asking Sergeant Burchill for a
 21 copy of the review?
 22 A Well, I certainly recall discussing it in the
 23 context of we weren't getting it. And he was
 24 aware that we wanted it. Do I recall using
 25 words that we wanted it? He was well aware that

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1 we wanted it through -- and that's evident from
 2 all of the correspondence. And I was certainly
 3 following up on that during my contacts with
 4 him.
 5 MR. GATES: Okay. Thank you very much,
 6 Mr. Schille. Thank you, Mr. Commissioner.
 7 THE COMMISSIONER: Thank you, Mr. Gates.
 8 MR. PROBER: Mr. Commissioner, I expect I'm
 9 going to be next. And we have had an extremely
 10 long day listening to Mr. Lockyer's readings,
 11 but I could probably finish. If you want to
 12 go -- start to finish if you want to go to 4:45?
 13 It's up to you.
 14 THE COMMISSIONER: We would normally go to 4:45.
 15 BY MR. PROBER:
 16 Q Sure. Good afternoon, Mr. Schille.
 17 A Good afternoon, Mr. Prober.
 18 Q If you have your volume of material.
 19 A I do.
 20 Q I would ask you to turn to tab 5, please?
 21 A Yes.
 22 Q And the pages aren't numbered, but it is a memo.
 23 And you probably remember it, to Mr. Dangerfield
 24 from Mr. Miller dated Tuesday, July 7, 1992,
 25 referencing the Quinney material. I can count

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1 the exact number of pages on it.
 2 A I have it.
 3 MR. PROBER: Do you have it, Mr. Commissioner?
 4 THE COMMISSIONER: I do.
 5 BY MR. PROBER:
 6 Q Thank you. Do you recall when you reviewed,
 7 first reviewed the file, any material being
 8 attached to this memo?
 9 A I don't think there was, no.
 10 Q Okay. Thank you. Did you go -- if you go on
 11 about two, three more pages, you will see a
 12 letter -- a memo, rather, dated March 11, 1993,
 13 to Mr. Dangerfield from Mr. Miller. Do you have
 14 that?
 15 A Yes.
 16 Q You will note the handwritten portion at the
 17 bottom?
 18 A Yes.
 19 Q Mr. Dangerfield has identified it as his. You
 20 will see that he doesn't recall receipt of the
 21 material and wants to look at it before sending
 22 it out. Do you see that?
 23 A I see that.
 24 Q Next is a memo dated Tuesday, April 13th, 1993
 25 to Whitley from Miller?

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1 A Yes.
 2 Q Do you have that?
 3 A I have that.
 4 Q Again, in the third paragraph, it refers to
 5 materials being attached. And, in fact, it
 6 refers to Mr. Dangerfield, or George, compiling
 7 a draft letter to send the material to
 8 Mr. Brodsky. Do you recall, when you first
 9 looked at the file, whether there was any
 10 material attached to this memo?
 11 A No, there wasn't.
 12 Q There wasn't, okay. Did you ever see a draft
 13 letter?
 14 A No.
 15 MR. PROBER: Mr. Clerk, if you could show the
 16 witness Exhibit 34, please? In terms of time,
 17 Exhibit 34 is dated March 19, 1993. So it's
 18 earlier than this last April 13th memo, but it's
 19 in a separate -- it's a separate document. It's
 20 just a memo, Mr. Commissioner. I don't know
 21 that you need it in front of you.
 22 THE COMMISSIONER: Okay.
 23 BY MR. PROBER:
 24 Q It is dated March 19, 1993, and it's Exhibit 34.
 25 It's a memo that Mr. Lockyer produced, actually,

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1 to Mr. Dangerfield, being very fair, as he was.
 2 Do you have that now?
 3 A I do.
 4 Q There is a copy of a letter referred to there.
 5 Do you remember if a copy of the letter was
 6 attached to the memo, a letter which was
 7 forwarded to me by Deputy Chief Klippenstein?
 8 A I don't recall.
 9 Q No. But you will note the writing on the
 10 right-hand portion, in terms of the
 11 recommendations that Mr. Miller is requesting
 12 from Mr. Dangerfield, his recommendation is:
 13 "We send the material to Brodsky with
 14 explanation."
 15 Do you see that?
 16 A Yes.
 17 Q Okay. Again, do you recall any attachments to
 18 this memo?
 19 A I don't. Well, I don't recall seeing this
 20 particular memorandum.
 21 Q Okay. And you wouldn't recall having
 22 attachments, obviously?
 23 A No.
 24 MR. PROBER: Mr. Clerk, could you show that
 25 memo, please, to Mr. Commissioner?

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1 THE COMMISSIONER: I will just get it from
 2 Mr. Schille.
 3 MR. PROBER: Thanks very much.
 4 THE COMMISSIONER: Okay.
 5 MR. PROBER: Thank you.
 6 THE COMMISSIONER: Okay.
 7 BY MR. PROBER:
 8 Q Finally, you have, I think, Exhibit 30C in front
 9 of you. It's volume 3, I believe?
 10 A I have that.
 11 Q Yes. I don't have it in front of me. I loaned
 12 it to Mr. Abra, but he may give it back. But,
 13 in any event, if you could go to tab 66, please.
 14 I believe this was characterized by Mr. Lockyer,
 15 thank you, as a review, one of the many reviews
 16 that occurred. But the title of it is "briefing
 17 note", and that's what it is, correct?
 18 A Yes.
 19 Q It's a briefing note?
 20 A Yes.
 21 Q Not a review, would you agree?
 22 A I would agree with that.
 23 MR. PROBER: Thank you. Those are all of my
 24 questions, thanks, Mr. Commissioner. Thank you
 25 Mr. Schille.

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1 going to take some time. And I hope that
 2 doesn't seriously inconvenience people, you
 3 included, Mr. Schille?
 4 THE WITNESS: No, not at all, Mr. Commissioner.
 5 THE COMMISSIONER: All right. We will adjourn
 6 until tomorrow at 9:30.
 7 THE CLERK: All rise.
 8 (Proceedings adjourned at 4:46 p.m.)
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1 THE WITNESS: Good afternoon, Mr. Prober.
 2 MS. CARSWELL: I don't know that I can finish in
 3 ten seconds, Mr. Commissioner. I actually had
 4 no questions until Mr. Abra stood up so
 5 Mr. Schille will have to thank him for my
 6 standing here.
 7 THE COMMISSIONER: How long would you be?
 8 MS. CARSWELL: Well, I don't see myself,
 9 frankly, being longer than five minutes. But
 10 then I know Mr. Wolson has questions after me, I
 11 think.
 12 MR. WOLSON: Yes.
 13 MS. CARSWELL: Mr. Wolson is nodding. And I
 14 would be prepared to start tomorrow because I
 15 wouldn't want Mr. Wolson to have been the only
 16 one to do that.
 17 THE COMMISSIONER: Actually, we should have
 18 Mr. Wolson standing right now.
 19 MR. WOLSON: In my usual spot, yes, my usual
 20 five-second spot.
 21 MS. CARSWELL: I am occupying Mr. Wolson's spot.
 22 And so I feel uncomfortable with Mr. Wolson's
 23 spot.
 24 THE COMMISSIONER: Well, I think we should
 25 probably adjourn until tomorrow because it is

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1 COURT REPORTER'S CERTIFICATE
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 5 DEBRA KOT and LISA REID, duly appointed Official
 6 Examiners in the Province of Manitoba, do hereby
 7 certify the foregoing pages are a true and
 8 correct transcript of our Stenotype notes as
 9 taken by us at the time and place hereinbefore
 10 stated.
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 14 -----
 15 Debra Kot
 16 COURT REPORTER
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 19 Lisa Reid
 20 COURT REPORTER
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