



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



THE HONOURABLE PATRICK J. LESAGE, Q.C., COMMISSIONER

January 2007

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**The Honourable Patrick J. LeSage, Q.C.
Commissioner**

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ACKNOWLEDGEMENTS

Conducting an Inquiry such as this, examining issues that are at the very foundation of our justice system, is an important and daunting task. In order to be of value, it must be conducted in a thorough yet expeditious manner. This requires all participants to work together in a cooperative and highly professional manner. This is exactly what occurred at this Inquiry. Every facet of the process worked as it should. I am indebted to all who made this Inquiry an example of why this is a worthwhile process.

I would like to thank my legal counsel, Michael Code and Jonathan Dawe, for their hard work and dedication. In the same vein, I thank each and every counsel who appeared at the Inquiry. Their judgment, skill and professionalism made it a pleasure to preside over these proceedings.

I am indebted to Lynn Mahoney, Blair Trudell, Jo Faichnie and Iris Wordsworth, who greatly assisted me in preparing this report.

To all those who made this Inquiry move along seamlessly, I am truly grateful. I would be remiss if I did not thank them all individually:

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I am also indebted to The Honourable John J. Enns for the benefit of his clarity of thought and hard work as reflected in his two reports dealing with the Police to Crown Disclosure, and Crown to Defence Disclosure in this matter.¹ I also wish to acknowledge the assistance provided to me by David McNairn's detailed analysis in his Investigative Report.

¹ J.J. Enns, *A Review of Crown to Defence Disclosure Compliance in the James Driskell Murder Trial and Appeal*, July 28, 2004; and J.J. Enns, *A Review of Police to Crown Disclosure Compliance in the James Driskell Murder Trial and Appeal*, March 2004.

I. INTRODUCTION

James Patrick Joseph Driskell (“Driskell”), now age 48, was arrested on October 22, 1990 on a charge of first-degree murder of Perry Dean Harder (“Harder”). The Crown preferred an indictment, and the matter therefore proceeded directly to trial without the benefit of a preliminary inquiry. He was convicted on June 14, 1991, sentenced to the mandatory term of life imprisonment with no eligibility of parole for 25 years. His appeal was unsuccessful. After having spent more than 13 years in prison, on November 28, 2003, he was released from penitentiary on bail, pending a review of his conviction by the Minister of Justice pursuant to section 696.2 of the *Criminal Code*. The review resulted in his conviction being set aside and a new trial directed. On March 2, 2005, the Manitoba Attorney General directed a Stay of Proceedings.

It is not in serious dispute that Driskell was incarcerated for 13 years, one month, and seven days for a crime for which he was wrongfully convicted.

At the outset, I wish to express my personal regret to Mr. Driskell for the hardship he has suffered because of the failures identified in this report, which contributed to his wrongful conviction.

By Order in Council dated December 7, 2005 (Appendix “A”)² the Government of Manitoba called a Public Inquiry. I was appointed Commissioner to do the following:

- (a) To inquire into the conduct of Crown Counsel who conducted and managed the trial of James Driskell and the subsequent appeal and departmental reviews of his conviction, and

² The Order in Council can be found in both official languages at www.reidreporting.com/driskell.html.

consider whether that conduct fell below the professional and ethical standards expected of lawyers and agents of the Attorney General conducting prosecutions at the time.

- (b) To inquire into whether the Winnipeg Police Service failed to disclose material information to the Crown before, during or after James Driskell's trial and, if so, consider whether the non-disclosure contributed to a likely miscarriage of justice in the prosecution against him.
- (c) To give advice about whether the conduct of Crown Counsel or members of the Winnipeg Police Service should be referred to the Law Society of Manitoba, or to the Law Enforcement Review Agency or an appropriate independent police service, for review and possible investigation by those bodies.
- (d) To consider the role of the RCMP Laboratory in the prosecution of James Driskell, and to review any systemic issues that may arise out of its role.
- (e) To give advice about whether any aspect of this case should be further studied, reviewed or investigated and by whom, and to make systemic recommendations arising out of the facts of the case which the commissioner considers appropriate.
- (f) To consider whether and in what way a determination or declaration of wrongful conviction can be made in cases like this, where:
 - the Minister of Justice for Canada directs a new trial under section 696.3(3)(a)(i) of the *Criminal Code* (Canada), and
 - after a review of the evidence, Crown Counsel directs a stay of proceedings under section 579 of the *Criminal Code* (Canada).³

In carrying out the mandate of the Order in Council, I conducted hearings relating to the pre-trial, trial and post-trial events surrounding the Harder murder, which I will call the Factual Inquiry. We then proceeded

³ Order In Council, dated December 7, 2005.

to the systemic phase of the Inquiry and examined the Crown stay of proceedings and the forensic science issues.

The following parties were granted standing at this Inquiry:

- James Driskell, represented by Alan M. Libman and James Lockyer
- The Province of Manitoba, represented by E.W. Olson, Q.C., and Robert Olson
- George Dangerfield, represented by Jay Prober and Brad King
- The Estate of Bruce Miller, represented by D. Abra, Q.C., and Steven Field
- Stuart Whitley, represented by R. Tapper, Q.C., and Chris Wullum
- The RCMP, represented by M.D. Gates, Q.C.
- The Winnipeg Police Service and certain members, represented by K. Carswell and Shannon Hanlin
- The Winnipeg Police Association and certain members, represented by R. Wolson, Q.C., and Sarah Wolson
- The Association in Defence of the Wrongly Convicted, represented by J. Kennedy, Q.C.

Fifteen witnesses were called (Appendix “D”) and 49 exhibits were filed, most of which were ‘books of documents’ (Appendix “E”).

In this report, I will approach the questions I am to answer regarding the conduct of the Crowns and the police by reviewing some of the evidence called at trial which resulted in Driskell’s conviction. The Order in Council permits me to consider not only evidence given *viva voce*

at the Inquiry, but also interviews and resultant statements taken by Commission Counsel and filed at the Inquiry. With the exception of two panels (forensic evidence, stay of proceedings), the *viva voce* and statement evidence at the Inquiry came from police or former police officers who were involved in the circumstances surrounding the investigations, a civilian RCMP Laboratory employee, Crown lawyers, lawyers who had represented Driskell and Reath Zanidean (“Zanidean”) and, finally, John Gumieny (“Gumieny”). Both Zanidean and Gumieny were important Crown witnesses at Driskell’s trial.

Because the mandate requires me to investigate and report fully on the matters surrounding the trial, conviction and appeal of Driskell, and to make recommendations, it is necessary that I make findings of fact, and evaluate what happened and why. In doing so I am mindful of Associate Chief Justice O’Connor’s comments in the *Report of the Events Relating to Maher Arar*:

I agree with those who argue that a public inquiry should not be turned into a fault-finding exercise. Indeed, in preparing this report, I have avoided making unnecessary negative or critical comments about individuals or agencies. That said, I have found it necessary in some instances to make comments that may be viewed as negative or critical in order to fully report on what occurred. In addition, I thought it necessary, in several places in the Report, to point to the shortcomings, as I viewed them...⁴

It is important to consider the significant role that public inquiries have in our Canadian society. Our justice system has benefited greatly from the wisdom of the previous wrongful conviction inquiries (*Guy Paul Morin, Thomas Sophonow, Donald Marshall and Parsons/Druken/Dalton*) and will, I hope, continue to benefit from what comes from this Inquiry. These inquiries could not take place and, therefore, would not advance the

⁴ *Report of the Events Relating to Maher Arar*, p. 12.

state of our Canadian system of justice, were it not for the candour, truthfulness and courage of all the witnesses who come forth and testify. These witnesses, who have all played one role or another in the subject matter of the Inquiry, risk their conduct being placed under the microscope, evaluated and commented upon, all publicly. Adverse comments will not be made about them unless there is clear and convincing evidence to justify so doing.

In this regard, I must also stress that I am mindful of the fact that this conduct now being scrutinized is being examined with the benefit of hindsight. The events which are before me took place between 1990 and 2004. Different standards and practices were in effect during this time frame. In addition, I have had the benefit of having *all* the facts neatly placed before me, from all the sources, a luxury that was not afforded each of the Crowns and police.

Finally, I wish to recognize the efforts of the members of the media, the lawyers and the investigators whose tenacity and perseverance ensured that this miscarriage of justice suffered by James Driskell was brought to light.

II. FACTUAL INQUIRY

Failure to disclose information to Driskell is the central issue of this Inquiry.

The Crown's case that he was the killer rested very largely on the evidence of two associates of Driskell, Gumieny and Zanidean. They claimed Driskell had discussed killing Harder to prevent him from testifying against Driskell on some property offence charges (the "chop shop" charges). Their evidence was also central to the Crown's claim that Harder's killing was planned and deliberate, and thus first degree murder.

At the heart of the disclosure issue is the failure to disclose information to Driskell with respect to matters that were relevant and extremely cogent regarding the credibility of both of these witnesses, particularly Zanidean.

1. Background

Zanidean was a native of Swift Current, Saskatchewan. Zanidean met Driskell through Driskell's brother, Ron, and they became friends. Based on information from a confidential informer (now known to be Zanidean – but never disclosed to the defence), in November 1989, the police obtained a warrant and searched a garage rented by Driskell and used by Harder where they discovered thousands of dollars worth of stolen property. Harder was arrested. He gave statements to the police incriminating both himself and Driskell with respect to the stolen property and break and enters he said they had committed. Driskell and Harder were subsequently jointly charged with a variety of criminal offences (the "chop shop" charges), including:

did unlawfully have in his possession a boat trailer and license plate, the property of ARTHUR J. LOGAN, 667 Queensway, in the City of

Winnipeg to a value not exceeding one thousand dollars,... [Driskell only charged]

did unlawfully break and enter a place to wit the premises of ATCO ENTERPRISES LTD., situated at 81 Lowson Crescent, in the City of Winnipeg and therein did commit the indictable offence of theft,... [Harder only charged]

did unlawfully have in his possession tools, tool box and a socket set, the property of CP RAIL, 150 Henry Avenue, in the City of Winnipeg to a value exceeding one thousand dollars...

did unlawfully break and enter a place to wit the premises of C J RENTALS AND CONTRACTING LTD situated at 727 Mission Road, in the City of Winnipeg and therein did commit the indictable offence of Theft...

did unlawfully steal a 1980 Chevrolet truck, the property of ACE DISPOSAL YARD, 606 Provencher Boulevard, in the City of Winnipeg, to a value exceeding one thousand dollars...

did unlawfully steal a 1989 Chevrolet truck, the property of WAJAX INDUSTRIES LTD, 20 Murray Park Road, in the City of Winnipeg, to a value exceeding one thousand dollars...

did unlawfully steal tires and rims, the property of BROOKS EQUIPMENT LTD., 1616 King Edward Avenue, in the City of Winnipeg, to a value exceeding one thousand dollars...

did unlawfully break and enter a place to wit the premises of WESTEEL DIVISION OF JANNOCK LTD situated at 450 DesAutels Street, in the City of Winnipeg and therein did commit the indictable offence of Theft...

did unlawfully have in his possession tanned leather hides, the property of WESTERN GLOVE WORKS, 555 Logan Avenue, in the City of Winnipeg to a value exceeding one thousand dollars...

On April 23, 1990, a preliminary inquiry was scheduled for June 21, 1990. However, Harder's counsel had negotiated a deal with the Crown in which Harder would plead guilty to some of the charges and would receive a penitentiary sentence. At Driskell's trial, Tim Killeen, Harder's counsel on the "chop shop" charges, testified that Harder was

going to plead guilty on June 21, 1990 at the preliminary inquiry and the Crown's position was that they were going to seek a term of incarceration of two to three years in penitentiary. Harder had originally intended to plead guilty at the April 23, 1990 appearance but he wanted to delay the plea for a few months for personal reasons. Because there was to be a guilty plea entered, Harder's counsel advised the Crown that he could cancel the witnesses scheduled for June 21, 1990. Ian Garber ("Garber"), Driskell's counsel on the "chop shop" charges, testified that it was his understanding from discussions with the Crown that Harder was going to plead guilty to the "chop shop" charges and that the charges would then be stayed against Driskell. On June 21, 1990 Harder failed to attend court and a bench warrant was issued for his arrest. The Crown requested an adjournment of the charges against Driskell, but the request was denied and the Crown offered no evidence. Driskell was therefore discharged.

On September 30, 1990, Harder's body was discovered in a shallow grave in a field between Brookside Boulevard and the railroad tracks. His body was badly decomposed and had been disturbed by animals, and had evidently been buried for some time, although it proved impossible to scientifically determine precisely when Harder died. It was later established that Harder had died from two gunshots to the chest.

It was the theory of the Crown that Driskell killed Harder because he believed that Harder was going to testify against him, and jeopardize Driskell's plans to become a millionaire by salvaging sunken cars from the bottom of Manitoba lakes.

2. The Swift Current Arson

On July 7, 1990, Driskell and Zanidean drove from Winnipeg to Swift Current, Saskatchewan, arriving late in the evening. They drove to an unoccupied house owned by Zanidean's sister, Carol Hayek ("Hayek"), and proceeded to pour gasoline and camp fuel throughout the house and cut ventilation holes in the walls. They ignited the accelerant, causing an

explosion that blew the front porch off the house. The ensuing fire destroyed the residence.

The Swift Current RCMP investigated the incident. It was immediately apparent that the fire was an arson. Cst. Ross Burton (“Burton”) eventually became the lead investigator. Based on the evidence they gathered, the investigators very quickly came to suspect that Hayek had arranged to have her own house burned in order to collect the insurance.

Although the Swift Current RCMP believed from an early stage of the investigation that Hayek probably planned the arson, it seemed unlikely in the circumstances that she had set the fire herself, and they suspected that she may have had one of her relatives set the fire. Accordingly, they began investigating the Zanidean family. Interviews by the police in late July led them to focus their inquiries on several of Hayek’s siblings, including Ray Zanidean, who had previously lived in Swift Current and had dealings with the local police. When Burton learned that Ray Zanidean was now living in Winnipeg, he sent a CPIC telex to the Winnipeg Police Service (“WPS”) requesting that they locate and interview Zanidean. In his July 27, 1990 telex, Burton provided a Winnipeg address he had found through a motor vehicle search, and stated:

Ray is a brother of [Hayek] ... I just learned today that he is living in Winnipeg. Please locate Ray and establish his whereabouts at the time of the fire. Also [be on the lookout for] any injuries consistent with an explosion/flash fire. If you have contacts at your local hospitals please determine if he was treated on the 8th [of July].

Almost two weeks later, on August 8, 1990, Sgt. Ian Mann (“Mann”) of the Winnipeg Police arson squad called Burton in response to his July 27, 1990 telex. Mann gave Burton a different Winnipeg address for Zanidean and reported that he was “having hospitals checked”, and that he would be interviewing Zanidean “today”. Burton took this to mean

that Mann had already spoken to Zanidean and arranged an interview. However, when interviewed by Insp. R. Hall (“Hall”) and Insp. J. Ewatski (“Ewatski”) (now Chief Ewatski of the WPS) during the 1993 “Perry Harder Homicide Review”, Mann explained that he made “a couple” of visits to what he believed was Zanidean’s address but never found anyone home, and that he never spoke to Zanidean either in person or by telephone. There is some evidence that by August 1990 Zanidean was no longer living at the address Mann attended. Following their August 8, 1990 conversation, Burton heard nothing further from Mann until mid-October, 1990.

3. Gumieny’s initial contact with the WPS (October 6 and 9, 1990)

On October 6, 1990, Gumieny contacted the WPS and spoke to Sgt. John Speirs (“Speirs”), indicating that he was prepared to come forward as a confidential informant with information about the Harder homicide. Speirs and Sgt. Cal Osborne (“Osborne”) met with Gumieny later that day and obtained Gumieny’s account, in which he implicated Driskell. Since Gumieny was at this point acting as a confidential informant, Osborne did not record this interview in his notebook, and omitted Gumieny’s name from the Supplementary Report he prepared of the meeting.

Three days later, on October 9, 1990, Osborne met with Gumieny again, together with Sgt. Henry Williams (“Williams”). On this occasion, Gumieny was persuaded to come forward as a witness rather than a confidential informant, and Osborne and Williams took a formal statement from him, and also summarized the interview in a Supplementary Report and in Osborne’s police notebook.

During their 1993 Review, Hall and Ewatski learned that Gumieny had contacted Crime Stoppers earlier in the day on October 9, 1990, and later collected a \$400 reward. When interviewed by Hall and Ewatski in

April 1993, Gumieny maintained that that he had “phoned Harry” [Williams] for assistance collecting the Crime Stoppers reward money. However, Osborne and Williams told Commission Counsel that they had no knowledge at that time of Gumieny’s call to Crime Stoppers or the reward payment. The fact that Gumieny had requested and obtained money from Crime Stoppers was apparently never disclosed to the Crown or to defence counsel.

4. Zanidean’s initial contact with the WPS (October 9, 1990)

On October 9, 1990, Zanidean called the WPS and offered to provide information about the Harder homicide. Zanidean’s motivation for going to the police is not entirely clear. However, it is a reasonable inference that Zanidean knew that Mann of the WPS was looking for him (on behalf of the Swift Current RCMP) and that Zanidean went in with a view to obtaining favourable consideration regarding the Swift Current arson. It has also been suggested that Zanidean was concerned that Gumieny, who he knew had already spoken to the police, might implicate him in Harder’s death.

Sgt. Tom Anderson of the WPS (“Anderson”) and Sgt. Albert Paul of the WPS (“Paul”) testified that Zanidean initially called Crime Stoppers and that the call was transferred to Paul, although they omitted this detail from their notes and contemporaneous report. Zanidean agreed to meet Paul and Anderson later that afternoon in Lockport, in the north of Winnipeg. Paul has identified a set of undated notes on loose paper as notes that he made during the initial meeting with Zanidean in Lockport on October 9, 1990, possibly during an initial conversation that took place in their car before they went into the Lockport police station to take a formal statement from Zanidean. These loose notes record Zanidean’s disclosure to Anderson and Paul that he had been the informant whose tip had led to Driskell and Harder being charged in the 1989 “chop shop” case:

Ray phoned Crimestoppers about them [Driskell and Harder]. Ray had just left the shop when it was raided. Got stopped by the police. Got \$700.00 from Crimestoppers. Phoned day before raid because Jim was loading stolen goods in trailer.

Zanidean's role in the 1989 "chop shop" case is omitted from Anderson and Paul's notebook entries for October 9, 1990, Paul's Supplementary Report of the interview, and Zanidean's formal statement of that date. There is no evidence that this fact was ever disclosed to the Crown, and it was not disclosed to the defence. That same day, the WPS detained and interviewed Driskell in relation to the Harder murder and later released him.

It was later learned, in the Hall and Ewaski review of the case in 1993, that Zanidean also applied for and received a Crime Stoppers payment after he had already provided his information in the Harder homicide. This fact was never disclosed to the Crown or the defence.

5. Zanidean's first admission to Anderson and Paul regarding the Swift Current arson (October 10, 1990)

On October 10, 1990, Anderson and Paul had Zanidean attend the Public Safety Building for a follow-up interview. Near the conclusion of the interview, Zanidean told Anderson and Paul that "there could be a problem with his credibility in court", explaining that during the summer he and Driskell "blew up a house in Swift Current, a relative's place". Paul told Zanidean that they would make inquiries with the Saskatchewan authorities and that he may be charged. Paul recorded this exchange in his police notebook, and Anderson initialled Paul's notes. Several weeks later, on October 28, 1990, Anderson prepared a Supplementary Report summarizing both the October 10, 1990 Zanidean interview and a subsequent interview conducted on October 11, 1990. In this Report, Anderson did not mention Zanidean's October 10th remarks concerning his involvement in the Swift Current arson and its potential impact on his credibility. While Zanidean's admission was of obvious interest to the

Swift Current RCMP, it also was potentially useful to the defence in attacking his credibility.

In any event, Anderson and Paul maintain that they orally briefed their superiors in the WPS about Zanidean's admissions. They also testified that Bruce Miller ("Miller"), Director of Winnipeg Prosecutions, would have been briefed on the matter once he became involved in dealing with witness protection issues, either by Anderson and Paul directly, or by their superiors, Staff/Sgt. W. VanderGraaf ("VanderGraaf") and Insp. Randy Bell ("Bell"). Miller died in 2004, before this Inquiry commenced. At the time of the Driskell murder trial, Miller reported directly to the Assistant Deputy Minister, Stuart Whitley ("Whitley"). Miller did not prosecute cases and only performed administrative functions. VanderGraaf testified that Anderson and Paul orally briefed Miller on Zanidean's Swift Current arson admissions. He agreed that this information was sufficiently important that it should have been put into a formal report. It was not.

6. Recorded conversations between Driskell and Zanidean (the "body packs") and Driskell's arrest (October 22, 1990)

On October 13 and 15, 1990, Zanidean, acting as a police agent, and wearing a concealed recording device, met with Driskell. He and Zanidean apparently discussed the Swift Current arson, but little was said of the Harder murder. On October 22, 1990, the police arrested Driskell and charged him with Harder's murder. Based on information received from Zanidean, the police detained and interrogated Ashif and Shafik Kara, obtaining statements from them implicating Driskell. Both Kara brothers subsequently recanted their statements and claimed that they had not said many of the things attributed to them by the police. The next day, the police executed a material witness warrant on Gumieny and had him enter a recognizance that required him to report to the police once a week and notify them of any change of address.

7. Mann's contact with the homicide investigators (on or around October 25, 1990)

During his June, 1993 interview by Hall and Ewatski, Mann recalled that at some point he overheard 23 Division Robbery/Homicide investigators who shared an office with the arson unit, talking about Zanidean. Mann recognized the name and told the Robbery/Homicide investigators that he was looking for Zanidean on behalf of the Swift Current RCMP. The Robbery/Homicide investigators seemed to know where Zanidean was, and it was left that they would contact the Swift Current RCMP. Mann thought that the Robbery/Homicide officer he spoke to was Anderson, but was not sure of this, and could not recall when this conversation took place. However, Burton recalls receiving a "cryptic" telephone call from Mann on or around October 25, 1990, in which Mann told him to await a call from Anderson, without giving any further explanation. Anderson and Paul do not remember ever speaking to Mann about Zanidean, and believe they only learned of Mann's involvement some years after the fact. However, VanderGraaf recalls speaking to Mann at some point before Anderson's first telephone call to the Swift Current RCMP and directing Mann to "back off" and leave the matter to the homicide investigators. VanderGraaf's view was that Zanidean was now a Crown witness in a murder prosecution, and that it would be inappropriate for the WPS to continue investigating him for arson on behalf of the Swift Current RCMP. His intention was to have Anderson advise Burton that Zanidean had already admitted to setting the Swift Current fire.

8. Zanidean's second statement to Anderson and Paul about the Swift Current Arson (October 29, 1990)

On October 29, 1990 Zanidean again wore a hidden recording device to a meeting with James Driskell's brother Ron. Following this meeting, Zanidean met with Anderson and Paul for a debriefing. After questioning Zanidean about his conversation with Ron Driskell, Anderson

raised the subject of the Swift Current arson, asking Zanidean “what was behind [it]”. Zanidean replied that his sister had “caused [him] some problems” and that he burnt down her house as an act of “revenge”, believing that she was uninsured and would lose money. He added that he “never made any money out of it”. When Zanidean asked Anderson what he thought would happen, Anderson replied that they “had notified Swift Current police” and that Zanidean was “on [his] own”, and that the Winnipeg Police “cannot help [him] with any of that”. Anderson recorded this exchange in his police notebook, but when he prepared a Supplemental Report of the interview the next day (October 30, 1990) he made no mention of the discussion about the Swift Current arson. As with Zanidean’s earlier October 10, 1990 admission, Anderson agreed that this omission on his part was intentional. Despite the absence of any written report of this second admission by Zanidean, Anderson states that his superior officers were orally briefed on this development shortly afterwards.

Several days later, on November 2, 1990, Anderson and Paul took a further statement from Zanidean, which Anderson recorded in question-and-answer format in a Supplementary Report prepared the next day (November 3, 1990). In one exchange, Zanidean is asked a question about a trip that he and Driskell took to Saskatchewan during which, according to Zanidean, Driskell made an inculpatory utterance about the Harder homicide. Anderson’s report of the way in which he framed his questions does not disclose the context or reason for this Saskatchewan trip, namely, that Zanidean and Driskell had driven to Swift Current to burn down Zanidean’s sister’s house.

9. Anderson’s first telephone conversation with Burton (October 30, 1990)

There is a dispute in the evidence as to exactly what transpired during Anderson’s and Burton’s October, 1990 telephone conversation. Although Anderson and VanderGraaf agreed that the Swift Current

RCMP's pursuit of Zanidean on the Hayek arson investigation presented significant witness protection issues for the WPS, they maintain that Anderson deliberately refrained from asking Burton to delay his investigation of Zanidean because they were anxious to avoid any suggestion that they had promised Zanidean any favours in relation to the Swift Current arson. According to Anderson and VanderGraaf, Burton spontaneously volunteered to suspend his pursuit of Zanidean until the conclusion of Driskell's trial for murder. While Anderson gratefully accepted this proposal and indicated that it would assist the Winnipeg homicide investigators, he is adamant that Burton made the offer without any prompting on his part. However, VanderGraaf agrees that in the circumstances it would have been obvious to Burton that postponing his investigation of Zanidean would assist the WPS, whether or not Anderson made a specific request. In his contemporaneous notes of the October 30, 1990 telephone call, Anderson did not mention Burton's offer to postpone his pursuit of Zanidean, stating only: "Burton advises no evidence to confirm [Zanidean's admission] but investigation will continue." Anderson's account of Burton's spontaneous offer to delay his pursuit of Zanidean first appears in writing in his October 8, 1991 memo to Insp. R. Johns ("Johns"), written almost a year after the fact and subsequent to Driskell's conviction for first degree murder, in response to what Anderson understood was an RCMP complaint. However, Anderson and VanderGraaf both agree that VanderGraaf was orally briefed on the situation at the time. In his October 8, 1991 memo to Johns, Anderson gives the following account of the October 30, 1990 telephone conversation with Burton:

[Burton] confirmed that he was in charge of the investigation. I discussed the situation with him and he indicated that the entire ZANIDEAN family was being interviewed with respect to the arson. He said there was no other evidence against Reath ZANIDEAN at that time. Cst. Burton made a suggestion to which I readily agreed. He offered to delay their pursuit of Reath ZANIDEAN until after he testified at our murder trial. He also said he would somehow flag ZANIDEAN'S name on RCMP Intelligence files so that no other RCMP officer investigating their arson, would pursue him. I told Cst.

Burton that we had made no deals with Reath ZANIDEAN and we would not make him privy to this agreement.

Following this conversation, I notified Inspector Bell and Staff Sergeant VanderGraaf of the agreement struck with Cst. Burton. I told ZANIDEAN that the RCMP had been notified but I did not reveal the agreement made with Cst. Burton.

Burton takes issue with Anderson's account. According to Burton, Anderson specifically asked Burton not to pursue Zanidean "at this time". Burton did not agree to this request, but merely agreed to pass it on to his superiors. He was suspicious of Anderson's motives, and spoke about the matter with his commanding officer, Staff/Sgt. Ron Ferguson ("Ferguson"), who agreed that they should open a higher security "Protected B" file. Ferguson testified that Burton would not have had the authority to offer to postpone the investigation of Zanidean without consulting with his superiors, explaining:

It would require guidance from our more senior officers ... and our intent, and we did continue with the investigation, the hold off was in attempting to locate Mr. Zanidean.

Consistent with Ferguson's recollection, the surviving contemporaneous documentation from the Swift Current RCMP file indicates that the investigation of Zanidean and his sister continued, but suggests an understanding that Mann of the Winnipeg arson squad would not be contacting Zanidean immediately. Burton's contemporaneous report of this call from Anderson has been destroyed. Subsequent reports prepared by Burton which have been preserved contain only edited portions of what was recorded in his contemporaneous report, as follows:

... ANDERSON advised that ZANIDEAN is a witness in a homicide prosecution as he observed DRISKELL execute a Crown witness in relation to another prosecution. ANDERSON requested that we keep this information in confidence and hold off on pursuing ZANIDEAN as it will endanger their prosecution of DRISKELL.

During their 1993 Homicide Review, Hall and Ewatski were given access to the Swift Current RCMP file at a time when it appears to still have been complete.⁵ Their 1993 Report appears to paraphrase a Swift Current report concerning the October conversation between Anderson and Burton, as follows:

According to the RCMP file, on 90-10-27 Sgt. Anderson spoke with Constable Burton advising him that Zanidean had admitted to the arson. He was also advised Zanidean was a witness in the “execution” of Harder and was asked if the RCMP would keep this information confidential and hold off their pursuit of Zanidean, as it would endanger the Driskell prosecution. It is indicated Burton agreed to this but that he would proceed against Zanidean when the murder trial was concluded.

During Hall and Ewatski’s review in 1993, Hall and Anderson had a telephone conversation (recorded on tape) in which they discussed, *inter alia*, Anderson’s views concerning Zanidean’s admissions to involvement in the Swift Current arson. The transcript of the conversation discloses Anderson telling Hall the following:

[A]s far as [Zanidean], as far as the evidence and everything always went smooth that way, except that little hurdle, of course, when he drops it on and says he’s blown up a house, but ... other than that everything went smooth. It wasn’t, it was the only uh, time he used uh, uh, or caused trouble was with the uh, that, you know, when it had to do with his negotiations with the Justice Department. ... And of course he did that even after his testimony.

...

⁵ The Swift Current arson file had at this point been closed for approximately two years and would not yet have been destroyed pursuant to the RCMP’s file retention and destruction policies. Burton testified that the file was still intact when he was transferred out of the Swift Current detachment some years later. Although Burton put “do not destroy” labels on the file before leaving Swift Current, much of the file was apparently destroyed anyway.

And, and, you know what, you know what the best backup of that, Bob [Hall], is the fact that right down to the end in parts of the protection negotiations, if, if, you talking to that horrible lawyer of his, what was his name again? Uh, you know who I mean? ... Zanidean's lawyer ... One of the things he would have told you is that one of the stumbling blocks all along was that they wanted an ironclad guarantee that he wouldn't be uh, charged. And Miller wouldn't give it to him and I wouldn't give it to him and ... nobody would give it to him.

During November 1990, Burton continued to gather evidence against Hayek. On December 14, 1990, he sent Mann copies of the RCMP investigative files relating to both the July 1990 Hayek fire (file #90-2787) and an earlier suspicious fire at Hayek's house in 1988 (file #88-2053). In his cover letter, he stated:

Reath ZANIDEAN would be a good suspect in the first arson as well. Once circumstances permit please interview Reath ZANIDEAN regarding this arson also.

On January 31, 1991, Burton requested a "lengthy diary date" extension on the arson file, explaining that he was "[a]waiting action from Winnipeg P.S." Burton testified that the "action" he was awaiting was Mann's interview of Zanidean and related hospital inquiries.

10. Police reports and memos regarding witness protection

On November 4, 1990, Anderson prepared a Supplementary Report proposing "short term" and "long term" witness protection measures for Zanidean, in which he suggested that Zanidean be put in an apartment or hotel under police guard until the trial, and then relocated to Calgary and given a new identity. This report refers to the fact that Zanidean owned his home and that it needed to be sold, for witness protection reasons, since Driskell and his associates were aware of it. The Crown would have received this report.

**11. The initial police meeting with Zanidean and Kovnats
(November 13, 1990)**

On November 12, 1990, Zanidean advised Anderson that he had retained a lawyer, David Kovnats (“Kovnats”). The next day (November 13, 1990), Anderson and Paul met with Zanidean and Kovnats. The officers’ recollection, as recorded in their notes, is that they advised Kovnats that the WPS would provide pre-trial protection for Zanidean and that Kovnats should contact Greg Lawlor (“Lawlor”) of the Manitoba Department of Justice (“Manitoba Justice”) to discuss post-trial relocation and change of identity. Lawlor was (and is) a senior prosecutor with Manitoba Justice. At the time of the Driskell investigation and trial, he had 15 years of practice as Crown counsel and held the very senior rank of “General Counsel”. In spite of his senior position in the department, he acted as junior counsel to George Dangerfield (“Dangerfield”) during Driskell’s murder trial. Kovnats testified that at the beginning of the meeting Zanidean asserted that the police had previously promised him immunity for “anything and everything” he had done. The officers had objected, denying that they had offered Zanidean immunity on any charges outside Manitoba. Kovnats knew that Zanidean was particularly concerned about a potential charge he faced in Saskatchewan (although he did not at this point know the nature of the charge), and told Anderson and Paul that this issue was a “deal breaker”, and that unless Zanidean was given immunity on all charges there was no point in continuing the discussions. Kovnats cannot recall exactly what the police said, but he left the meeting with the understanding that the police had backed down and that the offer of immunity for Zanidean on out-of-province charges was back on the table. Kovnats did not mention this discussion of immunity in

the notes he made of the meeting later that day,⁶ but maintains that he has an independent recollection of the matter. For their part, Anderson and Paul deny that they ever offered Zanidean immunity during either the November 13, 1990 meeting with Kovnats or their earlier meetings with Zanidean in October and November 1990. Anderson's recollection is that the subject of immunity for Zanidean was never to his knowledge raised before Kovnats' December 14, 1990 letter to Miller. Anderson and Paul did not produce a Supplementary Report of their meeting with Kovnats, however, they testified that they orally briefed their superiors.

12. The obtaining of a direct indictment and the initial witness protection arrangements for Zanidean and Gumieny

During the relevant period, Dangerfield was "Senior General Counsel" and formally reported to the Assistant Deputy Minister, (Whitley). However, in practice, he often reported to Miller, the Director of Winnipeg Prosecutions, on administrative matters and to ADM Whitley on substantive prosecutorial issues. On November 19, 1990, Dangerfield sent a memo to Lawlor directing him to prepare a memo to Whitley requesting a direct indictment in Driskell's case, which Lawlor did. In their respective memos, Dangerfield and Lawlor emphasized the close interconnection between their witness protection concerns and the direct indictment request, and Lawlor specifically asked Whitley to raise both issues with the Deputy Minister as soon as possible. Dangerfield noted in his memo that once they obtained a direct indictment against Driskell, they would have to provide him with full disclosure, which would disclose the identities of the key Crown witnesses. In their testimony, Dangerfield and

⁶ Kovnats' notes of the meeting are as follows: "Gregg Lawlor. Anderson – Promise – protection only. Swift Current has been informed – David Davis. Ian Garburg [*sic*]".

Lawlor agreed that this made it essential that they remain informed about the status of the witness protection arrangements being implemented by the WPS, so that they did not disclose the witnesses' identities before these protective measures were in place. In his memo to Whitley, Lawlor noted that "the key witness [Zanidean] had obtained a lawyer, who tells me his client is jumpy and nervous, and very demanding". Lawlor and Dangerfield both agreed that it was unusual for a witness to retain a lawyer to make demands on his behalf, and agreed that this was a disclosable fact. Dangerfield cannot recall whether he knew the specifics of Kovnats' demands at this point. He understood that Miller and Whitley would negotiate with Kovnats, and assumed that if the final agreement contained charge reductions or similar benefits for Zanidean, he would be advised of this so that he could disclose it to the defence. Although the direct indictment was signed by the Minister the same day that Dangerfield and Lawlor made their application, it was not disclosed to the defence or filed with the court for almost two months.

In late November and early December 1990, the WPS made arrangements to move Zanidean and Susan Fehr ("Fehr") out of their Chelsea Avenue home and into a "safe house". Manitoba Justice issued a series of cheques to Anderson and Paul to pay for the move and other related expenses. Anderson and Paul kept a ledger showing the sums they received and paid out, which indicates that on a number of occasions between November 1990 and February 1991 they received money directly from Lawlor. Although Lawlor has no recollection of being involved in the payment of witness protection expenses, he agrees that as one of the prosecutors responsible for the case, he needed to know that the Crown's key witness had been moved to a "safe house".

13. Kovnats' December 14, 1990 letter to Miller and steps taken by Miller and Whitley in response

Although Kovnats recalls having some initial contact with Lawlor, Miller soon took over the negotiations. Kovnats recalls having a number

of meetings and telephone discussions with Miller in November and December 1990, which culminated in Miller asking Kovnats to put his position in writing. Kovnats sent Miller a letter dated December 14, 1990 setting out a 15-point list of Zanidean's "requirements". With a few minor exceptions, Kovnats testified that he had raised all of these points with Miller in their prior discussions. His understanding was that Miller had agreed in principle to all of Zanidean's demands. The 15 written requests were as follows:

1. That the Crown purchase from him, effective December 1, 1990, his home for his direct costs in [sic] of the home, the CMHC fee, the mortgage appraisal fees and legal fees.
2. That the Crown provide him, after testimony, when he moves, with a new identity.
3. That when he moves the Crown provide him with the legal fees, mortgage appraisal fees and CMHC fees on the new house that he is buying.
4. That the Crown pay for all legal fees incurred by Ray with myself.
5. That the moving costs for Ray and Susan be borne by the Crown.
6. That Susan is taken care of with respect to her injury and to that end the Crown and the Department of Justice assist in providing assistance with the Confederation Life to have them continue paying the claim for so long as Susan is entitled to, without providing them with the address of Susan.
7. That new jobs are found for Susan and Ray, equal to the jobs that they would have had in Winnipeg and to that end we would advise you that Ray had been offered a job with the CPR as a brakeman.
8. That as a result of the new identity any other matters outstanding against Ray, of which the Crown is currently aware, will not be proceeded with either in this or any other province insofar as if Ray were to be convicted of any other offense and put in jail, there is no doubt in his mind that if the

party he is testifying against is convicted, that in the jail setting Ray would not be alive for very long.

9. For the current time they want an alarm system in their current home and constant police surveillance as needed.
10. That the Crown purchase from Ray his current 1983 Chevette and purchase for Ray an equivalent type of vehicle so that Ray can move around without fear of his life. THIS HAS BECOME A PRIORITY.
11. That the Crown assist Ray in making sure that he is able to obtain a mortgage when he moves in that he'll have no credit rating which will be sufficient to assist him in getting a mortgage, equivalent to the mortgage he had here on his current home.
12. That after testimoney [sic] and after Ray has moved they want an alarm system in their new home installed by the Crown.
13. That the police will give a new identity sufficient for Ray to carry on with his new life in a new place which includes things like credit ratings, health insurance, disability insurance for Susan and various other normal things that a person requires in their lives.
14. The new identity will be some place in B.C. where house pricing is equivalent to that in Winnipeg and if the Crown wishes him to move into a place where house pricing is in addition that an adjustment will be made in order from [sic] him to be able to afford the new home.
15. That the Crown will provide him with sufficient monies to live on until he starts his new job with his new identity in B.C.

The central matter motivating the request for immunity in paragraph 8 of Kovnats' December 14, 1990 letter was Zanidean's concern that he would be charged with a serious offence in Saskatchewan, which Kovnats later learned was the Swift Current arson. Kovnats testified he received assurances from Miller that Miller would "take care of it", and relied on this undertaking without knowing the specifics of how Miller would be able to protect Zanidean from charges in another province.

On December 28, 1990, Miller replied to Kovnats' December 14, 1990 letter, stating: "we will be addressing this matter internally at the earliest opportunity and matters will progress from there". That same day, Miller forwarded a copy of Kovnats' letter to his ADM, with a covering memo in which he suggested that they meet "[to] consider our position regarding this matter at the earliest opportunity perhaps together with the Deputy Minister and Mr. Dangerfield, Q.C." Miller's memo apparently went astray, and on January 11, 1991 he re-sent it, along with a further memo in which he indicated that the matter had "take[n] on greater urgency given the fact that the statements of witnesses have now been disclosed to defence counsel".

Kovnats recalls meeting with Miller and Whitley on January 22, 1991, consistent with Miller's handwritten note on his January 11, 1991 memo indicating that a meeting had been arranged for that date. Although Whitley does not specifically recall attending this meeting, he does not dispute that it took place. In his June 2, 1991 memo to file, Kovnats states:

At that meeting they promised me most of the things contained in the January meeting [*sic*; December letter?], promised to get in touch with the R.C.M.P. to get the proper Witness Protection person and they promised to get me a retainer letter. This letter has not appeared even to this date [*i.e.*, June 2, 1991].

In a further handwritten note on the January 11, 1991 memo, Whitley advised Miller: "we've got a meeting with [RCMP Cpl.] Tom Orr" on January 28, 1991. Cpl. Tom Orr ("Orr") was the RCMP officer in Winnipeg responsible for handling applications to the RCMP Source/Witness Protection Program (the "RCMP SWP Program"). Neither Orr nor Whitley specifically recall this meeting, and Whitley believes that it may have been rescheduled to another date, and that he may not have attended.

Dangerfield testified that at some point fairly early in his involvement in the Driskell prosecution he was specifically instructed by Miller and/or Whitley that he and Lawlor were not to know the details of the “protection arrangements” that were being made for the key Crown witnesses:

That we [he and Lawlor] were not to be involved in any negotiations, that we were told that the monies were being used to support these men in a program for a limited period of time, and that we were to tell [this to] the judge and Mr. Brodsky [Driskell’s counsel], and were not to know anything more.

He knew in general terms that the key witnesses were receiving pre-trial protection from the WPS, and he believed they would be placed in the RCMP witness protection program after the trial. However, he did not know what Zanidean was demanding, nor did he know the details of the agreement Zanidean ultimately reached with Miller. Lawlor does not recall ever receiving any similar instructions about the witness protection arrangements, but testified that he considered witness protection to be “somebody else’s responsibility” and that he did not know the details of the post-trial arrangements Miller and Whitley were making for Zanidean and Gumieny.

Whitley agrees that there were sound policy reasons not to have Dangerfield and Lawlor directly involved in negotiations with Zanidean and his lawyer. However, he expected Miller to keep Dangerfield informed of the state of the negotiations so that he could make appropriate disclosure, both of Zanidean’s demands and of the benefits he ultimately received. Whitley cannot recall either specifically directing Miller to brief Dangerfield on these matters or discussing them with Dangerfield himself, but assumed as a matter of common sense that Miller was keeping Dangerfield fully informed. He denies ever instructing Dangerfield that he was not to know or disclose to the defence the details of the witness protection arrangements. Whitley cannot think of any reason why Miller would have chosen to keep Dangerfield in the dark on these matters, and

has difficulty imagining that Miller would have done this, based on his knowledge of Miller's and Dangerfield's personalities. Whitley believes that Dangerfield would have "gone ballistic" if he had been kept in the dark about information relevant to a case he was prosecuting.

14. Brodsky's Disclosure Requests and the Crown and Police Responses

Brodsky's February 7, 1991 letter

In a letter to the Crown dated February 7, 1991, Greg Brodsky ("Brodsky"), defence counsel for Driskell, made a number of disclosure requests. This letter contains 48 itemized requests, including the following:

5. We would like the police records of the witnesses the Crown proposes to have testify, together with the outstanding charges that were not dealt with, and with parole applications that the police or others to the police knowledge offered assistance in connection with.

6. We would like to have the detail of the witness protection programmes Mr. Dangerfield mentioned in Court that have been offered to various witnesses.

...

16. We have eight or nine statements from Zanadine [sic], are there more that we do not have? I would like a record of all of his contacts with the police whether by way of formal statement or written notification in a police officer's notebook.

...

22. What motives do the police files have for people to implicate Jim Driskell in the killing?

23. What motives do people have for assisting the police that are demonstrated in the police files, and what do the police files show in connection with these last mentioned few items?

This letter was addressed to Lawlor, although Brodsky delivered it to Dangerfield and the Crown's response was signed by Dangerfield. Lawlor, however, also reviewed Brodsky's letter and made handwritten notes on it which he passed on to Dangerfield.

In his February 8, 1991 letter of reply, Dangerfield responded to Brodsky's requests for information in paragraphs 5, 16, 22 and 23 of the February 7, 1991 letter regarding the credibility of the Crown's witnesses, by stating either the information would be obtained from the police (re paragraphs 5 and 16) or that no information was in the police files (re paragraphs 22 and 23). In making this latter response, Dangerfield testified that he relied on the note that Lawlor had made on Brodsky's letter ("none") without making his own inquiries of the police. Lawlor testified that he probably reviewed the police report that had already been provided to the Crown, but did not make any further inquiries of the police.

Dangerfield also responded to Brodsky's paragraph 6 request by stating:

...we cannot provide you with the details of the protection offered witnesses for fear of giving them away but can assure you that the protection amounts to provision of monies to help support them while they are protected and a constant surveillance over them.

It was generally agreed by all who testified at the Inquiry that this response was erroneous, both in fact and in law, as much could have been disclosed about the Crown's witnesses without "giving them away".

Brodsky's April 25, 1991 Letter

On April 10, 1991, Brodsky wrote to Dangerfield requesting a witness list and reminding him that a number of the requests in his February 7, 1991 letter had not been addressed in Dangerfield's February 8, 1991 reply and remained unanswered. Lawlor provided the witness list on April 19, 1991 along with further disclosure, but did not address the remaining unanswered points from Brodsky's February 7, 1991 letter. On April 25, 1991, Brodsky sent the Crown his second major disclosure letter, containing 21 numbered paragraphs in which he repeated or refined a

number of the requests in his February 7, 1991 letter, and added further requests, including the following:

5. The criminal records of all witnesses on your list, what charges they had at the time, what dispositions were made, what favourable considerations were given to them for the not pressing of charges or laying of charges, and other matters that would influence them to testify in a particular fashion.

9. What do the Winnipeg City Police have on the fire in Swift Current, Saskatchewan...?

Two days later, on April 26, 1991, Lawlor sent Brodsky two separate letters, addressing several points from Brodsky's February 7, 1991 and April 25, 1991 letters, respectively. He also forwarded a copy of Brodsky's letter dated April 25, 1991 to VanderGraaf, seeking help responding to certain paragraphs.⁷

Lawlor's April 26, 1991 response to para. 16 of Brodsky's February 7, 1991 letter [Zanidean's informal statements to the police]

In paragraph 16 of his February 7, 1991 letter, Brodsky had requested:

16. ... a record of all [Zanidean's] contacts with the police whether by way of formal statement or written notification in a police officer's notebook.

In his February 8, 1991 reply, Dangerfield had asserted that there was "no record" of contacts with the police beyond those recorded in his previously-disclosed statements "except with respect to caring [for] him pending trial", but had added:

⁷ Specifically, paras. 5, 7, 8, 9, 10, 11, 12, 16, 19 and 20.

To be absolutely certain however we will supply you with any supplemental reports of conversation informal or otherwise with police officers.

In his first April 26, 1991 letter, Lawlor gave a further response to Brodsky's February 7 question #16, stating:

With respect to paragraph 16 of your letter of February 7th, I am advised that you have all statements/conversations of Zanidean.

Lawlor assumes from his use of the words "I am advised" that he must have based this response on information received from the police, since that was "the only place we could get that type of information." In fact, Anderson and Paul's notes, which at this point had not been disclosed to the Crown or the defence, contained two statements by Zanidean that were not recorded in any of the police reports. In these statements, Zanidean admitted to the Swift Current arson, suggested that he saw it as affecting his credibility, and claimed that he burned his sister's house as an act of revenge and had not received any money for it. Zanidean made the first of these statements on October 10, 1990, one day after he first went to the police, and the second several weeks later, on October 29, 1990. Lawlor testified that he first saw these notebook entries during his recent interview by Commission Counsel. Although Lawlor was aware that Zanidean was concerned about a criminal investigation in Saskatchewan, he did not know that Zanidean had admitted his involvement in the Swift Current arson early in his dealings with the WPS, raising it as a matter affecting his credibility. In Lawlor's view, Zanidean's admissions were relevant information that should have been disclosed by the police to the Crown in a supplementary report, which would in turn have been disclosed by the Crown to the defence. It would not have occurred to Lawlor to request Anderson and Paul's notebooks so that he could check their contents himself, because he relied on the police to put all relevant information in their notes into a supplementary report.

VanderGraaf does not recall ever discussing with Lawlor how to respond to Brodsky's request for any further "statements/conversations" recorded in police officers' notebooks. VanderGraaf does not know who else Lawlor might have spoken to. If Lawlor did pass Brodsky's question on to VanderGraaf, he would have referred it to Anderson and Paul rather than personally checking their notes. However, VanderGraaf knew from Anderson and Paul's oral briefings that they both had entries in their notebooks regarding Zanidean's admissions about the Swift Current arson that had not been put into a Supplementary Report. Accordingly, if Anderson or Paul had told VanderGraaf that the defence already had "all statements/conversations of Zanidean", VanderGraaf would have known that this assertion was false. However, he does not recall Anderson or Paul ever making such an assertion. For their part, Anderson and Paul do not recall ever being asked to respond to Brodsky's paragraph 16 request. Although Paul eventually sent a copy of his notes to the Crown, he did not do so until some time after May 17, 1991, several weeks after Lawlor's April 26, 1991 letter to Brodsky, yet prior to the trial. Anderson's notes appear never to have been provided to the Crown or disclosed to the defence.

*Lawlor's April 29, 1991 response to paragraph 9 of
Brodsky's April 25, 1991 letter [information about the Swift
Current arson]*

In paragraph 9 of his April 25, 1991 letter, Brodsky asked:

9. What do the Winnipeg City police have on the fire in Swift Current
Saskatchewan ...?

This question was among those that Lawlor had referred to VanderGraaf in his April 26, 1991 fax. On April 29, 1991, he sent a further letter to Brodsky replying to several of these questions, including paragraph 9. Lawlor stated:

Re: paragraph 9, Winnipeg police have nothing on these incidents.

In fact, the WPS not only had Zanidean's two admissions to the Swift Current arson, as recorded in Anderson and Paul's notebooks, but Mann had a file of his own (which he told Hall and Ewatski he later destroyed) and also a copy of the Swift Current RCMP investigative file, which he had apparently passed on to the homicide investigators. Lawlor testified that the responses in his April 29, 1991 letter must have reflected information he had received from the WPS. Although Lawlor knew that the Swift Current arson was an issue in Miller's negotiations with Zanidean and assumed that Miller knew more about the matter than he did, he did not check with Miller before sending his April 29, 1991 letter to Brodsky. Rather, he assumed that the police were giving him accurate information. According to Lawlor, Miller never briefed him on the discussions that had taken place between the WPS and the Swift Current RCMP and between Miller and Kovnats concerning the Swift Current arson.

VanderGraaf does not specifically recall receiving or responding to Lawlor's April 26, 1991 fax. In the ordinary course, he would have delegated this type of request to other officers, and it would have been logical to assign questions about the Swift Current arson to Anderson or Paul. Although VanderGraaf had spoken to Mann about Zanidean, he denies knowing that Mann had a copy of the Swift Current RCMP investigative file. However, he knew that Mann had been trying to locate Zanidean on behalf of the Swift Current RCMP in the summer of 1990, and he knew that Zanidean had raised the Swift Current arson as a matter of concern during his second meeting with Anderson and Paul. VanderGraaf also knew that Anderson and Paul had made entries in their notebooks summarizing Zanidean's admissions regarding the arson, which were not contained in any police reports. Accordingly, he would have known that Lawlor's assertion in his April 29, 1991 letter that the police had "nothing" on the Swift Current arson was not full, fair and accurate, and he cannot explain why Lawlor gave this response. Anderson does not think VanderGraaf would have delegated the question about the Swift Current arson to him, "because at that point VanderGraaf would know

everything about the Swift Current fire”. Anderson maintains that he only learned of Mann’s involvement in the arson investigation some years later, and he did not know that Mann had a copy of the Swift Current RCMP arson file. He testified:

[I]f somebody answered Mr. Brodsky that we didn’t have anything on the Swift Current arson, I wouldn’t have known that that was anything but a true statement...

15. Ongoing Witness Protection negotiations with Zanidean and Gumieny

On March 4, 1991, Miller sent Whitley a memo regarding Zanidean’s situation. After reminding Whitley of their prior meeting with Kovnats (on January 22, 1991), he set out three issues which Anderson had raised with Miller the previous week: (i) whether the Crown would assume responsibility for Zanidean’s mortgage payments and arrears; (ii) Anderson’s scheduled meeting with Orr “to discuss in greater detail and ultimately to launch the application for [Zanidean’s] participation in the [RCMP] witness assistance program”; and (iii) the possible need to take Zanidean into protective custody prior to the trial date. Miller also raised the outstanding issue of Kovnats’ retainer. Miller’s handwritten notes dated March 6 and 7, 1991 indicate that at this time he was engaged in discussions with Kovnats over various issues relating to Zanidean’s house, including the payment of his insurance premiums and the disposal of the house after Zanidean was relocated out of the province. In his March 7, 1991 note, Miller stated:

Chelsea Ave. [*i.e.*, Zanidean’s house] should be sold but at Kovnats’ bidding or re-possessed – left to mortgage foreclosure + sale.

– we will make up any shortfall based upon reasonable assessments, billings etc.

– our undertaking is to not leave witness in lurch or in jeopardy

Kovnats testified that these notes accorded with his understanding of the agreement in principle that he and Miller had reached by this time regarding Zanidean's house, namely, that the Crown would arrange to have the house taken off Zanidean's hands in a manner that would protect him from financial loss and would not adversely affect his credit rating. Although Miller's March 7, 1991 note does not expressly refer to Zanidean's demand that he be granted immunity on the Swift Current arson, Kovnats insists that this was also part of the agreement, and suggests that Miller's broad undertaking not to "leave [Zanidean] in the lurch or in jeopardy" can be understood as including the immunity demand. Throughout April and May 1991, there was extensive correspondence between Kovnats, Manitoba Justice civil counsel and counsel for the mortgagee regarding the details of the house transaction. It was eventually agreed that the mortgagee would take possession of the house without affecting Zanidean's credit rating, that his mortgage arrears would be forgiven, and that the Crown would pay Zanidean the value of his equity in the house. However, this arrangement was not finalized until May 31, 1991, and Zanidean did not execute the necessary documents until June 21, 1991.

16. The Zanidean and Gumieny RCMP SWP Applications (mid-March 1991)

Orr was the RCMP officer in Winnipeg responsible for handling applications to the RCMP SWP Program. This was a relatively new program and few, if any, of the concerned WPS officers had any involvement with it. The first step in the process was for the Winnipeg officers handling the file to complete an application form provided by Orr. A "Memorandum of Understanding" would then have to be prepared between the RCMP, the WPS and Manitoba Justice allocating responsibility for the costs of the program. This material would then be sent to Ottawa, where the final decision on entry to the program would be made.

In the early part of 1991, Orr provided the WPS with the RCMP application forms for Gumieny and Zanidean's application to the RCMP SWP Program. In Zanidean's case, VanderGraaf recalls that he, Anderson and Paul filled out the application form collaboratively. Anderson does not specifically recall working on the application but agrees that he may have prepared some parts of the form. Paul believes he had no involvement. Although the application form is undated, its contents suggest that it was completed in mid-March 1991, which accords with Orr's recollection.

Part VII(4) of Zanidean's application states:

In the course of interviewing witness Zanidean regarding his knowledge of this murder he informed us that he and murder accused Driskell had travelled to Swift Current, Sask. on 90-07-08 to burn down the house of Zanidean's sister. It is not clear what the motive was but the deed was done and Swift Current RCMP Cst. R. Burton confirms that they are investigating same (File #90-2787). Cst. Burton has agreed not to pursue Zanidean at this time but will continue investigation once our trial is concluded. We have made it perfectly clear to the witness that we will not pursue immunity from this charge in exchange for his evidence. We have told him that we notified RCMP and the out-come of the investigation rests with them. In the mean time, however, Zanidean's lawyer has requested of Mr. Bruce Miller, Crown Attorney, complete immunity from prosecution and a written guarantee stating same prior to the murder trial. This delicate matter has not yet been resolved.

Anderson agrees that much of the information in this paragraph must have come from him but denies writing this section of the application, while Paul does not believe he prepared any part of the application. The reference to "File #90-2787" is to the Swift Current arson investigative file sent to Mann by Burton on December 14, 1990. The fact that the homicide officers who prepared the application had access to the specific RCMP file number indicates that Mann must have given the homicide officers the RCMP file he had received from Burton in December 1990. Faced with this probability, Anderson testified that he

could not have prepared this part of the application, since he knew nothing about Mann's involvement in the arson investigation:

I think that says to me, proof positive, that someone who had the arson file, someone like Sergeant VanderGraaf or Sergeant Paul, must have typed that up. The information, the information pertaining to the conversations with Burton may have come from me, as I said, I either wrote this or provided the information to whoever did. And I think what you've shown me now convinces me that probably Staff Sergeant VanderGraaf typed up this section.

Likewise, Paul also maintains that he only learned about Mann's involvement in the matter many years after the fact.

There is a dispute in the evidence concerning the potential effect of the Swift Current arson investigation on Zanidean's RCMP SWP Program application. According to Anderson, Orr told the WPS that Zanidean could not be admitted to the Program as long as he was under criminal investigation in Saskatchewan. Kovnats also testified that he was led to believe that Zanidean could not participate in the Program if he had any outstanding criminal charges, although he cannot recall how he came to this understanding. VanderGraaf explained that he understood the Swift Current arson investigation to be a "bar to [Zanidean's] entry" to the RCMP Witness Protection Program, albeit one that "the RCMP could deal with ... over a course of time". In Zanidean's case, VanderGraaf saw the Swift Current arson investigation as "if not an absolute bar, close to it", although he recognized that "no problem is insurmountable". On the other hand, Orr maintains that the outstanding Swift Current RCMP investigation presented a complication, but *would not* have barred Zanidean from entry to the RCMP SWP Program if he was otherwise acceptable, and denies that he ever suggested otherwise to Anderson or VanderGraaf. According to Orr, the fact that a Program applicant was under criminal investigation or facing outstanding criminal charges gave rise to logistical difficulties that had to be addressed in the application, but did not disqualify the applicant from entry to the Program. Orr does not specifically recall discussing this point with Anderson, but agrees that he

may at some point have tried to explain to Anderson the practical complications presented by an outstanding investigation, and agrees that Anderson may have misunderstood what he was saying. While Orr later became sceptical as to whether Zanidean's application to the Program would succeed, this was because of Zanidean's difficult and demanding personality and unmanageability, not because of the Swift Current arson investigation.

Gumieny's application to the RCMP SWP Program was also prepared using the form provided by Orr, and it is also undated. However, it can be inferred from the contents of the application that it was probably completed some time between January 23 and February 13, 1991.⁸ The form was filled out by Gumieny's handlers, Osborne and Williams, and their divisional commander, Bell.

17. Kovnats and Orr's initial meeting March 25, 1991 and Kovnats' follow-up with Manitoba Justice officials

Kovnats' dockets indicate that he met with Miller and Whitley on March 20, 1991. Whitley does not specifically recall this meeting. On March 21, 1991, Orr arranged to meet with Kovnats on March 25, 1991 to discuss Zanidean's application. Orr came away from the March 25th meeting with the impression that Kovnats and Zanidean (who was not at the meeting) had unrealistic expectations about the benefits that Zanidean would receive through the RCMP SWP Program and the extent to which Zanidean would be able to dictate the details of his relocation. Likewise, Kovnats recalls leaving the meeting with the sense that the RCMP SWP

⁸ Part VII of the application refers to the January 23, 1991 fire in Zanidean's garage. There are also numerous references in the application to the proposed April 8, 1991 trial date, indicating that the form was completed before February 13, 1991, when the Crown's expedited trial motion was refused and the June 3, 1991 trial date was set.

Program was not what he and Zanidean had been promised by Miller and the WPS, and calling Miller, Whitley and the Deputy Minister, Graeme Garson, to complain. According to Kovnats, Miller assured him that he would “negotiate something or help us work out something”. Whitley does not recall this series of events.

18. Zanidean’s threatening note claim and his relocation to Calgary

On April 5, 1991, Zanidean phoned Paul and claimed that a threatening note had been left on his car windshield the previous day. Zanidean claimed to have been so shaken by this discovery that he lost the note before he called the police. As a result of this incident, the WPS temporarily moved Zanidean from his “safe house” to a hotel, and began making arrangements to relocate him to Calgary (where his wife was already staying) until Driskell’s trial began.

19. Anderson’s April 1991 telephone calls to Burton

Anderson’s belief in early April 1991 (which he attributed to comments from Orr) was that Zanidean could not enter the RCMP SWP Program as long as he was under investigation for the Swift Current arson. This presented a serious problem for the homicide investigators, insofar as Zanidean was a key witness who had been promised witness protection from the outset. Anderson “had no clue” how this problem could be resolved, and “knew [he] would have to talk to [his] supervisors and Mr. Miller about [it].” While Anderson was “never a big fan” of the idea of Zanidean being granted immunity on the Swift Current arson, he saw no alternatives. According to Anderson, he and Orr agreed that as a first step they would both make inquiries to ascertain the status of the Swift Current arson investigation. Anderson testified:

[T]he agreement that Corporal Orr and I closed off on was that I had this contact in Swift Current, with whom I had already spoken [i.e. Burton]. And he, being a member of the RCMP, also had a role in

talking to his brother officers in Swift Current about what their intentions are, what they planned on doing with that case. I volunteered to phone Ross Burton, and ask Corporal Orr if he would also talk to his brother officers and see what they had planned for this case.

Accordingly, he called Burton in early April 1991. Anderson made no contemporaneous notes of this telephone call, and made his first written account of his conversation some six months later, in his October 7, 1991 memo to Johns, written almost four months after Driskell's conviction for first degree murder, in which he stated:

We learned from Corporal Tom Orr of "D" Division that Zanidean would not qualify for the program if he was the subject of the RCMP arson investigation. Consequently, I had two further conversations with Cst. Burton. During the first conversation, I explained the dilemma and I believe he had already spoken to Cpl. Orr. In any case he had given the matter thought and he immediately offered to withdraw their pursuit of Zanidean entirely. He explained that he planned to interview James Driskell after the murder trial in an effort to gain evidence against both Zanidean and his sister but that he would only charge his sister. Approximately one week later I telephoned Cst. Burton again to ensure that his proposal was agreed to by his superiors. He assured me that his detachment commander had approved and I reminded him that we would not make Zanidean privy to this arrangement until after he testified. Following this conversation, Sgt. Paul and I notified Inspector D. Johnson, Staff Sergeant VanderGraaf and Crown Attorney Bruce Miller

Anderson maintains that this account accurately summarizes his two April 1991 conversations with Burton. He testified that although he did not personally question Burton's authority to make the decision not to pursue Zanidean, he asked Burton to have the decision approved by his superiors in the RCMP because he thought his own superiors and Miller "would want to hear it from somebody higher than Constable Burton".

Burton made contemporaneous reports of the April 5, 1991 telephone conversation, which were subsequently destroyed along with much of the Swift Current investigative file. Burton, however, quotes

from his contemporaneous reports in two later reports that have been preserved. In a July 19, 1991 report, Burton quotes from an earlier April 7, 1991 report, as follows:

[On April 5, 1991] the matter was discussed with Tom ANDERSON. It was agreed that the only viable solution would be to not charge ZANIDEAN. His testimony against DRISKELL for the execution would likely convict him. Once convicted, Driskell would likely provide evidence implicating ZANIDEAN and his sister, Carol HAYEK, for the Arson/Insurance Fraud in order to get even. HAYEK is the person that orchestrated and stood to gain financially from the offence and, therefore, is the primary target in this investigation.

In a January 9, 1992 report, Burton quotes from an earlier April 19, 1991 report, as follows:

On 91-04-05 call was received from Tom ANDERSON of Winnipeg P.S. Homicide Unit. He advised they wanted to put Reath ZANIDEAN under the Witness Protection Program as individuals associated with DRISKELL were actively trying to kill him at present. They had already located him at two locations where he was being hidden. The Witness Protection Program Co-ordinator in "D" Division [*i.e.*, Orr] advised that they would not hide ZANIDEAN as long as the writer [*i.e.*, Burton] was actively investigating him with the possibility of charges pending. ...

The matter was discussed with Tom ANDERSON. It was agreed that the only viable solution would be not to charge ZANIDEAN. ...

I advised ANDERSON that I would submit the above recommendation through channels. [Ellipses in the January 9, 1992 report.]

Burton's account of the April 5, 1991 telephone conversation is largely consistent with Anderson's description. Burton and Anderson disagree over who first proposed that the Swift Current RCMP abandon their pursuit of Zanidean, and as to whether it was Burton or Anderson who insisted that this proposal be ratified by Burton's superiors. Burton

also denies Anderson's speculation that he (Burton) had spoken to Orr prior to their April 5, 1991 telephone conversation,⁹ and states that it was Anderson who first suggested to him that Zanidean would be barred from entering the RCMP SWP Program as long as he was under investigation for the Swift Current arson. However, Anderson and Burton concur on the most significant point, namely, that when the conversation ended they had agreed that Burton would recommend to his superiors that the RCMP entirely withdraw their pursuit of Zanidean on the arson charge and focus their attention on building a case against his sister. They also agree that the reason for this course of action was the witness protection "dilemma". Burton and his commanding officer, Ferguson, agree that neither of them had the authority to discontinue their pursuit of Zanidean without obtaining approval "through channels". This meant that the proposal had to first go to Ferguson's immediate superior, Insp. R. Preston ("Preston"), the Swift Current sub-divisional commander, who would then take it to Divisional Headquarters in Regina.

Burton and Ferguson's evidence is that after Burton's April 5, 1991 conversation with Anderson, they met with Preston on April 15, 1991, and that Preston indicated he would "contact Cpl. Orr and discuss the matter further". The next day, Preston sent a memo to Ferguson stating:

I spoke with Cpl. Tom Orr 'D' Division Crim. Ops. Ray Zanidean is now under 'witness protection' and out of province. He will remain so until trial in June/91 then it is their intention to relocate him again permanently.

It would seem that the only course of action open to you now is to await the trial outcome and evaluate the situation then.

⁹ Orr also has no record or recollection of any conversation with Burton in this time frame.

Ferguson explained that the “outcome” they were awaiting was the decision by “D” Division as to whether or not Zanidean would be admitted into the RCMP SWP Program. Burton understood that his superiors *had not* approved the proposal to abandon their pursuit of Zanidean, but were directing him to await the conclusion of Driskell’s trial and obtain further instructions at that time. He has no record and no recollection of speaking to Anderson again in April, but if a second conversation did take place, Burton certainly would not have told Anderson that his superiors had approved the proposal to withdraw the pursuit of Zanidean on the arson charge, as this would have been entirely untrue.

**20. Orr’s April telephone conversations with Sgt. Upton
(April 4 & 12, 1991)**

After receiving Zanidean’s RCMP SWP Program application from the WPS, Orr decided that he needed more information about the Swift Current RCMP arson investigation, since it presented complications Orr would have to address when he forwarded Zanidean’s application to Ottawa HQ. Contrary to Anderson’s evidence, Orr recalls that he decided to call the Swift Current RCMP on his own, and not in consultation with Anderson. Orr also denies telling Anderson that the existence of the Swift Current investigation posed a complete bar to Zanidean’s admission to the Program. He has no recollection of any of the Winnipeg Police officers ever asking him for help dealing with the Swift Current RCMP investigation, and does not recall “taking a coordinated approach to the problem” with Anderson. Indeed, his only memory of ever meeting with Anderson was during the initial stages of the application process; after this, he dealt mainly with VanderGraaf.

On April 4, 1991, Orr called the RCMP Swift Current City Detachment and spoke to Ferguson’s second-in-command, Sgt. Upton (“Upton”). Orr did not make a contemporaneous note of their conversation, but as recorded in his subsequent April 12, 1991 note, Orr “explained the situation regarding Zanidean” to Upton, who said that he

would have Burton call Orr. When Burton had not called by April 12, 1991, Orr placed a second call to Upton on April 12, 1991. His contemporaneous note of the April 12th call is as follows:

As there was no call [from Burton] I talked to Sgt. Upton again. Swift Current will be concluding their file and Ray Zanidean is NO LONGER WANTED for questioning ... [emphasis and ellipsis in original]

Orr describes this note as a “fairly cryptic summary” of his conversation with Upton, and agrees that the ellipsis “[c]ould very well” have been intended to signify that there was more to the conversation than he recorded in his note. However, Orr no longer has any independent memory of the conversation, beyond what is in this note. According to Burton, it *was not* the case in April 1991 that Zanidean was “no longer wanted for questioning”; rather, as Burton indicated in his May 7, 1991 Continuation Report, he still expected Mann of the Winnipeg Police arson squad to interview Zanidean once Driskell’s trial ended. Even if Burton’s superiors ultimately decided that Zanidean should not be charged, he and Ferguson were still looking to build a case against Zanidean’s sister.

Orr does not recall whether or not he briefed Miller, VanderGraaf or Anderson about Upton’s statement that the Swift Current RCMP was abandoning their pursuit of Zanidean. However, in a July 19, 1991 Report, Burton states that in a subsequent telephone conversation with Anderson in July, Anderson made reference to “Sgt. Upton’s conversation with Cpl. Orr on 91-04-10 [*sic*]”, suggesting that at least by July, 1991, Anderson was aware that Orr had spoken to Upton in April 1991. Anderson maintains that he only learned about Orr’s contact with Upton several years later, and denies mentioning the April 1991 Orr-Upton conversation in his July 1991 conversation with Burton. In his report, Burton gives the following account of Anderson’s understanding of what transpired between Orr and Upton in April, 1991:

At the time that Cpl. Orr contacted Sgt. Upton he advised him that Zanidean was already under the Witness Protection Program and he

was concerned about us surfacing him for the arson. Sgt. Upton had stated that we would likely not do so however that decision would rest with the investigator.

Orr maintains that he would not have told Upton that Zanidean “was already under the Witness Protection Program”, since this was clearly not the case.

21. Orr’s April 16, 1991 telephone conversation with Preston

Two days after Orr’s second telephone conversation with Upton, he received a call from Preston, the Swift Current sub-divisional commander. Orr’s contemporaneous note of this April 16, 1991 telephone conversation states:

I discussed the matter with Insp. Preston and explained our situation to him including WCP’s [Winnipeg City Police’s] desire to keep a happy witness. Included was the problem of interviewing Z. once he became involved in the protection program and the possibility of difficulty should there be charges.

Insp. Preston stated he had a better view of the situation and would probably speak to the O i/c Crime Ops “F” Div. [at Regina Headquarters] in the near future and let us know.

After this conversation with Preston, it was clear to Orr that notwithstanding what Upton had told him two days earlier, the Swift Current RCMP had not yet decided what to do with Zanidean. Although Orr eventually developed serious reservations as to Zanidean’s suitability for the Program and came to have a very pessimistic view of Zanidean’s admission prospects, he probably did not indicate this to Preston since, at this early stage, his concerns about Zanidean had not yet crystallized. Orr does not recall whether or not he briefed Miller or the WPS officers about his conversation with Preston.

22. Evidence concerning the alleged arrangement to conceal the Swift Current agreement from Zanidean

According to Anderson, the Swift Current RCMP's decision to abandon its pursuit of Zanidean on the arson charge was a "blockbuster" development for the Harder homicide investigators, in that it cleared the way for them to fulfil their promise to their key witness and have him placed in the RCMP SWP Program. Although Anderson made no notes or report of this development, he testified that he kept VanderGraaf and Miller fully informed through oral briefings. VanderGraaf confirms this, stating that when he learned about Anderson's April 5, 1991 conversation with Burton, he contacted Orr and asked him to seek confirmation at more senior levels within the RCMP. According to VanderGraaf, Orr subsequently reported back to him that Upton had confirmed that the Swift Current RCMP were abandoning their pursuit of Zanidean, although Orr made it clear that this decision was contingent on Zanidean actually being admitted to and entering the RCMP SWP Program. VanderGraaf saw this as a very significant development, in that it not only removed a serious impediment to Zanidean's admission to the RCMP SWP Program, but also went some distance towards satisfying one of Kovnats' outstanding demands. Anderson and VanderGraaf both testified that Miller was fully briefed on this development and VanderGraaf testified that he personally briefed Dangerfield, which Dangerfield denies.

According to VanderGraaf and Anderson, it was Miller who decided that Zanidean should not be told until after he had completed his testimony about the arrangement that had been made with the Swift Current RCMP not to charge him with arson. VanderGraaf recalls attending a meeting with Bell and Miller in Bell's office in which the question of whether or not to tell Zanidean about the arrangement was debated. According to VanderGraaf, a consensus was reached that if Zanidean knew about the arrangement it "could be construed as a promise of favour", and that he should therefore not be told about it until after he testified. Anderson does not remember how the decision to conceal the

arrangement from Zanidean was reached, but recalls being specifically instructed by Miller not to tell Zanidean until after he testified that he would not be charged with the Swift Current arson. Paul's recollection of events is somewhat different. While he recalls being told about Anderson's April 1991 telephone conversation with Burton, he did not see this as a particularly significant development since he did not think Burton had the authority to bind the RCMP with respect to charging or not charging Zanidean. According to Paul, however, a few days before Zanidean took the witness stand, Miller advised that he had arranged formal immunity for Zanidean on the Swift Current arson, and directed Paul not to disclose this to Zanidean until after he testified, because it "would hurt [Zanidean's] credibility in court if he knew he had immunity before he testified".

VanderGraaf testified that he personally went to Dangerfield's office and briefed him both on the arrangement that had been made with the Swift Current RCMP, and on Miller's decision to conceal this arrangement from Zanidean until after he had testified. VanderGraaf assumed that Dangerfield agreed with this decision. VanderGraaf did not refer to this briefing during his interview with Commission Counsel on June 22, 2006, and testified that it came to mind only after he had reviewed and approved the summary of his interview. However, Dangerfield vigorously disputes that he ever received such a briefing, from VanderGraaf or anyone else. Rather, Dangerfield maintains that he did not know that any arrangement had been made to shield Zanidean from being charged with the Swift Current arson. Moreover, if he had known about any such arrangement, he would have ensured that it was fully disclosed and placed on the record when Zanidean took the witness stand. He maintains that he has never heard of an immunity arrangement being concealed from a witness in any other case, and doubts that Miller would have advised the police to proceed in this manner in Driskell's case. Similarly, Whitley is adamant that he was never briefed on any such arrangement. Whitley stated that he cannot conceive of Miller, who he knew well, making this kind of arrangement without consulting with

Whitley in advance, and added that he found it “incomprehensible” that such an arrangement could have been made without his and Dangerfield’s knowledge, since they all worked in close proximity to one another and had a close working relationship:

You don’t make these kinds of deals. You don’t not share these kinds of arrangements with the defence counsel. How could they possibly address the issues around credibility of a witness without knowing that?

23. Zanidean’s return from Calgary; the April 29, 1991 meeting.

By April 26, 1991, Zanidean had returned to Winnipeg after running into difficulties with the Calgary police and being evicted from his hotel. On April 29, 1991, Miller, VanderGraaf and Orr met with Zanidean, his wife and Kovnats. As set out in Orr’s notes, Zanidean and VanderGraaf had an angry disagreement about the extent of the police protection and financial support Zanidean had been receiving. Miller and VanderGraaf eventually left the meeting, after agreeing to reimburse Zanidean for some of his expenses while in Calgary. Orr remained behind to continue discussing Zanidean’s RCMP SWP Program application. Orr raised the possibility that Zanidean might obtain a cash payment from Manitoba Justice and relocate himself, rather than entering the formal RCMP SWP Program. Orr raised this possibility for two reasons. First, Zanidean and his wife continued to be very unhappy with certain aspects of the RCMP Program, and were uncertain whether they wanted to participate in it. Second, it had become increasingly apparent to Orr that Zanidean was a very poor candidate for the Program because of his difficult personality and unmanageability, an impression that had been reinforced by Zanidean’s recent difficulties in Calgary. Orr eventually came to believe that even if Zanidean and his wife overcame their own reservations about the Program and chose to proceed with their application to the RCMP SWP Program, it would very likely be denied.

24. Developments with Zanidean in early to mid-May 1991

Following the April 29, 1991 meeting, Miller and the WPS arranged for Zanidean to return to Calgary. However, he chose not to go, and by mid-May, 1991 the WPS appear to have lost track of his whereabouts. Accordingly, as Driskell's trial approached, Zanidean was not under any form of police protection. Zanidean's conduct during this period reinforced Orr's view that he was poorly suited for the RCMP SWP Program and unlikely to be admitted if he decided to proceed with his application. Orr continued to discuss the cash settlement alternative with VanderGraaf and Miller, and by the end of May they had all come to see this as the better post-trial option in Zanidean's case. However, Zanidean had still not decided whether or not he wanted to continue with his application to the RCMP SWP Program.

25. Developments in Swift Current in May and June 1991

In late April 1991, Burton was contacted by Brian Savage ("Savage"), a former RCMP officer now working for Brodsky as a private investigator. Savage indicated that Driskell might be willing to come forward as a witness against Zanidean on the Swift Current arson after the murder trial in June 1991. On May 28, 1991, he further advised Burton that Driskell was now prepared to make a statement immediately, provided that he was granted immunity on the arson charges. However, on May 29, 1991 Ferguson advised Savage that Driskell's immunity request:

... would have to be referred through channels so that any possible statement would have to be obtained after the Trial, due to the short time before the Trial commences.

Brodsky characterized this as "awful news", since he had hoped Driskell's statement would lead to Zanidean being investigated and charged with the Swift Current arson before the end of Driskell's trial, which would give Brodsky additional ammunition to use when attacking

Zanidean's credibility. Ferguson's commanding officer, Preston, approved the immunity request and it was submitted to Regina Headquarters for consideration. However, on June 18, 1991 Preston's superiors advised that they would not consider granting immunity to Driskell until after he had provided a statement. In his May 28, 1991 Report recommending that immunity be granted to Driskell, Ferguson raised the possibility of also granting Zanidean immunity in order to secure his evidence against his sister, but noted:

It may not be necessary to extend this consideration to Reath ZANIDEAN as he is to be relocated under the Witness Protection Plan.

Ferguson testified that this reflected his belief that Zanidean would likely enter the RCMP SWP Program after Driskell's trial, which would make charging him a practical impossibility, even if he did not have formal immunity.

26. The May 10, 1991 pre-trial, Brodsky's questions memo, and the Crown's written and oral responses

At a pre-trial held on May 10, 1991, Brodsky presented the Crown with a booklet of "Questions", itemizing some 23 outstanding disclosure requests. A further pre-trial was scheduled for May 22, 1991, so that the Crown could review and respond to Brodsky's "Questions" memo.

Favourable Considerations

Question #6 of Brodsky's May 10, 1991 memo reiterated a request he had first raised in his February 7, 1991 disclosure letter (as item #5) and then expanded on in his subsequent April 25, 1991 disclosure letter (also as item #5). In his May 10, 1991 memo, Brodsky framed his request as a demand for information about any "favourable considerations, not pressing charges and other matters that would influence [witnesses] to testify in a particular fashion". This was one of the questions Lawlor had

referred to VanderGraaf on April 26, 1991, but as of May 10, 1991, no answer had been provided.

On May 21, 1991, Lawlor sent Brodsky a WPS supplemental report dated May 18, 1991, in which Anderson responded to a number of Brodsky's May 10, 1991 "Questions", including item #6:

With respect to the second part of this question, [*i.e.*, the request for information about "favourable considerations, not pressing charges and other matters that would influence [witnesses] to testify in a particular fashion"] we are not aware of a single criminal charge outstanding against a single subpoena'd witness at the time of the deceased's disappearance. Furthermore, protection is the only favourable consideration given to any witness. We are not aware of any stayed charges or any other deals made with any witness in exchange for testimony.

Dangerfield and Lawlor both reviewed Anderson's report before it was sent to Brodsky. However, they maintain that they were unaware at the time of the arrangement Anderson says had been made with Burton, wherein Zanidean would not be charged with the Swift Current arson. Lawlor and Dangerfield agreed that if they had known of this alleged arrangement, they would not have considered Anderson's report to be a full, fair and accurate response to Brodsky's question. Anderson, however, defends his response by emphasizing that his arrangement with the Swift Current RCMP had been concealed from Zanidean and was therefore, in Anderson's view, not a "deal" that had been "exchanged" for Zanidean's testimony. He testified:

[N]o deals were made with Ray Zanidean for anything. So in spite of the fact that an arrangement had been made with Swift Current to not pursue Ray Zanidean on the arson, to facilitate his entry into the Witness Protection Program, I don't see anything untrue about that to this day, to this statement that I'm making or this last paragraph that you pointed out. There was no immunity. There was no – Ray Zanidean's testimony was in exchange for nothing, not immunity, or anything else. And, furthermore, there was no deal made on immunity with Ray Zanidean. It was made with Ross Burton in Swift Current.

Brodsky's question #6 and the subject of Zanidean and the Swift Current arson appears to have also been discussed at the subsequent May 22, 1991 pre-trial before Justice Morse. In a memo to file prepared after the pre-trial, Brodsky stated:

They are not prepared to involve themselves in the Swift Current fire, that is another police force. The RCMP were advised according to Dangerfield and Lawlor (by Lawlor) in Dangerfield's presence in the office of Justice Morse that [Zanidean] probably set this fire. The RCMP chose to do nothing about it. Any favour extended to [Zanidean] did not cover anythings [*sic*] outside Manitoba and nothing was held out to [Zanidean], in any event, within Manitoba.

Brodsky also wrote a second memo to file in which he stated:

With respect to question 6, the crown says that no favourable consideration was offered. The crown makes the point that the RCMP in Swift Current were notified of the involvement of [Zanidean] and it's up to them to pursue or not pursue the investigation. The Winnipeg police can only make agreements with respect to the area they are responsible for [the area of Manitoba]. They are not able to make agreements with respect to what some other police force, particularly the RCMP, will do and they did not.

By the time of the May 22, 1991 pre-trial, Brodsky, Lawlor and Dangerfield were all aware that Zanidean had made inculpatory admissions about the Swift Current arson on the body pack tapes, and Brodsky had also learned about Zanidean's involvement in the arson from his client, Driskell. However, Brodsky and the two prosecutors all state that they did not know about Zanidean's admissions to Anderson and Paul, which the officers had recorded in their notebooks but omitted from their supplementary reports. Lawlor and Dangerfield have no independent recollection of what they said to Brodsky about the Swift Current arson at the May 22, 1991 pre-trial. They agree that if Brodsky's record of the conversation is accurate, it can be inferred that they must have received some kind of briefing on the Swift Current arson from either Miller or the WPS, but neither specifically recall any such briefing, nor do they recall making any inquiries with Miller or the WPS about the matter (including

requesting relevant documents from the WPS files). VanderGraaf agreed that if Brodsky's notes of what was said during the May 22, 1991 pre-trial are accurate, Brodsky did not receive full, fair and accurate disclosure on this issue, based on VanderGraaf's knowledge of the situation with Zanidean and the Swift Current arson. Brodsky testified that it was never disclosed to him that Zanidean had been seeking immunity on the Swift Current arson, nor that the WPS had been in contact with the Swift Current RCMP and had arranged (or attempted to arrange) for Zanidean not to be charged with the arson. This information would have been of considerable assistance to him in developing his theory that Zanidean had gone to the police with evidence against Driskell in order to avoid being charged on the Swift Current arson.

Zanidean's informant history

Question #23 of Brodsky's May 10, 1991 "Questions" memo was as follows:

23. What information do the police have in their files with respect to Zanidean's involvement in the drug scene and has Zanidean ever been an informant for the police in terms of drugs or other matters?

In his May 18, 1991 Supplementary Report, Anderson replied to this question as follows:

The Winnipeg Police Department has no information on file that we are aware of, relating to Mr. Zanidean's involvement in the drug scene. We are not aware of Mr. Zanidean ever having acted in the capacity of a police informant prior to his involvement with James Driskell.

Dangerfield and Lawlor maintain that they were not aware that Zanidean, during his initial meeting with Anderson and Paul, had admitted to being the informant on the "chop shop" charges against Driskell and Harder. This detail was recorded in Paul's loose notes but not in his or Anderson's notebook or in any supplemental reports. Dangerfield and Lawlor testified that if they had known this fact, they would not have been

satisfied with Anderson's response, which Dangerfield characterized as "clearly wrong", and would not have permitted it to go to Brodsky uncorrected. Paul does not recall whether or not he assisted Anderson prepare his May 18, 1991 Supplementary Report, but agrees that the answer to Question #23 is "obviously" misleading. Anderson testified that when he drafted his response he may have forgotten about Zanidean's admitted role in the "chop shop" case. Although Brodsky attempted unsuccessfully to identify the "chop shop" informant while preparing for Driskell's trial, he did not discover that the informant was actually Zanidean until "long after" Driskell's trial. If he had known this fact at the time, this would have helped him "demonstrate that [Zanidean] had motive to implicate Mr. Driskell and to be fearful of him and to want him in a position where he couldn't do him damage".

Brodsky's Request for Access to WPS File

In his April 25, 1991 disclosure letter, Brodsky asked at paragraph 21:

21. Do you have any objection to my reviewing the Winnipeg Police Department file either by myself, by the Investigator I have assisting me, or jointly?

Having received no response to this request, Brodsky raised it again in his May 10, 1991 "Questions" memo (at para. 16). Brodsky testified that he had occasionally been granted direct access to police files in other cases in Manitoba, Saskatchewan and Ontario, describing it as "not an unusual thing".

Brodsky's file memo indicates that at the May 22, 1991 pre-trial Dangerfield "advise[d] he will not provide" direct access to the police file. Dangerfield cannot specifically recall why he refused Brodsky's request at this time, but suggests that it may have been because the trial date was drawing near and because he trusted the police to have already provided

everything relevant to the Crown, and knew that he and Lawlor had already given Brodsky everything they had.

27. The arrest of Zanidean on a material witness warrant and the dispute between Kovnats and Dangerfield at the Public Safety Building (May 24-27, 1991)

As the trial date approached, Kovnats and Zanidean became increasingly frustrated by Miller's failure to produce a written document memorializing the terms of what was, on Kovnats' account, an agreement in principle. At some point, Zanidean spoke to Kovnats about going "to the Defence Counsel and the TV stations" and "blow[ing] the whole thing out of the water". In late May 1991, Zanidean and his wife left Winnipeg and returned to Alberta. In his June 2, 1991 memo to file, Kovnats indicated that on May 23, 1991 he:

...advised Bruce Miller that my client had instructed me that if the Crown didn't do what he said, that [he] wasn't coming to Winnipeg until the Crown had agreed to everything that they had promised in the first instance and I advised Mr. Miller of that.

In his testimony, Kovnats explained that Zanidean was not refusing to attend court as required by the subpoena, but was refusing to meet with the police and Crown in advance of the trial until his demands were met. The police and Crown responded by obtaining a material witness warrant. Zanidean was arrested by the RCMP in Alberta and on May 26, 1991 Anderson and Paul flew to Calgary and returned Zanidean to Winnipeg in custody.¹⁰

¹⁰ Although Paul's contemporaneous memo states that he and Anderson flew to Calgary on May 27 (a Monday), in their contemporaneous memos Kovnats and Susan Fehr indicate that Zanidean was brought back to Winnipeg on Sunday (*i.e.*,

Upon his return to Winnipeg, Zanidean was taken to the central Winnipeg Police office in the Public Safety Building. On learning of his client's arrest, Kovnats called Miller, who advised that he would "take care of it". Kovnats, Miller and Dangerfield all attended at the Public Safety Building that evening. A heated argument broke out between Kovnats and Dangerfield. When Kovnats reiterated his client's position that Zanidean would not cooperate with the police or Crown until his demands were met, Dangerfield threatened to have Kovnats charged with obstructing justice. According to Kovnats, the police forcibly placed him in a room separate from Zanidean. Kovnats and Dangerfield agree that Kovnats probably did not spell out the exact nature of Zanidean's demands during the argument. Dangerfield maintains that he had previously received instructions from Miller that he was not to be privy to the details of Miller's negotiations with Kovnats, and that he therefore did not know the specifics of what Zanidean wanted. In his testimony, Dangerfield agreed that, the fact that Zanidean was demanding something in exchange for his testimony was relevant to his motivation and credibility, and in hindsight, he now recognizes that he had an obligation after the May 26, 1991 incident to make inquiries with Miller to ascertain what it was that Zanidean was demanding, and disclose this to the defence. Dangerfield explains that it did not occur to him at the time to make these inquiries.

Eventually the situation calmed down and Dangerfield left the Public Safety Building. An agreement was reached wherein Zanidean would be released on a recognizance requiring him to remain under police control at all times until the conclusion of his evidence. He and his wife were put in a hotel suite under 24-hour police guard. A schedule was established in which Anderson and Paul stood alternating 12-hour shifts,

May 26), and Kovnats has a distinct independent recollection that the incident at the Public Safety Building was on the weekend.

occasionally relieved by other officers. Zanidean could not leave the suite without his police guard and was not allowed to have any visitors, although he had free access to the telephone. According to Kovnats, Miller agreed to send a letter the following week setting out in writing the terms of Manitoba Justice's agreement with Zanidean. Kovnats' understanding of this agreement was that it met all of the key demands in his December 14, 1991 letter, including immunity for Zanidean on the Swift Current arson charge.

28. Events of May 29 to 31, 1991

Kovnats' May 29, 1991 discussion with Miller

Kovnats recalls a telephone conversation with Miller on Wednesday, May 29, 1991, three days after Zanidean's forcible return to Winnipeg and the incident at the Public Safety Building, in which Miller promised to provide the requested letter of agreement by the next day (Thursday). Miller called Orr later that afternoon. According to Orr's contemporaneous notes, Miller advised him that he:

... had received a letter from Mr. Kovnats advising Mr. Miller that unless:

1. his client was provided a letter by CMHC stating that his credit rating was OK for a future mortgage
2. unless his client was provided a letter addressed to CN railway to get a job like the one he had to turn down because he was a witness
3. unless his client was given immunity from prosecution for the Swift Current affair,

he would be tak[ing] steps to ensure his client's protection. Mr. Miller was given a day to respond.

Orr's notes go on to state that Miller and Orr also discussed "the aspect of a single pay out". Orr's notes are generally consistent with Kovnats' recollection of the issues he and Miller had discussed. In

particular, he recalls that Zanidean's interest in obtaining a cash settlement as an alternative to enrolment in the RCMP SWP Program "became a lot more serious" after his arrest on the material witness warrant and the May 27, 1991 incident at the Public Safety Building. As Kovnats explained in his testimony, this also elevated the importance of obtaining a written immunity guarantee for Zanidean:

If [Zanidean] was in witness protection, there would be no question, because he gets immunity, he can't go in it unless he is free from any prosecutions. But if he was going to take cash, then he had to have a letter confirming it.

Miller's May 29, 1991 call to Orr

As reflected in Orr's notes, Miller then called Orr and briefed him on Kovnats' demands. They discussed the alternative of Manitoba Justice giving Zanidean a cash payment instead of having him enter the formal RCMP SWP Program, which had been Orr's preferred option for Zanidean for some time. Orr told Miller he would "check with Swift Current and see what the standing was". Miller did not indicate that he was rejecting Zanidean's immunity demand out of hand, and Orr's objective in calling Swift Current was to obtain information that would assist Miller in responding to Kovnats' ultimatum. Orr proceeded to call the Swift Current Sub-Divisional office, hoping to speak to Preston, but he was not in. Orr then called the Swift Current City Detachment and left a message for Ferguson.

Orr's May 30, 1991 conversation with Burton

The following day, according to Orr's notes, he received a call from Burton, whom he had never previously spoken with:

[Burton] advised that there would be no proceedings against Zanidean either as a witness or accused, if he is accepted into the Program. At the present they have an admission from [Driskell] that Zanidean's sister set up the arson by providing a key and suggesting the B&E – she

had also cleared out the valuables – this info is coming from ex S/Sgt. Savage who is looking for Zanidean for [Driskell's] lawyer.

Cst. Burton requests that the info on charges not being laid against Z. be withheld from everyone else as they would really like to obtain the statement from Driskell and nail the sister.

Burton has no memory of ever speaking to Orr at any time, and no notes of the May 30, 1991 telephone conversation. Orr's account of what Burton told him is consistent with Burton's understanding of the state of affairs at the time. Burton and Ferguson were awaiting the outcome of Driskell's trial, pursuant to Preston's instructions, but they anticipated that if Zanidean was admitted to the RCMP SWP Program after the trial this would probably lead Preston and their superiors in Regina to order them to abandon their pursuit of Zanidean. Orr testified that since he had called Swift Current with the specific aim of assisting Miller, he very likely reported back to Miller on his conversation with Burton, although he has no independent memory of doing so or notes in his file.

Miller's May 31, 1991 letter to Kovnats

Miller wrote Kovnats a letter dated May 31, 1991, which Kovnats did not receive until the following Monday, June 3, 1991, the first day of Driskell's trial. Contrary to what Kovnats had expected, Miller's letter did not set out a detailed and comprehensive agreement with Zanidean. Rather, Miller merely stated in the fourth numbered paragraph:

The Department of Justice undertakes to provide your client with the existing protection until the conclusion of his evidence at the trial and subsequently to support his participation in the RCMP Witness Protection Program on terms yet to be arranged.

Miller's letter did not address Kovnats' and Zanidean's immunity demand.

29. The June 2, 1991 meeting between Kovnats and Brodsky

On Sunday, June 2, 1991 Brodsky called Kovnats requesting a meeting, explaining that he ultimately wanted to meet with Kovnats' client. Kovnats was hesitant to meet with Brodsky without first consulting with Miller, for fear of jeopardizing the agreement, but he reached Miller at home and obtained his approval. During their conversation, Miller also indicated that Kovnats could expect to receive Miller's letter on Monday. That night, Brodsky came to Kovnats' house and met with him. Although Kovnats revealed during the meeting that he was acting for Zanidean and was negotiating with the Crown on Zanidean's behalf, he would not disclose to Brodsky the subject matter of the negotiations. He agreed to pass on Brodsky's interview request to Zanidean, indicating that he expected to speak with him the following afternoon. During their meeting, Brodsky impressed upon Kovnats the importance of keeping proper file notes, which inspired Kovnats to spend the evening dictating a lengthy memo to file summarizing the history of the case.

30. The first week of Driskell's trial

The trial proper began on June 4, 1991. On June 5, 1991, Tod Christianson, the RCMP laboratory hair analyst ("Christianson"), testified about the microscopic similarities between Harder's hair and the two hairs found in the back of the van Driskell owned at the time of Harder's disappearance. Christianson testified that these similarities made it highly likely that the hairs in the van came from Harder. Ashif Kara testified on Thursday, June 6, 1991, substantially recanting his police statement, although the Crown was permitted to cross-examine him on his prior police statement in front of the jury. Gumieny was the final witness called in the first week, and completed his evidence on Friday, June 7, 1991. Brodsky did not cross-examine Gumieny on any benefits he was receiving or expecting.

31. Kovnats' June 4, 1991 meeting with Zanidean, his meeting with Miller, and his reply to Miller's May 31, 1991 letter

Kovnats received Miller's May 31, 1991 letter by fax on Monday, June 3, 1991. The next day, he drafted a response, and then met with Zanidean to review his draft letter and take instructions.¹¹ Kovnats and Zanidean were not pleased with Miller's letter, considering it "unacceptable". During the meeting, Zanidean "advised [Kovnats] for the first time that the statement he had given the police was not all in his own words but that the police had altered it". He instructed Kovnats to "meet with Miller and advise him of the truth", adding that he was preparing "full written instructions and a full written history of everything that has gone on with his case". Kovnats met with Miller later that day and demanded that he be given copies of Zanidean's police statements so that he could review them with his client and determine "exactly what the problem was". He told Miller that Zanidean:

... was saying that the basic content of his statement was correct but the wording had been changed by the Police and perhaps certain ideas had been added by the Police.

In his June 4, 1991 reply to Miller's May 31, 1991 letter, Kovnats reiterated in substance most of the significant demands in his December 14, 1990 letter, although Zanidean was no longer insisting that he be relocated to British Columbia if he entered the RCMP SWP Program. In

¹¹ In his memo to file, Kovnats erroneously referred to the meeting as taking place on "Tuesday, June 3". While Kovnats no longer recalls whether the meeting was on the Monday or the Tuesday, his dockets indicate that the events related in his memo occurred on Tuesday, June 4. Further, police records indicate that Anderson and Paul were relieved from their guard duties on Tuesdays, consistent with Kovnats' recollection that Zanidean was escorted to the meeting by another officer, Cst. Ken Cameron.

particular, Kovnats continued to insist that Zanidean receive assurances that he would not be held accountable for “any of his past activities”, a broad guarantee that was intended, *inter alia*, to protect him from prosecution on the Swift Current arson. The main new development in the June 4, 1991 letter was that Kovnats indicated for the first time that Zanidean was willing to accept a cash settlement as an alternative to enrolment in the RCMP SWP Program:

6. My client is prepared, instead of having the Witness Relocation Program in full, to take \$30,000.00 cash instead of the Witness Relocation Program, however, he would want to ensure that none of his past activities would come back to haunt him.

Kovnats can no longer recall exactly how the \$30,000 figure was arrived at, but states that “the theory behind it was not one of making a profit, but one of covering cost”. Kovnats also insisted that Zanidean be given a letter from the Crown stating:

... that the Crown and Winnipeg Police Department have no information which could result in my client being charged with an offence under any statute.

Zanidean had added this latter clause to the letter when he met with Kovnats, in order to ensure that the immunity guarantee “cover everything under the sun”.

A further issue addressed in Miller’s May 31, 1991 letter and Kovnats’ June 4, 1991 reply concerned the house transaction. The terms of the transaction had been largely worked out some time earlier, and on April 24, 1991 Mario Perrault (“Perrault”), the Manitoba Justice civil lawyer handling the deal, had sent Kovnats a trust cheque for \$7,209.04, representing Zanidean’s equity interest in the house and an insurance premium, along with documents that would, when executed by Zanidean, transfer title of the property to the mortgagee. Further wrangling ensued over whether Zanidean should also be reimbursed for a \$500 deposit he had put down when he purchased the house, which eventually led to

Kovnats returning the trust cheque and unexecuted transfer documents to Perrault. Miller eventually resolved this dispute and agreed to pay Zanidean the further \$500. On May 30, 1991, Perrault sent the trust cheque and transfer documents back to Kovnats, and in his May 31, 1991 letter Miller indicated that he was sending Kovnats a \$500 cheque in order to “afford your client the opportunity to proceed to complete the transaction with respect to Chelsea Ave”. However, in his June 4, 1991 reply Kovnats advised Miller that Zanidean would not execute the transfer documents and complete the house transaction “until all matters are finalized”. Zanidean was simply insisting on a “package deal” that resolved all issues under negotiation at once. Nevertheless, it is clear that as of June 4, 1991 an agreement had been reached on all parameters of the house deal, and that all that was missing was Zanidean and Fehr’s signatures on the documents now in Kovnats’ possession.

32. Kovnats’ June 6, 1991 meeting with Zanidean and his dispute with Paul

Following Kovnats’ June 4, 1991 meeting with Miller, Zanidean was given copies of his police statements, which he and Fehr proceeded to annotate, noting points that were allegedly incorrect or not in Zanidean’s own words. On June 6, 1991, Paul brought Zanidean and Fehr to a lunch meeting with Kovnats at a restaurant in St. Boniface. Paul stayed in the restaurant but kept his distance in order to afford Kovnats, Zanidean and Fehr some privacy. During the meeting, Zanidean and Fehr gave Kovnats the annotated copies of Zanidean’s statements, along with a lengthy handwritten account, written by Fehr and initialled by Zanidean, setting out their version of events since Zanidean’s first contact with the police in October, 1990. Zanidean and Fehr had Kovnats notarize this statement, which concluded with instructions that Kovnats was to disclose Zanidean’s account to the media, defence counsel and “any court that [Kovnats] feels best”. However, Kovnats indicated that Zanidean orally instructed him that he was to keep the notarized account and the annotated statements confidential “unless something blew up”. Accordingly,

Kovnats considered the documents to be privileged, until his client instructed him otherwise. When Kovnats left the restaurant with the documents, Paul recognized the police statements and demanded that Kovnats return them, on the basis that they were police property. Kovnats refused to hand over any documents, explaining that he had made solicitor-client privileged notes on the copies of Zanidean's statements. [During the course of this Inquiry, Kovnats received a written waiver of solicitor-client privilege from Zanidean, through his current counsel, which allowed Kovnats to release these documents to the Inquiry.] Kovnats tried unsuccessfully to call Miller and Whitley on his cell phone, eventually speaking to the Deputy Minister, who refused to involve himself in the dispute. The matter was resolved when Paul spoke to Insp. Angus Anderson, who instructed him to let Kovnats keep the papers. Paul did not make any notes of this incident or prepare a supplementary report.

33. The events of June 10, 1991

On Monday, June 10, 1991, the trial continued for its second week. Kovnats' dockets show considerable meeting activity on that day. He no longer recalls the specifics of his meetings, but assumes that they were meeting with Miller and/or his client in an attempt to work out a final agreement before Zanidean took the witness stand on June 11, 1991. Kovnats came away from these meetings with the understanding that an agreement in principle existed, but that it had still not been reduced to writing. Kovnats' recollection is that the question of whether or not Zanidean would enter into the RCMP SWP Program remained unresolved, but that Miller assured him that Zanidean would either be entered into the Program or would receive a \$30,000 cash payment. He recalls having a difference of opinion with Zanidean over whether a deal had been struck with the Crown, explaining that Zanidean "was being told by others that unless it was memorialized, there was no arrangement".

34. Zanidean's June 11, 1991 trial testimony

Zanidean testified on June 11, 1991. Although Kovnats had originally understood that part of his brief would be to attend court when Zanidean testified, he recalls being told by Miller that he "wouldn't be required in court", and receiving confirmation of this from his client. Accordingly, Kovnats was not present when Zanidean gave his evidence. Anderson and Paul accompanied Zanidean to the courthouse, but remained outside the courtroom; VanderGraaf, however, sat in the body of the court. Dangerfield conducted Zanidean's examination-in-chief, and Lawlor made notes.

Those portions of Zanidean's testimony, elicited during cross-examination by Brodsky, that are either incomplete, misleading or untrue are as follows:

1. Q: What do you know about a fire in Swift Current?
A: I know about a fire in Swift Current.
Q: I'm suggesting to you, so there's no misunderstanding, that you set a fire in Swift Current.
A: Yes, I did.
Q: To collect insurance money?
A: Not to collect insurance money.
Q: For what purpose?
A: I had a vendetta against my sister.
2. Q: And the police found out about that?
A: Yes, they did.
Q: And you're not charged?
A: Not yet.
Q: Not yet? Does it depend on how you do in court today?
A: No. What they told me was they give the Swift Current R.C.M.P. the information I give them, and that was it. Then I talked to my lawyer.
Q: You talked to your lawyer?
A: Right.
Q: About making a deal to avoid being charged in Swift Current?

- A: No, that's not what I said. What I did is I phoned my lawyer up and I said I've got to meet you, I got myself in a jam in Swift Current, I told the police about it. He said, "What did the police say?" I said, "The police told me that they have to contact the Swift Current R.C.M.P."
- Q: You're not charged with the fire you deliberately set, that right?
- A: Not yet, no, I'm not.
- Q: Well, when do you think you might be charged with the fire you deliberately set to get back at your sister in this vendetta you spoke of? When do you think you might be charged?
- A: I don't know. It's not up to me.
3. Q: I'm suggesting to you that the whole purpose of your trying to implicate Jim Driskell in a murder is to keep yourself out of jail on the Swift Current fire; what do you say to that?
- A: I say that's not true. If I did it just to get myself out of jail, that's, then I did the wrong thing, because I have lost a fortune – for me it's a fortune – since this started. I've had to move out of my house; my garage got burnt; my house got broken into.
- Q: Your house got broken into?
- A: Right.
- Q: And you had to move out of your house?
- A: Right.
- Q: You're being paid for that?
- A: Paid for moving out of my house? No.
- Q: What are you being paid for?
- A: I'm not being paid for nothing. All as they're doing is paying my accommodations where I'm staying right now.
- Q: Somebody's paying your living expenses?
- A: They're paying for my room and my meals.
- Q: For how long?
- A: Since I moved out of my house.
- Q: When was that?
- A: It was January or February.
- Q: Since January or February somebody has been paying your room and board?
- A: Right.
- Q: Who?

A: The government, as far as I know.
Q: And for how long will this last?
A: Sorry?
Q: For how long will they continue to pay for your room and board? That's a pretty good deal, isn't it?
A: Until the end of today, unless I'm needed tomorrow.
Q: I see. How much are you being paid?
A: I'm being paid, for me and my wife for food we're paid just under fifty dollars a day.
Q: Fifty dollars a day. And your mortgage payments?
A: My mortgage payments are in arrears right now since then, and I'm on the verge of losing my house; and you can check that out.
Q: What arrangements have you made for that?
A: I've made no arrangements for that.
Q: Have you signed an agreement?
A: No. With who?
Q: With anyone for the, to be compensated for this testimony?
A: No, I haven't.
Q: Did you engage a lawyer?
A: Did I engage a lawyer? Yes, I did.
Q: Was it for the purpose of negotiating a compensation package for this testimony?
A: I called my lawyer up the day after I told the detectives about the house in Swift Current, and that's what I called him about. I told him I needed a lawyer because I might be charged in the near future with the house in Swift Current.
Q: Didn't you engage the lawyer also to work out an agreement so that you could be compensated for your testimony?
A: I engaged a lawyer to take care of the witness protection program.
Q: Wasn't that payment of money?
A: No. What that is relocation and new identity, if needed.
Q: And start-up costs?
A: They never mentioned start-up costs. So far I've lost, I've had to give up two jobs because of this, and I asked them about the jobs and they says, "No, we don't reimburse you for jobs."
Q: Didn't you engage a lawyer in order to try and get you some money for your testimony?

- A: No.
- Q: How many times did you see a lawyer?
- A: I've seen him quite a bit.
- Q: You saw him quite a bit?
- A: Yes.
- Q: For what purpose?
- A: About the witness protection program, because apparently nobody knows about it. So, I needed a lawyer to help me talk to people about it.
4. Q: That is, Jim knew you burnt the house down?
- A: Jim was with me.
- Q: That's how he knew?
- A: Yeah.
- Q: And he could be a witness against you?
- A: Yeah.
- Q: Not very much of a witness now, now that you're pointing a finger at him; would that be fair?
- A: I don't know.
- Q: Isn't that the reason you're testifying today?
- A: I told you that wasn't the reason already, but I'll tell you again: No, that is not the reason.
5. Q: And you have no other explanation why you're not being charged with the Swift Current fire?
- A: The reason I haven't been charged is they have no evidence except what I told the city police. And they told the R.C.M.P.; it's a matter of getting the evidence now and charging me. That's what I'm assuming.
6. Q: That's to your advantage, isn't it?
- A: No, it isn't. Because now the Swift Current police know about it, they know where I am, it's a matter of – what I'm thinking, it's a matter of them gathering the evidence now because I think they need more than what I told the police, then they come and arrest me.
- Q: Mr. Zanidean, would I not be fair in suggesting to you that you could not have a better advocate for your cause, that is, to keep you out of jail, then the Winnipeg Police; that you wanted the Winnipeg Police to help you out with the R.C.M.P. police in Swift Current?
- A: I wanted them to, but they said they couldn't.

This evidence appears problematic for a number of reasons:

- Zanidean claimed that he set the Swift Current fire as an act of revenge against his sister, rather than as an insurance fraud, asserting that his sister was uninsured. While this is consistent with his October 29, 1990 statement to Anderson, it is contradicted by a substantial body of evidence gathered by the Swift Current RCMP, which establishes that the house *was* insured and strongly suggests that the fire was an insurance fraud arranged by Zanidean's sister;
- Zanidean denied that he had talked to his lawyer "about making a deal to avoid being charged in Swift Current". It is clear from the record that Zanidean in fact did instruct Kovnats to obtain immunity for him on the Swift Current arson. Zanidean stated that he did not know when he would be charged with the Swift Current arson, and suggested that he believed he *would* ultimately be charged. According to Anderson, Paul and VanderGraaf, Zanidean may well have believed that this was true; however, they maintain that the Swift Current police had in fact agreed *not* to charge Zanidean, but that this arrangement had been concealed from him (and that the Swift Current RCMP subsequently reneged on the arrangement, although Zanidean ultimately never was charged). However, Kovnats is adamant that since December 1990 there had been a clear understanding that Zanidean would receive some form of immunity on the Swift Current arson, although this agreement had not yet been reduced to writing;
- Zanidean maintained that he had "lost a fortune" by becoming a Crown witness, stating that he was "not being paid for nothing" and that the only money he and his wife were receiving was for their accommodations and "just under fifty dollars a day" for food. Further, he asserted that both of these payments would cease at the "end of today, unless I'm needed tomorrow". In fact, Zanidean, at

a minimum, knew that negotiations were underway for him to receive either a substantial cash payment (he asked for \$30,000 and eventually settled for \$20,000) or entry into the RCMP SWP Program;

- Zanidean claimed that his home mortgage was in arrears and that he was “on the verge of losing [his] house”. In reality, to Zanidean’s knowledge, Kovnats and Manitoba Justice had reached an agreement in which Zanidean would be paid for his equity interest in the home, his mortgage arrears would be forgiven and his credit rating would be unaffected. The only reason this agreement had not yet been executed was Zanidean’s own insistence on not signing the paperwork until the other aspects of his witness protection deal (including his immunity demand) were finalized and put in writing;
- Zanidean claimed that the only post-trial arrangements that had been made were “relocation and new identity, if needed”, and that “[t]hey never mentioned start-up costs”. In fact, Zanidean’s lawyer had specifically demanded in writing that Zanidean be given “sufficient monies to live on until he starts his new job with his new identity” (a new job which he was demanding be obtained for him by the Crown).

The central theme of Brodsky’s cross-examination of Zanidean was that Zanidean had gone to the police with allegations against Driskell in order to protect himself from being charged with the Swift Current arson and in order to obtain benefits for himself, a suggestion that Zanidean resisted. It is apparent from all the evidence that the Crown and/or the police had a number of pieces of information which were never disclosed to the defence, and which would have been of obvious assistance to Brodsky in pursuing this line of cross-examination, including the following:

- Zanidean was the informant on the 1989 “chop shop” charges against Driskell and Harder and had been paid for his information by Crime Stoppers;
- Mann had attempted to interview Zanidean on behalf of the Swift Current RCMP in August, 1990 in connection with the arson investigation;
- Zanidean had raised the Swift Current arson with Anderson and Paul at their second meeting, as a matter that might affect his credibility;
- Zanidean, through his lawyer, had repeatedly demanded immunity on the Swift Current arson and other substantial benefits;
- Zanidean had left Manitoba shortly before the trial, indicating through his lawyer that he would not cooperate unless his demands were met, triggering his arrest on a material witness warrant and forcible return to Winnipeg;
- Zanidean had told his lawyer that some aspects of his police statements were untrue, a claim that Kovnats maintains he relayed to Miller (although it appears from Zanidean’s annotations that those aspects of his statements that he claimed were inaccurate are not overly significant);
- Anderson had contacted the Swift Current RCMP and claims to have arrived at an “arrangement” whereby Zanidean would not be charged with the Hayek arson;
- Miller had agreed that Zanidean would not be left “in lurch or in jeopardy”, that the equity in his house would be purchased and his mortgage arrears forgiven and that his post-trial protection would be looked after “on terms yet to be arranged”.

VanderGraaf, who was in court for Zanidean's testimony, recalls Zanidean's evidence regarding the house, the duration of the support arrangements and start-up costs. Although VanderGraaf did not know all of the details, he knew that arrangements had in fact been made regarding the house, and knew that Zanidean would continue to receive financial support for some time after his testimony, including "start-up costs" in his new location. Nevertheless, VanderGraaf did not raise Zanidean's apparently false evidence on these matters with Dangerfield or Lawlor. Dangerfield told the Inquiry that before Zanidean testified he had been assured that Zanidean "was in the program and was agreeing to testify." Dangerfield agreed that when the Swift Current matter was raised by Brodsky in cross-examination, he had an obligation to make inquiries with Miller and ascertain the true facts, but did not do so. Although Dangerfield did not know the precise details of the witness protection arrangements, he knew from Anderson's November 4, 1990 report that these arrangements would include selling Zanidean's house, and that Zanidean would continue to be supported for some period after the trial. Dangerfield agreed that he must have known at the time that Zanidean's testimony on these matters was inaccurate, and he cannot explain why he took no corrective action and why he did not go to Miller and ascertain the true facts, which he expects he could have done quite easily. Lawlor also cannot explain why he did not go to Miller and request all of the true facts regarding the Swift Current arson once Brodsky pressed the point in cross-examination of Zanidean. He agrees that in hindsight Zanidean's claims that no arrangements had been made with respect to his house, that his financial support would end as soon as he finished testifying and that there had been no discussion of start-up costs were all contrary to common sense. Lawlor cannot explain why this did not occur to him at the time, or why he did not approach Miller to learn what witness protection arrangements had actually been made for Zanidean.

35. Post-testimony conversations with Zanidean about the Swift Current arson

As noted previously, Anderson, Paul and VanderGraaf assert that Miller specifically instructed them to conceal from Zanidean until after he had finished testifying the arrangements they say had been made with the Swift Current RCMP not to charge Zanidean for his role in the July 1990 arson. Anderson and Paul maintain that they first told Zanidean about this arrangement shortly after he completed giving his evidence on June 11, 1991, and that Zanidean initially appeared to disbelieve them. Both officers recall that by this time their relationship with Zanidean was strained. Neither Anderson nor Paul made any notes or reports of their June 11, 1991 conversation with Zanidean until Anderson prepared his October 7, 1991 memo to Johns.

36. The conclusion of the trial and Driskell's murder conviction (June 12-14, 1991)

After Zanidean testified on June 11, 1991, Paul was called on June 12, 1991 as the final Crown witness, giving evidence about a minor and non-contentious factual point.¹² After Garber testified as the sole defence witness, Brodsky and Dangerfield made their final submissions. The jury was charged the following day, and on the afternoon of Friday, June 14, 1991 they returned a verdict of guilty of first degree murder.

¹² Namely, the distance between Driskell's parents' home and the gravesite, which Paul had measured.

37. The Deputy Minister's June 12, 1991 retainer letter to Kovnats, Zanidean's June 13, 1991 threat to Orr, and the June 19, 1991 meeting

For some time prior to the trial, Kovnats had been demanding that Manitoba Justice provide him with a retainer letter. On March 22, 1991, Miller had sent an internal memo to Tom Hague, the Acting Assistant Deputy Minister, requesting that he retain Kovnats "at the usual rate". Subsequently, in his May 31, 1991 letter to Kovnats, Miller had promised that a formal retainer letter "will be forthcoming". However, the retainer letter was not issued until June 12, 1991. Although the letter specified that Kovnats was to "attend with [Zanidean] in Court when he testifies", it was not issued until the day *after* Zanidean completed his evidence. As noted above, Kovnats maintains that Miller specifically told him that he was *not* to attend court for Zanidean's evidence, and Zanidean verified this instruction.

After his testimony on June 11, 1991, Zanidean remained in the hotel suite under police guard. His relationship with Anderson and Paul continued to deteriorate, and Zanidean expressed his frustration at what he saw as the slow pace of the negotiations. The antipathy between Zanidean and the officers was mutual, and Anderson recalls that he and Paul were in regular contact with Miller trying to learn when they might be relieved of the task of guarding Zanidean.

On June 13, 1991 Zanidean called Orr directly and made what Orr interpreted as a "veiled threat", an incident which confirmed Orr's view that Zanidean was very unlikely to be admitted to the RCMP SWP Program. On June 19, 1991, Zanidean and Kovnats met with Miller and Orr to continue the negotiations.

Orr's contemporaneous note of that meeting states:

Meeting held and after much discussion nothing was resolved between Mr. Z., lawyer and Mr. Miller. The idea of a "relocation fee" is attractive to Z. 'et al.' but he was promised the sun and moon by WCP

[Winnipeg City Police] in the first instance and is sticking with that (mis)conception. I would imagine that will be the way they will go and that Witness Protection is out of the picture but we will see.

This was the last meeting Orr attended, and there is no indication in his file that any further steps were ever taken to advance Zanidean's application to the formal RCMP SWP Program. Zanidean never signed the application and it was never sent to Ottawa.

38. Zanidean's June 20, 1991 blow-up with Paul, his anonymous telephone call to Brodsky, and the termination of the Winnipeg Police protection

On June 20, 1991, while standing guard duty in Zanidean's hotel room, Paul and Zanidean became embroiled in a heated argument about the state of the negotiations, during which Zanidean threatened to "go to the press" and state "that his testimony had all been lies". When Paul suggested that this might lead to Zanidean being charged with perjury, Zanidean:

... stomped out of the room and made some comment about showing us not to fuck around with him. He attended to the bedroom and slammed the door.

Paul called Anderson at home to advise him of the situation, and noticed during their conversation that Zanidean picked up the bedroom phone extension several times.

At about 4:55 pm on June 20, 1991, Brodsky received a telephone call from an anonymous male, which he tape-recorded. The caller purported to be calling on behalf of a third party, who he characterized as a "significant witness" in Driskell's trial, but let slip several times that he was probably referring to himself. The caller claimed that the witness had been "told what to say, ... when to say and how to say them", and had gone along with it because "[h]e had too much to lose", explaining:

[T]his person was promised protection from the police, promised a whole bunch of other things, now the protection is ending and also everything else that was promised. ... It's garbage, everything was garbage pretty well.

The caller explained that the witness had testified about "stuff only Jim [Driskell] would have told this person", adding:

The police knew about it and so the police told this person to say these things, and he was supposed to say that he knew it on his own somehow. Like you know as well as I do they never had much on Jim. ... And a lot of it was made up and a lot of it was bull shit.

The caller said that he had to "talk to the lawyer first and then we'll go from there", indicating that he would call Brodsky back the next week. He never did call back. Brodsky suspected that the caller might have been Zanidean, but did not believe he could prove his suspicions. His office received a number of other anonymous calls before, during and after the trial from people claiming to have important information about Driskell's case. In July 1991, Brodsky obtained authorization from Legal Aid to have Savage investigate these calls, but Savage did not uncover any useful information. Brodsky testified that he did not try to have Driskell identify the voice on the tape of the June 20, 1991 call, because he believed that even if Driskell purported to identify the caller as Zanidean this would not carry sufficient weight to allow him to have the tape entered as fresh evidence on Driskell's appeal.

On June 21, 1991, the day after the blow-up between Zanidean and Paul and the anonymous call to Brodsky, Anderson and Paul were instructed by their commanding officer, Insp. D.K. Johnson, to discontinue their protection of Zanidean and to have Zanidean and Fehr find their own lodgings. When they checked out of the hotel, Paul obtained a printout listing all telephone calls that had been made from the hotel suite. When he reviewed this list a few days later, he noted that Zanidean had called Brodsky at 4:53 pm on June 20, 1991, which was "just after the blowout between Zanidean and [Paul]", and immediately after Paul's telephone

conversation with Anderson. Although Paul did not at this point have any direct information about what Zanidean had said to Brodsky, he recognized the significance of the call and “decided to retain [the telephone records] should [they] be required”. However, he apparently made no notes of the incident, nor did he produce a supplementary report about it until September 1993, more than two years later, when he was specifically requested to do so by Hall and Ewatski. The latter two officers had learned about the anonymous call to Brodsky’s office when they interviewed Driskell in the presence of Brodsky in connection with their Homicide Review. The Supplementary Report was never disclosed to the Crown or to Brodsky.

39. Miller’s June 21, 1991 letter to Kovnats

On June 21, 1991, Miller sent Kovnats a letter which, although signed by Miller, was stamped “Strictly Confidential. For discussion purposes only subject to approval of the Deputy Minister”. The letter read as follows:

This is further to our letter of May 31 and various discussions thereafter.

We maintain our commitment to protect your client based upon the assessment of risk done by police agencies.

The plan arranged for your client is one that has been worked out with the police and is one with which your client is comfortable.

This letter simply confirms that the Department of Justice for Manitoba, in accordance with our witness protection practise, is committed to funding the relocation of your client.

It is understood that the costs of relocation incidental to this plan will not exceed \$20,000.

It is further understood that other miscellaneous expenses claimed by your client must be the subject of further documentation.

All monies will be administered through the police.

Zanidean, who had been refusing to complete the house transaction “until all matters [were] finalized”, proceeded to execute the transfer documents on June 21, 1991, the date of Miller’s letter. Kovnats maintains that he was not involved in the final negotiations. He assumes that Zanidean must have been negotiating directly with Miller and the police. VanderGraaf, Anderson and Paul all maintain that *they* played no part in the final negotiations. Anderson and VanderGraaf indicate that to their knowledge no plan was “worked out” with the WPS, and suggest that “the police” Miller was referring to must be the RCMP. Anderson points out that by June 21, 1991, Zanidean’s relationship with the WPS (and he and Paul in particular) was uncomfortable. However, Orr also denies any knowledge of any negotiations that occurred after the June 19, 1991 meeting he attended, and indicates that to his knowledge the RCMP were not involved. He observes that the “plan” referred to in Miller’s letter appears to have involved a cash resettlement payment to Zanidean, and points out that there was no reason for the RCMP to be involved once Zanidean’s formal SWP Program application was off the table.

A copy of Miller’s June 21, 1991 letter found in Manitoba Justice files contains a handwritten note from Miller to Whitley, dated June 24, 1991, requesting that he review the letter with the Deputy Minister, who then added his own note advising Whitley that he “[saw] nothing wrong” with the letter. Whitley has no present recollection of discussing this letter with Miller, but explained that it was a legislative requirement that this kind of financial commitment had to be approved by the Deputy Minister.

40. Post-trial developments in Swift Current (June-July 1991)

As noted above, in mid-June 1991 Burton and Ferguson’s superiors in Regina had advised that no decision would be made on Driskell’s immunity request until after he provided a statement. Ferguson advised Brodsky of this, and suggested that he take an uncautioned statement from Driskell. Brodsky and Driskell agreed with this proposal,

and on June 27, 1991 Ferguson conducted an uncautioned interview of Driskell at the Public Safety Building in Winnipeg. In his statement, Driskell explained in detail how Zanidean had hired him to help burn down his sister's house in Swift Current in an insurance fraud scheme, how they had gone about the arson, and how Zanidean's sister had not paid them their full fee. Zanidean was supposed to be paid \$3,000 by his sister and Driskell was to get \$1,000, however Zanidean only gave him \$900. On June 30, 1991, Ferguson sent Driskell's statement to the Regina RCMP office with an accompanying report renewing the request that Driskell be granted formal immunity.

On July 4, 1991, Ferguson provided his superiors with a further report in which he outlined some of the difficult issues he had identified in the case, including the observation that if Zanidean's sister was charged with orchestrating the arson, this "will present evidence of 'Perjury' against Reath Zanidean during his testimony at the Murder trial against Driskell", since Zanidean had claimed the arson was an act of revenge against his sister. Ferguson also noted that:

Winnipeg Police Services are certainly concerned with the possibility of a convicted Murderer walking for the sake of an Arson charge.

In his testimony Ferguson recounted the conversation he had with a WPS officer when he attended in Winnipeg to take Driskell's statement, to which he referred in his July 4, 1991 report, as follows:

...And it was a plains clothes officer, a detective that was present in the room who made the remark that, I hope we are not going to have a murderer walk, or I hope you are not going to let a murderer walk for the sake of an arson.

In his July 4, 1991 report, Ferguson noted the dilemma that not laying charges could be interpreted as an attempt to conceal Zanidean's apparent perjury:

[A] failure to act accordingly [by charging Zanidean and his sister Hayek] could place our force in a tenuous position as our investigation and subsequent charges would assist [Driskell's] Appeal on the Murder conviction. Failure to respond judicially could be construed as an attempt at concealing evidence similar to the Donald MARSHALL case.

Burton and Ferguson's memos in early July 1991 reflect their understanding that Zanidean was now enrolled in the RCMP SWP Program. On July 13, 1991, Swift Current RCMP officers stopped Zanidean's wife for impaired driving; she claimed that she was immune from arrest because she and Zanidean "were under the Witness Protection Program." In subsequent inquiries, in mid-July, the Saskatchewan RCMP learned for the first time from Orr that this was not the case. This new information was significant, insofar as Burton and Ferguson, and their superiors in Regina, all appear to have believed that charging Zanidean with arson would be impractical if he were in RCMP witness protection. Once it emerged that Zanidean was not in the SWP Program, this obstacle to charging him disappeared.

41. Burton's July 1991 telephone conversations with Anderson

Brodsky advised the Swift Current RCMP that the body-pack tapes from the Harder homicide investigation contained statements incriminating Zanidean in the arson and corroborating Driskell's claim that Hayek paid them for their efforts. On July 16, 1991, Burton called Anderson, explained that Ferguson had taken a statement from Driskell implicating Zanidean in both the 1990 and 1988 arsons, and asked if the WPS could provide a copy of the body pack tape transcripts. In addition to discussing the body pack tapes, Burton and Anderson discussed the status of the arson investigation. According to Anderson (as set out in his October 7, 1991 memo to Johns):

[Burton] went on to say that superior RCMP officers in Regina had over-ruled Swift Current Officers and had decided to charge

ZANIDEAN. Cst. Burton was most apologetic and expressed disbelief that his superiors considered their arson more important than our murder. He attributed this strange decision to his superiors' lack of investigative experience and suggested that I must also be familiar with the ridiculous decisions of higher ranking officers.

I told Cst. Burton that we had already informed ZANIDEAN of his immunity which had become part of his negotiations with our Justice Department. I also expressed my dissatisfaction with this turn of events. Cst. Burton suggested that we leave further discussions regarding the issue to the Justice Department of Saskatchewan and Manitoba. He provided me with the name of Richard Quinney, Director of Prosecutions in Saskatchewan and I agreed.

Burton gives a very different version of the conversation. His best recollection of what was actually said is set out in his July 19, 1991 C-237 report, the relevant portions of which he would have dictated very soon after the conversation. Unlike many of Burton's reports, this report was not destroyed when the RCMP purged its files:

Sgt. ANDERSON was advised that ZANIDEAN might be charged with the 1988 and 1990 arsons. He advised that ZANIDEAN had stated to him after the murder trial that if he was charged he would go to the media and state that he only told Winnipeg P.S. "what they wanted to hear" regarding the murder so that DRISKELL would be acquitted on appeal or a new trial ordered.

Sgt. ANDERSON indicated he would be speaking with MILLER and DANGERFIELD regarding the possibility that ZANIDEAN may be charged. They may contact Sask. Justice in this regard.

Two days later, on July 18, 1991, Anderson and Burton spoke again. Burton's account of the July 18, 1991 conversation is again set out in his July 19, 1991 report. With respect to the body-pack tapes, Burton's recollection is that Anderson said he had been advised by the WPS trial co-ordinator that:

[T]he discussion [on the body pack tapes] with respect to payment of money by HAYEK to ZANIDEAN was in regard to another matter. It had nothing to do with the arson. Sgt. ANDERSON will be forwarding a copy of the transcripts and we will see for ourselves. Sgt.

ANDERSON further pointed out that ZANIDEAN knew the conversation was being taped and would certainly not have made any admissions which would indicate that the arson was for payment, not revenge.

On the issue of immunity for Zanidean, Burton's account of the conversation is as follows:

Sgt. ANDERSON also stressed that part of the deal for ZANIDEAN'S testimony was that he would not be charged for the 1990 arson. They made this representation based on my statement that I would recommend this and Sgt. UPTON'S conversation with Cpl. ORR on 91-04-10 in which he indicated that we would likely not be charging ZANIDEAN for the 1990 arson. At the time that Cpl. ORR contacted Sgt. UPTON he advised him that ZANIDEAN was already under the Witness Protection Program and he was concerned about us surfacing him for the arson. Sgt. UPTON had stated that we would likely not do so however that decision would rest with the investigator. Cst. Burton was not aware that ZANIDEAN was under the Witness Protection Program until 91-04-16 when Inspector PRESTON called Cpl. ORR to discuss the possibility of not charging ZANIDEAN and learned that this was the case. Previous C-237 dated 91-04-19 refers.

42. The July 17, 1991 meeting at "F" Division RCMP Headquarters in Regina

On July 17, 1991, Burton and Ferguson went to Regina and briefed a group of their superiors on the state of the Hayek arson investigation. On August 8, 1991, the RCMP sent a copy of the investigative file to Ellen Gunn ("Gunn"), who was then the Saskatchewan Justice Director of Public Prosecutions. In a memo to file dated August 29, 1991, Richard Quinney ("Quinney") noted his and Gunn's concerns about the suggestion in the file that Zanidean had been offered immunity on the Swift Current arson charge by the WPS, the seeming reluctance of the WPS to assist the RCMP's investigation, and Zanidean's apparent perjury at Driskell's trial regarding the motive for the arson. Quinney's memo indicates that the RCMP would be continuing their investigation and that Saskatchewan Justice would in due course contact Manitoba Justice.

43. Post Trial Developments with Gumieny

Unlike Zanidean, Gumieny applied to and was admitted into the formal RCMP SWP program. Shortly after he testified, he and his family were relocated to Ottawa. Under the terms of his agreement with Manitoba Justice and the RCMP, he was to remain in the program for only six months and was not to be given a new identity. Gumieny did not get along with his Ottawa RCMP handler and disliked the area where he was living, and on October 11, 1991, he called Dangerfield to complain about his situation. Dangerfield passed the complaint to Miller and it was eventually relayed back to Ottawa through Orr. On October 21, 1991, Orr's Ottawa counterpart, Sgt. Jim Puchniak ("Puchniak"), visited Gumieny and attempted to address his concerns. Subsequent correspondence among Orr, Dangerfield, Miller and Puchniak in November 1991 indicates that Miller authorized an additional expenditure for Gumieny, apparently so that he could move prior to the end of his apartment lease. Dangerfield does not know why Miller wrote a memo on November 4, 1991 asking Dangerfield for information about the terms of Gumieny's witness protection arrangements, since this was a matter Miller had dealt with, about which Dangerfield knew nothing.

Gumieny's agreement with the RCMP expired on December 18, 1991. Although money had been allocated to allow him to move to a new apartment, he had apparently stayed where he was. In early January he renewed his complaint with Dangerfield, who appears to have relayed the complaint to Miller, from where it again went to Orr and back to Puchniak in Ottawa. A few weeks later, on January 27, 1992, Gumieny called Puchniak directly to complain that:

he was freezing and what were the RCMP going to do about it. During the conversation, Mr. Gumieny advised he would be calling George Dangerfield to complain and would also go to the press.

Puchniak interpreted this as a threat to go to the press and say that the RCMP were not looking after him properly, a kind of threat not

uncommon with protected witnesses. He does not recall Gumieny making any threat to recant his trial testimony. Puchniak reported the incident to Orr, and heard nothing further from Gumieny. The RCMP wrote to Miller to advise him of the situation, and Miller wrote a memo to Dangerfield warning him that “Mr. Gumieny, who appears to have taken a shine to you, may be calling you again.” However, Dangerfield’s recollection is that he did not hear from Gumieny again for some time.

In April 1993, Hall and Ewatski interviewed Gumieny in Ottawa. During the interview, Gumieny indicated that he wished to be relocated to another city. Hall and Ewatski passed Gumieny’s request on to Manitoba Justice, which initially refused to pay any of the costs. Gumieny apparently began calling Dangerfield directly, and at some point during the next month Dangerfield appears to have agreed to pay the costs of a rental truck to allow Gumieny to move with his family to Thunder Bay. Dangerfield has no independent recollection of any of these events. Further negotiations ensued during which Gumieny demanded additional financial assistance. A misunderstanding arose in which Miller came to believe that all offers of assistance from Manitoba Justice to Gumieny had been rescinded, while the RCMP believed that Manitoba Justice was still prepared to pay for the truck rental. Ultimately, the RCMP paid the costs of Gumieny’s truck rental (\$2,874.29) and sent the bill to Manitoba Justice, which initially refused to pay but eventually agreed to reimburse the RCMP.

In May 1993 while Gumieny’s Thunder Bay relocation was under negotiation, Gumieny made a number of threats to complain to the media about how he was being treated. On at least one occasion, he appears to have contacted an Ottawa newspaper. In addition, on several occasions in May he called Hall and his former handler Osborne, threatening to go to the media and to Driskell’s private investigator and tell them that his trial testimony was “what the police said to say.” At one point he threatened to say that he had been coerced by the police. Hall later received information that Gumieny had followed through on this threat by calling an Ottawa

newspaper. However, Osborne states that in the second of two telephone conversations he had with Gumieny on May 18, 1993, Gumieny reaffirmed the truth of his trial testimony and stated that his threats to recant and alleged police coercion were false. Gumieny told Commission Counsel in July 2006 that his trial evidence was true and that his recantation threats to Hall and Osborne in 1993 were false and just a ploy to get money to support his drug habit. He denied ever following through on these threats.

44. The Quinney Correspondence with Manitoba Justice

By January 1992, Quinney had succeeded Gunn as Saskatchewan Director of Prosecutions on her appointment to the bench. On January 15, 1992, he telephoned Miller to discuss his concerns about the evidence Zanidean gave at Driskell's trial. The next day, he wrote a detailed three-page letter to Miller, enclosing a copy of Driskell's statement to the RCMP and explaining how Driskell had described his and Zanidean's involvement in the Swift Current arson and had claimed that they had been paid by Zanidean's sister as part of an insurance fraud scheme. Quinney also explained that the RCMP had concluded that Driskell's statement was substantially correct and had uncovered independent evidence confirming that the motive for the arson was financial gain and not, as Zanidean had claimed at Driskell's trial, revenge against his sister. Quinney suggested that this information should be disclosed to Driskell's defence counsel:

Although perhaps not our prerogative it would also be our recommendation that disclosure of this information be made to counsel acting for Mr. Driskell at your earliest opportunity. The recent *Stinchcombe* decision from the Supreme Court of Canada clearly establishes our ongoing obligation to continue disclosure.

Quinney also explained that while there was conflicting evidence on the point, Zanidean appeared to be of the view that he had been granted immunity from prosecution on the Swift Current arson. Quinney indicated that he had concluded that Zanidean would be able to successfully raise an

abuse of process argument if he were prosecuted for the arson, and that Saskatchewan Justice had accordingly decided not to charge him. Quinney also pointed out that after Driskell's trial Anderson had told the RCMP that Zanidean had threatened to go to the media and say that his evidence had been all lies.

On March 9, 1992 Quinney wrote a second letter to Miller enclosing an eight-page RCMP investigation report which corroborated the details of Driskell's statement and supported the conclusion that Zanidean had perjured himself at Driskell's trial when testifying about the Swift Current arson. Quinney concluded this letter by once again referring to the necessity of disclosure of this information to Driskell's counsel:

I trust this will be of assistance to you in providing appropriate disclosure to Mr. Driskell's counsel.

Driskell appealed his conviction, and Dangerfield had carriage of the appeal for the Crown. However, Miller did not forward the Quinney material to Dangerfield until July 7, 1992. Dangerfield testified at the Inquiry that he does not recall seeing Miller's memo or the Quinney material at this time. Driskell's appeal was heard in the Manitoba Court of Appeal on December 7, 1992 and dismissed. The information that Saskatchewan Justice had sent to Manitoba Justice nine and eleven months earlier regarding Zanidean's perjury and immunity had not been disclosed to Driskell's counsel.

One year after Quinney's second letter, on March 10, 1993, Sid Lerner ("Lerner"), a lawyer with the Manitoba Crown's office, sent Miller a memo indicating that he had been contacted by "Kelly of the Minister's office" regarding a media inquiry about whether Zanidean had been granted immunity on the Swift Current arson. Lerner's memo states that he had discussed the matter with Miller on March 9, 1993 and told Miller that Dangerfield did not recall seeing the Saskatchewan Justice material, and that this material had never been sent to Brodsky. Lerner and Miller

agreed that the material should be disclosed and that Miller would raise the matter again with Dangerfield.

The next day, on March 11, 1993, Miller sent a memo to Dangerfield about this disclosure issue. Dangerfield responded by returning Miller's memo with a handwritten note stating that he did not recall the materials, and asking Miller to refresh his memory by show them to him.

On the weekend of March 13-14, 1993 the *Winnipeg Sun* published a series of articles suggesting that Driskell may have been the victim of a miscarriage of justice. The articles expressly referred to an alleged secret immunity deal with Zanidean regarding the Swift Current arson.

On March 16, 1993 Dangerfield was asked to prepare a briefing note for the Minister, presumably in relation to the *Winnipeg Sun* articles, which stated:

In short the trial was fairly conducted with the defending counsel being provided with full particulars of the evidence to be called against Driskell. Nothing was kept from him.

Dangerfield did not mention the information contained in the Quinney letters, which he explained at the Inquiry as follows:

I tried to write a dispassionate explanation of the trial, not what happened afterwards, which threw some doubt on the trial. And that's what I did, I wasn't trying to deceive anybody, I was just writing a plain note, that's all.

On March 16, 1993 Janie Duncan ("Duncan") a private investigator working for Driskell, wrote to Winnipeg Deputy Chief L.H. Klippenstein ("Klippenstein") requesting a variety of information about Larry Coleman, whom she was proposing as an alternate suspect in the Harder homicide. Klippenstein forwarded the letter to Miller seeking advice on how he should respond and on March 19, 1993 Miller sent a

memo to Dangerfield about this issue. In a handwritten reply on this latter memo Dangerfield also addressed the outstanding Quinney materials disclosure issue, recommending that they be sent “to Brodsky with an explanation”. Dangerfield no longer recalls any discussions he had with Miller at the time, nor does he remember drafting the letter to Brodsky referred to in Miller’s subsequent memo to Whitley, but assumes he must have done so.

Miller subsequently sent Whitley a memo dated April 13, 1993:

I have spoken to you on a couple of occasions regarding the issue of the provision of additional information to Mr. Brodsky which was shared with us by our colleagues in the Saskatchewan Department of Justice last year.

As you know, I asked Mr. Dangerfield to review the material in question and to make a recommendation as to how we deal with it at this time. In my humble opinion, it would be inappropriate for us to withhold the information. From what I gather, it was due to an oversight that Mr. Dangerfield did not address this issue when it was first brought to his attention last July.

As you can see from the materials attached, Mr. Dangerfield clearly agrees that the material should be sent to Mr. Brodsky with an accompanying explanation. At my request, George has compiled a draft letter serving that purpose.

There is as well a draft letter to Ms. Janie Duncan, a private investigator who has been working on the Driskell matter and as you know, has been referred to anonymously in some of the articles written in the Winnipeg Sun.

I would respectfully request that you review the draft responses prepared. I would ask you to address your mind not only to the issue of the contents of those letters but also to the issue of who should be signing the matter off.

I would be pleased to discuss this matter with you once you have had an opportunity to conduct your review.

Thank you for your consideration.

The two letters referred to in Miller's memo cannot now be found in Manitoba Justice files and have been missing since at least 2000. Whitley is adamant that he never received this April 13, 1993 memo from Miller and has no recollection of discussions with Miller on this issue.

On April 16, 1993 Miller wrote to Quinney in response to statements that had been made in the *Winnipeg Sun* articles about the alleged immunity deal with Zanidean, and requested further information from Saskatchewan Justice about the decision not to prosecute Zanidean on the Swift Current arson. In his response on April 28, 1993, Quinney confirmed that there had been no immunity discussions between Manitoba and Saskatchewan Justice, and advised that Saskatchewan Justice had never granted Zanidean immunity from prosecution. He went on to explain that:

The materials disclose a considerable amount of confusion as to whether or not Mr. Zanidean was told by the Winnipeg City Police, prior to testifying or after his testifying, that the police in Swift Current were now going to grant him immunity with respect to the arson in Swift Current...There appears to be no doubt however that Zanidean certainly thought that he had been granted immunity from prosecution for the arson offences.

Based on a review of this material, it was our determination as expressed in my letter to you of January 16, 1992, that any prosecution would be unsuccessful as Mr. Zanidean would be able to launch a successful abuse of process argument on the immunity issue. For that reason, we determined that we could not proceed further with respect to a charge against Zanidean.

Miller's April 16, 1993 letter to Quinney and his April 15, 1993 letter to Orr both indicate that Miller was gathering information so that he could brief his Minister in response to the *Winnipeg Sun* articles. Further, the Minister had publicly announced there would be an internal review of the Driskell case. Whitley agreed that these are matters in which he would normally have been involved. However, he has no recollection of these developments.

45. The Hall/Ewatski Review

The Winnipeg Police also responded to the *Winnipeg Sun* articles by ordering an internal review of the Driskell investigation. In March 1993, Winnipeg Police Chief J. Henry (“Henry”) asked Hall and Ewatski to conduct a “paper review” of the Harder homicide investigation file. However, their mandate was subsequently expanded to include interviews of witnesses and other key participants in the original investigation and prosecution. Because of concerns raised by the Police Association, only a few police officers (including Mann) were ever formally interviewed. Hall and Ewatski had only informal conversations with most of the key officers in the Harder investigation, including VanderGraaf, Anderson and Paul.

In May, 1993, Hall and Ewatski were granted access to Orr’s file, and came to learn from Orr’s file materials that the Swift Current RCMP investigators believed that the Swift Current arson had been an insurance fraud, contrary to Zanidean’s testimony at trial that it had been an act of revenge against his sister. Hall and Ewatski were about to leave for B.C., where Zanidean then lived, and attempt to re-interview him (he ultimately refused to cooperate). They were concerned about how they should deal with his apparent perjury at Driskell’s trial. Accordingly, on May 13, 1993 they met with Miller, seeking background information about Zanidean and advice on this issue. Hall and Ewatski have no significant independent recollection of what Miller said during this meeting beyond what they recorded in their contemporaneous notes, which include the following details:

- Miller indicated that he was already aware of Zanidean’s apparent perjury and had discussed it with Dangerfield, who took the view that it had no effect on the outcome of Driskell’s trial because Zanidean’s evidence against Driskell was corroborated by other witnesses;

- Miller advised Hall and Ewatski that Zanidean's lawyer had requested immunity for his client on the Swift Current arson, "but did not receive this";
- Miller advised that he had subsequently learned from Saskatchewan Justice that Zanidean had not been charged with the arson because of "confusion between Justice Departments as to what [he] had been told about immunity";
- Miller indicated that Zanidean had received a \$20,000 cash payment, but no other compensation.

A few days later, on their way to B.C., Hall and Ewatski stopped at the Swift Current RCMP detachment, where they were allowed to review the Hayek arson file (then still intact) and interview Burton. Hall and Ewatski's file memos indicate they obtained a great deal of relevant information from both Orr's RCMP file in Winnipeg and from the Swift Current RCMP files, both about the Saskatchewan RCMP arson investigation and about Zanidean's immunity negotiations with the police and Crown in Manitoba.

On August 23, 1993, Hall and Ewatski met with Dangerfield and Lawlor, who expressed complete satisfaction with the homicide investigation and the information that they had received from the police. They also indicated that they were "happy that full disclosure was given to Greg Brodsky". Ewatski does not recall whether or not he and Hall briefed Dangerfield and Lawlor on the potentially new information they had acquired during their review, such as the following:

- Paul's June 20, 1991 blow-up with Zanidean and his threat to go to the media and recant;
- Anderson's account in his October 7, 1991 memo to Johns of the "arrangement" that had been reached with the Swift Current RCMP not to charge Zanidean with the arson and

the steps that had been taken to conceal this arrangement from Zanidean until after his testimony; or

- the material in the Swift Current RCMP file suggesting an alternative scenario in which the WPS promised Zanidean immunity on the Swift Current fire in exchange for his testimony against Driskell.

There is no indication in Hall and Ewatski's notes that these issues were raised during the meeting with Dangerfield and Lawlor.

In August 1993, Hall and Ewatski interviewed Driskell, in the presence of Duncan and counsel. During the meeting, they played for Hall and Ewatski a tape of the June 20, 1991 anonymous telephone call to Brodsky. Driskell expressed the opinion that the caller sounded like Zanidean. Later, at Hall and Ewatski's request, Paul prepared a supplementary report of his June 20, 1991 blow-up with Zanidean and gave them the hotel telephone records, which showed that Zanidean had called Brodsky's office at a time coinciding with the anonymous call. This was the first time that Paul's account of the blow-up and the existence of the hotel telephone records was ever documented in a formal report.

In September 1993, Hall and Ewatski completed their report and delivered it to Chief Henry. Chief Henry, and his successors up to and including now Chief Ewatski, treated the report as an internal document and refused to make it public, except in a highly edited form that effectively removed all meaningful content. The Crown was not provided with a copy of the Review, and no steps were taken to disclose to the Crown any of the information the officers had gathered during their case review.

In his interview with Commission Counsel in May, 2006, Hall indicated that with the benefit of hindsight and later analysis of the evidence, he now recognizes that he and Ewatski uncovered evidence

during their investigation which may not have been known to the Crown, and which he now believes should have been disclosed to the Crown by means of operational reports. Ewatski agreed that this would be the proper thing to do “[i]f there was new factual information in [their report] that we believed the Crown was not privy to”, but insisted that they had believed at the time that all of the factual information in their report was already known to the Crown. According to Ewatski, he and Hall:

... formed the opinion that Mr. Dangerfield and Mr. Lawlor were certainly aware of all of the aspects surrounding this investigation.

However, Ewatski did not specifically recall whether they asked Dangerfield and Lawlor about matters in documents that Dangerfield and Lawlor probably did not see or could not possibly have seen during the trial, because they had not yet been written, or because they were inaccessible to the WPS and/or Manitoba Justice. Anderson’s memo to Johns dealing with his discussions with Burton, and Paul’s Supplementary Report regarding the phone records are two such examples.

46. Janie Duncan Letters and Responses

On November 14, 1994, Duncan wrote a letter to Miller in which she stated:

I would suggest that you come forward now Mr. Miller with respect to the deals the above noted person [Zanidean] received in return for his testimony against my client, James Driskell.

I am giving you this opportunity to provide us with the particulars of the deals that were made, as a second crucial witness has come forward in our pursuit of justice for Mr. James Patrick Driskell.

Miller’s December 9, 1994 reply did not respond directly to her request so she then wrote a further letter to Miller on January 2, 1995, in which she asked:

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

As Miller had recently been appointed a judge, the new Acting Director of Winnipeg Prosecutions, Rob Finlayson ("Finlayson"), prepared a response. He obtained a draft letter prepared by Miller, dated January 6, 1995, at the bottom of which Miller had typed a note:

check with Shermie did they lead evidence on witness [sic] protection
?deals. [sic] everything done through Witness protection was lead [sic]
in evidence?

"Shermie" was Lawlor's nickname. Underneath Miller's note, Lawlor had written the following reply (addressed to Miller's assistant):

Gail – all of the transcripts are missing – but I'm sure this is accurate.

On January 13, 1995, Finlayson sent Duncan a somewhat edited version of Miller's January 6, 1995 draft reply, advising Duncan to review "the transcript of the evidence of Mr. Zanidean which will contain the answers to your questions". By this time, the trial transcripts could not be located. Finlayson had never seen them. He advised Commission Counsel that he based his response on Lawlor's assurance that Miller's draft letter was accurate, not realizing at the time that the information Duncan was requesting was actually not in the trial transcripts, and that much of Zanidean's testimony on the subject was apparently false or misleading. Finlayson assumed that Lawlor's recollection of what was in the trial record was accurate, so he did not ask Miller if he recalled the details of the deal with Zanidean. Lawlor testified that the transcripts were missing when he gave this advice to Miller, and that he assumed that the information about Zanidean's "deal" had been placed on the record because this is what generally would have been done in this kind of case. He cannot explain why it was not done in Driskell's case.

Finlayson later received a phone call from Duncan in response to his January 13, 1995 letter, and discussed the matter with Miller. In a February 16, 1995 memo to file he prepared of these conversations, Finlayson stated:

[Miller] indicated to me that the only charge against Zanidean for arson was one in Saskatchewan and it was stayed by the prosecutors there because of lack of evidence, not because of any input from Manitoba Justice officials.

Finlayson's recollection is that at this point he had not yet seen the 1992 and 1993 correspondence between Quinney and Miller, and therefore did not realize that Miller's assertion that the Saskatchewan charge was "stayed by the prosecutors there because of lack of evidence" was inaccurate.

On March 20, 1995, Duncan wrote again to Finlayson:

Based on our information it would appear Mr. Bruce Miller is covering up a deal. Ray Zanidean was offered immunity by Manitoba Justice in return for his testimony against Jim Driskell.

Our evidence from a witness shows RCMP in Swift Current, Saskatchewan had ample evidence to proceed with arson charges against Ray Zanidean, but they were instructed by Saskatchewan Justice not to proceed. It is also our evidence in a letter I received on September 10, 1993 from Saskatchewan Justice that they had in fact corresponded with Manitoba Justice after the decision with respect to the Zanidean matter had been made. Mr. Finlayson, there is a cover up and Mr. Bruce Miller has knowledge of this cover up.

In response to this letter, Finlayson called Quinney on May 4, 1995. Quinney's notes of the conversation, which are consistent with Finlayson's own recollection, state in part as follows:

Told [Finlayson] I [had not] reviewed file for some time but recalled:

- Police (RCMP) had asked us about charges vs. Ray Zanidean

- We had concluded that we could not proceed vs. him because either WCP or RCMP had improperly granted him immunity on the Swift Current arson charge and we would, should charges be brought, face a successful ... motion for abuse of process
- That we thought police invest. est. Driskell's version of the trip to S.C. to burn down Z's sister's house was correct and Zannidean's [*sic*] version as apparently told on Driskell's trial was probably not
- We could not go against Driskell because he had been granted immunity by police
- That I wrote Bruce Miller advising him as above and suggesting that he immediately disclose this to defence counsel to Driskell

In his reply to Duncan, dated May 9, 1995, Finlayson focused on what he understood to be Duncan's allegation that Manitoba Justice officials had gone to Saskatchewan Justice officials and arranged immunity for Zanidean. Finlayson did not disclose the information he had received from Quinney, which confirmed what was in Quinney's 1992 and 1993 correspondence with Miller (which by this time Finlayson would have read). Finlayson's assumption at the time was that the information Quinney had given Miller had been disclosed to Brodsky years earlier, although he took no steps to verify that disclosure had in fact been made.

On June 24, 1995, Duncan sent Finlayson a response to his May 9, 1995 letter. Duncan asked whether Finlayson had interviewed Miller or Dangerfield "to ascertain if Ray Zanidean received a deal as a result of testifying against [Driskell]". In his reply, dated July 19, 1995, Finlayson referred Duncan to the trial transcript, as he had first done six months earlier in his January 13, 1995 letter. Finlayson explains that he was again relying on Lawlor's assurance in January 1995 that everything about any "deals" had been disclosed on the record, which was consistent with his own knowledge that the general Crown practice would have been to bring this kind of information out in chief.

47. The Schille Review

In June 2000, nine years after Driskell's conviction, now Assistant Deputy Minister, Finlayson asked Crown prosecutor Dale Schille ("Schille") to conduct a review of the Driskell file. Finlayson told Schille that he wanted the file reviewed because of media interest in the case and Duncan's letters. He explained that Manitoba Justice had committed to doing a file review some time previously, but that the Deputy had since learned that no such review had ever been done. Schille was selected because he had come to Manitoba Justice from out of province several years after Driskell's trial and appeal. In addition to regular prosecution duties, Schille recalls working on the review for about three or four months in the fall and winter of 2000, and completing it some time in the winter of 2000-01.

Schille arranged to have the Driskell file retrieved from storage. The file was reasonably well-organized, but it appeared to Schille that the correspondence had been disassembled and reassembled with the documents out of sequence. During his review of the file, Schille saw both Quinney's 1992 correspondence with Miller and the related 1992 and 1993 internal memos between Miller, Dangerfield and Whitley. He assumed that the Quinney material had been disclosed to Brodsky in 1993, as indicated in Miller's April 19, 1993 memo to Whitley. The absence of a letter to Brodsky in the file confirming the disclosure of this material did not trouble Schille, given the poor condition of the correspondence file and the fact that other materials Schille expected to find were not there (such as officers' notes).

In his report, Schille referred to the perjury issue raised in Quinney's letters, but did not mention the other two issues (*i.e.*, the suggestion that Zanidean had been promised immunity by the WPS, and his alleged threat to recant his testimony if he was charged with the arson). Schille considered the perjury issue more significant, as he understood the other two issues to involve factual disputes with the Manitoba authorities.

Schille stated in his report that he assumed everything in Quinney's letters had been disclosed to the defence. He did not specifically mention that the file documents suggested that this material had been received in early 1992 but had not, as he understood it, been disclosed until 1993. The fact that Brodsky had not brought an application to reopen the appeal and adduce the Quinney material as fresh evidence did not cause Schille to question his assumption that the material had been disclosed, at least by 1993. Schille thought that Brodsky would have already known from Driskell that Zanidean's evidence regarding the arson was false, and Brodsky might have concluded that he could not meet the "due diligence" fresh evidence threshold.

Schille always expected that the fact of the very late disclosure of the Quinney material, more than a year after Manitoba Justice received it and several months after Driskell's appeal was dismissed, would be raised by James Lockyer ("Lockyer") both on Driskell's s.696.1 *Criminal Code* "miscarriage of justice" application to the federal Minister of Justice and the related bail hearing that was scheduled to be heard in October 2000. When Schille read Lockyer's very detailed bail application factum, he realized that Lockyer had made no mention of this issue, but was raising other issues that Schille considered far less significant. It was only then that Schille realized for the first time that Lockyer must not have the Saskatchewan material. Schille took immediate action to disclose the material to Lockyer and to remove himself from the case, on the grounds that he might now be a witness. Schille never heard any explanation as to why the Saskatchewan material was not disclosed in 1993 by Miller, Dangerfield and/or Whitley.

III. FACTUAL FINDINGS

I now turn to findings with respect to the issues in the Order in Council regarding the conduct of Crown Counsel who conducted and managed the trial, subsequent appeal and departmental reviews, and whether the WPS failed to disclose material information to the Crown before, during or after the trial.

Counsel at the Inquiry agree that although the decision in *R. v. Stinchcombe*¹³ was not released by the Supreme Court of Canada until November 1991, the Manitoba policy and practice during the relevant period, late 1990 and 1991, was that all material and relevant information in the hands of the police and Crown was to be disclosed to counsel for the accused. After *Stinchcombe*, it of course became mandatory. There is no issue, therefore, that information about “favourable considerations”, the “arrangement” not to prosecute Zanidean, and other similar information, was to be disclosed.

1. Failure to disclose the “arrangement” not to prosecute Zanidean with respect to the Swift Current arson, and failure to disclose other “favourable considerations” to the defence.

Brodsky’s February 7, 1991 letter:

5. We would like the police records of the witnesses the Crown proposes to have testify, together with the outstanding charges that were not dealt with...

¹³ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

6. We would like to have the detail of the witness protection programmes Mr. Dangerfield mentioned in Court that have been offered to various witnesses.

...

22. What motives do the police files have for people to implicate Jim Driskell in the killing?

23. What motives do people have for assisting the police that are demonstrated in the police files, and what do the police files show in connection with these last mentioned few items?

Brodsky's April 25, 1991 letter:

5. The criminal records of all witnesses on your list, what charges they had at the time, what dispositions were made, what favourable considerations were given to them for the not pressing of charges or laying of charges, and other matters that would influence them to testify in a particular fashion.

Brodsky's List of Questions dated May 10, 1991:

6. ...It must particularly be noted that, notwithstanding the records provided to us in terms of the aforementioned individuals, no response has been made with respect to the issue of favourable considerations, not pressing charges and other matters that would influence them to testify in a particular fashion.

The "Arrangement" Not to Prosecute Zanidean

Although the term "immunity" was used frequently at the Inquiry, when I refer to immunity, I use it in its most generic sense, simply to mean an arrangement struck that results in a person being given favourable consideration concerning criminal conduct.

A clear articulation of the procedure to follow when a prosecution witness, particularly a witness of questionable integrity, is being granted "immunity" or any other favourable consideration is discussed by The Honourable Patrick Galligan, Q.C. in the analogous situation of an accomplice, as follows:

It has been consistently held by Canadian courts that, before an accomplice testifies against someone with whom the accomplice committed a crime, the charge against the accomplice should have been completely dealt with and the sentence imposed. That is in contrast with the practice said to be followed in some of the courts in the United States where the charge against the accomplice is not disposed of before he or she testifies so that the threat of serious consequences hangs over the witness' head if he or she does not perform as expected by the prosecutor. That practice has been roundly condemned in many Canadian courts. The danger inherent in the practice is well explained by Mr. Justice Rothman, giving the judgment of the Court of Appeal of Quebec, in *R. v. Heng* (1995), 68 Q.A.C. 309 at page 314:

In deferring ... [the disposition of a charge(s)] ... until after he or she has given evidence in a case of this kind, there is always the danger that this will be perceived by the witness as a precaution to assure that he does give evidence as he has agreed to do. *But there is also a more serious danger that this will be perceived by the witness and others as an inducement to assure not only that the evidence be given but that the evidence be favourable to the prosecution.* [emphasis added by Galligan]¹⁴

The understanding that Anderson states he had with Swift Current RCMP in October, 1990 was that the RCMP would not pursue the arson charges against Zanidean until after he testified at the Driskell murder trial. By March and April of 1991 it was clear to both Anderson and Orr that the Swift Current RCMP had agreed (or offered) to terminate the arson investigation of Zanidean since Swift Current RCMP assumed Zanidean had or would enter the Witness Protection Program. In other words, there was an arrangement to grant him *de facto* immunity. It was on the basis of this latter undertaking that Anderson, on June 11, 1991, after Zanidean had concluded his testimony against Driskell, advised him

¹⁴ March 1996 Report of The Honourable Patrick Galligan, Q.C. to the Attorney General of Ontario in the matter of Karla Homolka.

he would not be prosecuted for the Swift Current arson. In other words, he was granted immunity.

Neither of the 'arrangements for favourable consideration' was recorded in Anderson or Paul's notebooks. None was included in 'reports' or 'supplementary reports' that went to the Crown. The only written record of these arrangements was an internal report to Johns (WPS) in October 1991, in response to a perceived complaint from the Swift Current RCMP, which report was never forwarded to the Crown.

The evidence at the Inquiry of Anderson, Paul and VanderGraaf is that they provided oral briefings of these 'arrangements' to Miller and, in the case of VanderGraaf, that he also briefed Dangerfield. Like the arrangements themselves, there is no written record of any of these conversations with Miller and/or Dangerfield.

What happened in this case is just plain wrong. This case exemplifies why that process is so wrong. Zanidean from the outset was negotiating favourable consideration for, amongst other things, the Swift Current arson that he (and Driskell) committed. Even if he was not explicitly or formally advised that favourable consideration would be given in return for his prosecution testimony, it was, at the very least, implicitly understood that he would be. It was apparent and logical to both Zanidean and his counsel that the *quid pro quo* for favourable consideration regarding the Swift Current arson charge was that he be a cooperative witness. By a cooperative witness I mean, and he would have understood, that he testify in a manner consistent with his statements to the police. That, of course, can mean nothing short of ... stick to your statements and you will be rewarded. It appears that Anderson, Paul and VanderGraaf believed it was appropriate to proceed in this fashion, based on advice they said they received from Miller. The rationale was that since no explicit promise or favour was given the witness prior to his testimony, he would not be contaminated and not testify in return for rewards granted. The fallacy and the disingenuousness of this position is

that the police knew that he was going to be rewarded (for his testimony). Zanidean and Kovnats had every reason to believe that Zanidean would be rewarded, yet he was able, under this process, to totally mislead the jury.

The WPS “arrangement” with the RCMP and the decision to formally withhold it from Zanidean until after he testified was wrong. I am satisfied the jury was seriously misled as to Zanidean’s motivation to testify.

Dangerfield had sufficient information to oblige him to make inquiries about the Kovnats/Miller negotiations. Dangerfield knew from the unusual incident at the Public Safety Building at 9:00 p.m. on a Sunday night just prior to the trial that there was a serious disagreement surrounding the negotiations between Kovnats and Miller. It is disingenuous for a trial prosecutor who had involved himself in the middle of a volatile negotiation concerning the witness to then rely on some sort of “Chinese wall” within the Manitoba Justice Department as an excuse for not fully informing himself about those negotiations. He knew that such negotiations, absent those that dealt purely with protection issues that might reveal Zanidean’s whereabouts, should be disclosed to the defence. That was his professional responsibility.

At the same time, Miller had a professional obligation to ensure that Dangerfield was informed about the negotiations with Zanidean and Kovnats. Miller should have provided a written report to Dangerfield, in disclosable form, about all of the many material developments in the course of these lengthy eight month negotiations. No such written report was ever provided.

There have been many instances in my experience where the conduct of a deceased has become a focus. I am mindful of this. I have no hesitation in accepting the evidence at this Inquiry that Bruce Miller was a man held in high repute and esteem.

Favourable Considerations

In Brodsky's May 10, 1991 letter to the Crown, information was requested concerning "favourable considerations" provided to witnesses. This request was passed on to VanderGraaf, and Anderson, who prepared a supplementary report. The response provided to Brodsky was that "protection is the only favourable consideration" and "we are not aware of...any other deals made with any witnesses in exchange for testimony". This is a misleading response. It implicitly denies what was actually occurring regarding Zanidean's and Kovnats' ongoing demands for immunity; Zanidean's likely hope of some future benefit; the actual "arrangement" made with the Swift Current RCMP; and the substantial financial package for Zanidean that was still under negotiation. These were all matters that should have been disclosed to Brodsky. Dangerfield and Lawlor had by that time received some information about the Swift Current matter, which they disclosed orally at the pretrial. That should have put them on notice that Anderson's May 18, 1991 supplementary report was incomplete at best. After the incident at the Public Safety Building, as earlier mentioned, Dangerfield should have made further inquiries of the police, and/or Miller, about the status of the Swift Current arson and the negotiations with Kovnats and Zanidean so that he was in a position to make full disclosure to Brodsky.

2. Failure to disclose Zanidean's informer status.

Brodsky's May 10, 1991 'Questions Memo'

What information do the police have in their files with respect to Zanidean's involvement in the drug scene and has Zanidean ever been an informant for the police in terms of drugs or other matters?

Brodsky's question asked if Zanidean had "ever been an informant for the police." Presumably to avoid giving an answer to the question asked, Anderson reframed the question when he responded as to whether Zanidean ... "had been an informant prior to his involvement with James

Driskell”. By reframing the question, Anderson misled the Crown and Brodsky in that he omitted the relevant fact that Zanidean was the rewarded informant on the “chop shop” charges. Once again the response to Brodsky’s relevant and legitimate question was a misleading and therefore false response.

3. Failure to accurately disclose all of the information about the Swift Current arson

Brodsky’s February 7, 1991 letter:

We have eight or nine statements from Zanidean, are there more that we do not have? I would like a record of all of his contacts with the police and whether by way of formal statement or written notification in a police officer’s notebook.

Brodsky’s April 25, 1991 letter:

What do the Winnipeg City Police have on the fire in Swift Current, Saskatchewan...?

On April 26, 1991, Lawlor responded to Brodsky’s first request by stating “I am advised that you have all statements/conversations of Zanidean”. This response was inaccurate. Lawlor and Dangerfield did not have Anderson’s and Paul’s notebooks at the time of this response. Lawlor provided this information “on advice” from WPS (Anderson, Paul, VanderGraaf.) All of Zanidean’s statements to the police about the Swift Current arson were important and relevant. They ought to have been properly recorded by the WPS, sent to the Crown and then disclosed to the defence. This did not happen. Anderson and Paul failed in this regard and VanderGraaf, as their superior, should have ensured an accurate recording was kept and forwarded to the Crown.

Brodsky’s second request was referred to VanderGraaf by Lawlor. Lawlor responded to Brodsky in a letter dated April 29, 1991 that “Winnipeg Police have nothing on these incidents.” This is false. It is

apparent that this response to Brodsky's request was provided to Lawlor by the WPS. The WPS had the documentation that Burton of the Swift Current RCMP sent to Mann of the WPS in December 1990 about the Swift Current arson. Information about the Swift Current arson and a file # also appears in Zanidean's application form for the Witness Protection Program, prepared by WPS in or about March 1991. By May 22, 1991, the date of the second pre-trial before Morse J., Dangerfield and Lawlor had received some briefing about the WPS dealings with the RCMP in Swift Current. They had a professional obligation to make further inquiries about their earlier response to Brodsky which they would logically have known to be incorrect. Full disclosure of the WPS file, which included the Swift Current arson file information, along with Zanidean's two statements about the arson, would have strongly suggested that Zanidean burned the house because he was paid to do so, not for revenge, as he testified. Zanidean's motivation to commit crime, in return for money, as well as his preoccupation with the Swift Current arson when meeting with the WPS, would have been useful information for the defence.

4. Failure to correct any misleading or inaccurate evidence given by Zanidean at trial.

When examining Lawlor's conduct, I am mindful of the role he played in this matter. The evidence is clear that he was the "junior" Crown counsel. Dangerfield was in charge. Lawlor operated in this capacity at all relevant times. I am of the view, therefore, that in all areas where the trial Crowns' conduct can be criticized, Dangerfield must bear greater responsibility than Lawlor.

Crown counsel has a duty to correct Crown evidence that he/she knows to be false or misleading. The real issue here is whether Zanidean's evidence was false/misleading and whether the Crown knew or ought to have known it was false/misleading. It seems clear that Zanidean's evidence left the jury with a misleading picture on a number of

material points, as outlined above in Part II under heading 34. Dangerfield and Lawlor had sufficient information to at least give rise to concerns as to whether Zanidean was being truthful about his motivations and about favourable considerations that were being discussed or were already granted. The Crown had passed on Brodsky's earlier requests concerning these matters. The Crown would therefore have reasonably anticipated that Zanidean would be cross-examined on these matters which were obviously relevant. Once that cross-examination took place and Zanidean's evidence appeared to be misleading, it was incumbent on them to make further inquiries of the WPS and specifically to inquire of Miller about the negotiations and arrangements with Kovnats and Zanidean.

5. Failure to disclose Zanidean's recantation.

As described earlier, on June 20, 1991, six days after Driskell had been convicted of first degree murder, Zanidean was still trying to finalize his financial package with the Crown. Sgt. Paul was providing protection for Zanidean at the hotel when he became involved in an argument with Zanidean. During the argument Zanidean threatened to "go to the press" and state "that his testimony had all been lies."

Zanidean's statements in this regard took place in the context of his dissatisfaction with the progress being made concerning the benefits package. This incident confirms that Zanidean had given his evidence under a hope or expectation of future benefits and that he threatened to withdraw his evidence when some of the anticipated benefits did not materialize. The telephone records obtained by Paul confirmed that Zanidean called Brodsky's office. The blow-up, the threat of recantation and the telephone records were material and relevant evidence that Paul should have recorded in a contemporaneous police report and communicated to the Crown. The Crown in turn would be obligated to disclose the report to Brodsky. Such a report once disclosed to Brodsky would have (a) had the benefit of allowing Brodsky to prove the identity of the anonymous caller to his office on June 20, 1991 who, as will be

recalled, suggested Driskell had been convicted on false evidence; (b) it would have been information supportive of Brodsky's position that Zanidean was benefiting or expecting to benefit from his testimony, or at least that he was expecting not to be placed at disadvantage by being a witness, as he had implied in his testimony; and (c) it would have shown Zanidean's character in that he was willing to use threats of recantation in order to get his way. Brodsky could have utilized this information in support of an application to adduce new evidence at Driskell's appeal.

6. Failure to disclose the Quinney correspondence prior to Driskell's appeal, and following his appeal.

Quinney letter dated January 16, 1992:

Although perhaps not our prerogative it would also be our recommendation that disclosure of this information be made to counsel acting for Mr. Driskell at your earliest opportunity. The recent *Stinchcombe* decision from the Supreme Court of Canada clearly establishes our ongoing obligation to continue disclosure.

The subject matter of the Quinney letters dated January 16, 1992 and March 9, 1992 was, as was suggested by Quinney, relevant, material and disclosable pursuant to both established Manitoba policy and practice, and, after November 1991, pursuant to the Supreme Court of Canada's decision in *Stinchcombe*. The information in these letters should have been disclosed to Brodsky as soon as possible after receipt and certainly long before Driskell's appeal (held in December 1992). Miller received these materials and reviewed them. The evidence is unclear as to exactly when Dangerfield received the letters from Miller. It may well be that Dangerfield did not receive the original memo from Miller and therefore only received the information in March, 1993. Given that Miller had lead responsibility for the negotiations with Zanidean, which were at the heart of the Quinney materials, and since the letter recommended disclosure to the defence, Miller ought to have followed-up with Dangerfield to ensure that disclosure was made. The failure to disclose before the appeal does

not mean that there was not an ongoing obligation of disclosure; there was.

This continuing obligation to disclose was recognized in the correspondence in late March 1993 between Miller and Dangerfield. I believe that Whitley had been made aware of the issue, whether or not he received Miller's April 13, 1993 memo which refers to Miller having discussed the issue with Whitley "on a couple of occasions". There is no reason why Miller would have made this notation if it had not occurred. Miller was involved in this issue throughout April 1993, for the purpose of ministerial briefings in response to the media controversy and questions in the Legislature about the case. Even though Whitley was ill and on medical leave for a relatively short period at about this time, these are matters about which he as ADM would have been aware. Whitley was spoken to by Miller. He was coordinating other correspondence on the file with Miller. This was a very important issue, and as the ADM responsible for criminal law, he had an obligation to be satisfied that disclosure was made and the harm corrected. It was not. Whitley, among others, bears the responsibility. Miller as the original recipient, and Dangerfield as the subsequent recipient of the Quinney letters, must also accept responsibility for the failure to ensure the information was passed on to Driskell/Brodsky. I do not conclude that the failure was deliberate but the failure was, at least, careless indifference.

7. Failure to disclose new factual information uncovered in the 1993 Hall and Ewatski Review.

The Hall and Ewatski Review uncovered relevant information and documents that had been previously unknown to the Crown such as: the Crime Stoppers' payments to Gumieny and Zanidean; Paul's report setting out Zanidean's June 20, 1991 threat of recantation; proof of the identity of the anonymous caller to Brodsky on June 20, 1991; Gumieny's post-conviction threats to recant his trial testimony; substantial RCMP documentation about the Swift Current arson and the "arrangement"

between the WPS and the RCMP not to charge Zanidean with the arson; and the fact that Mann had been looking for Zanidean in Winnipeg prior to Zanidean going to the police and becoming a Crown witness. Each of these pieces of evidence would have been helpful to Brodsky and subsequent Driskell counsel in their quest to have the case re-opened. After receipt of the Hall and Ewatski Report, WPS should have disclosed this information to the Crown. Even if, as I accept, Hall and Ewatski and members of the WPS thought at the time of the report that Driskell/Brodsky and/or the Crown were generally aware of much of what they had learned, it should have become clear with the continued media controversy that Driskell/Brodsky did not have this specific information.

I do not believe Hall and Ewatski should be criticized for not initially disclosing to the Crown the relevant information from their 1993 Report. Their Report was an internal Report. Neither Hall nor Ewatski were or had been investigators of the homicide. They were reporting directly to Chief Henry. However, after 1998 when Ewatski became Chief and requests were made to disclose the Report, he should, as Chief, have released the Report to Manitoba Justice, or at the very least, all of those portions that were relevant to the ongoing controversy about favourable considerations, deals, etc., for Zanidean's and Gumieny's benefit, as well as the threatened recantations of Zanidean and Gumieny. He was familiar with the information contained in the Report and must have been aware of the continued controversy. Ewatski contributed to Driskell's continued incarceration by refusing to disclose the Report after he was appointed Chief in 1998.

8. Failure to respond accurately to Duncan in 1995 concerning "deals" with Zanidean.

Duncan letter to Miller, January 2, 1995:

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

Miller had prepared a draft response to this letter. Before it was sent to Duncan, Miller was appointed a judge so Finlayson sent a response based on Miller's draft. Finlayson was assured by Lawlor that Miller's draft was accurate. The response provided was that everything had been led in evidence. It had not. Lawlor and Miller both contributed to Finlayson making this inaccurate response. Miller, by this time, knew that Zanidean had been paid a large cash settlement and had been told that he had *de facto* immunity on the Swift Current arson, a promise that had ultimately led Saskatchewan Justice to decide not to charge him. The cash settlement was paid after the trial and Anderson's 'formal' advice to Zanidean about the immunity was also given after the trial. Miller must have known that at least these matters could not have been led in evidence (although the negotiations regarding these matters could have been). Lawlor may not have been aware of these post trial developments, but he did know that no evidence was led at trial about deals or arrangements with Zanidean.

9. The Schille Review

In assessing Schille's role, it must be remembered that he was dealing with a decade old file whose correspondence had been disassembled and reassembled out of sequence. Furthermore, the police notes were missing from the file. He perhaps should have asked himself more questions when the documentation was not clear. Notwithstanding he could have done a more thorough review, I am not prepared to conclude that he either intentionally or recklessly failed in his professional responsibility. He will not be the subject of censure in this report for failing to realize, for example, that the Saskatchewan Justice correspondence had not been forwarded to Driskell/Brodsky.

10. Summary

Having regard to the issues raised in the Order in Council, based on the evidence presented, I find that the conduct of Crown counsel,

Whitley, Miller, Dangerfield and Lawlor fell below then existing professional standards expected of lawyers and agents of the Attorney General.

I also find that the WPS, namely VanderGraaf, Anderson and Paul, failed to disclose material information to the Crown before, during and after Driskell's trial. Ewatski's failure to disclose occurs only after he became Chief in 1998. These failures contributed to the miscarriage of justice suffered by Mr. Driskell.

The significant role the WPS and Manitoba Justice played in Driskell's wrongful conviction has now been thoroughly examined by not only this Inquiry, but also by the two reports authored by The Honourable John J. Enns and the investigative report of David McNairn of the Federal Department of Justice.

Paragraph (c) of the Order in Council is as follows:

To give advice about whether the conduct of Crown Counsel or members of the Winnipeg Police Service should be referred to the Law Society of Manitoba, or to the Law Enforcement Review Agency or an appropriate independent police service, for review and possible investigation by those bodies.

It is to be remembered that three of the four police officers are no longer with the WPS. Accordingly, the Law Enforcement Review Agency would have no jurisdiction to conduct an investigation or pursue disciplinary proceedings. The fourth, Ewatski, has, I am informed, tendered his resignation effective in the near future. There are also limitation periods which apply to an investigation by the Law Enforcement Review Agency. In these circumstances, therefore, I believe it would serve no purpose to recommend a review by that Agency.

As to whether the conduct of Crown Counsel should be referred to the Law Society of Manitoba for further investigation or review, it is, as above, to be remembered that three of the four counsel about whom I have

made adverse findings no longer practise in Manitoba. While the Law Society of Manitoba would have jurisdiction to investigate Lawlor, it would be disproportionate, in my view, to single out Lawlor given his role as junior counsel. The evidence heard at this Inquiry, and this report, is of course available to the Law Society of Manitoba.

As far as any further police investigation regarding possible criminal charges, I would not in all of the circumstances recommend such pursuit. A further police investigation is not likely to uncover any additional information. While there were a number of serious breaches of basic disclosure obligations at an institutional level, it would be extremely difficult, given the passage of time, to establish beyond a reasonable doubt that particular individuals were criminally culpable. I do not believe there would be a reasonable prospect of conviction against individual police officers or Crown Counsel. In these circumstances, therefore, I do not recommend such an investigation.

I am aware that Driskell has commenced a civil action. I should note that other persons convicted of crimes as a result of miscarriage of justice have received compensation. I recommend that Driskell's claim for compensation be considered in light of the findings in this report.

IV. SYSTEMIC ISSUES ARISING FROM FACTUAL INQUIRY

1. The WPS

Note Taking and Statement Taking

The Inquiry heard evidence concerning Anderson, Paul and VanderGraaf's failure to make notes or produce reports of various events, and their explanation that they were acting in accordance with general WPS practices in effect at the time.

Even though there were no formal policies in place at the time, it was the accepted practice and fundamental to a police officer's role in the justice system that there be an accurate record of the information given to the police officer. If that information relates to a prosecution, it must be passed on to the Crown Attorney. This was not always done in the Driskell investigation. The police do not take notes just for *their* benefit (to assist their recollection in the future). They are recording information that may have great significance to the Crown and to the accused. Because the significance of this information may not be apparent until some time in the future, it is imperative that, to the extent possible, *all* information be recorded and passed on.

The WPS in its Submissions advised that the WPS "Notebooks Policy" was revised in May 2006 as part of a comprehensive "Manual Rewrite" that began in 2005 and is ongoing. Furthermore, it advised that the Police Reports Policy was revised in July 2006 and the interviewing policy was revised in February 2000.

I have reviewed these policies (Exhibit 43(d)). Although they are commendable, I recommend that the policies specifically state that complete, detailed notes are to be taken and that *all* this information is to

be passed to the Crown Attorney if it relates to a prosecution, including all information relating to the credibility of a prosecution witness.

Disclosure to the Crown

The WPS points out that there is now in place a written disclosure protocol that requires the police to disclose to the Crown:

All information relating to the investigation, that is within the possession or control of the police, whether relevant or not...All information must be shared with the Crown at the first reasonable opportunity in an organized and descriptive manner having regard to the nature of the investigation...

I am of the view that this policy, combined with the amendments I have suggested to the policies on note taking and report writing, are sufficient to address the issues raised in the Driskell matter.

Before leaving this area, I think it is important to commend the steps taken in August 2006 by the Canadian Association of Chiefs of Police, under the leadership of its President, Chief Ewatski, in regard to the prevention of miscarriages of justice, and the recommendations pertaining to police training.

2. Manitoba Justice

Direct Indictments

In this case, the Crown chose to obtain permission to proceed by way of “direct indictment”, thus eliminating the need for a preliminary inquiry. I concur in the comments of The Honourable John Enns in his *Review of Police to Crown Disclosure Compliance in the James Driskell Murder Trial and Appeal*, when he said:

With the benefit of hindsight, perhaps in the Driskell case it would have been better to have convened a preliminary hearing to enable both Crown and defence to test issues such as the credibility of the two main Crown witnesses, Reath Zanidean and John Gumieny.¹⁵

I have reviewed the Manitoba Policy Directives contained in Exhibit 23. The first Policy Directive was in effect at the time of the Driskell investigation and trial. It sets out a number of factors to consider when deciding whether a direct indictment will be preferred. In the case of preferring an indictment where a preliminary inquiry has been held and the accused discharged, written representations from counsel for the accused are normally invited. There is no such invitation where a preliminary inquiry has not been held, such as with Driskell.

The “direct indictment” policy directive as it existed as of August 1996 states in part:

Where no preliminary inquiry has been held a direct indictment deprives the accused of a significant opportunity to test the Crown’s case, and must therefore only be used where exceptional circumstances justify such a procedure.

The updated Policy Directive, dated December 2004, does not contain that same commentary and states:

...the power to indict an accused directly should be exercised in accordance with the criteria set out in this policy and in the interests of justice in the particular case.

This does not go far enough. In my opinion, the 1996 Commentary ought to be included. The preliminary inquiry has a long history in Canadian criminal law. It can be and often is of immeasurable

¹⁵ *Review of Police to Crown Disclosure Compliance in the James Driskell Murder Trial and Appeal*, dated March 2004, p. 11.

assistance to the Crown and more often to the accused. Overriding the right to a preliminary inquiry when that right is available in the *Criminal Code* is an extraordinary step only to be used in the rarest of cases. I believe that had a preliminary inquiry been conducted in this case, the likelihood of this miscarriage of justice having occurred would have been diminished. It is my recommendation that the accused's counsel should be invited to make submissions to the Attorney General, not only when the decision about proceeding by way of direct indictment is being considered by the Attorney General after an accused has been discharged at the preliminary inquiry, but also in situations like Mr. Driskell's where the accused has been charged but there has been no preliminary inquiry.

Bench and Bar Meetings

Driskell and AIDWYC proposed the creation of a Criminal Justice Committee, such as recommended in the *Lamer Inquiry Report*. The WPS also recommended the creation of a similar committee. There can be no doubt that there is need for constant and continuing dialogue between the various participants in the criminal justice system. It can only enhance our system. However, I feel that a more "informal" or less regimented process may be more beneficial.

I recommend that there be quarterly meetings of representatives of the Bench, the Crown, the Defence Bar, the police and correctional authorities. Such meetings would open the channels of communication between these branches of our justice system and enable them to address the myriad of issues that constantly arise.

Homicide File Review

In the *Thomas Sophonow Inquiry Report*, Commissioner Cory stated as follows with respect to the important role that Crown Counsel plays:

The role of Crown Counsel is of great importance to the administration of justice and to the welfare of the community. The Crown prosecutor must proceed with the case against the accused fairly and courageously... Crown Counsel must be of absolute integrity and above all suspicion of favouritism or unfair compromise.

Crown Counsel must be a symbol of fairness, prompt to make all reasonable disclosure. As well, they must be scrupulous in the attention given to the welfare and safety of witnesses. They enjoy the respect of all the judiciary. The community looks upon the Crown prosecutor as a symbol of fairness, of authority and as a spokesman for the community.¹⁶

In the *Lamer Inquiry Report*, Commissioner Lamer also commented on this critical figure in the justice system:¹⁷

The role of a Crown Attorney requires not only professional skills and judgment but also courage. Often the working conditions include difficult time pressures and limited resources. It may be particularly difficult for less experienced Crown attorneys to exercise contrarian thinking. Experienced Crown attorneys, in leadership roles must foster critical thinking and independence in their younger counterparts. A Crown attorney, like a judge, must not only exercise good judgment but must also be willing to make unpopular decisions.

I concur with and strongly support these views.

In recent years, non-disclosure issues have arisen in three homicide cases prosecuted by Dangerfield – *Sophonow*, *Driskell* and *Ostrowski*. In addition, in *Unger* and *Sanderson*, two other homicide cases prosecuted by Dangerfield, hair microscopy evidence given at trial has since been refuted by DNA evidence. Dangerfield, now retired, was a dedicated hard-working Crown attorney. Nevertheless, in light of his involvement in the Driskell and above-mentioned cases, I recommend that if there are similar

¹⁶ *Thomas Sophonow Inquiry Report*, p. 55.

¹⁷ *Lamer Inquiry Report*, pp. 136-137.

cases of his in which people come forward claiming a wrongful conviction, that Manitoba Justice direct an independent external review of those cases.

3. Post-Conviction Disclosure

The Honourable G. Arthur Martin, Q.C., in the *Report of the [Ontario] Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, stated as follows with respect to the Crown's disclosure obligations:

The need to disclose extends into appeal periods following conviction. The factual findings of the Marshall Commission demonstrate clearly the need to disclose evidence that Crown counsel realizes raises a doubt about the guilt of someone who has already been convicted, no matter when such evidence comes to Crown counsel's attention. The Commissioners conclude, at Vol. 1, p. 87, that had certain evidence, which came to light only after Mr. Marshall's conviction in 1971, been brought to the attention of the Crown counsel responding to the conviction appeal, and through Crown counsel to the defence and the Court of Appeal, a new trial would have been "all but inevitable".

While the obligation to disclose extends throughout any appellate litigation that follows a conviction, it is not tied to the currency of any appeal periods. In a number of recent cases, the disclosure of evidence, whether fresh or otherwise, sometimes even years after all appeal routes had been exhausted and convictions upheld, has led to new trials being ordered, or convictions quashed outright. See, for example, *R. v. Marshall*; *Reference re Milgaard* ... where the Supreme Court concluded that the original trial and appeal were error free and fair, but ordered a new trial based on fresh evidence; and *Reference Re: Nepoose* ... The *Nepoose* reference is particularly instructive on the importance of police disclosure to Crown counsel. The Alberta Court of Appeal, in ordering a new trial based on the fresh evidence, commented, at 423, that much of the fresh evidence "was either known

to the investigators or in the possession of the investigators, but not made available either to the Crown prosecutor or to the accused.”¹⁸

It appears from Exhibit 43d that the WPS now has a policy in place for cataloguing and ensuring that all material is provided to the Crown. I recommend this policy be revised to extend to all post-conviction disclosure, whenever the information is obtained. This policy also must incorporate a procedure by which this information is given to the Crown.

It does not appear that Manitoba Justice has a policy to deal with post-conviction disclosure. I recommend their pre-trial disclosure policy be extended to include post-trial disclosure. This revised policy must also incorporate a procedure by which Manitoba Justice receives this information from the police and then discloses it to the accused or counsel.

4. Unsavoury Witnesses

It is clear from the evidence advanced at the Inquiry that Zanidean and Gumieny fall into the category of “unsavoury witness.”

Much has been written about this category of witness. The category includes jailhouse informants, accomplices and other potentially unreliable witnesses. In considering the issues relating to these witnesses, it is important to revert to basic principles. Justice Dickson of the Supreme Court of Canada referred to this in *Vetrovec v. The Queen* as the “common sense” approach:

I would hold that there is no special category for “accomplices”. An accomplice is to be treated like any other witness testifying at a criminal trial... I would only like to add one or two observations concerning the proper practice to be followed in the trial court where as

¹⁸ *Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, 1993, at p. 207.

a matter of common sense something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character...¹⁹

It is clear that Justice Dickson felt that there should be no pigeon-holing of these types of witnesses. It does not matter whether they are jailhouse informants, accomplices or any other type of “unsavoury” witness; what matters is the recognition of the important fact that their evidence may be suspect, for one reason or another.

Commissioner Kaufman in the *Commission on Proceedings Involving Guy Paul Morin* addressed this in his Recommendation 52 – Extension of Crown Policy to Analogous Persons:

The current Crown policy defines “in-custody informer” to address one type of in-custody witness whose evidence is particularly problematic. However, the policy does not address similar categories of witnesses who raise similar, but not identical, concerns. For example, a person facing charges, or a person in custody who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in-custody informer to falsely implicate an accused in return for benefits. The Crown Policy Manual should, therefore, be amended to reflect that Crown counsel should be mindful of the concerns which motivate the policy respecting in-custody informers, to the extent applicable to other categories of witnesses, in the exercise of prosecutorial discretion generally.²⁰

The issue that arose in the Driskell case (and appears to have occurred in *Ostrowski*) is that dealings with this type of witness were not fully documented and not disclosed to the defence.

¹⁹ *Vetrovec v. The Queen* (1982), 67 C.C.C. (2d) 1 at 17.

²⁰ *Commission on Proceedings involving Guy Paul Morin*, Recommendation 52.

The recommendations regarding note taking, report writing and disclosure should cover all dealings with these witnesses, however, I would also recommend that the WPS policies and Manitoba Justice policies be revised to specifically provide that *all benefits* requested, discussed, or provided or intended to be provided *at any time* in relation to any “central” witness be recorded and disclosed.

5. The Post-Conviction Review Process

In the *Thomas Sophonow Inquiry Report*, Commissioner Cory recommended that:

...there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged...²¹

I concur in this recommendation, especially in light of the submissions of the WPS, and the evidence of Chief Ewatski, recognizing the difficulties encountered with the post-conviction review process. In particular, I am concerned about the adversarial nature of the present process. Driskell could not launch an application until he had sufficient disclosure to satisfy the Department of Justice standard for launching a section 696.2 review. However, the WPS would not make disclosure for purposes of a section 696.2 review until Driskell’s application was made. This is a classic ‘catch 22’ situation. If there was an independent inquisitorial body, as in the U.K., it could, after having been satisfied that a threshold, not necessarily a high threshold, has been met, commence the section 696.2 process of its own initiative. In this way, information that is unavailable to the applicant because of their inability to compel disclosure,

²¹ *Thomas Sophonow Inquiry Report*, p. 291.

would be available to the independent agency to allow them to make a better determination of whether a miscarriage of justice occurred.

V. USE OF THE CROWN STAY POWER IN S.696 CASES

Paragraph 1(f) of the Order in Council directs the Inquiry as follows:

- (f) To consider whether and in what way a determination or declaration of wrongful conviction can be made in cases where:
 - The Minister of Justice for Canada directs a new trial under s. 693.3(a)i [now s. 696.3] of the Criminal Code; and
 - After a review of the evidence, Crown Counsel directs a stay of proceedings under s. 579 of the Criminal Code.

As this paragraph raised a policy issue, and was not dependent on any adjudicative facts, the Commission initially delegated Professor Kent Roach of the University of Toronto Faculty of Law to write a Report on the issue. He produced a thorough 63 page Report, together with a three page Executive Summary.

Commission Counsel, after consultation with me and with Professor Roach, listed seven major questions or issues arising from the Roach Report that I felt required further discussion to assist me. The seven questions or issues were then discussed by a panel composed of Professor Roach and six other experts:

- Rob Frater, Senior General Counsel, Federal Prosecution Service, who has worked at all levels of the federal Department of Justice, including trial, appellate and policy work;
- Geoffrey Gaul, an experienced senior prosecutor in British Columbia and currently the Director of Legal Services, Criminal Justice Branch, Ministry of the Attorney General;

- Professor Tim Quigley of the College of Law at the University of Saskatchewan, a leading scholar in the field of Canadian criminal procedure;
- Bruce MacFarlane Q.C., former Assistant Deputy Attorney-General (Criminal Law) for Canada, former Deputy Attorney-General for Manitoba, and currently a professor at the University of Manitoba Faculty of Law;
- Retired Justice of the Newfoundland Court of Appeal, William Marshall, who is currently conducting a review of the prosecution service in Newfoundland as a result of the recommendations of the *Lamer Inquiry*;
- Kerry Scullion, Director and Senior Counsel in the Criminal Conviction Review Group in Ottawa where he advises the federal Minister of Justice on s. 696 cases.

The panel discussion took place at a roundtable hearing on September 18, 2006. The parties, Commission Counsel and myself all participated in the panel discussion.

The Roach Report is attached as Appendix F. It sets out a detailed discussion of the topic, together with citations to all the relevant jurisprudence and commentaries. Accordingly, I can be succinct in stating my own conclusions and recommendations.

I will follow the same seven part analytical structure that was used at the roundtable hearing on September 18, 2006, in order to discuss this question of the use of the Crown stay power in s. 696 cases.

The factual context for this issue is simple and does not require any great elaboration. On March 3, 2005, the federal Minister of Justice exercised his powers under what is now s.696.3(a)(i), setting aside Driskell's conviction for first degree murder and ordering a re-trial in the

Manitoba Court of Queen's Bench. The exercise of this *Criminal Code* power requires that the Minister "conclude that a miscarriage of justice likely occurred." The Minister made a public statement, accompanying his decision, to the effect that failures to make full disclosure had "clearly denied Driskell the right to a full and fair hearing" and had "seriously prejudiced the fairness of the original trial and the validity of the original conviction." As can be seen from this report, I concur in that determination.

Very shortly after the s. 696.3 order, Manitoba Justice entered a Crown stay pursuant to s.579 of the *Criminal Code*. The stay was not entered at an appearance in open court but by a letter, dated March 3, 2005, from senior Crown Counsel Robert Morrison Q.C. to the Clerk of the Court. Although this letter was written on the same day as the Minister of Justice of Canada's order, Manitoba Justice had obviously been reviewing the file for some time as a result of Justice Scurfield's bail order on November 28, 2003 and Mr. McNairn's detailed report to the federal Minister of Justice on August 26, 2004. Mr. Morrison directed that a Crown stay be entered on the basis of his conclusion that "no reasonable jury could now have sufficient confidence in the testimony of Zanidean and Gumieny so as to convict Mr. Driskell."

1. What is the effect of a Crown stay under s. 579 of the Criminal Code and the deeming provision after the passage of one year?

The Roach Report comprehensively reviews the case law and commentary dealing with this first question (at pp. 9 – 17 and 55 – 58). Based on the authorities, Roach concludes that a Crown stay merely "suspends" the proceedings. A stay does not involve any adjudication on the merits of the case and does not give rise to any protections against

double jeopardy. Accordingly, the same proceedings that have been stayed can be recommenced by the Crown at any time. The effect of the deeming provision in s. 579(2)²² is simply that the Crown would have to commence afresh, with a new Indictment or Information, rather than simply re-activating the existing charging documents.

There was no initial disagreement by the panel with Roach's legal opinion on this issue. However, at later points in the hearing, some panellists took the position that the Crown stay does not merely "suspend" the proceedings but actually brings the prosecution to "an end" or to a "termination." This appeared to be a semantic debate since all panellists agreed with Professor Roach that the Crown could recommence the proceedings, at any time, after entering a stay. Some of this debate over what terminology best characterizes the effect of a stay may be due to a failure to distinguish between a judicial stay (which does terminate proceedings) and a Crown stay (which does not).

I agree with the views of Roach on this first question. It is a pure question of law and the authorities are clear. The plain dictionary meaning of the term "stay" is that it is a "suspension of judicial proceedings" or a

²² S. 579(1) and (2) provide as follows: (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated; (2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the commencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

“postponement of carrying out judgment.”²³ Former Chief Justice Lamer recently addressed the issue and concluded, “A stay of proceedings simply puts the charge on hold.”²⁴ Black’s Law Dictionary gives the legal meaning of the verb stay as “to hold [it] in abeyance” and defines the noun stay as “a suspension of the case.”²⁵

There appears to be no room for disagreement with this common sense, and legal, understanding of the effect of a Crown stay entered pursuant to s. 579 of the *Criminal Code*. Given that the Crown can recommence the same proceedings at any point, after entering a s. 579 stay, it is not accurate to say that the stay “terminates” or puts “an end” to the charge(s). It merely suspends the proceedings to await some further decision by the Crown as to the status of the prosecution.

2. What is the effect of an order for a new trial under s. 696.3(a)(i)? Does it create a reasonable expectation of either a re-trial or a verdict of acquittal and does the entry of a Crown stay in such cases leave some remaining stigma?

Roach discusses these issues at pp. 3 – 9 and 42 – 43 of his Report. He points out that the statutory standard for obtaining one of the two available remedies under s.696.3 is that a “reasonable basis” exists “to conclude that a miscarriage of justice likely occurred.” Upon making this finding, the Minister of Justice must send the case back to the courts (either to the Court of Appeal, for a fresh appeal, or to the trial court for a “new trial”). Given this statutory scheme, the Minister does not determine issues of guilt or innocence. Rather, the Minister simply decides that the

²³ *The Concise Oxford Dictionary*, 7th Ed. 1982, at p. 1039.

²⁴ *Lamer Inquiry Report*, p. 317.

²⁵ 5th Ed. 1979, West Publishing Co., p. 1267.

case should be “returned to the judicial system” where the courts will determine the substantive issues.

Professor Roach concludes that the s.696 process respects the separation of powers between the Executive and the Judicial branches, by referring likely miscarriages of justice back to the courts. He asserts that the judiciary has ultimate responsibility for convictions and that this process “creates a legitimate and reasonable expectation that a successful applicant’s conviction will be reconsidered by the courts.”

A number of different views emerged from the panel. In particular, Mr. Scullion took the position that the Minister’s order pursuant to s.696 does not create an expectation that there will be an adjudication by the courts. In his view, “it’s simply the method by which a case that is out of the system is put back in the system.” He further asserted that the Minister’s order actually “vacates the conviction” and thereby restores the presumption of innocence to the accused. Some panellists agreed with these views while others agreed with Professor Roach. As to whether the entry of a Crown stay leaves any residual stigma, the panellists’ views varied. Those panellists who took the position that the stay is a final “termination” of proceedings and that the s. 696 order does not create any expectation of an adjudication, tended to find little or no stigma from the entry of a stay in these cases.

I agree with Mr. Scullion that the Minister’s order pursuant to s.696.3(3)(a)(i) must have the effect of vacating the conviction and restoring the presumption of innocence. Although the *Criminal Code* provisions do not expressly say this, the order of “a new trial” can only be possible if the conviction has in fact been vacated. Similarly, these *Criminal Code* provisions must have the effect of restoring the presumption of innocence in order for the accused to have “a new trial” under our system of law. However, I also agree with Professor Roach that the extraordinary nature of the s.696 process gives rise to a reasonable

expectation that there will be some kind of public court proceeding to resolve the case.

Judicial processes are by definition, open public processes. Executive processes are generally not open and public. The conviction entered in these s.696 cases was entered by judicial order after an open public trial. When the executive sets aside the conviction, it does so after a necessarily confidential internal review of the case. The public knows only about the evidence that was aired publicly at the original criminal trial. When the executive sends the matter back to the courts, after finding a “reasonable basis” for a “likely” miscarriage of justice, the s.696 process creates a reasonable expectation that there will be some kind of public accounting for the case at a judicial hearing.

Given my previous conclusion, that a Crown stay merely suspends the proceedings, it cannot amount to a final statement as to the validity of the prosecution. Furthermore, the process for entering a Crown stay by way of writing a letter to the Clerk of the Court means that no judicial hearing need take place. There is no opportunity for the accused to seek a judicial remedy and there is no opportunity for the court to adjudicate on the case in any way.

I agree with the conclusions of the *Lamer Inquiry* on this point:

A stay of proceedings may leave an impression with the public that the charge is merely being “postponed” or “the authorities,” in a broad sense, still believe in the validity of the charge. That impression is likely to be magnified where, as in this case, the accused had already been convicted and spent years in prison prior to his successful appeal.

In all these circumstances, the entry of a Crown stay does leave residual stigma and is not a satisfactory final remedy in s.696 cases. It may be a perfectly appropriate interim remedy in some cases, as will be discussed below.

3. Do you agree with the *Lamer Inquiry* recommendations to the effect that a Crown stay should only be entered where there is a “reasonable likelihood of recommencement of proceedings” and that a withdrawal or the offering of no evidence should be utilized where Crown counsel concludes that there is no reasonable prospect of conviction?

This issue is discussed in Professor Roach’s Report at pp. 21 – 29. He notes that the Crown has 4 options upon receiving a s.696 order from the Minister of Justice directing “a new trial”: first, to proceed to trial; second, to offer no evidence and invite an acquittal; third, to seek a withdrawal of the charge; and fourth, to enter a stay. There are two overarching distinctions between these various options. The first three options all require a court proceeding and some judicial supervision whereas the fourth option generally does not. In addition, the first two options produce a final verdict that will protect the accused against subsequent proceedings whereas the last two options provide no protection against double jeopardy. In other words, the Crown stay is the only option that is characterized by both a lack of judicial supervision and a lack of finality.

In these circumstances, Professor Roach agrees with the *Lamer Inquiry* recommendations to the effect that the Crown should either offer no evidence, or withdraw the charge, where it has been determined that there is no reasonable prospect of conviction. The Crown stay should only be used “where there is a reasonable likelihood of recommencement of proceedings” and where, for example, the Crown simply needs more time to allow the police “to conduct further investigation.”

Some of the panellists disagreed with the *Lamer Inquiry* recommendations. Mr. Gaul argued that “there is no practical difference between a withdrawal and a stay of proceedings” and that a stay is the quickest way to “end those proceedings,” without the necessity of a court appearance, when the Crown has decided that there is no reasonable prospect of conviction. Mr. Frater and Mr. MacFarlane Q.C. added that a

further difficulty with the Crown withdrawing charges is that the *Criminal Code* makes no mention of this procedure and so there is some uncertainty as to its status.

I am in general agreement with Professor Roach, and with the *Lamer Inquiry* recommendations, in the particular context of s.696 cases. Although the *Lamer Inquiry* recommendations deal with the broad use of the Crown stay power, in all contexts, for example, at an initial trial, this is beyond the scope of my terms of reference.

As set out in my earlier conclusions, it is especially in the context of s.696 cases that there is a real need for some public accounting and for some judicial supervision of the proceedings. It is for these reasons that I do not agree with Mr. Gaul's argument that there is "no practical difference" between a stay and a withdrawal. A withdrawal must take place at a public court proceeding, there is some degree of judicial supervision and the accused is entitled to appear in court with counsel and seek judicial remedies. These are important differences that do not apply to a Crown stay. At an initial trial proceeding, where there has not yet been any public airing of the evidence, leading to a conviction, and where the Crown has decided that there is no reasonable prospect of conviction, Mr. Gaul's point about the need for an expeditious executive remedy, like a Crown stay, might have greater force. However, the argument has no real persuasiveness in a case where the accused has spent years in jail, as did Driskell, after being convicted at a public trial, and has then gone through the confidential executive process of a successful s.696 review. In these latter cases, there is a real need for public proceedings and judicial supervision.

As to the point made by Mr. Frater and Mr. MacFarlane Q.C., about the lack of any *Criminal Code* provision expressly recognizing the Crown power to withdraw a charge, the same argument could be made about many well-recognized procedural and substantive rules. The abuse of process power, the presumption of innocence, the degree of proof

beyond reasonable doubt, the entrapment defence, the limits on the defence of consent to serious physical assaults and the requirement that the *actus reus* must be voluntary are all well-known common law doctrines that are not mentioned in the *Criminal Code*. There are many more uncodified rules known to our criminal law and criminal procedure.²⁶

The Crown's power to withdraw a charge is recognized in Canadian jurisprudence. At pp. 22 – 23 of his Report (footnotes 80 – 85), Roach refers to a number of leading commentaries and cites 8 of the leading cases from courts in New Brunswick, Saskatchewan, Ontario and Nova Scotia, including two decisions of the Supreme Court of Canada. I am therefore satisfied that the power to withdraw exists in Canadian law, either as an implied power that is necessarily incidental to the power to prosecute, or as a common law power.

Given my conclusion that the Crown stay power is a temporary suspension of proceedings, pending a final determination by the Crown as to the validity of the prosecution, it is my view that a “stay” should only be exercised in a s.696 case where there is some reasonable likelihood that the proceedings will be recommenced. Assuming there is an ongoing investigation, then once it concludes the case should be brought back to court for final determination, either by way of trial, the offering of no evidence or the withdrawal of charges. Although the latter option is like the stay in that it does not provide any protection against double jeopardy, it is preferable to the stay because it is requested in open court, it is subject to some judicial supervision and it sends a clear message to the public that the Crown is not prosecuting the case, as opposed to temporarily putting

²⁶ It is to be noted, however, that since the advent of the *Charter of Rights and Freedoms*, in the last 25 years, some of these matters are now entrenched in the constitution (e.g., the presumption of innocence).

the case “on hold” by entering a stay. The word “withdrawal” is on its face more telling than “stay.”

4. If the stay is nevertheless to be utilized in s. 696 cases, should that decision be made personally by the Attorney-General (or D.P.P.) and only after hearing representations from counsel for the accused?

Professor Roach discusses this issue at pp. 29 – 32 of his Report. He notes that the s. 696 order for a new trial is made personally by “the Minister of Justice” whereas the s.579 stay power is exercised by “the Attorney General or counsel instructed by him.” Furthermore, the s.2 definition of “Attorney General” includes “his or her lawful deputy.” As a result, the stay power has been delegated down to the line prosecutor level in some jurisdictions whereas the s.696 power has been retained by the Minister.

Professor Roach argues forcefully that in s.696 cases the s.579 stay power should be exercised personally by the Attorney-General or by the D.P.P. in those jurisdictions that have adopted a D.P.P. system. He asserts that this personal intervention by the Attorney-General would “help to focus responsibility and accountability” for the exercise of an executive power that prevents the successful s.696 applicant from accessing the courts and seeking a final verdict. Professor Roach further argues that the Attorney-General or D.P.P. should receive submissions from the accused’s counsel, prior to entering a Crown stay in s.696 cases, to help counter any tendency by the prosecutors and police to be defensive or intransigent about their theory of the case, given that the federal Minister of Justice will already have found a “likely” miscarriage of justice.

When the panel of experts discussed this issue, there was broad agreement with Professor Roach’s recommendations to the effect that the stay decision in s.696 cases should be made at a very high level in the relevant Ministry of the Attorney-General or D.P.P.’s office and that

submissions should be received from the accused's counsel. The only qualification was that Mr. MacFarlane Q.C., with Mr. Frater's support, argued that the decision should be made at the Deputy Attorney-General level. Mr. MacFarlane Q.C. asserted that there was a broad trend in Justice Departments across the country "to insulate Attorneys-General from individual cases" in order to avoid the perception that the Minister is using the case "to drive a political agenda of some sort." Mr. Gaul added that in British Columbia both the Attorney-General and Deputy Attorney-General are insulated by statute (the *Crown Counsel Act*) and that the stay decision would have to be made by the Assistant Deputy Attorney-General in charge of criminal prosecutions (subject to the Minister or Deputy issuing a published written directive over-riding the ADM's decision).

Given the broad consensus on this issue, and given the cogency of Professor Roach's argument, I am in agreement with his two recommendations. I wish to comment on the one point where there is some minor disagreement between the experts, namely, whether the Crown's decision to enter a stay in s.696 cases should be made at the level of the Attorney-General or Deputy Attorney-General. I am strongly of the view that the Attorney-General must be accountable for any prosecution within his/her Ministry that has led to a "likely" miscarriage of justice. This is the very essence of the Attorney's historic role in the administration of justice, as Professor Edwards has explained so well in his writing on the subject.²⁷ Accordingly, when such a case has arisen, and the line prosecutors in the Ministry are recommending that a Crown stay be entered, thus removing the case from any public court proceedings and from judicial supervision, the Attorney-General must take responsibility for that decision. The Supreme Court of Canada made a similar point,

²⁷ John L.I. J. Edwards, *The Law Officers of the Crown*, London: Sweet and Maxwell, 1964; Edwards, *The Attorney General, Politics and the Public Interest*, London: Sweet and Maxwell, 1984.

when discussing the Crown stay power, in its unanimous decision in *R. v. Dowson*:²⁸

When one adds to these considerations the fact that, apart from the court's control, the only one left is that of the legislative branch of government, given a choice, any interpretation of the law, which would have the added advantage of better ensuring the Attorney-General's accountability by enhancing the legislative capacity to superintend the exercise of his power, should be preferred.

The likelihood that the Attorney-General will be held accountable for his/her department's handling of a "likely" miscarriage of justice is much greater if the Attorney has been directly involved in the decision-making about the case. Although there is a risk that the Attorney-General will be wrongly attacked, on grounds that his/her involvement constitutes political interference in the case, the Attorney must be able to persuasively defend and explain the department's decisions in such a case on non-political grounds. I find it hard to believe that the Attorney-General would not already have been briefed on a s. 696 case, long before the decision to enter a Crown stay. These cases have a high public profile, they raise important issues of public policy and the Attorney will invariably have had some prior knowledge and involvement in the file. The entry of a Crown stay is simply one further step in a case in which the Attorney-General should already have been engaged.

Accordingly, I am of the view that if a "stay" is to be used in a s.696 case, the decision should be made personally by the Attorney-General (or D.P.P., where applicable) on the advice of his/her senior officials, and only after receiving submissions from the accused's counsel.

²⁸ (1983) 7 C.C.C. (3d) 527 at 536 (S.C.C.).

5. Where a Crown stay is entered in a s. 696 case, should the stay be lifted before the expiry of the one year statutory period so that the Crown is then required to either proceed, withdraw or offer no evidence?

This issue is discussed in Professor Roach's Report at pp. 30 – 32 and 61 – 62. He argues that in those s.696 cases that fall within the *Lamer Inquiry* guidelines, where a Crown stay is entered in order to permit an ongoing police investigation to be completed, the Crown should lift the stay within the s.579(2) one year limitation period. In this way, the case will be brought back to court and some judicial supervision of the proceedings will be insured. Otherwise, the one year limitation period will pass, the proceedings will be deemed "never to have been commenced" and the courts will arguably lose jurisdiction over the case.

Professor Roach assumes that the police should be able to complete any re-investigation in a s.696 case within one year of the Minister's order and that when the stay is lifted the Crown should be in a position to proceed with "either a new trial or the calling of no evidence." However, he acknowledges that there may be exceptional cases where, at the end of the one year period, the accused is still under "active and fruitful investigation." In these cases, the Crown should be obliged to re-lay a fresh information at the end of the investigation and either "conduct a new trial or call no evidence." In other words, a Crown stay should never be the final remedy in a s.696 case.

The expert panel discussed this issue at the roundtable hearing. There was broad agreement with the proposition that a s.696 case, that has been stayed due to an ongoing re-investigation, should be kept under active review by the Crown in order to determine whether there is any reasonable prospect of conviction. However, the panellists disagreed as to the need to bring such a case back to court for either a trial or the offering of no evidence. Once again, the disagreement on this point turned on the debate about stigma and about the legal effect of a Crown stay. Mr. Gaul and Mr. Frater regarded the stay as "the best possible result" for the

accused because “it ends the prosecution, full stop” and “restores the state of nature” as the accused is deemed never to have been charged. Accordingly, they argued that there was no need to bring the case back to court since the Crown stay was a beneficial final remedy for the accused. Panellists like former Justice Marshall, on the other hand, supported Professor Roach because they regarded the stay as leaving some considerable stigma. Marshall argued that the legal fiction enacted under s.579(2) does not respond to the s.696 accused’s real experience of having been charged and convicted as a result of a “likely” miscarriage of justice:

To me it’s not good enough to say that the charge is deemed, you know, deemed as it didn’t exist, because it does exist. And the people ... have had to live with it.

In light of my previous conclusions, it will be apparent that I agree with Professor Roach on this issue. As previously stated, I do not agree with Mr. Gaul and Mr. Frater that a Crown stay terminates the prosecution and produces a beneficial result for the accused. It merely suspends the prosecution and, particularly in a s.696 case, it leaves a significant residual stigma. More importantly, it deprives the accused of any public accounting for the case in court and it prevents any judicial supervision and the possibility of judicial remedies. Accordingly, a Crown stay is not an appropriate way to end a s.696 case. Professor Roach’s recommendations are fair to the accused and they do not prejudice any legitimate public interests. If the police are conducting an ongoing investigation of the accused it will be appropriate to enter a Crown stay. At the end of the one year period, if the investigation still appears to be “active and fruitful,” it will be appropriate to let the stay lapse. But once the investigation is complete, the case should be brought back to court so that the Crown can give a public accounting and so that submissions can be made by both parties, under judicial supervision, as to the appropriate final disposition.

I acknowledge that there are procedural difficulties in this regard but some process has to be devised. I do not recommend re-laying a fresh

information, if the Crown does not intend to proceed, but I do recommend that the Crown appear in court, after notifying the accused and counsel, and formally withdraw or offer no evidence on the old information. It will be up to the accused to decide whether to appear and to attorn to the old information in these circumstances.

6. After a Crown withdrawal or offering of no evidence and an acquittal in s. 696 cases, should a further criminal procedure be available in which the accused can seek a finding of “wrongful conviction” or “factual innocence”?

Professor Roach discusses this issue at pp. 32 – 43 and 59 – 61 of his Report. It is the most difficult and complex part of the Report. In essence, Professor Roach argues that the two traditional verdicts available through the criminal trial process, guilty and not guilty, are an insufficient response to the phenomenon of s.696 cases. As he puts it at p.36 of his Report:

The general public, including those who interact with the wrongfully convicted, may need a more formal and official exoneration than a not guilty verdict to truly restore a person who has been wrongfully convicted to full standing in the community. Once a person has been convicted and imprisoned, something more than a not guilty verdict may be needed to fully and truly restore the presumption of innocence.

At this stage of his argument, Professor Roach is assuming that a s.696 case has been returned to a trial court and a final verdict of “not guilty” has been entered, either after a re-trial or after the Crown has offered no evidence. As he notes, the difficulty with a traditional verdict of “not guilty” is that it covers a broad array of cases ranging from demonstrable factual/actual innocence to a Crown case that establishes probable guilt but falls just short of proof beyond reasonable doubt. As a result, it is said that this broad generic verdict does not amount to a true exoneration of the factually innocent.

Professor Roach concludes that a further criminal procedure should be available, at the accused's election, in which he/she could attempt to establish factual innocence on a balance of probabilities and obtain a judicial declaration to that effect. Throughout this discussion Professor Roach uses the term "wrongful conviction" to describe actual/factual innocence, as opposed to legal innocence where the Crown merely fails to discharge its burden. Accordingly, he describes the proposed procedure as one "that would be used to declare the existence of a wrongful conviction." However, he argues that factual innocence is not limited to DNA cases where there is conclusive proof of actual innocence.

The panel of experts discussed this issue. Professor Roach conceded, at the outset of the discussion, that this was "the most difficult" issue he had to confront and that his proposal was a "somewhat tentative" exploration of the issue and that he made it "not without some doubt." The reason for his hesitation, as he acknowledged, is that his proposal could be seen as "undermining the integrity of the not guilty verdict." He agreed that his proposal could lead to the situation in a s. 696 case where the Crown calls no evidence and invites a "not guilty" verdict, and the trial judge then turns to the defence to call evidence of "actual innocence." In these circumstances, there is an obvious risk that those accused who accept the "not guilty" verdict, and decline to call evidence supporting a further verdict of "actual innocence," would be perceived by the public as factually guilty. This is what Professor Roach means by "undermining the integrity of the not guilty verdict" because the new verdict of "wrongful conviction" or "factual innocence" tends to imply that the traditional verdict of "not guilty" really means "not proven."

The other panellists gave varied responses to Professor Roach's proposal. Former Justice Marshall agreed with the proposal but strongly objected to the term "factual innocence" creeping into the criminal law, for the reasons set out above. He argued in a paper delivered in June, 2005 to the AIDWYC Conference that the concept of a "wrongful conviction" is a broader term that encompasses all cases "where the convictions are

shown to have been materially influenced by egregious conduct or error by officers or agents of the state.” He repeated these views at the public hearing. Mr. Scullion suggested that the cases of demonstrable factual innocence, like *Milgaard*, *Sophonow* and *Morin*, are not problematic as very public apologies and exonerations take place outside of the criminal process and compensation is then paid by the state. It is the cases “that fall between the cracks, that are not factual innocence, the egregious error cases” that are more problematic in the s. 696 process. Mr. Gaul expressed concern about the stigma that would attach in those cases where the accused chooses not “to take that extra step and try and have a judicial determination [of] ... wrongful conviction.” Professor Quigley supported Professor Roach’s proposal but suggested that the burden should be on the Crown to negative innocence. Mr. MacFarlane Q.C. supported the proposal but suggested an informal truth-seeking hearing, without any formal allocation of a burden of proof, but where the accused would be obliged to testify.

In their written submissions on systemic issues, counsel for Driskell and for AIDWYC recommended that “A joint study should be undertaken at the Federal and Provincial levels for the creation of an *Innocence Hearing* model for persons who have been wrongfully convicted.” They recommended that a pilot project should be set up in Manitoba, as one way to further study the proposal, noting that Bruce MacFarlane Q.C. had supported this idea during the panel discussion.²⁹

I have some concerns about Professor Roach’s proposal for a new form of “innocence” hearing. I believe that it risks undermining the integrity of the two traditional verdicts available at a criminal trial. Lamer J., as he then was, gave the majority judgment of the Supreme Court of

²⁹ Systemic Submissions made on behalf of James Driskell and the Association in Defence of the Wrongly Convicted, pp. 36-38.

Canada in *R. v. Grdic*³⁰ and cautioned against any attempt to qualify the verdict of “not guilty”:

There are not different kinds of acquittals and, on that point, I share the view that “As a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence”: see Martin L. Friedland, *Double Jeopardy* (1969) Clarendon Press, Oxford, p. 129 ... To reach behind the acquittal, to qualify it, is, in effect, to introduce the verdict of “not proven”, which is not, has never been and should not be part of our law.

This decision has been repeatedly followed and I would be very cautious before recommending any new procedure that may depart from it.³¹ I am particularly concerned about the point made by Mr. Gaul, and acknowledged by Professor Roach, that those accused who choose not to undertake the new “innocence” hearing will be exposed to even greater stigma. This point is particularly important because in many s. 696 cases the “likely” miscarriage of justice will be due to a failure to preserve or disclose potentially exculpatory evidence years ago, resulting in an unfair trial. When these errors are discovered, many years later, it will often be too late to investigate the facts fully, present reliable evidence about the original events and then arrive at safe findings of fact on a balance of probabilities. In other words, the serious errors that were made in the past can forever destroy the chance of having a fair and accurate trial in the present. An accused who is caught in this dilemma, after a successful s. 696 review, may be innocent but may also be unable to prove it on a balance of probabilities. It would be unfair to leave such an accused with the stigma of a tarnished “not guilty” verdict that would be perceived under such a process to really mean “not proven.”

³⁰ (1985) 19 C.C.C. (3d) 289 at 293 – 294 (S.C.C.).

³¹ For a recent review of the case law applying *Grdic* see: *R. v. Mahalingan* (2006), 80 O.R. (3d) 35 (Ont. C.A.).

In this sense, I agree with former Justice Marshall that the term “wrongful conviction” ought not to be equated exclusively with “factual innocence.” There will be cases where the accused cannot prove “factual innocence” because of what Justice Marshall refers to as “egregious errors” committed in the past. We rely on fair trials to arrive at safe and accurate verdicts. Where serious mistakes have been made by the Crown or the police in the past, making it no longer possible to conduct a fair trial in the present, the accused has been “wrongly convicted” in the common sense meaning of that term, even though he/she may no longer be able to establish the so called “factual innocence.”

In spite of the above concerns that I have about Professor Roach’s proposal for a new “innocence” hearing, I do agree with him that s. 696 cases raise special concerns that may well require new and creative procedures in order to address the damage caused to factually innocent accused by a “wrongful conviction.” The Order in Council establishing this Inquiry expressly asked me to address the question of how a “declaration of wrongful conviction can be made” in s. 696 cases. I hope that Professor Roach’s Report, the panel discussion at the public hearing on September 18, 2006, and this Report have commenced a debate on this difficult topic. It requires further study in my opinion. Accordingly, I agree with the two recommendations proposed by Driskell and AIDWYC, namely, that there should be a joint Federal/Provincial/Territorial Study of the matter which could include a Pilot Project.

In conclusion on this point, it should be noted that the entire discussion summarized above has been about the potential need for some form of “innocence” hearing but only in s.696 cases. This is because the Order in Council limits the question in this way. And yet many of the most notorious “wrongful convictions” in this country – *Morin*, *Sophonow*, *Parsons*, *Dalton*, and *Druken* – never reached the s. 696 process. This is another reason for recommending further study by a Federal/Provincial/Territorial body as to whether there is a need for a

“factual innocence” hearing in “wrongful conviction” cases, both in the s.696 context and in the appellate context.

7. Are there suitable procedures presently available for making a finding of “wrongful conviction” or “factual innocence,” such as the s. 696 process, public inquiries, tort actions or the existing compensation process?

Professor Roach discusses this issue at pp. 43 – 55 of his Report. It is closely related to the previous issue because the argument in favour of a new “innocence” hearing, as part of the s.696 criminal process, is partly driven by the perceived inadequacy of the other existing processes. Roach exhaustively reviews various kinds of proceedings that are currently available in which a declaration of “wrongful conviction” might possibly be obtained by a “factually innocent” s.696 accused. Without attempting to summarize his analysis of each one of these processes, it is apparent that they all suffer from certain shortcomings. To illustrate the point, there is no currently available tort action in which a factually innocent accused can be compensated simply because he was “wrongly convicted.” Existing tort actions all require proof of negligence or malice or abuse of office or lack of reasonable and probable grounds, none of which are truly responsive to the core wrong in these s.696 cases where the accused has been convicted and imprisoned as a result of a “miscarriage of justice.” It could be argued that there should be a strict liability tort to compensate any “factually innocent” person who has been convicted and imprisoned, no matter how error-free and well-meaning his/her original trial.³²

³² In *U.S.A. v. Burns & Rafay*, [2001] 1 S.C.R. 283 the Supreme Court of Canada discussed the phenomenon of “wrongful convictions” and noted that David Milgaard, who was factually innocent, was convicted and imprisoned for 23 years after a fair, error-free trial in which he was represented by able counsel and in which there was apparently no significant police or prosecutorial misconduct.

However, any tort action would still be costly and risky for the “wrongly convicted” accused to undertake, as Professor Roach points out.

The panel of experts discussed this issue, although the discussion tended to focus almost entirely on the previous issue, for the reasons set out above. That discussion has already been summarized under the previous heading and there is nothing further to add.

My conclusion in relation to Question 6 was that it requires further study. Given that Question 7 is closely inter-related with Question 6 it should also be the subject of this further study. For example, the further federal/provincial study of Question 6 that I have recommended might conclude that a simple new civil or administrative procedure, characterized by non-adversarial mediation/arbitration, without any burden of proof or formal rules of evidence and without any of the existing tort law requirements, would be the best solution to the problem of exonerating “factually innocent” accused who have been “wrongly convicted.” If this conclusion was reached there would then be less need to introduce a new criminal verdict of “factual innocence” or “wrongful conviction” that runs the risk of undermining the traditional verdict of “not guilty.”

In light of this close inter-relationship between the present issue and the previous issue they should both be the subject of further study and any related pilot project or projects. It should also be noted that Federal/Provincial/Territorial Justice Ministers are currently reviewing compensation guidelines for the wrongfully convicted.³³ Given Canada’s obligations in relation to compensation in cases of “miscarriage of justice”, pursuant to Article 14(6) of the International Covenant on Civil

³³ See: News Release, November 9, 2005, Federal/Provincial/Territorial Meeting of Ministers responsible for Justice, Whitehorse, Yukon.

and Political Rights, I recommend that the study and related pilot projects concerning Questions 6 and 7 ought to be linked to the Ministerial review of compensation guidelines.

Conclusion

Applying my recommendations to the particular facts of Driskell's case, it can be seen that the entry of the Crown stay on March 3, 2005 does not accord with my view of best practice or a fair and just result. There was no suggestion of an ongoing re-investigation that might implicate Driskell. Furthermore, the stay was allowed to lapse upon the expiry of the one year limitation period and the case was never brought back to court for a determination, under judicial supervision, as to the final status of the prosecution.

However, it is apparent that Crown stays are quite commonly entered in Manitoba in cases where the Crown has determined that there is no reasonable prospect of conviction and where the Crown does not intend to request further police investigation. Accordingly, the Crown stay in this case was entered in accordance with the existing Manitoba practice and did not amount to misconduct.

It should be apparent from my previous conclusions and recommendations that I believe the current practice needs to change, at least in the context of s. 696 cases.

VI. REVIEW OF THE ROLE OF RCMP LABORATORY IN DRISKELL'S PROSECUTION - FORENSIC SCIENCE ISSUES

A. Summary of the Evidence Relating to the Microscopic Hair Analysis in Driskell's Case

In his various police statements, Zanidean maintained that during the winter of 1989-90 Driskell had proposed various schemes for killing Harder and disposing of the body, some involving the use of his van. Gumieny also claimed that Driskell had talked about using the van to kidnap and kill Harder, although he gave less detail than Zanidean about how the van was to be used.

On October 9, 1990, after Gumieny and Zanidean had come forward with their allegations linking Driskell to Harder's murder, the police stopped Driskell and an acquaintance, Donald Bannerman, while they were driving together in Bannerman's van. Bannerman explained that he had acquired the van from Driskell "around the end of July [1990]",³⁴ and consented to a police search of the vehicle. Cst. Conrad Pearson searched the van the next day (October 10, 1990), vacuuming the floor and seizing a rug from the rear cargo area. He also found a single hair on the van wall. Pearson took these and a number of other items to the RCMP Forensic Laboratory in Winnipeg and gave them to Tod Christianson, a hair and fibre analyst. He also submitted a large number of hairs found at the gravesite believed to have come from Harder's

³⁴ The police later found a bill of sale indicating that the van had been transferred from Driskell to Bannerman on August 9, 1990.

scalp.³⁵ Consistent with the practice at the time, Christianson did not make notes of his initial meeting with Pearson or of most of his subsequent conversations with Pearson and other WPS forensic identification officers.

In 1990-91, Tod Christianson was one of about five hair and fibre examiners in the Winnipeg Laboratory of the RCMP Forensic Laboratory Services (“RCMP FLS”). He had been a hair and fibre examiner for about seven years (including one year as a trainee), and had worked on almost 470 prior hair and fibre cases. He had presented microscopic hair comparison evidence in 26 previous cases.³⁶

Christianson examined the exhibits he received from Pearson and identified 34 “questioned” human hairs from the van,³⁷ which he proceeded to compare microscopically against a “representative array” of six “known” hairs from the gravesite, and an additional group of about 20 known hairs (the “bulk mount”).³⁸ He concluded that three of the questioned hairs from the van were microscopically “consistent” with the known hairs, *i.e.*, that for each questioned hair there was a specific known hair, from either the array or the bulk mount, that displayed the same

³⁵ Harder’s body had been disturbed by animals, and the hairs found near the gravesite were clumped together in a manner characteristic of hairs from a corpse. Subsequent mitochondrial DNA testing has confirmed that the hairs come from a single individual. The inference that the gravesite hairs are Harder’s is overwhelming, and has never been challenged.

³⁶ In six other cases, Christianson had testified about fibre examinations or other physical matching evidence.

³⁷ Christianson began with 35 hairs: the single hair Pearson had found on the side wall; 25 hairs from the rear carpet, and 9 hairs from the floor vacuumings. However, one of the hairs was readily identifiable on microscopic examination as an animal hair, leaving him with 34 human hairs to compare against the known samples.

³⁸ The examination process is described in detail in Douglas Lucas’s Report (see Appendix G).

combination of features, “within normal range of variation”.³⁹ Christianson agreed that deciding whether the differences between two hairs fell within the “normal range of variation” involved a “somewhat subjective” determination, and that different hair examiners sometimes disagree.

Consistent with his training, Christianson made detailed notes of the appearance of the six known hairs in the array, but did not make notes about the known hairs in the bulk mount. The RCMP *Hair and Fibre Section Methods Manual* (“*The Methods Manual*”) directed hair examiners not to make detailed notes with respect to the questioned hairs. If a questioned hair was found to be “consistent” with a known hair, they were directed to note “only the length of the hair, the condition of the root, and any unusual features”. Accordingly, Christianson made only minimal notes of the characteristics of the three “consistent” questioned hairs. Since two of the three “known” hairs he used as direct comparators were from the bulk mount, they are also not described in his notes.

At the time, it was not RCMP Laboratory policy or practice to have forensically significant hair comparisons reviewed by a second hair examiner. This kind of “peer review” sometimes occurred informally, but Christianson would not document it in his notes, and does not recall any “peer review” occurring in this case. His superiors would have reviewed his file and report, but these would have been purely paper reviews. It was also not standard practice to photograph forensically significant hairs; indeed Christianson indicated that photography was discouraged because it “had the potential to be misleading”. His practice was to take photos

³⁹ In this case, Christianson determined that one questioned hair “consistent with” one of the six known hairs in the array, and that two questioned hairs were “consistent with” specific known hairs on the bulk mount. He did not identify or describe the bulk mount hairs in his notes, but would have marked them on the bulk mount slide.

only “when there was some kind of an anomalous feature or something of interest that I wanted to forward on and share with examiners from other labs”. The hairs in this case had no distinctive features, and Christianson did not photograph them.

Christianson set out his conclusions in a Report dated January 9, 1991, the relevant portion of which stated:

Scalp hairs consistent with having originated from the same person as the known scalp hair sample, Exhibits 42 and 48, were found as follows:

Exhibit 134: one (1) scalp hair

Exhibit 141: two (2) scalp hairs

This wording was based on “guidelines” in the *Methods Manual*. Christianson’s supervisors would have reviewed the report, and then sent it to the police. His notes would not have gone to the police or Crown without a specific request for them. Christianson does not recall such a request in this case, and none is documented in the Crown, WPS or RCMP files. Christianson referred to his notes during his trial testimony, but does not recall anyone asking to see them.

Christianson testified at Driskell’s trial on June 5, 1991. He appears not to have met with either Dangerfield or Lawlor before taking the witness stand.

RCMP Laboratory hair examiners were expected to testify in accordance with the “guidelines” in the *Methods Manual*, which recommended using the term “consistent with”. Accordingly, Christianson told the jury that he had identified three of the questioned hairs from the van as “consistent with the hair samples from the gravesite”. When asked what he meant by “consistent”, Christianson described the microscopic hair examination process, and then stated:

[W]hen I say that a hair is consistent, as I have in this case, that means that the hairs have all of the features that the known samples have, within normal biological variation, and there's nothing, nothing you would – that you can't account for. So that if there was some feature, for example abnormal colour or something like that, that would cause that hair to be eliminated. So, it falls exactly within the range of the variation of the known sample with no unaccounted for differences whatsoever.

And the point about this type of analysis is that it's not a positive identification, all right, because the only way you could do that is to look at all the hairs from all the person's head that exist, and that's an impossibility. But I can tell you, based on my experience, that the chances of just accidentally picking up a hair and having it match to a known sample are very small. So if the hair is consistent, that means it either came from the same person as that known sample or from somebody else who has hair exactly like that.

And in order to give you a sort of guideline or a rule of thumb to determine how much weight to put on that, you can look around the room and just see how many people even have similar hair styles. If you look at one hair and you examine those 20 features, it's got even more information than you can see by looking at different lengths of hair and different colours and different hair styles. That's not to say that you can't accidentally meet somebody or two people on the street that have exactly the same kind of hair, just like sometimes you accidentally mistake one person for another, but the chances are not very high. So that's basically what hair comparison is like.

In cross-examination, Christianson elaborated on this evidence as follows:

Q: You're not saying that there wouldn't be, in the City of Winnipeg, four hundred people with hairs that would be similar to the two [sic] that you found?

A: I'm not saying anything. In fact, I specifically address only the questioned hairs and the known sample that I'm dealing with, and I conduct my comparison only on those, and I don't consider the possibilities of other people, only the standards that I'm looking at.

Q: But would it be possible to have 4,000 people with similar characteristics to the two samples [sic] that you found?

A: Well, I don't know what the number would be so I don't feel, I don't feel it's appropriate to use a number like 4,000. I feel it's appropriate to describe it in the way that I just did where you consider it to be – it's actually a pattern recognition problem, and it's just like recognizing faces. There are so many characteristics on the hair that you become familiar with looking at that it becomes like looking at a face, and you and I both know that it is possible to confuse a face.

Q: Okay.

A: But when you're looking at it in detail for a specific face, the chances become less.

At the Inquiry, Christianson defended the use of the term “consistent with”, stating that despite the criticism of this expression in the *Morin Inquiry Report*,⁴⁰ he still considered it a good term and would continue to use it today, for want of a better alternative. Christianson agreed that there was a legitimate concern that the term might mean different things to different people, but stated:

I think it indicates that we [forensic scientists] need to do a better job of explaining what we [mean], but I doesn't mean that we necessarily have to abandon the use of the word.

He thought he had properly explained what he meant in his trial evidence, stating:

⁴⁰ In the *Morin Inquiry Report*, Commissioner Kaufman expressed concern about the use of the term “match” in hair microscopy evidence, noting its potential to confuse and mislead the fact finder. I share this concern, and agree with Commissioner Kaufman that the term “match” should be avoided in testimony. Nevertheless, I have chosen, with some hesitation, to use the term in this Report as a convenient shorthand for a conclusion by a hair examiner that a questioned hair had the “same combination of features, within normal range of variation”, as a specific known hair – the test applied by Christianson when he conducted hair microscopy examinations. This is the same sense that the term was used in the *Methods Manual* and by Christianson in his trial testimony.

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

The *Methods Manual* suggested that hair examiners respond to questions about the probative value of a finding of “consistency” as follows:

When careful examination by a qualified examiner indicates that a questioned hair is consistent with a known source, there are two possibilities. Either the hair actually originated from that source, or there was a coincidental match. Since it is possible for two different people to have hairs which are indistinguishable by present methods, it is known that coincidental matches can occur in forensic hair comparison. However, based on my knowledge and experience as a hair examiner, I am of the opinion that such coincidental matches are a relatively rare event. The explanation that the questioned hair actually originated from the known source is generally the more likely of the two.

Christianson understood that examiners could use their own words, as long as they conveyed the critical point that a “match” is not a certainty. He preferred to explain the likelihood of a coincidental match by using non-numerical terms like “remote”, “very small” or “not very high”, which he felt conveyed the correct level of probability. He told the Inquiry that he believed the numerical probability of a coincidental match occurring in the population was somewhere between 1 in 100 and 1 in 1000, but explained that he preferred not to use these figures when testifying in court, as he considered them potentially prejudicial and misleading. He did not give any numerical probability estimates in his trial testimony.

Although the *Methods Manual* stated that “[t]he strength of a finding of similarity depends on such factors as the number of questioned hairs found to be similar to the known sample, the presence of unusual characteristics, the racial origin of the hairs involved and whether or not complete hairs were found”, Christianson did not refer to any of these

factors in his trial testimony or explain how they affected the significance of his conclusions. At the Inquiry, Christianson defended this decision, stating:

Well, the hairs are still a match, and it's like a threshold, and the match, or the consistent conclusion does not rely on there being some kind of distinctive individualizing features. ... [T]his was in the manuals, but by the time I was doing the hair comparisons, the trend was to move away from doing that [i.e., distinguishing between "strong positive" and "positive" conclusions]. The trend was to simply determine whether hairs were consistent or not. And I agree with that concept.

In Christianson's view, if two hairs were microscopically "consistent", this meant that "the chances are not very high that the hairs originated from different sources".

Christianson told the jury at Driskell's trial that "the chances of just accidentally picking up a hair and having it match to a known sample are very small". However, as a matter of elementary statistics, the probability of finding a coincidental match in a group of hairs depends on the size of the group. Christianson did not tell the jury how many questioned hairs he had examined, or explain how this affected the likelihood of a coincidental match arising, although he agreed at this Inquiry these were relevant considerations bearing on the significance of his conclusions.

At this Inquiry, Christianson explained that he based his belief that coincidental hair "matches" were rare on studies by the former RCMP Hair and Fibre Section Chief Scientist, Barry Gaudette⁴¹, on his own

⁴¹ B.D. Gaudette and E.S. Keeping, "An Attempt at Determining Probabilities in Human Scalp Hair Comparison", 19 *J. Forensic Sci.* 599 (1974). In their paper, the authors estimated that "[i]f one human scalp hair found at the scene of a crime is indistinguishable from at least one of a group of about nine dissimilar hairs from a given source, the probability that it could have originated from another source is very

experience as a hair examiner, and on his performance on an RCMP training exercise known as the “hundred hair test.”⁴²

During his trial testimony, Christianson sought to explain the significance of his conclusions by drawing analogies with jurors’ own ability to distinguish between different hairstyles and faces. These were Christianson’s own analogies, not drawn from his training or the hair microscopy literature. He thought they were “conservative”, explaining that “one does meet people with similar hair on the street”, and noting that both hair comparisons and facial recognition involve “pattern recognition based on biological features.”

Although he noted some minor errors and misstatements⁴³ in his trial evidence, Christianson generally stood by both his conclusions and the manner in which he had explained them to the jury, stating:

I am happy with the way the evidence was presented in Driskell. I think it was as good as I really could have done it ...

small, about 1 in 4500”. Christianson thought this estimate was too low and believed that the actual probability was between 1 in 100 and 1 in 1000.

⁴² Trainees were given 100 questioned hairs and had to decide how many (if any) were microscopically similar to a known sample. Since the questioned hairs were not intended to be representative of the population at large, no inferences could be drawn from this about the general rate of coincidental matches.

⁴³ Specifically, Christianson indicated to the jury that the known hair samples he had examined came from the police exhibits 42 and 48, whereas they actually came exclusively from exhibit 48. Further, when explaining what he meant when he said that a questioned hair was “consistent with” the known sample, Christianson had erroneously suggested that this meant that the questioned hair “ha[d] all o the features that the known samples had, within biological variation”. In reality, the questioned hair did not have to have *all* of the features of *every* known hair Christianson examined; rather, what Christianson looked for was a single known hair either in the six-hair array or the bulk mount that had the same combination of features, “within normal biological variation.”

He expressed his continued confidence in the validity and utility of hair microscopy.

In 2002, the hairs from Driskell's case were sent to the United Kingdom for mitochondrial DNA (mtDNA) testing by the Forensic Science Service (FSS). This testing revealed numerous differences between the mtDNA sequences of the gravesite hairs and the three questioned hairs from Driskell's van. Accordingly, the FSS concluded that there was "extremely strong support for the proposition" that the three questioned hairs "did not originate from the same person as the hair from the gravesite" [*i.e.*, Harder].⁴⁴ Further, the FSS found that the mtDNA sequences of the three questioned hairs were significantly different from one another, and that "the number of differences is sufficient to conclude that the hairs originated from three different individuals."⁴⁵

B. Analysis

Sections 1(d) and (e) of the Order in Council direct me:

(d) To consider the role of the RCMP Laboratory in the prosecution of James Driskell, and to review any systemic issues that may arise out of its role.

(e) To give advice about whether any aspect of this case should be further studied, reviewed or investigated and by whom, and to make

⁴⁴ The FSS ordinarily uses a seven-point scale for expressing "the value of a match or non-match", ranging from "inconclusive" at the low end to "extremely strong support" at the high end. However, in this case, the FSS appears to have considered the differences between hair #13 and the gravesite hairs to be so numerous to allow an unqualified statement that this hair "did not" come from Harder.

⁴⁵ Specifically, the FSS found thirteen differences between hairs #5 and #13, nine differences between hairs #5 and #29, and twelve differences between hairs #13 and #29. As with the comparison between questioned hair #13 and the known hairs, the FSS appears to have considered the differences between the questioned hairs to be so numerous that this conclusion could be stated without qualification.

systemic recommendations arising out of the facts of the case which the commissioner considers appropriate.

The focus of this part of the Inquiry is on the hair microscopy evidence at Driskell's trial, and on any systemic issues arising out of this evidence. I must address three distinct questions:

- (i) Did Tod Christianson conduct his microscopic hair examinations and present his evidence at Driskell's trial in accordance with accepted professional practices and standards at the time?
- (ii) With the benefit of hindsight and in light of subsequent scientific developments, is it now possible to identify flaws in these historical standards and practices?
- (iii) Considering the matter prospectively, what systemic recommendations should I make arising out of the facts of this case?

The panel, chaired by Mr. Lucas, which assisted me in exploring these issues, also included (in alphabetical order):

- Michael R. Bromwich, the former Inspector General of the US Justice Department, and now a partner with the US law firm Fried, Frank, Harris, Shriver & Jacobson LLP, where he heads the internal investigations, compliance and monitoring group. As Inspector General, he led a review of the FBI Laboratory; he is currently leading an independent investigation into problems at the Houston Police Department Lab and Property Room;

- Dr. Peter R. De Forest, a Professor at the John Jay College of Criminal Justice (City University of New York), and an expert in forensic hair microscopy;
- Dr. Joel Mayer, the Deputy Director of Scientific Affairs at the Centre of Forensic Sciences of Ontario;
- Dr. William J. Tilstone, currently a deputy Director of the National Forensic Science Technology Center in Largo, Florida and formerly the Director of the State Forensic Science laboratory in Adelaide, South Australia;
- Peter J. Neufeld, the co-founder and co-director of the Innocence Project at the Benjamin N. Cardozo School of Law (Yeshiva University) in New York City;

In considering these questions, I have benefited enormously from the views of a number of people with great expertise in forensic science and laboratory management and oversight issues. The Commission retained Douglas M. Lucas, the former head of the Centre of Forensic Sciences of Ontario, to prepare a report addressing both aspects of s. 1(d) of the Order in Council. First, he was asked to review Tod Christianson’s laboratory work and trial testimony, and provide an opinion on whether Christianson had acted in accordance with “sound professional and scientific practise at the time.” Second, he was asked to identify any broader systemic issues that he saw arising out of the RCMP Laboratory’s role in the Driskell case. Mr. Lucas provided his report on August 17, 2006 and a brief addendum on September 11, 2006.⁴⁶ On September 21, 2006, a panel of distinguished experts attended before me for a “round table” discussion in which they commented on the “systemic issues”

⁴⁶ Appendices G and H

aspects of the Inquiry relating to forensic sciences. They responded to a series of broad questions presented by Commission Counsel, and counsel for the parties were permitted to ask their own questions. I have found this discussion extremely helpful in grappling with the difficult issues raised in this Inquiry.

After some earlier reservations, all parties, including the RCMP FLS, had accepted the validity of the FSS mtDNA results and agreed that the three questioned hairs from the van were not Harder's. I agree fully with this conclusion, and find that the three hairs found in the van did not come from Perry Harder and, indeed, came from three different individuals.

Christianson's evidence at trial, in substance, was that the three hairs very likely were Harder's. As Mr. Lucas points out, there are two possible explanations for this apparent discrepancy. First, the hairs may not, in fact, have been microscopically similar, *i.e.*, Christianson may have overlooked dissimilarities or failed to appreciate their importance. Second, Christianson may have been correct that the hairs were microscopically similar, but this similarity may have been purely coincidental. This second explanation, while supportive of his laboratory analysis, would raise questions about the reliability of hair microscopy evidence as a technique, and about the accuracy of Christianson's trial testimony concerning the probative value of a microscopic hair "match". Since the hairs were destroyed during the mtDNA testing and Christianson's observations cannot now be reviewed, it is impossible to determine conclusively on the evidence before me which of these two theories is correct.

The RCMP FLS cooperated fully with Mr. Lucas's inquiries. Mr. Lucas was favourably impressed by Christianson's training, noting that the FLS hair and fibre training program was unusually "formal and structured" compared to the programs typically offered by other forensic laboratories at the time. He was "satisfied that Mr. Christianson was fully

qualified to perform the H&F [hair and fibre] examinations in the Harder case”. This assessment has not been challenged by any of the interested parties, and I accept Mr. Lucas’s conclusion that Christianson was adequately trained and formally qualified to conduct microscopic hair examinations. However, as explained below, I have some concerns about how he was trained to present his conclusions in court.

Mr. Lucas reviewed in detail the methods and techniques Christianson used during his laboratory examination, and concluded that they:

... were well documented in a Methods Manual and were, with minor exceptions, generally accepted in forensic science. The exceptions were lower magnifications than commonly employed, no requirement for protective gloves during examinations, and no requirement for independent verification of conclusions.

He also comments that Christianson’s report was “briefer than what would have been the general practice in such a case in many forensic labs in the 1990/91 period”, although it was drafted in accordance with RCMP FLS standards. The first question I must consider is whether any of these departures from generally accepted practices should have been recognized as problematic by the RCMP FLS officials responsible for setting laboratory policy.

On the issue of magnification, Mr. Lucas notes that the levels the RCMP *Methods Manual* specified should be “the most commonly used” (*i.e.*, 100× and 125×) were “lower than many hair examiners would use”. However, the *Methods Manual* specifically instructed examiners to use higher magnifications “when more detail is required”. On the evidence before me, I cannot say that the RCMP’s choice of default magnification was wrong. Further, it would be speculative to conclude that Christianson might have spotted some distinguishing characteristics in the hairs in this case if he had used a higher magnification.

With respect to the RCMP Laboratory's exhibit-handling practices, it would undoubtedly have been preferable for examiners to have worn gloves. However, Mr. Lucas notes this did not become standard forensic laboratory practice until some years after Driskell's case. In any event, Christianson's handling of the hairs does not seem to have affected any of the test results in this case. While the FSS did find contaminating DNA on one of the gravesite hairs, which could have come from Christianson's or the police's handling of the hairs, this contamination was detected and controlled for, and did not affect the final mtDNA test results.

The RCMP Laboratory's terse report-writing style is somewhat more problematic. As Mr. Lucas notes:

It was more general practice in forensic labs in this period to include in their reports information about all their findings, such as the number of hairs found on an item, even those which were not consistent with the knowns.

This omitted information was important, since the likelihood of a coincidental microscopic "consistency" cannot properly be assessed without knowing how many questioned hairs have been examined.

In my view, a shortcoming in the RCMP Laboratory's hair microscopy practices in the early 1990s is the failure to have "positive" conclusions reviewed and verified by another examiner. Mr. Lucas notes that this kind of verification procedure was not "universal practice in 1990/91" in other laboratories, but that it was a standard practice in "some laboratories in which there was more than one qualified hair examiner". The Winnipeg Laboratory had as many as five qualified hair examiners on staff during the early 1990s, and did implement a verification policy some years later, without any apparent difficulty.

The forensic science panellists all agreed on the importance of verification. As Mr. Lucas observed during the panel discussion:

The scientific working group on materials analysis guidelines just in effect say that it's desirable to have a second hair examiner verify every association that may have a probative value. And I think that represents the view of the profession ...

While I am cautious about criticizing past practices with the benefit of hindsight, it was widely recognized at the time that microscopic hair comparisons are highly subjective, and that different examiners sometimes disagree. In these circumstances, the benefits of having hair comparison results reviewed by another examiner should have been clear. Findings of microscopic "consistency", when presented as highly probative on the issue of identity (even if not decisive), were likely to carry great weight with juries in what were generally very serious criminal cases. Indeed, other laboratories had by this time recognized the importance of verification and implemented appropriate review procedures. The RCMP FLS should have taken similar steps, at least in facilities like the Winnipeg Laboratory with multiple hair examiners on staff.

The lack of contemporaneous verification of Christianson's observations has had several unfortunate consequences in this case. From Driskell's point of view, it is not unreasonable to assume that there might have been microscopic dissimilarities between the hairs that a second hair examiner might have noticed. While it cannot be known exactly how the hair microscopy evidence influenced the jury's deliberations, Christianson gave compelling testimony in which he presented his results as highly probative on the issue of identity. Further, since the hairs of interest in this case were at least partially consumed by the mtDNA testing in 2002, it is no longer possible to review and either confirm or refute Christianson's conclusions. The absence of a verification protocol in the RCMP's Winnipeg Laboratory in 1990-91 thus puts everyone at this Inquiry (including, I should note, Mr. Christianson himself), at a considerable disadvantage.

Mr. Lucas and the panellists also identified several areas where the RCMP FLS's procedures in 1990-91, while consistent with practices in other laboratories at the time, are lacking when assessed against present-day standards. First, Christianson's notes, while kept in accordance with the existing RCMP FLS policies, were much less detailed than would be expected in an accredited laboratory today. In particular, he did not make detailed notes of the characteristics of the three questioned hairs he concluded were microscopically "consistent with" the known hairs. As Mr. Lucas points out, this severely limited Christianson's supervisors' ability to assess the validity of his conclusions when reviewing his file. All of the panellists agreed that proper notes are essential to peer review, a central feature of scientific validity.

When assessing whether historical laboratory practices were reasonable, it must be asked whether the problems identifiable today should have been apparent at the time. In this regard, it is significant that it was an established RCMP FLS practice in 1990-91 for Christianson's immediate supervisor to conduct a "technical review" of his work by reviewing his notes. As Mr. Lucas notes, it is undisputed that this review "would not have been capable of validating Mr. Christianson's conclusions because of the minimal descriptions in the work notes of the [questioned] hairs". The RCMP FLS, having apparently recognized the need for "technical reviews" in hair microscopy cases, should have ensured that hair examiners kept sufficiently detailed notes to make this review meaningful. Instead, the *Methods Manual* specifically directed examiners not to make detailed notes of questioned hairs identified as "matching" known hairs – that is, the forensically significant comparisons. While I do not blame Christianson for following the established RCMP FLS note-taking policy, it is the policy itself that was wrong. The effect of this policy was that hair examiners' work could not be subjected to any meaningful review.

The panellists also noted that in 1990-91 the RCMP FLS, like most other forensic laboratories at that time, did not conduct microscopic hair

comparisons “blind” – that is, the examiner who compared the hairs generally knew something about the police theory of the case, and thus knew if the police were expecting to find a hair “match”. The panellists agreed that it is important for someone in a laboratory to be briefed on the facts of the case in order to decide what tests to conduct. However, they also agreed that it would be better for the actual laboratory work to be performed by a different examiner insulated from this knowledge, to minimize the insidious danger of “confirmation bias”.

The forensic sciences appear to have been slow to implement safeguards like blind testing. It would be unfair to single out the RCMP FLS for what appears to be a broader systemic problem in the forensic sciences community.

Turning to the issue of Christianson’s trial testimony, Peter Neufeld succinctly observed during the panel discussion that:

There are two components to hair microscopy. The first is the observations to see whether two hairs are similar or dissimilar. And the second one is, is if you can conclude that they are similar, what kind of probative inferences can be drawn from those observations.

At Driskell’s trial, Christianson testified that he could find no microscopic dissimilarities between the three van hairs and the gravesite hairs that could not be explained as “normal biological variation”. He then explained, through the use of analogies, that the likelihood of this microscopic similarity arising coincidentally was, in his opinion, “not very high” – *i.e.*, that the far more likely explanation was that the hairs were all from the same person, Perry Harder. Implicit in this latter opinion, and essential to it, was a factual claim about how frequently coincidental hair “matches” occur in the population. While Christianson’s practice was to avoid giving a numerical probability figure, he used words and expressions indicating that coincidental matches were rare.

As noted previously, at the time of Driskell's trial the RCMP FLS hair examiners were specifically directed to use the term "consistent with" when describing their results. The RCMP did not, of course, have the benefit of the *Morin Inquiry Report's* criticism of this phraseology, and Christianson, in particular, cannot be faulted for following RCMP FLS policy. Mr. Christianson continues to see nothing wrong with this language, and would use the term "consistent with" when presenting hair microscopy evidence today,⁴⁷ notwithstanding the adverse comments in the *Morin Inquiry Report*:

There are multiple difficulties presented by the use of the term 'consistent with.' First, some use the term interchangeably with 'could have' originated or 'cannot be excluded' as originating. The term is now shrouded in confusion. ... Second, the term 'consistent with' may be used by forensic scientists in other disciplines to mean something different. For example, the jury heard testimony that Guy Paul Morin's pocket knife was 'consistent with' the weapon which caused Christine Jessop's death. I did not take from this evidence anything more than the fact that his knife, and countless others, could not be excluded. Third, to some, 'consistent with' in common parlance would extend to anything that is not inconsistent with (i.e., anything which cannot be excluded). Fourth, to some, 'consistent with' implies perfect or near identity of the two items.⁴⁸

The panellists at this Inquiry echoed Commissioner Kaufman's concerns.

Although I appreciate the difficulty of devising alternatives to terms like "consistent with", I am troubled that forensic science examiners would continue to use this language today despite the concerns that have

⁴⁷ The RCMP FLS stopped doing microscopic hair comparison work in the late 1990s. Mr. Christianson now holds an administrative position and no longer performs forensic laboratory work himself, although it appears that he is still occasionally called on to testify in historical cases.

⁴⁸ *Morin Inquiry Report*, pp. 340-41.

been raised about its potential to mislead judges and juries. Even if the examiner believes they have a clear understanding of what they mean by the term, the problem is that their audience may not share this understanding.

The main danger associated with the language of “consistency” is that a jury or judge may misinterpret a statement meant by a witness to suggest only a weak association, as indicating a much closer connection than the witness intends. However, when Christianson used the term “consistent with” in microscopic hair cases, he was trying to indicate a strong association – that is, he wanted the trier of fact to understand that there was only a “remote” likelihood that the questioned and known hairs had different origins. My concern with that testimony is not so much with the choice of language but, rather, with the substance of what he was trying to convey to the jury about the probative value of his microscopic observations on the critical issue in this case, namely, that Harder was very likely the source of the three questioned hairs found in Driskell’s van.

As noted previously, Christianson told the jury:

I can tell you, based on my experience, that the chances of just accidentally picking up a hair and having it match to a known sample are very small. So if the hair is consistent, that means it either came from the same person as that known sample or from somebody else who has hair exactly like that.

In Mr. Lucas’s opinion, “this statement is in accordance with [Christianson’s] training and would be agreed with by virtually all hair examiners, with the exception of the mention of the chances of a random match being ‘very small’, which some might not agree with.”

I accept Mr. Lucas’s conclusion that Christianson’s testimony at the Driskell trial was in most respects typical of how hair microscopy evidence was presented in the early 1990s. I also accept that Christianson believed (and still believes) that his evidence about the rarity of coincidental matches was fair and accurate. However, I have concerns

about whether his opinion on this issue was scientifically justifiable, both at the time he gave his testimony and today. Further, when I consider his testimony with the benefit of hindsight, I have concerns about whether the jury would have properly understood the limited probative value of the microscopic observations.

In the *Morin Inquiry Report*, Commissioner Kaufman observed that:

[T]he prejudicial effect [of microscopic hair comparison evidence] may be substantial, since the scientific opinion brings with it an aura of respectability and infallibility.⁴⁹

Several of the panellists noted that in the years since the *Morin Report*, there has been growing recognition of the importance of ensuring that judges and juries understand the underlying scientific basis for a stated conclusion, including all of the associated limitations and uncertainties.

Dr. Peter De Forest emphasized that “[it] is of course a very, very important thing, [that the] limitations of the conclusions must be made clear so everybody really understands what you’re saying”. In the Driskell case, Christianson described to the jury at some length how he had compared the hairs concluded that they were microscopically similar. However, like other hair examiners at that time, he did not explain in any significant detail why he concluded this similarity was unlikely to be coincidental, nor did he set out the relevant factors that the jury should consider to appropriately assess the scientific validity of this belief. He may not have fully appreciated that what he had been taught about the rarity of coincidental matches was largely conjectural and lacked a solid foundation.

⁴⁹ *Morin Inquiry Report*, 315.

At trial, Christianson introduced the subject of coincidental matches by stating that “based on [his] experience, the chances of just accidentally picking up a hair and having it match to a known sample are very small”. Framing the issue in this way was problematic for two reasons. First, the relevant issue in this case was not the likelihood of a randomly chosen hair “accidentally matching” a known sample, but, rather, what conclusions (if any) could be drawn about the origin of the questioned hair when such a “match” was found. These are different questions and a jury might not fully appreciate the distinction or be confused by it. Second, it was critical that the jury understand that even if the chances of a particular questioned hair coincidentally matching a known sample were small, the more questioned hairs one examines, the greater the chances are of finding coincidental matches. Christianson did not simply find three hairs in the van and discover that they all matched the gravesite hairs; rather, he found these three hairs by examining a larger group of 34 questioned hairs. Accordingly, the relevant issue for the jury to consider was the likelihood that at least three hairs in this larger group would coincidentally match the known sample. Since the jury was not told how many questioned hairs in total Christianson had examined, they were not able to address this question.

As noted above, Christianson explained the significance of his microscopic observations to the jury through analogies with jurors’ own experiences observing hairstyles and facial features. At the Inquiry, he advised that he had not intended these analogies to “give [the jurors] an idea about probabilities”, but had merely been trying to explain “how much information is present in the hair.” However, the analogies might well have led the jury to believe otherwise, particularly when he linked the “hairstyle” analogy to the likelihood of a coincidental match, stating that it was meant “to give you a sort of *guideline or a rule of thumb to determine how much weight to put on that*” (Emphasis added).

The key question for the jury with respect to the hair microscopy evidence was the likelihood that the hairs from Driskell’s van came from

Harder. In my view, the jurors would quite naturally have understood from Christianson's analogies that they should assess this likelihood by considering the chances that they would find themselves unable to distinguish different people's hairstyles or facial features, even after examining them as closely as Christianson said he had examined the hairs. The clear implication of these analogies was that the jury should conclude that coincidental hair "matches" were exceedingly rare. However, there is no relationship between the percentage of the population with completely indistinguishable hairstyles or faces, and the incidence of persons whose hairs are microscopically indistinguishable "within normal biological variation". Indeed, Christianson's own estimate at this Inquiry was that the probability of finding a coincidental microscopic hair "match" was between 1:100 and 1:1,000 – a much higher estimate than a juror would likely extract from his analogies.

The RCMP FLS *Methods Manual* distinguished between "strong positive" and merely "positive" results, suggesting that when there were a "large number of hairs in agreement" or when the hairs had "unusual characteristics", a hair examiner could describe the likelihood of a coincidental match as "extremely remote". In contrast, hair examiners were advised to give a more guarded assessment of the probative significance of a mere "positive" result:

When careful examination by a qualified examiner indicates that a questioned hair is consistent with a known source, there are two possibilities. Either the hair actually originated from that source, or there was a coincidental match. Since it is possible for two different people to have hairs which are indistinguishable by present methods, it is known that coincidental matches can occur in forensic hair comparison. However, based on my knowledge and experience as a hair examiner, I am of the opinion that such coincidental matches are a relatively rare event. The explanation that the questioned hair actually originated from the known source is generally the more likely of the two. [Emphasis added]

The *Methods Manual* also suggested that when hair examiners were asked to explain the basis for this opinion, they should refer to

“publications”, “attendance at workshops and seminars”, “discussions with others in the field”, “understudy training”, the “100 hair exercise” and other “proficiency tests”, and their years of casework experience.

These references in the *Methods Manual* pre-date Driskell’s trial by some six and a half years. Christianson advised the Inquiry that the suggested explanations were not considered mandatory, and that by 1990 it was no longer the practice to distinguish “strong positive” from “positive” conclusions. Accordingly, his approach was to treat all microscopic hair “matches” as giving rise to a strong likelihood that the hairs shared a common origin, regardless of the number of “matching” hairs or the presence or absence of “unusual characteristics”. Further, his standard approach when testifying was to characterize the chances of “matching” hairs coming from different sources as “remote”, “very small”, or “not very high” – a considerably more forceful statement than the recommended phrase in the *Methods Manual*. He advised this Inquiry that this was how he had been trained to present hair microscopy evidence. I accept this explanation, and accept that there was a change in RCMP FLS policy – either formal or *de facto* – from the somewhat more cautious approach outlined in the *Methods Manual*. I also accept that Christianson believed that what he regularly told judges and juries about the probative value of hair comparison “matches” was correct. However, the question is whether this opinion was objectively justifiable, either in the early 1990s or today.

In considering this question, I rely on the work of the *Morin Inquiry*, where Commissioner Kaufman summarized this evidence as follows:

The evidence is clear that hair comparisons can yield *exclusionary* results — that is, it is possible to definitively *exclude* someone as the donor of an unknown hair. To give the most obvious example: a blond-haired person can be excluded as the donor of a dark brown hair. A hair comparison which *excludes* someone as the donor of an unknown hair is an important investigative tool and can be of great evidentiary significance at trial.

The difficult issue arises where hair comparisons are used for *inclusionary* purposes — that is, to permit an inference that a person (usually the accused) was the donor of an unknown hair. The evidence is clear that hair comparisons cannot yield a conclusion that a person was *definitely* the donor of an unknown hair. The characteristics of a person's hairs vary from hair to hair, and they may differ even within a single hair on a person's body. Hair comparisons are *not* akin to fingerprint comparisons. Hairs are not unique, and the assessment of the similarities, differences and importance of hair characteristics is highly subjective. Efforts to quantify, through statistical analysis, the probability that a person was the donor of an unknown hair are not generally accepted in the forensic community — in my view, with good reason.

The Commissioner noted that “[t]he forensic scientists who appeared generally agreed that hair comparison evidence was valuable as an exclusionary tool, but had limited utility as an inclusionary tool”, although they did not all agree on the exact limits of the technique for inclusionary purposes. Dr. William Tilstone (who also appeared as a panellist at this Inquiry) took the view that:

... if a scientist does not have a database which allows him to express quantitative information, he should avoid language which implies some quantitative rarity.

Dr. Tilstone and Dr. James Robertson of the Australian Federal Police agreed that hair examiners' conclusions should be expressed “in ‘exclusionary’ rather than ‘inclusionary’ terms”, a view essentially adopted by Commissioner Kaufman:

[R]eports must reflect the limitations upon the scientists' findings. Whether reflected in reports or in testimony, scientists must use language which clearly reflects these limitations. For this reason, terms like ‘could have come from a particular source,’ although they contemplate the opposite, should be rejected in favour of language which more explicitly highlights the full implications of a scientific finding. Dr. Tilstone suggested describing hair comparisons in terms

like “I cannot exclude that these things had a common origin, but other explanations are possible.”⁵⁰

Although Commissioner Kaufman thought it would be inappropriate “to articulate any hard and fast rules as to when [hair microscopy] evidence should be admitted in a criminal trial”, he suggested that evidence “of the kind introduced in the *Morin* case should rarely be admitted for inclusionary purposes”. Accordingly, he appears to have accepted that while hair comparison evidence could properly be admitted “for inclusionary purposes” when the high threshold standard used by the RCMP FLS to determine “consistency” was met (which was not the case in *Morin*), the evidence should still be presented in exclusionary terms, and hair examiners should not purport to give opinions about the likelihood of the questioned hairs coming from any particular person. Commissioner Kaufman’s recommendations regarding the use of appropriate language – in particular, his rejection of terms like “consistent with” and “match” in favour of expressions such as “may or may not have” – reflect this understanding of the limited inclusionary value of even the strongest hair microscopy evidence.

None of the expert panellists at this Inquiry challenged Commissioner Kaufman’s conclusions on this issue. While the panellists had differing views on whether microscopic hair evidence should still be admissible in criminal trials, they generally agreed that it should not be presented to juries as supporting a positive inference about identity without, at a minimum, a careful and thorough explanation of its limitations.

The concerns raised in the *Morin Inquiry Report* and by the panellists about the limited probative value of hair microscopy findings

⁵⁰ *Morin Inquiry Report*, p. 344.

are reinforced by the fact that it is has now become possible to conduct DNA retesting of microscopic hair “matches”. The results are disturbing. DNA testing of the hairs from four Manitoba murder cases (including Driskell) has shown that in all four cases (involving six hairs altogether), the microscopically indistinguishable hairs in issue were from different people. During the panel discussion, Mr. Neufeld noted that his organization in the United States, the Innocence Project, had now been involved in a number of cases where convictions based on hair microscopy evidence had been reversed through DNA testing. A recent US study of FBI Laboratory hair microscopy work⁵¹ showed that “of the 80 hairs that were microscopically associated, nine comparisons were excluded by mtDNA analysis” – an 11% discrepancy. These recent developments cast further doubt on the reliability of the probability assumptions relied on by hair examiners in the past, including in Driskell’s case.

Purportedly “scientific” evidence should not be presented in criminal trials as probative on the issue of identity unless this conclusion has a strong empirical and/or theoretical foundation. I agree with the views expressed by the panellists and in the *Morin Inquiry Report* that if hair microscopy evidence remains admissible, any conclusions should be expressed in “exclusionary” rather than “inclusionary” terms (*i.e.*, framed as a statement that the source of the known hairs cannot be excluded as the source of the questioned hairs).

Forensic scientists have a special obligation to present their opinions in a manner that allows the jury to assess the validity of their conclusions and assign appropriate weight to their evidence. The RCMP FLS appears to have taken a commendably conservative approach to their

⁵¹ M. Houck and B. Budowle, *Correlation of Microscopic and Mitochondrial DNA Hair Comparisons*, 47 J. Forensic Sci. 964 (2002).

laboratory hair microscopy work, in that its hair examiners were trained to apply a relatively high threshold test for determining “consistency” between two hairs.⁵² However, they were also trained to present their findings in court as strongly probative on the issue of identity, and to elaborate on the basis for this claim only if they were specifically asked to do so. Mr. Lucas notes in his report that this claim was “never widely accepted in forensic science”, and the experimental data supporting this claim was very limited. As a result, judges and juries did not have the necessary information to properly weigh the evidence nor did they know that the science itself had never been properly validated. As Dr. Joel Mayer explained during the panel discussion:

In fact, when hair microscopy and hair examination was being used by many forensic science laboratories, the debate as to the usefulness and the significance of the findings was still raging on. And that’s the wrong way to go about it. That debate should have taken place first, and once there was consensus and agreement, then turn around and employ this technique. So it should have been validated first. Unfortunately, as I look at it, the validation was ongoing while the information was being produced and evidence was given. At the end of the day, is this science?

The way in which hair microscopy evidence was routinely presented in Canadian trials reflects a broader problem of the justice system’s failure to grapple with the difficult challenge of ensuring that supposedly “scientific” evidence is properly scrutinized and fairly presented. During the panel discussion, Michael Bromwich spoke at some length about this broader systemic problem, drawing on his extensive

⁵² For instance, in their article “Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?”, [1996] *Col. Human Rights L. Rev.* 227, C.A. Stafford Smith and P. Goodman criticize hair microscopy and Mr. Gaudette’s probability calculations, but commend him and the RCMP for their “rigorous standards” (at pp. 253-55).

experience with the FBI and Houston Police laboratories in the US. He observed:

I think prosecutors are vastly undereducated in terms of forensic science. I think defence lawyers are vastly undereducated in forensic science. One of the reasons that the FBI lab's evidence went unchallenged really for decades is because it had a blue chip, gold edged reputation, that seemingly intimidated defence lawyers from even entering into a dialogue with FBI witnesses. The number of times we learned that terribly significant evidence was not even challenged in court by defence lawyers was stunning to us, as we reviewed a large number of cases. What we found in Houston is a set of institutional problems where there is a terribly inadequate level of communication pretrial between the prosecutor on the one hand and the forensic science witness on the other hand, as well as an almost total lack of education, except in rare instances, of defence lawyers representing their clients where forensic science is a critical component in the case.

Dr. De Forest also emphasized the importance of education of counsel so as to better expose the weaknesses inherent in the “science”.

These problems are all illustrated to some degree by the facts of Driskell's case. At the end of the day it was the RCMP FLS, in my view, that is responsible for ensuring that the evidence presented by its scientists regarding the probative value of microscopic hair analysis fairly and accurately sets out not just the conclusions that help the Crown, but all of the limitations and uncertainties surrounding those conclusions. That did not happen.

C. Systemic Issues

During the 1970s and 1980s, the RCMP Forensic Laboratory Service placed considerable emphasis on hair microscopy, maintaining a staff of approximately 35 hair examiners across Canada. Other Canadian forensic laboratories also conducted microscopic hair comparison. Since hair microscopy is laborious and time-consuming, it was generally reserved for serious cases, such as homicides. For many years the

admissibility of hair microscopy evidence was generally assumed, and its reliability was rarely challenged. However, the situation has changed significantly in recent years. The *Morin Inquiry Report* in 1998, while specifically focusing on the work of the CFS in Ontario, prompted significant improvements in RCMP FLS practices, including changes to hair examiners' note-taking practices and the introduction of peer review of microscopic observations. The *Morin Inquiry Report* also highlighted how hair microscopy evidence could lead to wrongful convictions, and suggested that trial courts should carefully scrutinize the admissibility of this evidence. The other major development has been the continued improvement of DNA testing techniques, which has greatly reduced the demand for hair microscopy analysis.

The RCMP's Winnipeg Laboratory ceased microscopic hair analysis in 1999, and over the next few years hair microscopy was entirely phased out in the RCMP FLS system. While the RCMP's decision to discontinue hair microscopy work appears to have been driven by resource considerations, during the panel discussion Dr. Mayer indicated that the CFS had decided to scale back its hair microscopy operations in part because of reservations about its limited evidentiary value, and that the CFS was "stopping this kind of work almost altogether.

Driskell and AIDWYC submit that hair microscopy evidence should be eliminated from Canadian criminal trials, arguing that it "does not have the necessary probative value to be admissible ... and its value in the criminal justice system should be limited to its use as an investigative tool." While the RCMP disputes the underlying premise that microscopic hair evidence is unreliable, it "takes no position on how this type of forensic evidence is received in the criminal justice system". Manitoba Justice opposes this proposal, submitting that some of the forensic science panellists had endorsed the continued utility of hair microscopy evidence in criminal trials. The other parties take no position on this issue, although the WPS observes that it no longer submits hairs for microscopic analysis.

There were a range of views expressed by the forensic science panellists on the question of whether hair microscopy evidence should still be admissible in criminal trials. Mr. Neufeld advocated prohibiting hair microscopy evidence in criminal trials. Dr. Mayer indicated that the CFS has concluded that hair microscopy is insufficiently probative to be used as positive evidence on the issue of identity, although he noted that “[i]t may have some exclusionary value”. Dr. Tilstone supports the exclusionary use of hair microscopy when the questioned hairs and known hairs are “clearly different in their characteristics”, but cautioned that “[g]oing beyond the conclusion that they could not have come from that source ... is getting into very difficult territory”. Mr. Lucas’s view was that:

[M]icroscopic hair comparison continues to be a useful technique in forensic science for exclusionary purposes, and may be helpful for inclusion purposes in certain circumstances. And it's probably a narrow band of circumstances, particularly where DNA, for example, isn't possible, and where the potential population of sources of hair is very, very limited.

Finally, Dr. De Forest cautioned against “throw[ing] the baby out with the bath water” and suggested that hair microscopy still had an important role in criminal investigations. He was critical of current hair microscopy practices, noting that “there is a lack of education, a lack of awareness to the limitations, and [that] it is being applied inappropriately,” emphasizing that the probative value of microscopic hair evidence was highly dependent on the particular factual context. Dr. De Forest also endorsed the potential exculpatory value of hair microscopy, noting that mtDNA was unable to distinguish between persons related through the maternal line. He observed that once hair samples are destroyed through mtDNA testing, the potentially useful information that might be obtained from microscopic examination is lost.

The forensic science panellists also addressed the related question of the adequacy of the existing legal standards for determining the

admissibility of “scientific” evidence. Mr. Bromwich and Mr. Neufeld, the two lawyers on the panel, indicated that their concern was not with the legal standards themselves but, rather, with courts’ willingness to enforce these standards in criminal cases. Dr. Tilstone suggested that courts were asking the wrong question by focusing on “whether something is scientific or not scientific”, and that greater emphasis should be placed on the reliability of testing and the reproducibility of results, rather than “whether it is this arcane thing called scientific.” He referred to the laboratory quality assurance literature, particularly the *International Laboratory Accreditation Cooperation (ILAC)* definition of an “objective test”, as a potential model.⁵³

Anyone who listened to the discussion of the forensic science panel could not fail to have serious concerns about the manner in which hair microscopy evidence has been presented in at least some past criminal trials. I have already indicated some minimal restrictions that Commissioner Kaufman recommends, and with which I concur, regarding its future use (*e.g.*, that conclusions be framed in exclusionary terms, and that examiners refrain from using language that suggests some degree of inclusionary probability). The broader question of whether there should be even more extensive limits placed on the admissibility of hair microscopy evidence was considered by Commissioner Kaufman as follows:

Evidence that an accused cannot be excluded as the donor of a hair left by the perpetrator may, in limited circumstances, have a high degree of probative value. For example, if the offence was likely committed by one of two suspects, evidence that a hair left by the perpetrator could have come from one suspect and could not have come from the other may be highly probative. Dr. Robertson pointed to the situation of an automobile accident, where the authorities wish to identify the driver and know from the start that it was one of the four people who were in

⁵³ *ILAC Guidelines for Forensic Science Laboratories*, ILAC-G19: 2002, §3.

the car. Evidence that only one of the individuals cannot be excluded as the donor of a hair left on the driver's seat may be of real probative value.

In the vast majority of cases, however, such evidence has extremely limited probative value: it merely permits the trier of fact to infer that the accused is one of a limitless class of persons who cannot be excluded as the perpetrator based upon this analysis.⁵⁴

He also noted that a particular danger of hair microscopy evidence:

... is that its prejudicial effect may be substantial, since the scientific opinion brings with it an aura of respectability and infallibility. The length and complexity of testimony which must be examined to produce the minute conclusion that the accused cannot be excluded as the donor of the unknown hair has the potential to mislead the jury and cause the testimony to acquire a prominence and importance out of all proportion to its insignificance. Any trier of fact, hearing an exhaustive detailing of the minutiae of hair similarities found, could easily (and understandably) conclude that only some legal or professional restraint prevents the experts from saying that the compared hairs come from a common source.

After considering the Supreme Court of Canada's decision in *R. v. Mohan*,⁵⁵ Commissioner Kaufman concluded:

I do not think it appropriate to articulate any hard and fast rules as to when such evidence should be admitted in a criminal trial. As Dr. Young pointed out, the potential uses of the evidence will vary case by case, and advances in technology may alter the value of a particular analysis. In my respectful view, however, it is appropriate for trial judges to undertake a far more critical analysis of the admissibility of this kind of evidence. My own view is that hair comparison evidence of

⁵⁴ *Morin Inquiry Report*, pp. 312-13.

⁵⁵ (1994), 89 C.C.C. (3d) 402 (S.C.C.).

the kind introduced in the *Morin* case should rarely be admitted for inclusionary purposes.⁵⁶

I agree with Commissioner Kaufman's analysis. The remaining question is whether there have been intervening developments in the eight years since the *Morin Inquiry Report* that affect the analysis and make it appropriate to go further than Commissioner Kaufman was prepared to go in 1998. In my opinion, there have been several developments bearing on this issue:

- the continued emergence since 1998 of what Mr. Christianson aptly described as the “DNA juggernaut”, and the corresponding decline in the use of hair microscopy, makes it increasingly unlikely that there will be significant technological or research advances in hair microscopy that might bolster its inclusionary powers. Since, as Commissioner Kaufman noted, “comparative hair analysis has no utility other than in the forensic context”, the fact that leading laboratories like the RCMP and CFS have abandoned or greatly scaled back their use of the technique is likely to slow the pace of research in the area;
- the number of DNA exonerations in cases involving hair microscopy evidence has heightened concerns about the reliability of this evidence, tipping the balance of probative value versus prejudicial effect further towards exclusion;
- the increased availability of mtDNA testing and improvements in nuclear DNA techniques since 1998 means that in many cases where hair microscopy evidence might be tendered there is now a *much more reliable* DNA alternative available, making it

⁵⁶ *Morin Inquiry Report*, p. 323.

increasingly questionable to justify exposing criminal defendants to the prejudicial dangers identified by Commissioner Kaufman.

These additional factors add to Commissioner Kaufman's concerns, and lend further support to his recommendation.

I concur with the position expressed by a majority of the panellists that hair microscopy evidence should remain potentially admissible, but should be received only with great caution and, when received, should be accompanied by a warning regarding its inherent frailties. I agree with Commissioner Kaufman's Recommendation 2, which states:⁵⁷

Trial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt. Evidence that shows only that an accused cannot be excluded as the donor of an unknown hair (or that an accused may or may not have been the donor) is unlikely to have sufficient probative value to justify its reception at a criminal trial.

I would add that when conducting this "critical analysis" of the evidence and weighing its probative value against its prejudicial effect, it seems to me one relevant consideration is whether the probative value of the evidence involves purely exclusionary reasoning. For example, in cases where there is other evidence that serves to narrow the range of suspects to a small number of people, hair microscopy evidence that eliminates all but one suspect as the source of a questioned hair can have significant probative force, without relying on any unwarranted assumptions about the number of people in the general population who have similar hair. Conversely, as Commissioner Kaufman noted, when hair microscopy evidence establishes only that "the accused is one of a limited class of persons who cannot be excluded as the perpetrator", the

⁵⁷ *Morin Inquiry Report*, p. 311-12 (Recommendation 2).

probative value of the evidence will be “extremely limited”, and concerns about prejudice will be heightened.

I therefore recommend that microscopic hair comparison evidence should be received with great caution and, when received, jurors should be warned of the inherent frailties of such evidence. As with any evidence, judges must scrutinize the proposed evidence and weigh its probative value against its prejudicial effect.

A further proposal by Driskell and AIDWYC is that:

A Committee should be established, nationally or province by province, to examine all cases of culpable homicide:

- prosecuted in Canada during the past 20 years
- in which the Crown tendered and relied upon microscopic hair comparison evidence
- where the accused pleaded not guilty at trial, asserting factual innocence, but was found guilty

to consider whether there is a reasonable basis to believe that, by virtue of this evidence, a miscarriage of justice has taken place.

Manitoba Justice, to its credit, took the initiative in 2003 and established an Advisory Committee to review homicide cases in the province involving hair microscopy evidence. The Committee identified two cases as falling within its mandate, *Unger and Sanderson*. Subsequent mtDNA testing has demonstrated that the hairs in both cases that had been presented at trial as “consistent with” the known hairs actually had different origins. In the wake of these results the Advisory Committee’s mandate was expanded to encompass sexual assault and robbery cases, but it did not identify any such cases as falling within its mandate (although an additional homicide case was sent to outside counsel for review).

The most significant difference between Driskell and AIDWYC's proposed audit and the previous work of the Manitoba Advisory Committee is that they are proposing a national audit of cases. The Inquiry was advised that reviews were currently under consideration or in progress in Ontario and New Brunswick, but the details of these are unclear. I note that the Reports of the three most recently-completed provincial Commissions of Inquiry into wrongful convictions – the *Morin Inquiry* in Ontario, the *Sophonow Inquiry* in Manitoba, and the *Dalton, Druken and Parsons Inquiry* in Newfoundland and Labrador – all recommended that certain steps be taken at a national level. The forensic sciences panellists generally supported the concept of a broader review.

I am concerned that the problems identified relating to hair microscopy evidence in Driskell's case are not unique to his case or unique to Manitoba. I accept that a more extensive review of cases from across the country would be advisable, and encourage the Attorneys General of the Provinces and Territories to work together to examine how a case review similar to that conducted in Manitoba might be performed on a national level, and consider the appropriate parameters of such a review. I also recommend that Manitoba Justice consider whether there are cases that fell outside the mandate of the 2003 Advisory Committee, where a review now appears warranted.

Driskell and AIDWYC also request that I make the following recommendation:

An independent review Committee of interested parties should be established to examine and make recommendations for the improvement of the system of RCMP Forensic Laboratory Services across Canada. Its mandate should include both the scientific practices and the institutional culture of the Laboratory. The same Committee should consider whether it is in the public interest, and the interests of the administration of justice, for the Laboratory to move out of the jurisdiction of the RCMP.

Although this Inquiry has a broad mandate to consider systemic issues arising out of the facts of Driskell's case, the focus of the evidentiary hearings was almost exclusively retrospective, concentrating on events of almost sixteen years ago. The evidence relating to the RCMP FLS dealt almost exclusively with hair microscopy, a technique that the FLS no longer uses. Conversely, Driskell and AIDWYC's proposed review would have a purely prospective focus.

The forensic science panellists made a number of valuable comments and observations bearing on this proposed recommendation. The panellists were invited to discuss how a forensic laboratory should respond when questions are raised about the validity of its past work, either because the competence of particular laboratory scientists has been challenged, or because doubts have arisen concerning the scientific legitimacy of a particular technique. There was a general consensus that in the former case the laboratory has no choice but to thoroughly review the impugned work. In the latter case, Mr. Lucas drew a distinction between incremental scientific developments that may not necessarily invalidate past work, and more fundamental developments that affect the accuracy of prior results.

Dr. Mayer, Mr. Neufeld and Mr. Bromwich discussed the danger of laboratories reacting to either type of problem by assuming an overly defensive and adversarial posture.

Although some might suggest Mr. Christianson's testimony and the RCMP FLS's initial response to the mtDNA evidence in this case raise some concerns about their willingness to recognize potential errors, I am not persuaded the evidence raises sufficiently strong concerns about "cultural" problems within the RCMP FLS to justify a broad review of its current operations.

In the final analysis, I am not persuaded that it would be appropriate for me to recommend the kind of review of the RCMP FLS

sought by Driskell and AIDWYC at this juncture and on the evidence before me, having regard to several factors:

- The RCMP FLS no longer performs hair microscopy work
- The RCMP FLS ultimately accepted the validity of the mtDNA results and the conclusion that the questioned hairs in this case did not come from Harder. Even if one were to accept Driskell and AIDWYC's characterization of this as a "new position", which the RCMP FLS disputes, it indicates that the RCMP FLS, to its credit, is prepared to listen to the opinions of others, reflect on the evidence, and reassess its conclusions;
- The RCMP FLS have been extremely cooperative throughout this Inquiry, both with Mr. Lucas during his review, with Commission Counsel, and with Mr. Driskell's counsel. As a federal agency, the RCMP FLS could have resisted the Inquiry's attempts to obtain information. The fact that it chose not to take an adversarial stance and cooperated with the Inquiry process is, in my view, significant, and helps to allay any concerns about the RCMP FLS's institutional ability to reassess and learn from experience;
- Perhaps most importantly, I am mindful of the fact that the RCMP FLS now has an external Advisory Group, reporting to the Assistant Commissioner, Forensic Laboratory Services, that includes among its current members the Hon. Horace Krever – no stranger to public inquiries involving complex scientific issues. The members of this Advisory Group will have available this Report and, I hope, give consideration to Driskell and AIDWYC's proposal for an external review of the RCMP FLS in light of the evidence at this Inquiry and my conclusions. In my opinion, the Advisory Group are in a much better position to assess the necessity and advisability of such an external review than I am on

the record before me, which contains virtually no direct evidence about the RCMP FLS's current operations and activities.

I am not persuaded that it would be appropriate for me to make a recommendation, on the evidence before me, on the difficult question of whether it would be better for the FLS to be separated from the RCMP's policing operations. The forensic science panellists generally agreed that in their experience, formal affiliations between a forensic laboratory and a police force are not always a cause for concern.

There are, as Mr. Bromwich and Mr. Lucas both observed, problems of public perception associated with having a forensic laboratory institutionally situated with a police force. There may well be advantages in having a national forensic laboratory system in Canada that is separate from the RCMP. However, I am not persuaded that it would be appropriate for me to recommend that a committee be established to study this issue, particularly since the relationship between this complex policy issue and the facts of Driskell's case is at best uncertain. However, I suggest that the RCMP FLS Advisory Committee may wish to consider the comments of the expert panellists on this issue and the related issue of independent laboratory oversight.

VII. CONCLUSION

In concluding this Report, I can do no better than to paraphrase the concluding remarks from the second report of The Honourable John Enns where he said that some of the solutions recommended in his reviews were not new ones “but simply a plea to all involved in law enforcement, to conscientiously and diligently follow existing principles and guidelines”. I echo his hope that this Report will, in some small way, encourage that.

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- I. Statement of John Edward Bark, The Forensic Science Laboratory, December 2, 2002

APPENDICES



Appendix A

No. 479/2005

ORDER IN COUNCIL

ORDER

1. The Honourable Patrick LeSage, Q.C. (the "commissioner") is appointed to do the following:

- (a) To inquire into the conduct of Crown Counsel who conducted and managed the trial of James Driskell and the subsequent appeal and departmental reviews of his conviction, and consider whether that conduct fell below the professional and ethical standards expected of lawyers and agents of the Attorney General conducting prosecutions at the time.
- (b) To inquire into whether the Winnipeg Police Service failed to disclose material information to the Crown before, during or after James Driskell's trial and, if so, consider whether the non-disclosure contributed to a likely miscarriage of justice in the prosecution against him.
- (c) To give advice about whether the conduct of Crown Counsel or members of the Winnipeg Police Service should be referred to the Law Society of Manitoba, or to the Law Enforcement Review Agency or an appropriate independent police service, for review and possible investigation by those bodies.
- (d) To consider the role of the RCMP Laboratory in the prosecution of James Driskell, and to review any systemic issues that may arise out of its role.
- (e) To give advice about whether any aspect of this case should be further studied, reviewed or investigated and by whom, and to make systemic recommendations arising out of the facts of the case which the commissioner considers appropriate.
- (f) To consider whether and in what way a determination or declaration of wrongful conviction can be made in cases like this, where
 - the Minister of Justice for Canada directs a new trial under section 696.3(3)(a)(i) of the *Criminal Code* (Canada), and
 - after a review of the evidence, Crown Counsel directs a stay of proceedings under section 579 of the *Criminal Code* (Canada).

2. The commissioner must perform his duties without expressing any conclusion or recommendation about the civil or criminal liability of any person or organization, and without interfering in any ongoing police investigation or criminal proceedings relating to the murder of Perry Harder.

3. The commissioner must complete his inquiry and deliver a final report containing his findings, conclusions and recommendations to the Attorney General by December 31, 2006. He may also give the Attorney General any interim reports that he considers appropriate to address urgent matters. All reports must be in a form appropriate for public release, but release is subject to *The Freedom of Information and Protection of Privacy Act* and other relevant laws.

4. In conducting his inquiry, the commissioner may do the following:

- (a) To avoid duplication of effort, the commissioner may review the full judicial record, all files maintained by Manitoba Justice and the Winnipeg Police Service, the reports of the Honourable John Enns to the Attorney General, and any other reports or analyses about the case.
- (b) The commissioner may interview any person connected with the case, including current and former employees of both Manitoba Justice and the Winnipeg Police Service. On the commissioner's behalf, interviews may be conducted by the special counsel referred to in clause (c), either alone or in the commissioner's presence. If conducted alone, the special counsel must give the commissioner a transcript or a report of each interview.

JUSTICE
Initiating Department/Agency
Authorized Officer
APPROVED BY:
Civil Service Commission
Finance
APPROVED AS TO FORM BY:
Name
Civil Legal Services or
Legislative Counsel Office
Initials

RECOMMENDED:
Minister

APPROVED BY EXECUTIVE COUNCIL:
Presiding Member

ORDERED:
Lieutenant Governor
December 07, 2005
Date



No. 479/2005

If it appears necessary to ensure cooperation and public accountability, or to assess important issues of credibility, the commissioner may accept and record information and evidence publicly and under oath under *The Manitoba Evidence Act*.

- (c) The commissioner may employ special counsel, who is wholly unconnected to persons involved in the prosecution and defence of James Driskell, to review relevant documentation, interview witnesses and examine specific persons publicly and under oath.
 - (d) Upon delivering his final report, the commissioner must provide the Deputy Attorney General with all original statements, transcripts and other documents prepared during the course of the Inquiry which, upon payment of an appropriate fee in accordance with *The Freedom of Information and Protection of Privacy Act*, may upon request be made available to members of the public.
5. Government departments and agencies, and any other bodies established under the authority of the Manitoba Legislature, including the Winnipeg Police Service, must assist the commissioner to the fullest extent permitted by law.
6. The Minister of Finance may pay the following amounts from the Consolidated Fund, at the request of the Attorney General:
- (a) travelling and other incidental expenses that the commissioner incurs conducting his inquiry;
 - (b) fees and salaries of any advisors and assistants employed or retained for the purpose of the inquiry;
 - (c) reasonable legal fees incurred from time to time to assist James Driskell during the inquiry, if standing at the inquiry is granted to him;
 - (d) reasonable legal fees incurred from time to time to assist the Department of Justice and its former employees, if standing at the inquiry is granted to them;
 - (e) any other operational expenditures required to support the inquiry.
- Legal fees referred to in paragraphs (c) and (d) are to be in amounts and subject to terms set by the Deputy Attorney General in accordance with the policies and practices of the Government of Manitoba.
- Accounts of legal fees referred to in clause (c) are subject to taxation by a taxation or judicial officer appointed for the purpose by the commissioner. Accounts of legal fees referred to in paragraph (d) are subject to taxation by the Director of Civil Legal Services of the Department of Justice.
7. This Order comes into effect the day it is made.

AUTHORITY

Subsection 83(1) and section 96 of *The Manitoba Evidence Act*, C.C.S.M. c. E150, state in part:

Appointment of commission

83(1) Where the Lieutenant Governor in Council deems it expedient to cause Inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

...

(c) the administration of justice within the province;

...

(f) any matter which, in his opinion, is of sufficient public importance to justify an Inquiry;

he may, if the Inquiry is not otherwise regulated, appoint one or more commissions to make the Inquiry and to report thereon.



Power to make rules

96 The Lieutenant Governor in Council may make provision, either generally in regard to all commissions issued and inquiries held under this part, or specifically in regard to any such commission and Inquiry, for

- (a) the remuneration of commissioners and persons employed or engaged to assist in the inquiry, including witnesses;
- (b) the payment of incidental and necessary expenses; and
- (c) all such acts, matters, and things, as are necessary to enable complete effect to be given to every provision of this Part.

BACKGROUND

1. Perry Harder disappeared from the Winnipeg area on June 16th, 1990. His body was discovered 3 ½ months later. In October, 1990 James Driskell was charged with the first degree murder of Perry Harder. The trial lasted nine days before Mr. Justice Morse sitting with a jury. On June 14, 1991 the jury returned with a verdict of guilty of first degree murder. Mr. Driskell was sentenced to life imprisonment without eligibility for parole for 25 years.
2. On June 3, 2003, through counsel, Mr. Driskell asked the Minister of Justice for Canada to review his conviction for murder. The application was completed on October 22, 2003.
3. On March 3, 2005 the Minister of Justice for Canada directed a new trial for James Driskell. Later that day, Crown Counsel directed a stay of proceedings on the charge on the basis of a review of the evidence in the case.

DRISKELL INQUIRY

TERMS OF REFERENCE

1. The Commission of Inquiry appointed pursuant to an Order-in-Council will have the responsibility to inquire into the conduct of Crown Counsel who conducted and managed the trial of James Driskell and the subsequent appeal and departmental reviews of his conviction. It is to consider whether that conduct fell below the professional and ethical standards expected of lawyers and agents of the Attorney General conducting prosecutions at the time. The Commission of Inquiry will also have to inquire into whether the Winnipeg Police Service failed to disclose material information to the Crown before, during or after James Driskell's trial and, if so, consider whether the non-disclosure contributed to a likely miscarriage of justice in the prosecution against him. The Commission of Inquiry is to consider the role of the RCMP Laboratory in the prosecution of James Driskell, and to review any systematic issues that may arise out of its role.
2. The Commission shall perform its duties without expressing any conclusion or recommendation about the civil or criminal liability of any person or organization, and without interfering in any ongoing police investigation or criminal proceedings relating to the murder of Perry Harder.
3. The Commission shall complete its inquiry and deliver its final report containing its comments, findings, conclusions and recommendations to the Attorney General. The report must be in a form appropriate for public release.
4. To the extent the Commission considers it iadvisable, it may rely on any transcript or record of any proceedings from any court in relation to the proceedings referred to above on such other related material it considers relevant to its duties.
5. For more specific details, please refer to Order-in-Council #479/2005 (187KB PDF).

DRISKELL INQUIRY

RULES OF PROCEDURE AND PRACTICE

[These rules were approved at the Standing Hearing before the Honourable Patrick J. LeSage, Q.C., Commissioner and came into force on April 4, 2006.]

PART I: GENERAL

1. The Commission's mandate, established by Order-in-Council #479/2005, is:
 - to examine the conduct of Crown counsel who conducted and managed the trial of James Driskell and the subsequent appeal and departmental reviews of his conviction, and consider whether that conduct fell below the professional and ethical standards expected of prosecutors at the time;
 - to inquire whether the Winnipeg Police failed to disclose material information to the Crown at any time and if any such non-disclosure contributed to a likely miscarriage of justice;
 - to give advice about whether the conduct of Crown counsel or the police should be referred to an appropriate body for further review or investigation;
 - to consider the role of the RCMP laboratory in the prosecution of James Driskell and to review any systemic issues that may arise out of its role;
 - to give advice about whether any aspect of this case should be further studied, reviewed or investigated and if so, by whom, and to make systemic recommendations arising out of the facts of the case that the Commissioner considers appropriate;
 - to consider whether and in what way a determination or declaration of wrongful conviction can be made in cases like this where a new trial is ordered by the Minister of Justice for Canada pursuant to s. 696.3(3)(a)(i) of the *Criminal Code* and Crown counsel subsequently directs a stay of proceedings under s. 579 of the *Code*.
2. The Commissioner is authorized by s. 4(b) of the Order-in-Council to hold public hearings "[i]f it appears necessary to ensure cooperation and public accountability or to assess important issues of credibility". Public hearings will be convened in Winnipeg at the Winnipeg Convention Centre, 375 York Avenue, Winnipeg, Manitoba at a date and time to be set by the Commissioner.

3. In these Rules:

- (i) the term "documents" is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device.
- (ii) "party" means a person, group of persons or organization who has been granted standing by the Commissioner under Part II of these Rules.
- (iii) "Commissioner counsel" refers to the "special counsel" retained by the Commissioner pursuant to s. 4(c) of the Order in Council

4. All parties and their counsel shall be deemed to undertake to adhere to these Rules. Any party may raise any issue of non-compliance with the Commissioner. The Commissioner shall deal with a breach of these Rules as he sees fit including, but not restricted to, revoking the standing of a party, and imposing restrictions on the further participation in or attendance at the hearings by any party, counsel, individual or member of the media.

5. The Commissioner may amend these Rules or dispense with compliance with them as he deems necessary to ensure that the hearing is thorough, fair and timely.

PART II: STANDING

6. The Commissioner has appointed counsel to represent him and the public interest during the Inquiry. Commission counsel will assist the Commissioner throughout the Inquiry and are responsible for ensuring that the Inquiry is conducted in an orderly fashion, and that all matters bearing on the public interest and falling within the scope of the Commissioner's mandate are brought to the Commissioner's attention. Commission counsel have standing throughout the Inquiry.

7. Persons, groups of persons or organizations who wish to participate in the Inquiry may seek standing before the Inquiry. The Commissioner may grant standing if he is satisfied that an

applicant has a substantial and direct interest in the subject-matter of the Inquiry or that the applicant's participation in the Inquiry may be helpful to the Commission in fulfilling its mandate. Persons, groups of persons or organizations that are granted standing are referred to in these Rules as "parties". An application for standing shall be made both in writing and orally pursuant to the terms set out in the Call for Applications for Standing issued by the Commission on March 15, 2006.

8. The Commissioner will determine on what terms a party may participate in the Inquiry, and the nature and extent of such participation.

9. As provided for in Part III (Evidence), counsel representing a witness who is called to testify before the Commission may participate during the hearing of that witness's evidence without the necessity of applying for standing.

PART III: EVIDENCE

A. General

10. The Commissioner may receive any evidence that he considers to be helpful in fulfilling his mandate whether or not such evidence would be admissible in a court of law.

B. Preparation of Documentary Evidence

11. All parties granted standing under Part II of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Documents in the possession or control of a party that are already in the possession of the Commission shall be listed but need not be produced, unless specifically requested by Commission counsel. Upon the

request of Commission counsel, parties shall also provide originals of relevant documents in their possession or control for inspection.

12. Upon the request of Commission counsel, any non-party shall produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Documents in the possession or control of a non-party that are already in the possession of the Commission shall be listed but need not be produced, unless specifically requested by Commission counsel. Upon the request of Commission counsel, such non-parties shall also provide originals of relevant documents in their possession or control for inspection.

13. All documents received by the Commission will be treated by the Commission as confidential, unless and until they are made part of the public record or the Commissioner otherwise directs. This does not preclude Commission counsel from producing a document to a potential witness prior to the witness giving her testimony, as part of Commission counsel's investigation.

14. Any party or non-party required to produce a document or documents pursuant to paras. 11 or 12 or pursuant to a subpoena or summons issued pursuant to s. 88(1) of the *Manitoba Evidence Act* (see para. 23) and who claims privilege over any such document shall produce a list of the documents over which privilege is claimed stating the basis and reasons for the claim of privilege.

15. If Commission counsel wishes to challenge a claim of privilege, Commission counsel shall apply as follows:

(i) to the Commissioner, or

(ii) to the Court of Queen's Bench of Manitoba, in relation to a claim of solicitor-client privilege, if the party claiming the privilege requests that the issue be adjudicated by the Court.

During the argument of a privilege claim under para. 15(i) the Commissioner shall not disclose any disputed document to Commission counsel or to the other parties, but may, with the assistance of the party or non-party claiming privilege, prepare and produce a summary of the document. If the party or non-party claiming solicitor-client privilege requests that Commission Counsel apply for a ruling to the Manitoba Court of Queen's Bench under para. 15(ii), the party or non-party shall make this request in an expeditious manner.

C. Witness Interviews and Disclosure

16. As provided in s. 4(b) of Order in Council #479/2005, Commission counsel may interview people believed to have information or documents bearing on the subject-matter of the Inquiry. The Commissioner may choose whether or not to attend an interview, and Commission counsel will provide the Commissioner with a transcript or report of all interviews conducted in his absence. Persons interviewed by Commission counsel may choose to have legal counsel present during the interview, but are not required to do so. Persons whose interview is requested by Commission counsel shall answer all relevant questions and produce any relevant document. A subpoena or summons may be issued pursuant to para. 23 if the person to be interviewed requests one.

17. If Commission counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in Part I, Commission counsel will prepare a statement of the witness's anticipated evidence or a transcript of their interview, and will provide a copy of this statement or the interview transcript to the witness before he or she testifies in the hearing. After the statement or transcript has been reviewed by the witness, copies shall be disclosed to the parties on their undertaking to use it only for the purposes of the Inquiry.

18. If Commission counsel determines that it is not necessary for a person who has been interviewed to be called as a witness in the public hearings referred to in Part I, Commission Counsel may tender the witness statement or transcript to the Commissioner at the hearing, and the Commissioner may consider the information in the witness statement or transcript when making his final findings, conclusions and recommendations. If Commission counsel interviews a person and decides not to call that person to testify at the public hearings, Commission counsel will provide the parties with a transcript of the interview, if available, or a summary of the relevant information provided by that person. As provided in para. 27, a party may apply to the Commissioner for leave to call any person as a witness or for a direction that Commission counsel call that person as a witness.

19. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.

D. Witnesses

20. Witnesses who testify will give their evidence under oath or upon affirmation.

21. Witnesses are entitled to have their own counsel present while they testify. A witness's counsel has standing in the Inquiry for the purposes of that witness's testimony, and may examine the witness as provided in paras. 24 and 25.

22. Witnesses may be called to give evidence in the Inquiry more than once.

23. Where he considers it advisable, the Commissioner may issue a summons or subpoena pursuant to s. 88(1) of the *Manitoba Evidence Act* requiring a witnesses to give evidence on oath or affirmation and/or to produce documents or other things. A summons or subpoena may be issued in relation to either the pre-hearing interviews conducted by Commission counsel, the pre-hearing requests for documents or the public hearings.

E. Oral Examinations

24. The order of examination of a witness will ordinarily be as follows, subject to para. 25, below:

- (a) Commission counsel will examine the witness. Except as otherwise directed by the Commissioner, Commission counsel may adduce evidence from a witness by way of both leading and non-leading questions;
- (b) The parties who have been granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. If these parties are unable to agree on the order of cross-examination, this will be determined by the Commissioner;
- (c) Subject to para. 25, counsel for the witness will examine the witness last, regardless of whether or not counsel is also representing another party;
- (d) Commission counsel will then have the right to re-examine the witness.

25. A witness's counsel may apply to the Commissioner for permission to lead that witness's evidence-in-chief. If permission is granted, the witness will be examined in the following order:

- (a) counsel will examine the witness in accordance with the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner;

- (b) Commission counsel will then be entitled to examine the witness
- (c) The other parties with standing will be in entitled to cross-examine the witness, as provided for in para. 24(b);
- (d) Counsel for the witness will then be entitled to re-examine the witness;
- (d) Commission counsel will then be entitled to conduct a final re-examination of the witness.

26. After a witness has been sworn or affirmed at the commencement of his or her testimony, no counsel other than Commission counsel may speak to that witness about the evidence he or she has given until the witness has completed his or her evidence, except with the permission of the Commissioner. Commission counsel may not speak to the witness about his or her evidence while the witness is being cross-examined by other counsel, except with the permission of the Commissioner.

27. Once Commission counsel has indicated that they will not be calling a particular witness to testify at the public hearings referred to in para. 2, a party may apply to the Commissioner and request that the witness be called to give evidence. If the Commissioner is satisfied that the witness's testimony is needed, the Commissioner may direct Commission counsel to call the witness (in which case para. 24 applies) or may allow the requesting party to call the witness and adduce his or her evidence in chief (in which case para. 25 applies, with suitable modifications).

F. Use of Documents at Hearings

28. Before a witness testifies at the Inquiry, Commission counsel may, where practicable and appropriate, provide the witness and the parties with a binder or a list of those documents that are likely to be referred to during that witness's testimony. Before these documents will be provided to a party or the witness, he or she must undertake to use these documents only for the purposes of the Inquiry and to abide by such other restrictions on disclosure and dissemination that the

Commission considers appropriate. The Commission may require that documents provided, and all copies made, be returned to the Commission if not tendered in evidence.

29. The undertakings given pursuant to paras. 17, 18 and 28 are of no force in relation to any document or information that has been entered into the public record. The Commission may, upon application, release any party or counsel in whole or in part from the provisions of an undertaking regarding the use or disclosure of documents or information.

30. Without leave of the Commissioner, no document shall be used in cross-examination or otherwise unless copies of the documents have been provided to Commission counsel in a timely manner pursuant to paras. 11 and 12.

G. Access to Hearings and to the Evidence

31. Subject to para. 32, the hearings referred to in para. 2 will ordinarily be open to the public. The use of fixed camera(s) in the hearing room will be permitted on terms and conditions to be determined by the Commissioner after hearing submissions from interested parties.

32. Where the Commissioner is of the opinion that it is necessary in the interests of the maintenance of order or the proper administration of justice to exclude all or any members of the public from the hearing room, he may, after hearing submissions from interested parties, direct that portions of the hearing be held in the absence of the public or on such terms and conditions as he may direct.

33. Applications from witnesses or parties to hold any part of the hearing in the absence of all or any members of the public should be made in writing to the Commission at the earliest possible opportunity.

34. The transcripts and exhibits from the hearings will be made available as soon as practicable for public viewing. Transcripts will be posted on the Commission's web site as soon as is reasonably practical and will be available to both the parties and the public. Transcripts of any portions of the hearing that are held in the absence of the public pursuant to para. 32 will be made available for public viewing on such terms as the Commissioner may direct if, after hearing the evidence and any submissions, the Commissioner concludes that it is in the public interest to release these transcripts.

PART IV: NOTICES REGARDING ALLEGED MISCONDUCT

35. The Commissioner will not make a finding of misconduct on the part of any person unless the person or, if the person is deceased, his estate has had reasonable notice of the substance of the alleged misconduct and has been allowed full opportunity during the inquiry to be heard in person or by counsel.

36. Any notices of alleged misconduct will be delivered on a confidential basis to the person to whom the allegations of misconduct refer.

PART V: AMENDMENTS TO THE RULES

37. These Rules may be amended and new Rules may be added if the Commissioner considers it advisable to do so in order to fulfil his mandate and ensure that the process is fair and thorough.

DRISKELL INQUIRY

First Week: July 17, 2006

1. Inspector Ross Burton
2. Staff/Sgt. Ron Ferguson (retired)
3. Sgt. Tom Orr (retired)

Second week: July 24, 2006

1. Staff/Sgt. William Vandergraaf (retired)
2. Sgt. Tom Anderson (retired)
3. Sgt. Albert Paul (retired)

Third week: August 2, 2006

1. David Kovnats
2. Greg Brodsky
3. Chief of Police Jack Ewatski

Fourth week: August 14, 2006

1. George Dangerfield
2. Stu Whitley

Fifth week: September 18, 2006

1. Panel on Crown Stay of Proceedings
2. Tod S. Christianson
3. Chief of Police Jack Ewatski
4. Panel on Forensic Science Issues
5. Gregg A. Lawlor

Sixth week: September 28, 2006

1. Dale Schille

Appendix E



DRISKELL INQUIRY

EXHIBIT LIST

COMMISSIONER

Honourable Patrick Lesage, O.C.,

COMMISSION COUNSEL

Michael Code

Jonathan A. Dawe

CHIEF ADMINISTRATIVE OFFICER

R.L. (Bob) Giasson

Court Clerks: Michele Smith, Doug McCoy, Wendy Falkner

Hearing dates: July 17-20; 24-27; 31, 2006

August 1-3; 8-11; 14-17, 2006; September 18-22;

| EK ID. | EX. NO. | EXHIBIT DESCRIPTION | FILED BY |
|-------------------|--------------------|--|---------------------|
| | | <u>July 17, 2006</u> | |
| | 1 | Book of documents for Commission Counsel's examination of Insp. Ross Burton and Staff/Sgt. Ron Ferguson (retired) containing tabs A1-50, B1-30 | M. Code |
| | | <u>July 19, 2006</u> | |
| | 2 | 4 page handwritten document. Titled <u>RCMP GRC Transit slip</u> ; dated 91-10-08; <u>RE: ZANIDEAN "ET AL"</u> | J. Lockyer |
| | | <u>July 20, 2006</u> | |
| | 3 | Book of documents for Commission Counsel's examination of Sgt. Tom Orr (retired) Containing tabs 1-43 | M. Code |
| | | <u>July 24, 2006</u> | |
| | 4a | Book of documents for Mr. Driskell's Counsel cross-examination of Sgt. Tom Orr (retired); containing tables 1-23 | J. Lockyer |
| | 4b | Book of documents for Mr. Driskell's Counsel cross-examination of Sgt. Tom Orr (retired) Supplemental Book 1; containing tabs 1-7 | J. Lockyer |
| | | <u>July 25, 2006</u> | |
| | 5 | 4 page typed document titled; John Gumieny Summary of Telephone Interview by Commission Counsel July 6, 2006 | J. Prober |
| | 6a | Volume 1; Book of documents for Commission Counsel's examination of Staff/Sgt. William VanderGraaf (retired), Sgt. Tom Anderson (retired), and Sgt. Albert Paul (retired), containing tabs 1-6 | M. Code |



DRISKELL INQUIRY

EXHIBIT LIST

| EX ID. | EX. NO. | EXHIBIT DESCRIPTION | FILED BY |
|-----------|------------|--|-------------|
| | 6 b | Volume 2; Book of documents for Commission Counsel's examination of Staff/Sgt. William VanderGraaf (retired), Sgt. Tom Anderson (retired), and Sgt. Albert Paul (retired), containing tabs 1- 57; July 27, 2006 tabs 58, 59 added | M. Code |
| | 4c | 1 page cover letter dated July 21, 2004 from Hill Abra Dewar to Judge Enns and a 3 page letter dated July 13, 2004 from Judge Bruce Miller to Judge Enns | J. Lockyer |
| | 4d | 5 page hand written document. Titled <u>RCMP GRC Transit slip</u> : to Federal Policing Officer; from Source Witness Protection; dated 93-05-05 | J. Lockyer |
| | | July 26, 2006 | |
| | 7 | Book of documents for Mr. Driskell's counsel cross examination of Sgt. William VanderGraaf, containing tabs 9-13 | J. Lockyer |
| | 8 | Book of documents for cross-examination of: Staff/Sgt. William Vandergraaf (retired), Sgt. Tom Anderson (Retired); Sgt. Albert Paul (retired); containing tabs 1-4 | E.W. Olson |
| | | July 31, 2006 clerk - D. McCoy | |
| | 9 | Book of Documents for Mr. Driskell's Counsel - cross-examination of Sgt. Al Paul, containing tabs 1-2 | A. Libman |
| | | August 1, 2006 clerk - W. Falkner | |
| | 10a | Book of documents for Mr. Driskell's counsel - Cross Examination of Sgt. Tom Anderson containing tabs 1-8 | J. Lockyer |
| | 10b | 1 page copy of notebook cover of Sgt. C. Osborne | J. Lockyer |
| | 10c | 1 page supplementary report dated October 9, 1990 | J. Lockyer |
| | 11 | CD of audio recording of Reath Zanidean call to Greg Brodsky on 6-20-91 | J. Lockyer |
| | 12 | Book of Documents for Cross-Examination of Sgt. Tom Anderson (retired) and Sgt. Albert Paul | D. Abra |
| | 13 | Page 4 of the Ewatski/Hall Report | J. Kennedy |
| | | August 2, 2006 | |
| | 14 | 2 Page letter dated April 28, 1993, To: Mr. Bruce Miller Q.C., From: Mr. C. Richard Quinney Q.C. | R. Wolson |
| | 15a | Volume 1; Book of documents for Commission Counsel's examination of David Kovnats; containing tabs 1-25 | M. Code |
| | 15b | Volume 2; Book of documents for Commission Counsel's examination of David Kovnats; containing tabs 26-51 | M. Code |
| | | August 3, 2006 | |
| | 16a | Page 83 of the Perry Dean Harder homicide review | K. Carswell |
| | 16b | Page 30 - 35 of the log book of Hall and Ewatski | K. Carswell |
| | 17 | Page 97-99 of the transcript of Mr. Brodsky's Cross Examination of Mr. Zanidean from the Driskell Trial | R. Wolson |
| | | August 8, 2006 | |
| | 18 | Book of Further documentary disclosure of David Kovnats; received by Commission office on August 3, 2006, 3:05 P.M. | M. Code |
| | 19 | 2 page letter dated June 17, 1991, to Mr. Bruce Miller from Mr. David B. Kovnats | M. Code |
| | 20a | Volume 1: Book of Documents for Commission Counsel's Examination of Greg Brodsky, containing tabs 1-25 | J. Dawe |



DRISKELL INQUIRY

EXHIBIT LIST

| EX ID. | EX. NO. | EXHIBIT DESCRIPTION | FILED BY |
|-----------|------------|---|-------------|
| | 20b | Volume 2: Book of Documents for Commission Counsel's Examination of Greg Brodsky, containing tabs 26-55 | J. Dawe |
| | 20c | Volume 3: Book of Documents for Commission Counsel's Examination of Greg Brodsky, containing tabs 56-57 | J. Dawe |
| | 20d | Chart titled: Driskell Inquiry Index of Brodsky's Copy of Police File; pages 1-15 Revised: July 12, 2006 | J. Dawe |
| | 21 | Book of Documents for Mr. Driskell's Counsel Examination of Greg Brodsky, Q.C., containing tabs 1-11 | J. Lockyer |
| | 22 | 2 page letter from Don Slough A/Assistant Deputy Attorney-General and FIPPA Access Officer to Mr. Mark Wasyliv August 9, 2006 | J. Lockyer |
| | 23 | Manitoba Department of Justice Public Prosecutions Policy Directive; Guideline No. 2:DIR:1; subject: Direct Indictments, Date: August 27, 1996; 3 pages & Date: December, 2004; 2 pages | J. Kennedy |
| | 24 | 2 page letter, dated June 20, 1991; From J.G.B Dangerfield, Q.C.; To H.B Stephen, Chief of Police; Re: R. v. Driskell | K. Carswell |
| | 25 | MEMO dated June 8, 1993; To: G. Greg Brodsky, Q.C.; From: Michael Fairney; 5 pages | K. Carswell |
| | 26 | Book of Documents for the Estate of Bruce Miller; Douglas N. Abra, Q.C.; containing tabs 1-6 | D. Abra |
| | 27a | Additional Book of Documents for Cross-Examination of : Greg Brodsky; containing tabs 1-9 | E.W. Olson |
| | 27b | News article from the Winnipeg Free Press, Friday, January 30, 2004 CLARIFICATION AND APOLOGY | E.W. Olson |
| | 27c | 3 page letter dated November 18, 2004 to Mr. David McNairn from Mr. Rob Finlayson Assistant Deputy Attorney General | E.W. Olson |
| | 27d | 3 page letter dated November 25, 2004 to Mr. David McNairn From Mr. Bruce A. MacFarlane, Q.C.; Deputy Minister of Justice and Deputy Attorney General August 10, 2006 | E.W. Olson |
| | 27e | Justice News Release dated September 20, 2005; Titled Forensic Evidence Review Committee Report Released | E.W. Olson |
| | 27f | Letter dated December 17, 2004 to Mr. Gregory Brodsky, Q.C.; from Mr. Rob Finlayson Assistant Deputy Attorney General | E.W. Olson |
| | 27g | News article from the Lawyers Weekly, April 23, 2004 MANITOBA ATTORNEY GENERAL HAS ACTION PLAN ON DISCLOSURE | E.W. Olson |
| | 27h | First Annual Crown Defence Conference; September 26 & 27, 2002; 5 pages & Second Annual Crown Defence Conference; September 11 & 12, 2003; 5 pages; & Third Annual Crown Defence Conference September 9 & 10, 2004; 5 pages | E.W. Olson |
| | 27i | Letter dated November 25, 2004 to Bruce MacFarlane, Q.C, from James Lockyer, | E.W. Olson |
| | 28a | Volume 1: Book of Documents for Commission Counsel's Examination of Chief Jack Ewatski; containing tabs 1-3 | M. Code |
| | 28b | Volume 2: Book of Documents for Commission Counsel's Examination of Chief Jack Ewatski; containing tabs 4-10, tab 11 added | M. Code |
| | 29a | Pages 18-21 of 59 of a transcript of an interview with Gumieny, Ewatski and Hall; titled JOHN EDWARD GUMIENY INTERVIEW CONTINUED... | J. Lockyer |
| | 29b | WPS notes of: Sgt. C. Osborne; 5 pages | J. Lockyer |
| | 29c | Transcript of a phone conversation between Hall and Potvin; re: Driskell; 19 pages | J. Lockyer |



DRISKELL INQUIRY

EXHIBIT LIST

| EX ID. | EX. NO. | EXHIBIT DESCRIPTION | FILED BY |
|-----------|------------|---|-------------|
| | | August 11, 2006 | |
| | 29d | Book of Documents for the Examination of Chief Jack Ewatski; containing tabs 1-17 | J. Lockyer |
| | 29e | CD of audio recording of Chief Ewatski's Press Conference; November 25, 2003 | J. Lockyer |
| | | August 14, 2006 | |
| | 30a | Volume 1: Book of Documents for Commission Counsel's Examination of George Dangerfield, Q.C.; Gregg Lawlor; Stuart Whitley, Q.C.; containing tabs 1-25 | M. Code |
| | 30b | Volume 2: Book of Documents for Commission Counsel's Examination of George Dangerfield, Q.C.; Gregg Lawlor; Stuart Whitley, Q.C.; containing tabs 26-57 | M. Code |
| | 30c | Volume 3: Book of Documents for Commission Counsel's Examination of George Dangerfield, Q.C.; Gregg Lawlor; Stuart Whitley, Q.C.; containing tabs 58-82 | M. Code |
| | | August 15, 2006 | |
| | 31a | Book of Documents for Mr. Driskell's Counsel cross examination of George B. Dangerfield, Q.C.; containing tabs 1-16 | J. Lockyer |
| | 31b | Pages 8014 - 8233 (4 pages on one page) of Transcript from the Sophonow Inquiry | J. Lockyer |
| | 31c | Book of further disclosures received from James Lockyer and Alan Libman (Counsel for James Driskell) containing tabs 1-3 | J. Lockyer |
| | 31d | Addendum to the Further Disclosures received from James Lockyer and Alan Libman (counsel for James Driskell) | J. Lockyer |
| | 32 | Book of Summary of Interviews by Commission Counsel of witnesses who are not being called to testify; containing tabs 1-5 | M. Code |
| | | August 16, 2006 | |
| | 33 | Page 122 of transcript of Mr. Brodsky's cross examination of R. Zanidean from the Driskell trial | J. Prober |
| | 34 | Memo dated Friday, March 19, 1993 to J.G.B. Dangerfield, Q.C. from Bruce Miller, Q.C. Re: R. v. James Driskell | M. Code |
| | | August 17, 2006 | |
| | 35a | Original copy of the Winnipeg Sun dated Saturday, March 13, 1993 | J. Lockyer |
| | 35b | Original copy of the Winnipeg Sun dated Sunday, March 14, 1993 | J. Lockyer |
| | 35c | Original copy of the Winnipeg Sun dated Sunday, March 21, 1993 | J. Lockyer |
| | 35d | Photocopies of news articles from the previous 3 exhibits and other related news articles | J. Lockyer |
| | 35e | Memo dated September 15, 1997; to Rob Finlayson from Dave Mann; 5 pages | J. Lockyer |
| | 35f | Briefing paper, Criminal Justice Division; Prepared by: Rob Finlayson; 5 pages | J. Lockyer |
| | 35g | Bundle of various documents numbered 1-57 First document page 1, from the RCMP dated March 23, 1993 | J. Lockyer |
| | 35h | James Patrick Driskell review by Dale Schille; pages 1-23 | J. Lockyer |
| | 35 i | Book of materials for Mr. Driskell's counsel examination of Mr. Stuart J. Whitley, Q.C., containing tabs 1-3 | J. Lockyer |
| | 36a | 5 Bundles of Guidelines Policy on Disclosure: late 1980's and May 2001; October 1990; late 1980's (duplicate); January 1992; May 2001 (duplicate) | E.W. Olson |
| | 36b | Additional Documentary Disclosure received by Commission Office from E.W. Olson, Q.C.; containing tabs 1-10 | E.W. Olson |
| | 37 | 2 page hand written document dated May 4, 1995 | R. Tapper |



DRISKELL INQUIRY

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| EX ID. | EX. NO. | EXHIBIT DESCRIPTION | FILED BY |
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| | | SEPTEMBER 18, 2006 CLERK: D. MCCOY | |
| | 38a | Cerlox bound document titled "Book of Documents for Commission Counsel's Examination of Tod Christianson" - Tabs 1 - 9 | J. Dawe |
| | 38b | 11 pg. Memorandum dated 96-10-28 by B.D.Gaudette | J. Dawe |
| | 39 | Cerlox bound document titled "Book of Documents for the Examination of Tod Christianson" - Tabs 1 - 3 | J. Dawe |
| | | SEPTEMBER 19, 2006 | |
| | 40a | Cerlox bound document with blue cover titled "Book of Documents for Mr. Driskell's Counsel - Examination of Tod Christianson" - Tabs 1 - 5 | J. Lockyer |
| | 40b | 2 pg. letter dated August 14, 2006 addressed to Michael Code, from M. David Gates Q.C., RE: DNA evidence at the Driskell Commission of Inquiry | J. Lockyer |
| | 40c | 4 pg. Transcript of Proceedings, in the matter between Her Majesty the Queen and Nickios Zurowski, of March 10, 2005 | J. Lockyer |
| | 40d | 4 pg. excerpt from The Commission on Proceedings Involving Guy Paul Morin, Chapter II: Forensic Evidence and the Centre of Forensic Sciences. Pgs 339 - 342 | J. Lockyer |
| | 40e | 2 pg. excerpt of article titled, "Some Further Thoughts on Probabilities and Human Hair Comparisons", by B. D. Gaudette B.Sc. | J. Lockyer |
| | 41 | 4 pg. letter dated September 12, 2006 addressed to M. David Gates Q.C., from Jonathan Dawe, RE: DNA Evidence at the Driskell Commission of Inquiry | J. Dawe |
| | 42a | Cerlox bound document, titled "Documents for Cross-Examination of: Chief Ewatski - by Counsel for the Attorney General", tabs 1 - 4 | E.W. Olson |
| | 42b | Cerlox bound document, titled Further Documents for Cross-Examination of: Chief Ewatski - by Counsel for the Attorney General", tabs 1 - 4 | E.W. Olson |
| | | SEPTEMBER 20, 2006 | |
| | 43a | Cerlox bound document with blue cover titled, "Winnipeg Police Service Chief of Police Jack Ewatski - Book of Documents", tabs 1 - 10 and sub tabs 1 - 3 | K. Carswell |
| | 43b | 72 pg. legal sized document, headed Recycled Account Books, RE: Murder of Perry Dean Harder, Police notes. | K. Carswell |
| | 43c | 11 pg. document titled, "Resolution Adopted at the 101 st Annual Conference, August 2006 St. John's, Newfoundland & Labrador" from Canadian Association of Chiefs of Police | K. Carswell |
| | 43d | Cerlox bound document titled, "Further Disclosures from the Winnipeg Police Service, tabs 1 - 10 | K. Carswell |
| | | SEPTEMBER 21, 2006 | |
| | 44 | Cerlox bound document with blue cover titled "Book of Documents for Mr. Driskell's Counsel - Cross Examination of Gregg Lawlor", tabs 1 - 5 | A. Libman |
| | | SEPTEMBER 22, 2006 | |
| | 45 | 1 page letter dated September 14, 2006, addressed to Mr. Bob Giasson from E.W. Olson, with 4 pg. Quicklist search result of Mr. Lawlor's 1990-1991 Court of Appeal case load, and 5 pg. Position Description for Director, Regional Prosecutions and Legal Education dated May 4, 2001 attached. 10 pages in total. | E.W. Olson |
| | 46 | Black binder titled, "Conduct of the Crown - Abuse of Process and Related Topics", written by Gregg Lawlor Manitoba Justice - Prosecutions | E.W. Olson |
| | 47 | Cerlox bound document titled "Summary of Interviews by Commission Counsel: Tab A- Judge Sid Lerner (summary of telephone interview by Commission Counsel: September 8, 2006) Tab B- Dale Schille (summary of telephone interview by Commission Counsel: September 15, 2006) | M. Code |

**DRISKELL INQUIRY****EXHIBIT LIST**

| EX ID. | EX. NO. | EXHIBIT DESCRIPTION | FILED BY |
|-----------|------------|--|-------------|
| | | SEPTEMBER 28, 2006 | |
| | 1a | 130 pg. document, materials received from "O" Division pages marked in lower right hand corner 2- 131 | J. Dawe |
| | 48 | Cerlox bound document titled "Book of Documents for Commission Counsel's Examination of Dale Schille", tabs 1 - 21 | J. Dawe |
| | 49a | Cerlox bound document with blue cover titled "Book of Documents for Mr. Driskell's counsel - Examination of Mr. Dale Schille", tabs 1 - 6 | J. Lockyer |
| | 49b | 18 pg document with buff cover titled "Book of Documents for Mr. Driskell's counsel - Examination of Mr. Dale Schille - Supplemental Documents" | J. Lockyer |
| | 49c | 5 pg. Preliminary Report dated July 25 th , 2003 by Jonathan Newman of the Ministry of Public Safety and Security - The Centre of Forensic Sciences with 16 pages of attachments. 21 pages in total | J. Lockyer |
| | 49d | 12 pg. paper titled "Wrongful Conviction Claims: How Should the Crown Respond?", dated May 5 th , 2005 by Bruce MacFarlane Q.C. | J. Lockyer |

Appendix F

Report Relating to Paragraph 1(f) of the Order In Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell

Kent Roach*

Executive Summary

The first part of the report examines the significance of an order for a new trial by the Minister of Justice under section 696.3(3)(a)(i) of the Criminal Code in light of the Canadian experience with such extraordinary relief and with wrongful convictions. An order for a new trial under section 696.3(3)(a)(i) requires the Minister of Justice to conclude that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. The author examines the rarity of Ministerial orders for a new trial and the reasonable expectation that they create that the successful applicant will receive another day in court. Three of the four orders for a new trial under the new s.696 system—the cases of Steven Kaminski, Darcy Bjorge and James Driskell—have resulted not in a new trial but in the entry of a prosecutorial stay under s.579 of the Criminal Code.

The second part of the report examines the significance of a prosecutorial stay under section 579 of the Criminal Code, as well as the related common law device of a *nolle prosequi*. The author concludes that the prosecutorial stay, like the *nolle prosequi*, does not result in an adjudication of guilt and it leaves the accused vulnerable to subsequent prosecution. In his recent Newfoundland report, Chief Justice Lamer commented that “a stay of proceedings may leave an impression with the public that the charge is being ‘postponed’ or ‘the authorities’, in the broad sense, still believe in the validity of the charges.” Proceedings can be recommenced on the same indictment within a year of the entry of the prosecutorial stay, but thereafter the proceedings are deemed under s.579(2) never to have taken place.

Jurisprudence relating to prosecutorial stays is examined including the Supreme Court’s reference to a prosecutorial stay in the David Milgaard reference and its more recent recognition in the Rejean Hinse case that a judicial stay did not provide the accused with a ruling on his innocence or culpability and that an acquittal was a more appropriate disposition in the circumstances of that case. Although prosecutorial stays have traditionally been immune from judicial review, the current position is that they can be challenged as an abuse of process, but that the courts will generally defer to their use as a legitimate form of prosecutorial discretion. Provincial policies relating to the use of prosecutorial stays are also examined and the conclusion reached that none of the provincial policies examined, including Manitoba’s, specifically address the use of prosecutorial stays in cases where the Minister of Justice has concluded that a miscarriage of justice likely occurred.

The third part of the report examines alternative dispositions open to Crown counsel in cases where a new trial has been ordered under section 696.3(3)(a)(i). One alternative is the conduct of a new trial in which the prosecutor will have to prove the

convicted person's guilt beyond a reasonable doubt. If there is no reasonable prospect of conviction, however, the option of a new trial will not be appropriate. In such cases, the prosecutor can withdraw charges, but this will not generally produce a verdict of acquittal or allow the accused to plea *autrefois acquit*. Another alternative is for Crown counsel to call no evidence and for the accused to obtain a not guilty verdict that will protect him or her from subsequent prosecutions about the same matter.

The fourth part of the report, drawing heavily on Chief Justice Lamer's recent Newfoundland report, proposes a number of principles that should govern Crown counsel's choice of alternative responses to an order for a new trial under s.696.3(3)(a)(i) of the Criminal Code. Chief Justice Lamer noted that practices on the use of prosecutorial stays varied throughout Canada, but concluded that prosecutorial stays should only be used when there is "a reasonable likelihood of recommencement of proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen." This standard recognizes that the prosecutorial stay leaves a person open to further proceedings and should only be used if there is a reasonable expectation that the prosecution will indeed be recommenced.

The author notes that Chief Justice Lamer's guidelines are proposed for prosecutorial stays in general. In the extraordinary context of an order of a new trial by the Minister of Justice under section 696.3(3)(a)(i), the author suggests three additions to the Lamer guidelines. They are 1) that a prosecutorial stay should only be entered by the Attorney General or the Director of Public Prosecution, 2) after hearing submissions from the successful applicant and 3) any decision to enter a prosecutorial stay should be revisited as soon as possible and in any event within a year of the entry of the stay and before the proceedings are deemed under s.579(2) never to have been commenced. At that time, prosecutors should either proceed with the new trial that has been ordered by the Minister of Justice or call no evidence so that the accused receives a not guilty verdict. A prosecutorial stay should not be the final disposition for a successful s.696.1 applicant.

The final part of the report outlines a variety of methods by which a determination or declaration of a wrongful conviction can be made in a case where the Minister of Justice has ordered a new trial, but a prosecutorial stay has been entered. The author examines the distinction between a prosecutorial stay which produces no verdict and a determination of a wrongful conviction, as well as the distinction between a not guilty verdict that legally represents a failure by the state to prove guilt beyond a reasonable doubt and a determination of a wrongful conviction based on innocence. Possible standards for making a determination or declaration of innocence or a wrongful conviction are examined based in part on the standards outlined by the Supreme Court of Canada in the 1992 David Milgaard reference. The author argues that the highest standard of proof of innocence beyond a reasonable doubt places an unrealistic burden on the applicant, except in cases of DNA exonerations, and he argues that declarations of wrongful convictions should not be restricted to such cases. The author suggests that the most likely standard that would be used to declare the existence of a wrongful conviction would require the convicted person to establish innocence on a balance of probabilities

and that this would create a meaningful distinction in law between a not guilty verdict that would occur when the state failed to prove guilt beyond a reasonable doubt and a declaration of a wrongful conviction or innocence.

The author examines a variety of informal means of obtaining a determination and a declaration of a wrongful conviction including apologies and recognition of innocence by police and prosecutors and civil society reviews and exonerations. He also examines administrative processes including the s.696.1 process, the issue of free pardons, public inquiries, and the compensation process. Finally, he examines possible judicial processes including those relating to interim release pending the s.696.1 process, determinations by Courts of Appeal under s.696.3(2), judicial apologies and civil actions. He argues that the judiciary should be responsible for determination and declarations of wrongful convictions because the executive may be reluctant to acknowledge its mistakes and because wrongful convictions are matters within the inherent domain and responsibility of the judiciary as opposed to the executive.

The author reviews two Court of Appeal cases that suggest that courts may have no jurisdiction to consider a case after the entry of a prosecutorial stay under section 579. In such cases, the convicted person may be forced to seek exoneration through other less satisfactory informal or administrative means or through expensive civil lawsuits or requests that the Attorney General re-commence proceedings. The author argues that this state of affairs underlines the need for a prosecutorial stay only to be used as a provisional measure after a new trial has been ordered by the Minister of Justice on the basis of reasonable grounds to believe that a miscarriage of justice has likely occurred. Successful s.696.1 applicants should not be left in the legal limbo of the prosecutorial stay. They deserve their day in court, the finality of a verdict and an opportunity to seek a judicial determination and declaration of whether they are an innocent victim of a wrongful conviction.

Introduction

I was retained by Commissioner Patrick LeSage, Q.C. to prepare a report to assist him in carrying out paragraph 1(f) of the Order in Council establishing him as a Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell. The paragraph reads as follows:

f) To consider whether and in what way a determination or declaration of wrongful conviction can be made in cases where

- the Minister of Justice for Canada directs a new trial under section 693.3(a)(i) of the Criminal Code (Canada), and
- after a review of the evidence, Crown Counsel directs a stay of proceedings under section 579 of the Criminal Code (Canada)¹

This interesting and challenging assignment has required me to examine the significance of an order of a new trial by the Minister of Justice under section 696.3(a)(i) of the Criminal Code, as well as the significance of a stay of proceedings under section 579 of the Criminal Code (henceforth the prosecutorial stay to distinguish it from the judicial stay) and its related common law predecessor, the *nolle prosequi*. In addition, the significance of the prosecutorial stay can only be fully understood in light of alternative remedies open to Crown counsel once an order for a new trial has been made. These alternatives include the conduct of a new trial, the withdrawal of charges and the offering of no evidence by the prosecutor to produce a not guilty verdict. The choice of these alternative remedies are largely matters of prosecutorial discretion that are guided by the distinct role of the Attorney General and Crown prosecutors as Ministers of Justice with a mandate to ensure that justice is done.² Justice Lamer has recently commented that “[t]he wide latitude for prosecutorial discretion in relation to stays and the absence of judicial accountability presents a variety of opportunities for abuse.”³

In addition to examining the choice of prosecutorial remedies or responses to an order for a new trial, this report examines how determinations and declarations of a wrongful conviction could be made after a prosecutorial stay has been entered. Although wrongful convictions of the innocent are an undeniable and tragic reality of our justice system that cause incalculable harm to the wrongfully convicted and their families and can undermine public confidence in the administration of justice, no explicit legal procedures exist in Canadian law to determine and declare that a wrongful conviction has occurred. This does not mean that the wrongfully convicted are never exonerated and their innocence never affirmed, but rather that exonerations generally come from informal processes and often as a result of DNA exonerations. Section 1(f) of the Order in Council raises the question of the ability of our existing system of criminal justice to make determinations or declarations of wrongful convictions that will fully exonerate the wrongfully convicted. An inability of the justice system to exonerate the wrongfully

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¹ Order in Council Manitoba No. 479/2005

² *Boucher v. The Queen* [1955] S.C.R. 16.

³ The Right Honourable Antonio Lamer *The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken*, 2006 at 320 (henceforth the Lamer Inquiry).

convicted can add insult and lingering suspicion and stigma to the irreparable injury of a wrongful conviction.

In discharging my mandate I have conducted research into Canadian, British, American and Australian law on the subject. I have also found the report of former Chief Justice Lamer on three Newfoundland cases released in late June, 2006 to be especially helpful on the use of prosecutorial stays and alternative remedies such as calling no evidence. I also had access to the letter by Robert H. Morrison Q.C. of March 3, 2005 explaining the rationale for the entry of a stay of proceedings under section 579 of the Code in Mr. Driskell's case. I have written to all Attorneys General asking them to provide me with any policies, directives or practices that exist in their offices with respect to the use of stays under s.579 of the Criminal Code and in particular the use of such stays and alternative remedies such as withdrawal of charges or calling no evidence that may be used in possible miscarriage of justice cases. Most Attorneys General have supplied me with their relevant policies. I have also conducted interviews with senior prosecutors and defence lawyers on this subject. I thank all who have generously provided their expert assistance to me.

The organization of this report is as follows. I will first examine the significance of an order for a new trial under section 696.3(3)(a)(i) of the Criminal Code. I start here because of the fundamental significance of such an order both for the public and the convicted person. I stress that this report does not examine the use of prosecutorial stays in general, but only after the Minister of Justice has ordered a new trial on the basis that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

In the next section, I examine the significance of a prosecutorial stay under section 579 of the Criminal Code, as well as the related common law device of a *nolle prosequi*. Topics to be examined include whether a prosecutorial stay or a *nolle prosequi* bars subsequent prosecutions and the effects of section 579(2) in providing that the proceedings will be deemed never to have been commenced a year after the prosecutorial stay has been entered.

The full significance of a prosecutorial stay under section 579 can only be understood in the context of alternative processes open to Crown counsel and these will be examined in the third part of the report. One alternative is to conduct a new trial in which the prosecutor will have to prove the convicted person's guilt beyond a reasonable doubt. In some cases, however, particularly when there is no reasonable prospect of conviction, the option of a new trial will not be appropriate. In such cases, the prosecutor has at least two other alternatives to the use of a prosecutorial stay: namely the withdrawal of charges or the calling of no evidence. I will examine the implications of these alternative procedures for the accused and the public with particular regard to the possibility of subsequent proceedings.

In the fourth part of my report, I will make recommendations about the proper approach that should be taken by Crown counsel in using stays under section 579 of the Criminal Code and alternative processes after the Minister of Justice has ordered a new

trial under section 696.3(3)(a)(i) of the Criminal Code. In making these recommendations, I am fortunate to have the benefit of recommendations made on these questions by Chief Justice Lamer in his recent Newfoundland inquiry. Chief Justice Lamer has crafted helpful guidelines about the respective role of prosecutorial stays, withdrawal of charges and new trials which I incorporate in my analysis. I also propose a few additions to these guidelines that are designed to adapt them to the specific circumstance of a new trial having been ordered under section 696.3(3)(a)(i).

In the final part of my report, I consider the complex and difficult question of how determinations and declarations of wrongful convictions can be made in general and in particular after, as in Mr. Driskell's case, a prosecutorial stay has been entered. As threshold matters, I must consider possible definitions of a wrongful conviction and possible legal standards for determining whether a wrongful conviction has occurred. I will then examine a variety of informal, administrative and judicial procedures that could be used to determine and declare a wrongful conviction, as well as new procedures that could be created to determine and declare whether a wrongful conviction has occurred.

I. Understanding the Significance of Orders of New Trials under Section 696.3(3)(a)(i) of the Criminal Code

In recent years, there has been increasing recognition that wrongful convictions have occurred in Canada and many other countries. The most dramatic recognition of this problem in Canada came with the Supreme Court of Canada's 2001 decision in *United States of America v. Burns and Rafay*.⁴ In that case, the Supreme Court essentially reversed decisions it made only a decade earlier⁵ to hold that section 7 of the Charter (which provides that a person's life, liberty or security of the person can only be deprived in accordance with the principles of fundamental justice) would generally be violated if a person was extradited to face trial in another country without assurances that the death penalty would not be applied. The main justification given by the Court for requiring assurances that the death penalty not be applied was the dangers of executing the innocent. The Court stated:

Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of

⁴ [2001] 1 S.C.R. 283.

⁵ *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779 at 835.

wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.⁶

Increased awareness of the prevalence of wrongful convictions is in large part related to successful claims of “actual innocence”⁷ that have been made possible by DNA testing. At the same time, the Supreme Court of Canada recognized that “DNA testing only helps correct conviction of the innocent in a narrow class of cases; most homicides do not involve biological evidence that can be determinative of guilt or innocence”.⁸ The Court added that “the concern about wrongful convictions is unlikely to be resolved by advances in the forensic sciences, welcome as those advances are from the perspective of protecting the innocent and punishing the guilty” because “there is always the potential that eyewitnesses will get it wrong... And there is always the chance that the judicial system will fail an accused...”.⁹ In *Burns and Rafay* the Supreme Court clearly recognized that wrongful convictions involve the conviction of innocent people and that we cannot rely solely on DNA testing to protect the innocent from wrongful convictions.

Although DNA exonerations have undoubtedly increased awareness of wrongful convictions, there is a real danger that it has made it more difficult for innocence and wrongful convictions to be recognized in non-DNA cases. In my view, it would be fundamentally wrong to limit recognition of wrongful convictions to DNA exonerations. There is no principled reason why a person’s status as an innocent should be affected by the happenstance of whether there is DNA evidence and whether that evidence has been retained. Pioneers of DNA exonerations have warned that they only touch the surface of the much larger problem of wrongful convictions. If wrongful convictions are only related to DNA exonerations, awareness and concern about wrongful convictions may fade as police and prosecutors properly use DNA, when it is available, to exclude the innocent as suspects.¹⁰

The Canadian Process for Re-Opening Convictions

The Canadian process of re-opening convictions is a matter of some controversy and is beyond my mandate in this report. What is within my mandate, however, is the need to understand the significance of an order of a new trial by the federal Minister of Justice when a convicted person has applied to re-open his or her case. In 1994, Justice Minister Allan Rock articulated a number of principles to govern the then s.690 process for applications for the royal prerogative of mercy by those claiming to be wrongfully convicted. The 1994 guidelines, sometimes called the Thatcher guidelines after the case that prompted their announcement, characterized the s.690 process as an “extraordinary”

⁶ Ibid at para 1.

⁷ Barry Scheck, Peter Neufeld and Jim Dwyer *Actual Innocence When Justice Goes Wrong and How to Make it Right* (New York: New American Library, 2003).

⁸ [2001] 1 S.C.R. 283 at para 109 quoting testimony of Peter Neufeld to the House of Representatives Judiciary Committee on June 20, 2000.

⁹ Ibid at para 116.

¹⁰ Barry Scheck and Peter Neufeld “DNA and Innocence Scholarship” in Sandra Westervelt and John Humphrey eds *Wrongly Convicted: Perspectives on Failed Justice* (New Brunswick: Rutgers University Press, 2001).

remedy that “does not exist simply to permit the Minister to substitute a ministerial opinion for a jury’s verdict or a result on appeal”. Relief under s.690 will ordinarily be based on new evidence that was not considered in the courts below. The final principle is the most relevant in determining the significance of an order for a new trial under section 696.3. It provided:

Finally, an applicant under section 690, in order to succeed, need not convince the Minister of innocence or prove conclusively that a miscarriage of justice has actually occurred. Rather, the applicant will be expected to demonstrate, based on the analysis set forth above, that there is a basis to conclude that a miscarriage of justice likely occurred.¹¹

This principle suggests that an order for a new trial (or the alternative remedy of a new appeal) will not be made by the Minister of Justice unless a relatively high threshold is satisfied, usually on the basis of new evidence. At the same time, this principle also suggests that the order of a new trial by the Minister of Justice will not in itself constitute a determination or a declaration that a wrongful conviction has occurred.

The 1994 principles were in part codified when the Criminal Code was amended in 2002 to provide a new process for review of applications by those whose normal appeals had been exhausted. The new provisions provide for *Inquiries Act* powers to be exercised by the Minister or his or her delegate when investigating applications.¹² Section 696.3(3) provides:

On an application under this Part, the Minister of Justice may

(a) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or

(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

(b) dismiss the application.

(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

¹¹ as quoted in 2005 Annual Report by the Minister of Justice on Applications for Ministerial Review of Miscarriages of Justice.

¹² Criminal Code s.696.2

In addition, the Minister of Justice has a discretion “at any time” under s.696.3(2) of the Criminal Code to “refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court”. This latter power, unlike the order of a new trial or a new appeal under s.696.3(3), does not require a conclusion by the Minister that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. The possible use of this power to refer a determination and declaration of a wrongful conviction to a Court of Appeal will be discussed in the last section of this report.

The extraordinary nature of s.696.1 process and the general need for new matters of significance to be presented to convince the Minister of Justice to order a new trial or a new appeal is underlined by section 696.4 of the Criminal Code which provides:

696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

- (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
- (b) the relevance and reliability of information that is presented in connection with the application; and
- (c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

Regulations provide an additional outline of the process used to decide such applications. Section 4(1)(a) of the regulations generally require the Minister of Justice to conduct an investigation in respect of the application “if the Minister determines that there *may* be a reasonable basis to conclude that a miscarriage of justice likely occurred.” This is a lower standard than the standard required under section 696.3(3)(a) to order a new trial which is that the “Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice *likely occurred*.”

Neither the Criminal Code provisions nor the regulations address the question of when an appeal or a new trial is the appropriate remedy ordered by the Minister. I am informed by the head of the Criminal Convictions Review Group that new trials are generally reserved for convictions that have the most fundamental and pervasive problems while new appeals are generally used for more discrete issues. I also note that Justice Kaufman in his extensive report on the Truscott case stated that a Minister’s “order of a new trial must continue to be regarded as an extraordinary remedy...it is a remedy more likely to be adopted- and contemplated- where factual innocence has been demonstrated to the Minister.”¹³ The order of a new trial requires the Crown to establish guilt beyond a reasonable doubt whereas the convicted person has the burden of

¹³ Hon. Fred Kaufman Truscott Report at para 2132

establishing that a conviction should be quashed under an appeal. It would be helpful if the grounds that the Minister of Justice uses to choose between a new trial and a new appeal as a remedy were articulated in the regulations or the material issued by the Criminal Convictions Review Group.

The Minister of Justice's 2005 annual report explains the process as follows:

The *Criminal Code* gives the Minister of Justice the power to review a conviction under a federal law to determine whether there may have been a miscarriage of justice, or what is often called a "wrongful conviction." If the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, the Minister has the authority to order a new trial or refer the matter to the court of appeal for the province or the territory in question.

When an innocent person is found guilty of a criminal offence, there has clearly been a miscarriage of justice. A miscarriage of justice can also occur where new information surfaces which casts doubt on whether the applicant received a fair trial. Thus, the Minister's decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system where the relevant legal issues are determined by the courts according to law. The issue of guilt, therefore, is determined by the courts, not the Minister.¹⁴

This passage is significant because it indicates that a successful applicant under s.696.1 will not receive a declaration of innocence or a declaration that he or she is a victim of a wrongful conviction. It also indicates that a miscarriage of justice is a broader concept than a wrongful conviction and includes an unfair trial. This is also a point made by Justice Kaufman in his report on the Truscott case.¹⁵ Finally the above quoted passage underlines the principle that the "the issue of guilt" is to be determined by the courts and not the Minister.

A booklet prepared to assist those applying for a Ministerial review explains the process as follows:

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

¹⁴ Minister of Justice 2005 Annual report on Applications for Ministerial Review of Miscarriages of Justice.

¹⁵ Drawing on the jurisprudence defining miscarriage of justice under s.686 of the Criminal Code, Justice Kaufman concludes that "while the continued conviction of a person shown to be factually innocent is the most obvious 'miscarriage of justice', the existence of new evidence which could reasonably be expected to have affected the verdict may also provide a reasonable basis for concluding that a miscarriage of justice likely has occurred, not because the accused is likely innocent, but because it would be unfair to maintain the accused's conviction without an opportunity for the trier of fact to consider the new evidence." Hon. Fred Kaufman *Truscott Report* April 2004 at para 163, see also para 2074.

Minister has the power to grant you a remedy (i.e., a new trial or hearing or a new appeal proceeding).¹⁶

This booklet is significant because of its emphasis on the remedy provided by the Minister after a successful application. It supports a successful applicant's expectation that he or she will receive his or her day in court as a remedy in the form of a new trial or a new appeal. The possibility that there will be no new trial because of a prosecutorial stay is not mentioned. Yet prosecutorial stays have been ordered in three cases in which new trials have been ordered under s.696.3 thus effectively depriving the successful applicant of a judicial proceeding as a remedy.¹⁷

Those familiar with the criminal justice system and its complex weave of federal and provincial authority would undoubtedly point out that the federal Minister of Justice has no power over the ability of a provincial Attorney General to enter a stay under section 579 of the Criminal Code. Although such an argument is constitutionally and legally correct, it does not change the fact that the Minister of Justice's order under s.696.3 creates a legitimate and reasonable expectation that a successful applicant's conviction will be reconsidered by the courts because there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

The final contextual matter that is relevant to understanding the significance of an order for a new trial under section 696.3 is that so few people apply for and even fewer receive such an extraordinary remedy. In the 2005 annual report, the Minister of Justice indicated that he allowed five of six applications and ordered new trials in three of the successful applications and ordered new appeals in the other two cases. The 2004 annual report indicates that six decisions were made on applications and all were dismissed. The 2003 annual report indicates that one decision was made and it was to order a new trial. As of March 31, 2005 there were 33 active applications under s.696.1. These figures are relevant because they demonstrate the comparative rarity of applications and the greater rarity of successful applications under section 696.1.¹⁸ They also indicate that new trials have so far been ordered in the majority (4 of 6 applications) of the small number of successful applications under the new regime. Moreover, three of the four orders for a new trial- the cases of Steven Kaminski, Darcy Bjorge and James Driskell- have been pre-empted by the entry of a prosecutorial stay.

¹⁶ "Applying for a Conviction Review" at <http://canada.justice.gc.ca/en/ps/ccr/application/index.html>

¹⁷ Steven Kaminski received a prosecutorial stay after a new trial was ordered by the Minister under s.696.3(a) as did Darcy Bjorge and James Driskell. Prosecutorial stays were also used under the old s.690 system in cases where, after a s.690 referral to the Court of Appeal, the Court of Appeal ordered a new trial. Wilson Neepose's case was subject to a prosecutorial stay after the Court of Appeal had ordered a new trial on a reference under s.690 and the same happened to Wilfred Beaulieu after the Court of Appeal had ordered a new trial on a reference under s.690. David Milgaard's case was subject to a prosecutorial stay after the Supreme Court ordered a new trial. See Melvyn Green Affidavit in *Unger v. The Queen*, October, 2005.

¹⁸ Between 1898 and 1987, the former s.690 process was used 32 times with an unknown number of applications. Between 1983 and 1990 there were 216 applications, but only 2 interventions under s.690. See Patricia Braiden and Joan Brockman "Remedying Wrongful Convictions through Applications to the Minister of Justice under Section 690 of the Criminal Code" (1999) 17 Windsor Y.B. Access to Justice 3 at 15.

II. Understanding the Significance of Prosecutorial Stays under Section 579 of the Criminal Code

In order to understand prosecutorial stays under section 579 of the Criminal Code, it is necessary to understand the *nolle prosequi* power that has historically been a prerogative of the Attorney General of England and Wales. In what follows, I will first examine the common law *nolle prosequi* and then examine the current Canadian statutory regime for prosecutorial stays.

The Nolle Prosequi

In his life long work on the Attorney General, John Edwards described the *nolle prosequi* as one of the pre-eminent powers of the Attorney General. Writing in 1964, Professor Edwards contrasted the ability a prosecutor to request that a judge allow the withdrawal of charges with the power of “the Attorney-General alone...to enter a *nolle prosequi*, and that power is not subject to any control.”¹⁹ He stressed that the *nolle prosequi* could only be entered by the Attorney General²⁰ and that the Attorney General remained responsible to Parliament “for the manner in which he discharges the discretionary powers inherent in, or attached to, his ancient office.”²¹ At the same time, however, Professor Edwards was frank that the Attorney General had rarely, if ever, been questioned about the use of the *nolle prosequi* in Parliament.²²

Professor Edwards recognized that there were alternatives to the *nolle prosequi* and that many of them were more advantageous to the accused. Writing in 1964 he stated:

Wherever possible on grounds of fairness to the accused, it is agreed, the preferable course would be to dispose of the indictment, which would otherwise remain on the file, by offering no evidence and then obtain a directed verdict of not guilty from the jury.²³

At the same time, Professor Edwards acknowledged cases in which the Attorney General had entered a *nolle prosequi* in the face of inconsistent guilty and not guilty verdicts on closely related counts and multiple proceedings.²⁴ An anonymous 1958 article that was later revealed to have been written by Mr. G.E. Dudman, then Legal Secretary of the Law Officer's Department²⁵, observed that the use of a *nolle prosequi* with respect to a case involving a labour dispute where the jury had returned irreconcilable verdicts “produced neither a conviction nor an acquittal; it did not bring the strike to an end.”²⁶ Another case in which the *nolle prosequi* was used also produced “an unsatisfactory result” in which a

¹⁹ John L.I. J. Edwards *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 227

²⁰ *ibid* at 230

²¹ *ibid* at 227

²² See also “Nolle Prosequi” [1958] *Crim.L.Rev.* 573 at 582

²³ *ibid* at 235

²⁴ *ibid* at 233, 235.

²⁵ Edwards *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell, 1984) at 445 n.11

²⁶ “Nolle Prosequi” [1958] *Crim.L.Rev.* 573 at 580.

co-accused who the jury was unable to agree was guilty did not receive an acquittal. In another case in which the *nolle prosequi* was used, Mr. Dudman commented that because "it is scarcely conceivable that either the Attorney-General or any of his successors will seek to revive the charge contained in it, there appears to be no reason of any kind why [the accused] should not have been placed in charge of a jury and formally acquitted on the direction of the judge."²⁷ Both Professor Edwards and Mr. Dudman expressed a clear preference for the calling of no evidence as a fairer and more conclusive means to resolve criminal cases.

Writing in 1984, Professor Edwards noted that the practice of the Attorney General of England and Wales was only to use a *nolle prosequi* in cases "where, after the indictment has been signed, it is the found that the accused, for reasons of ill-health or other medical reasons, is unlikely ever to be fit to stand his trial and there is no other way of disposing of the indictment."²⁸ He observed that "the policies of the Crown's prosecutors have shifted towards either seeking the leave of the court to the withdrawal of the charges or in offering no evidence and thereby ensuring a directed verdict of acquittal."²⁹ Returning to a theme expressed in his earlier writings, Professor Edwards added that:

From the point of view of the defendant the latter procedure is to be preferred, since his discharge in these circumstances is a reality not a fiction and the erasure of the indictment from the court's active file is proof that the proceedings in question have been permanently and irrevocably terminated.³⁰

Professor Edwards went on to contrast the option of withdrawing charges which required the judge's consent and did not result in a plea of *autrefois acquit* and offering no evidence which generally did not require the judge's consent³¹ and would protect the accused from subsequent proceedings.

Writing from the perspective of the accused's protection from double jeopardy, M.L. Friedland also discussed the *nolle prosequi* and alternative dispositions. Professor Friedland stressed the discretion of the Attorney General to enter a *nolle prosequi* "at any time after, but not before, a bill of indictment has been signed. The case law is clear that, notwithstanding a *nolle prosequi*, the accused remains liable to be re-indicted."³² With reference to Professor Edwards' work cited above, he observed that:

Although there may be cases in which a *nolle prosequi* has been entered where it would have been preferable to obtain a directed verdict of acquittal by offering no evidence, the accused is not normally subjected to further proceedings in these cases.³³

Professor Friedland, however, also indicated that a withdrawal of a prosecution was "normally used in cases, where, usually because of a weak case, no evidence is offered

²⁷ Ibid at 580.

²⁸ Edwards *The Attorney General, Politics and the Public Interest* at 445

²⁹ Ibid at 446

³⁰ Ibid at 446

³¹ He did note some authority for the proposition that the trial judge would have to approve a prosecutorial decision to call no evidence. *R. v. Broad* (1978) 68 Cr. App. R. 281.

³² M.L. Friedland *Double Jeopardy* (Oxford: Oxford University Press, 1969) at 30.

³³ Ibid at 31.

and the jury bring in a verdict of acquittal”³⁴. He stressed that this procedure should be distinguished from either a *nolle prosequi* or a withdrawal of charges both of which would leave the accused exposed to further proceedings.

Commentators in Australia have also drawn a distinction between a *nolle prosequi* and an acquittal. One commentator has written that “the fact that a *nolle prosequi* has been entered in a particular case has the consequence that the jury has not determined the question of guilt or innocence of an accused.”³⁵ Caselaw in Australia has also made the point that the “entry of a *nolle prosequi*, although establishing that the proceedings have terminated in favour of the accused person, does not establish her innocence.”³⁶ Commonwealth authority on the *nolle prosequi* is united in determining that its use is a traditional prerogative of the Attorney General and that the *nolle prosequi* suspends but does not preclude further proceedings.

The Prosecutorial Stay Power under Section 579 of the Criminal Code

There have been statutory equivalents to the *nolle prosequi* power ever since the Criminal Code was first enacted in 1892. The current section provides:

579. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

As early as 1919, the Ontario Court of Appeal analogized the prosecutorial stay with the *nolle prosequi* and approved of a case holding that the prosecutorial stay, as distinct from the calling of no evidence to produce a not guilty verdict, did not bar subsequent proceedings.³⁷ Professor Friedland in his leading work on double jeopardy concluded that “as with a *nolle prosequi*, the entering of a stay does not bar subsequent proceedings on another indictment and is not subject to the control of the courts.”³⁸ This authority was cited with approval by the Manitoba Court of Appeal in 1983 in rejecting an accused’s argument that the Charter right against double jeopardy applied to a prosecutorial stay under section 579 of the Code.³⁹

³⁴ *ibid* at 31.

³⁵ Peter McDermott “*Nolle Prosequi*- The Law and Practice in Queensland” (1993) 17 *Crim.L.J.* 319 at 323

³⁶ *R. v. Saunders* [1983] 2 Qd R. 270 at 271-272

³⁷ *R. v. Spence* (1919) 31 C.C.C. 365 (Ont.C.A.).

³⁸ M.L. Friedland *Double Jeopardy* at 36

³⁹ *Re Burrows* (1983) 6 C.C.C.(3d) 54 at 67 (Man.C.A.)

Canadian commentary has generally cautioned against reliance on prosecutorial stays. One commentator in 1962 commented that while the prosecutorial stay was “necessary” if “used sparingly and with responsible discretion”, it was an exception to the general principle that everyone has the “right to be called upon once and only once to stand in peril on an accusation in respect of the same matter and the same offence.” He colourfully drew an analogy between the stay and the “sword of Damocles” adding that the stay was “mysterious because no one knows why his accusers have put the case in indefinite cold storage.”⁴⁰ This author advised that the stay should not be made available in the lower courts because a prosecutor should not be able “to back away and stay the proceedings and escape reprisals for possibly false and frivolous accusations damaging and harmful”.⁴¹ He also warned that stays should not be used in the lower courts unless the Attorney-General was prepared personally to supervise such proceedings. In his 1969 work on *Double Jeopardy*, Professor Friedland also recommended that the predecessor to s.579 be amended to require the Attorney General or perhaps his deputy to approve the entry of a prosecutorial stay. Professor Friedland based this law reform recommendation on the need to ensure accountability in Parliament for the use of prosecutorial stays and his prediction that the Attorney General “will tend to use his power in cases to end proceedings against accused persons, whereas Crown attorneys will tend to use it to lay other charges.”⁴² Connie Sun recommended the abolition of the prosecutorial stay power in 1974. Alternatively, she argued that it should only be exercised by the Attorney General in order to promote accountability for its use.⁴³ Writing in 1977, Stanley Cohen warned about the potential for abuse of prosecutorial stays and argued that withdrawals of charges were superior because they would subject “the discretion of the prosecutor to court scrutiny”.⁴⁴

Melvyn Green, a vice President of AIDWYC before his appointment to the bench, commented critically on the use of prosecutorial stays in possible miscarriage of justice cases. He argued that the prosecutorial stay is a means to terminate proceedings “without conceding either factual innocence or prosecutorial error.” He added that a prosecutorial stay is a “grey-zone message. A stay, it is clear, is not an exoneration...The defendant is left in a legal- and very public limbo: no longer an accused but forever shrouded in a cloud of officially induced suspicion.”⁴⁵

Academic cautions and warnings about the use of prosecutorial stays have not been heeded. Parliament extended the use of prosecutorial stays to summary conviction matters⁴⁶ and it has not acted on reform proposals that only the Attorney General

⁴⁰ D.E. Greenfield “The Position of the Stay in Magistrate’s Court” (1962) 4 Crim.L.Q. 373 at 374

⁴¹ *ibid* at 382.

⁴² *ibid* at 36.

⁴³ Connie Sun “The Discretionary Power to Stay Criminal Proceedings” (1973-74) 1 Dalhousie L.J. 482 at 522.

⁴⁴ Stanley Cohen *Due Process of Law* (Toronto: Carswell, 1977) at 159.

⁴⁵ Melvyn Green “Crown Culture and Wrongful Convictions” (2005) 29 C.R.(5th) 262

⁴⁶ Criminal Code s.795

personally be able to exercise this power. Stays of proceedings are used routinely in many jurisdictions as a means to terminate proceedings with apparently little thought given by prosecutors about the fact that such a disposition does not provide the accused with an acquittal or prevent subsequent prosecutions. As outlined above, prosecutorial stays have been used in three cases in which the Minister of Justice has ordered a new trial under s.696.3 of the Code.

Judicial Consideration of Prosecutorial Stays

The power of the prosecutor to stay public or private prosecutions under s.579 of the Criminal Code has been described by the Supreme Court as one of five “core elements of prosecutorial discretion” that relate to whether a prosecution will be brought and what form a prosecution will take. As such, the decision whether to use a stay should be made independently by the prosecutor in accordance with the traditions of the prosecutor as a Minister of Justice. At the same time, the use of the prosecutorial stay, like other exercises of prosecutorial discretion, will be treated with deference by the courts and other parts of government.⁴⁷

The reference to counsel instructed by the Attorney General in section 579 has been interpreted broadly so that the prosecutorial stay, unlike the *nolle prosequi*, is not restricted to use by the Attorney General.⁴⁸ Section 579(2) provides that proceedings may be recommenced without laying a new information or preferring a new indictment within a year of entry of the stay. Once the year has expired, however, the proceedings “shall be deemed never to have commenced.” This means that the accused is liable to further proceedings. For example, murder charges have been re-laid years after the entry and expiry of the prosecutorial stay.⁴⁹ The prosecutorial stay, like its common law cousin the *nolle prosequi*, does not constitute a bar to subsequent prosecutions.⁵⁰ This is of

⁴⁷ *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372 at paras 45-46.

⁴⁸ *R. v. McKay* (1979) 9 C.R. (3d) 378 (Sask.C.A.) recognizing that an agent of the Attorney General has general authority to enter a prosecutorial stay without specific instructions from the Attorney General.

⁴⁹ *R. v. Allen* (2002) 208 Nfld and P.E.I. R. 250 (Nfld.C.A.). Philip Stenning has similarly concluded that “There seems to be no reason to suppose that the introduction...of a one-year limit on the suspension of criminal proceedings, following a stay of proceedings in any way alters the implications of such a stay, other than in relieving the accused of the threat of recommencement of those proceedings once the time limit has elapsed. Since sections 508(2) and 732.1 [see now s.579(2) and s.795] both provide that proceedings which have been stayed but not recommenced during the time limit ‘shall be deemed never to have been commenced’, they would seem to present no bar to the subsequent initiation of fresh proceedings for the same offence.” Philip Stenning *Appearing for the Crown* (Montreal: Yvon Blais, 1986) at 233. (emphasis in original) Tim Quigley, however, appears to take a different position and states that “If the Crown does not recommence within the time periods [of s.579(2)], the stay is equivalent to an acquittal. Thus, in a conceptual sense, a prosecutorial stay merely suspends the proceeding until the requisite time period has elapsed, where-upon it becomes permanent.” Tim Quigley *Procedure in Canadian Criminal Law* 2nd ed (Toronto: Carswell, 2006) at 16.4. I must disagree with the proposition that an expired stay is the equivalent to an acquittal and note that Professor Quigley himself discusses occasional cases in which the Crown has commenced new proceedings after the use of a prosecutorial stay.

⁵⁰ This is distinct from the Court’s recognition that a judicial as opposed to a prosecutorial stay of proceedings should be treated as an acquittal for the purposes of the appeal provisions of the Criminal Code. *R. v. Jewitt* [1985] 2 S.C.R. 128 at para 56.

particular relevance to cases under section 696.3 which tend to be serious cases that have no statute of limitations. It is also of relevance because it suggests that the prosecutor could re-open a case by relaying the same charge even years after a prosecutorial stay has been entered. As will be discussed in the last section of this report, this could provide a means through which a not guilty verdict and perhaps even a declaration of a wrongful conviction could be made after the entry of a prosecutorial stay.

In 1983, the Supreme Court stated in relation to the predecessor of section 579 that:

The power to stay is a necessary one but one which encroaches upon the citizen's fundamental and historical right to inform under oath a justice of the peace of the commission of a crime. Parliament has seen fit to impose upon the justice an obligation to "hear and consider" the allegation and make a determination. In the absence of a clear and unambiguous text taking away the right, it should be protected. This is particularly true when considering a text of law that is open to an interpretation that favours the exercise of that right whilst amply accommodating the policy consideration that supports the power to stay. When one adds to these considerations the fact that, apart from the court's control, the only one left is that of the legislative branch of government, given a choice, any interpretation of the law, which would have the added advantage of better ensuring the Attorney-General's accountability by enhancing the legislative capacity to superintend the exercise of his power, should be preferred.⁵¹

This case is significant in its recognition that a traditionally important use of the prosecutorial stay has been in relation to private prosecutions and that the Attorney General has generally only been held accountable in the legislature and not the courts for the exercise of the discretionary power to enter a prosecutorial stay.

The advent of the Charter has, however, increased the possibility for challenging various forms of prosecutorial discretion. In *R. v. Fortin*⁵², the Ontario Court of Appeal rejected a Charter challenge to prosecutorial stays stressing the traditional ability of the prosecutor to enter such stays as well as the ability of all counsel instructed by the Attorney General to use the stay. In *R. v. Scott*⁵³, the majority of the Supreme Court held that the use of a prosecutorial stay to protect the identity of a confidential informer was not an abuse of process. Justice Cory stated for the majority:

At the outset, it must be noted that Crown counsel was at all times acting in good faith. The Crown was obliged to protect the identity of the informer...Crown counsel attempted to fulfill that obligation. Yet the judge presiding at the first trial made it very clear by his rulings and statements that he would not listen to the Crown's submission. In my view, Crown counsel acted properly in staying the action to protect the identity of an informer. In the circumstances, the Crown was

⁵¹ *R. v. Dowson* (1983) 7 C.C.C.(3d) 527 at 536.

⁵² (1989) 33 O.A.C. 123

⁵³ [1990] 3 S.C.R. 979 See also *Chartrand v. Quebec* (1987) 40 C.C.C.(3d) 270 (Que. C.A.) leave denied 41 C.C.C.(3d) vi recognizing the ability of the courts to review the exercise of prosecutorial discretion under the Charter but holding that the Charter was not violated

not bound to follow the lengthy and somewhat circuitous route of offering no further evidence and appealing the inevitable acquittal. On the facts of this case, it was appropriate for the Crown to move for a stay in accordance with the statutory authority granted by s. 508 (now s. 579) of the Code. Subsequent to the stay of proceedings the Crown moved at the first reasonable opportunity to renew them. Once again the Crown acted properly. In the circumstances of this case, it could not possibly be said that the appellant was prejudiced in any way by delay in his trial as he was at all times in custody on another matter.⁵⁴

Scott recognized the ability of the prosecutor to recommence proceedings against the accused after the use of the prosecutorial stay as opposed to the alternative of offering no evidence. It also recognized the possibility that the use of the stay could be challenged on the basis that the Crown acted in bad faith or abused its discretionary powers.

Although there is caselaw in Canada, including a few cases decided after the Charter, that supports the view that the use of the prosecutorial stay is immune from judicial review⁵⁵, the better view is that prosecutorial stays are subject to judicial review, albeit a deferential form of judicial review that will generally only intervene if the Crown has used the stay for an improper purpose or as a part of an abuse of process.⁵⁶

The prosecutorial stay has not been the subject of extensive judicial comment in relation to orders for new trials under section 696.3 or its predecessor section 690. In *Reference re Milgaard*⁵⁷, however, the Supreme Court noted that:

It would be open to the Attorney General for Saskatchewan under the *Criminal Code* to enter a stay if that course were deemed appropriate in light of all the circumstances. However, if a stay is not entered, a new trial proceeds and a verdict of guilty is returned, then we would recommend that the Minister of Justice consider granting a conditional pardon to David Milgaard with respect to any sentence imposed.

This passage suggests that the Supreme Court recognized that a prosecutorial stay could be used in a case in which a new trial was ordered because of concerns about the safety of the conviction and that a stay could prevent the holding of a new trial. As outlined in part one of this report, a prosecutorial stay was subsequently entered in Mr. Milgaard's case. He was subsequently exonerated in 1997 by the results of DNA testing and an apology by the federal Minister of Justice.⁵⁸

In the case of Rejean Hinse, the Supreme Court recognized that a judicial stay would not result in a verdict on the merits. In that case, the Quebec Court of Appeal entered a judicial stay after Mr. Hinse had served 15 years in prison after having examined new evidence. Justice Steinberg of the Quebec Court of Appeal concluded that

⁵⁴ *ibid* at 992

⁵⁵ *R. v. Panartie Oils Ltd.* (1982) 69 C.C.C.(2d) 393 (N.W.T.S.C.); *Hebert v. Marx* (1990) 62 C.C.C.(3d) 371 (Que.C.A.); *Whitehead v. Saskatchewan Provincial Court* (1989) 76 Sask. R. 78 (Q.B.).

⁵⁶ *R. v. N(D)* (2004) 188 C.C.C.(3d) 89 (Nfld.C.A.); *Kostuch (Informant) v. Alberta (Attorney General)* (1995) 101 C.C.C.(3d) 321 (Alta.C.A.).

⁵⁷ [1992] 1 S.C.R. 866.

⁵⁸ News Release July 18, 1997 at http://www.milgaardinquiry.ca/June1_06JoyceMilgaard.shtml

the evidence was “not sufficiently clear and conclusive enough to justify acquittal of the appellant at this stage”. The fact that 33 years had passed since the crime meant that “proceeding with a second trial of the appellant under these circumstances would be vexatious and oppressive, would violate the community’s sense of fair play and decency and, therefore, would constitute an abuse of process.”⁵⁹ The accused was not satisfied with the remedy of a judicial stay and sought leave to appeal to the Supreme Court. The Supreme Court decided that it could hear the appeal pursuant to its general jurisdiction under s.40 of the *Supreme Court Act*. One of Chief Justice Lamer’s rationale for this ruling was that it was necessary to hear appeals from additional orders that were ancillary to an appeal court’s order relating to a conviction or appeal. He stated:

A court of appeal could effectively undermine an accused’s success on appeal by ordering a new trial only on certain limited issues which are completely unrelated to the accused’s underlying innocence or culpability. The accused’s success in procuring a new trial under s. 686(2)(b) would be eviscerated by the court’s “additional order” under s. 686(8). To deny the existence of an appeal to this Court in such an instance would deprive the accused of any mechanism to vindicate his substantive right to a new trial or an acquittal under s. 686(2) following a successful appeal. Given this troubling concern, I am inclined to adopt a more generous interpretation of s. 40(1) (and a correspondingly more narrow interpretation of s. 40(3)) which would facilitate this Court’s supervisory role in ensuring the underlying consistency of appellate court orders rendered under the procedural regime of the Criminal Code.⁶⁰

The significance of this passage is the Court’s recognition that a stay of proceedings did not address the “accused’s innocence or culpability” or the accused’s interest in a verdict on the merits.

The Court’s concern with the underlying issue of guilt or innocence and its recognition that the stay did not address such central questions was affirmed when in 1997, it concluded on another appeal by Mr. Hinse that:

In the circumstances, being of the view that the evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt, we are all of the view that the appropriate remedy is an acquittal. Accordingly, the appeal is allowed, the stay of proceedings order is set aside and the acquittal of the appellant is entered.⁶¹

The Court’s two decisions in the Rejean Hinse case illustrate how it has become more sensitive to the accused’s interest in a verdict on the merits and its recognition that a stay of proceedings does not address the ultimate issue of guilt and innocence.

Another relevant case is the Court’s decision in *R. v. Balafrej* in which the accused tried to bring proceedings under the Quebec Civil Code to overturn an acknowledged wrongful conviction. On consent, the Supreme Court reversed the Court of Appeal’s

⁵⁹ *R. v. Hinse* (1994) 64 Q.A.C. 53 at paras 34, 36

⁶⁰ *R. v. Hinse* [1995] 4 S.C.R. 597 at para 34.

⁶¹ *R. v. Hinse* [1997] 1 S.C.R. 3 at paras 2-3.

decision under s.70 of the Supreme Court Act, quashed the conviction and entered an acquittal.⁶²

Both prosecutorial and judicial stays are united by the fact that they deprive the accused of a verdict on the merits. The Supreme Court of Canada has recognized that a judicial stay does not determine the merits of charges against the accused and has taken steps to preserve the accused's opportunity for a verdict on the merits. In 1988, the Court recognized that a stay of proceedings would be the appropriate remedy for a successful defence of entrapment, but also devised a creative procedure that ensured that the entrapment defence leading to a stay would only be litigated after a decision on the merits.⁶³ This entrapment case, like the *Hinse* cases and the *Balafrej* case, all recognize that an accused entitled to an acquittal has a compelling interest in such a verdict on the merits. These cases are somewhat in tension to the Supreme Court's seeming acceptance in the *Milgaard Reference* that a prosecutorial stay could be an acceptable disposition.

Provincial Policies with Respect to the Use of Stays

I have been informed that no written policies exist in Manitoba with respect to the use of stays under s.579. I note, however, that at the time that a stay was entered in Mr. Driskell's case that Bob Morrison was quoted in the Winnipeg press as stating that the stay should not be interpreted as a "a recognition of factual innocence". Bruce MacFarlane stated that "a stay of proceedings means we're unable to prove the case, its not a statement of exoneration. We can't prove either guilt or innocence. (Driskell) is free of charges, he's no longer restricted by bail and he's no longer a convicted murderer."⁶⁴ In testimony before the Lamer inquiry, Mr. MacFarlane commented that he did not "have strong views as to whether or not you stay or offer no evidence. My point is that there's an obligation at that point to terminate the case. As to the proper mechanism, I think it would depend largely on local practice. The practice in Manitoba would likely be to stay because that's the Crown action."⁶⁵ Chief Justice Lamer added that Mr. MacFarlane "did recognize the importance of the negative public impression that could be left by the stay. He stated that where there is some 'anxiety' that additional evidence might arise, a stay is appropriate, but where there is 'simply no evidence' an acquittal should occur." Chief Justice Lamer concluded that "Crown policy with respect to invoking the stay of proceedings varies in different parts of Canada."⁶⁶

The Ontario Crown Policy Manual states that with respect to stays that approvals are required for criminal offences that have resulted in death and "that Crown counsel should ensure that the use of this discretionary power is consistent with the proper administration of justice."⁶⁷ Chief Justice Lamer, however, also considered and expressed approval for an elaboration of the Ontario policy that "a stay of proceedings

⁶² Supreme Court Bulletin April 15, 2005; Criminal Conviction Review Annual Report 2005 at 14.

⁶³ *R. v. Mack* [1988] 2 S.C.R. 903.

⁶⁴ Dan Lett and Leah Janzen "Driskell Free at Last" Winnipeg Free Press March 4, 2005.

⁶⁵ Lamer inquiry at 319

⁶⁶ *ibid* at 320.

⁶⁷ Province of Ontario, Ministry of the Attorney General *Crown Policy Manual Stay and Recommencement of Proceedings* March 21, 2005 at <http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/default.asp>

should not be entered unless there is a reasonable likelihood of additional, incriminating evidence coming to light.”⁶⁸ Chief Justice Lamer approved of this standard and, as will be seen, incorporated it in his proposed guidelines for the use of prosecutorial stays.

The New Brunswick Manual provides that “In New Brunswick, the practice has been to stay proceedings only for special circumstances. If there is a legitimate reason why the Crown cannot expeditiously proceed to trial, the request for a stay will likely be granted. Where, however, the Crown has no reasonable prospect of proceeding to trial within the time for re-commencement, the charge should be withdrawn and the matter thereby concluded.”⁶⁹

I have been informed that there are no specific policies in British Columbia concerning the use of a stay of proceedings, but that “a stay of proceedings is the usual process by which Crown counsel terminate a prosecution in British Columbia”.⁷⁰ In general, a case in British Columbia requires a substantial likelihood of conviction and that the prosecution be in the public interest. Exceptional circumstances can justify departures from this rule, but the Crown Policy Manual indicates that “such circumstances will most often arise in cases of high risk, violent or dangerous offenders or where public safety concerns are of paramount consideration.”⁷¹ There is no specific mention of the accused’s interest in a verdict on the merits as being one of the exceptions to bringing a prosecution where there is no substantial likelihood of conviction. There is also no specific discussion of the relative merits of using a prosecutorial stay, withdrawing charges or calling no evidence to produce a not guilty verdict, but I am informed that in a minority of cases where there is no substantial likelihood of conviction that the procedure of calling no evidence is used.⁷²

Alberta’s guidelines provide that when deciding whether to enter a Stay of Proceedings, agents should consider:

- a) the circumstances of the case and the inability of the Crown to proceed with the case;
- b) the merits of the particular case (including the sufficiency of evidence and the likelihood of conviction);
- c) the relative importance of the case;
- d) the likelihood of re-activation or recommencement.⁷³

Under these guidelines, the likelihood of recommencement of proceedings is only one of

⁶⁸ Lamer inquiry at 320.

⁶⁹ DPP Guideline 18 New Brunswick Stay of Proceedings March 10, 2003.

⁷⁰ Correspondence Allan Seckel Deputy Attorney General of British Columbia June 26, 2006.

⁷¹ Crown Counsel Policy Manual British Columbia Nov. 18, 2005 CHA 1.

⁷² Crown policies in British Columbia are also under review in light of the Lamer report.

⁷³ Alberta Attorney General Guideline 11 Stay of Proceedings and Withdrawal of Charges Nov. 10, 1993.

many factors to be considered before a prosecutorial stay is used.

The Newfoundland Crown Policy Manual, which is under review in light of the Lamer report, stresses that prosecutorial stays under s.579 are one of the core functions of prosecutorial discretion and that they allow the prosecutor to recommence proceeding either on the same indictment within a year of the entry of the stay or with a new indictment at any time. The Manual provides:

In Krieger v. Law Society of Alberta 2002 SCC 65, the Supreme Court of Canada listed what it considered to be the core elements of prosecutorial discretion: (a) the discretion to prosecute a charge laid by the police; (b) the discretion to enter a stay of proceedings in either a public or private prosecution; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether; and (e) the discretion to take control of a private prosecution. The SCC stated that ...While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General....

After the expiration of a year, if the proceedings are not recommenced, the proceedings are deemed never to have been commenced. This does not mean that the Crown can never proceed on the charge. It is not the same as an acquittal. It means that a new information will have to be sworn or a direct indictment preferred, and the proceedings will commence from that point.⁷⁴

This policy makes the important point that a prosecutorial stay will not prevent the re-laying of charges. This is especially important in homicide and other serious cases which in Canada do not have a statute of limitations. To this end, the Newfoundland guidelines cite a case in which a new murder charge was laid three years after a prosecutorial stay was entered.⁷⁵

The Newfoundland guidelines emphasize that the prosecutorial stay is a matter of prosecutorial discretion and state that:

the Crown is **not** required to give reasons for entering a stay of proceedings. A stay is a direction to the Court, not a request of it. There are many reasons why the Crown may not wish to provide reasons for its' decision in a particular case, and legitimate policy reasons as to why the Crown should not be asked to do so in **any** case. These include the protection of the identity of informers or undercover police officers, avoiding jeopardizing ongoing investigations, protection of the privacy interests of witnesses or complainants, or preservation of the possibility of pursuing the prosecution at a later time.

The Newfoundland guidelines add that:

It is the prerogative of the Crown Attorney to withdraw charges, enter a stay of proceedings or to call no evidence and allow an acquittal to be entered. ...Should

⁷⁴ Newfoundland Crown Policy October, 2005 appendix D

⁷⁵ *R. v. Allen* (2002) 208 Nfld and P.E.I.R. 250.

the decision be made to enter a stay of proceedings, then the police and victim should be advised of the nature of a stay of proceedings. The Crown Attorney should address with the police the possibility of the stay charge again proceeding should circumstances or evidence change....If a new trial is ordered after an appeal and the Crown decides that it will **not** pursue the matter then some action must be taken. The matter cannot be left in limbo. The Crown Attorney must consider whether to stay, withdraw or call no evidence.⁷⁶

An appendix to these guidelines suggests that "where the investigation discloses conclusive evidence that either the offence did not occur or that it was not committed by the accused, you should consider whether it is appropriate to call no evidence and ask for an acquittal to be entered." It also contemplates situations where the prosecutor concludes "that the offence probably occurred and was committed by the accused, but that there is not a reasonable prospect of conviction.... In general, if there is a reasonable possibility that the circumstances may change or further evidence found which would change that, it is preferable to enter a stay. These are not absolute rules, though, because there are a lot of grey areas."

The Newfoundland guidelines were subject to some criticism by the Lamer inquiry and the Lamer inquiry's recommendations with respect to stays and alternative remedies will be discussed in the fourth part of this report.

None of the provincial policies that I have seen specifically address the use of prosecutorial stays in possible wrongful conviction cases. Moreover, many of the provincial policies do not situate the selection of a stay in the context of the alternatives of withdrawing charges or offering no evidence.

Summary

The prosecutorial stay under s.579 of the Criminal Code is the equivalent of the *nolle prosequi*. A prosecutorial stay does not bar subsequent proceedings and it deprives the accused of a verdict on the merits. In both entrapment cases and in the Rejean Hinse case, the Supreme Court has recognized that the accused may have a legitimate interest in a not guilty verdict as opposed to either a judicial or prosecutorial stay. At the same time, however, the Supreme Court contemplated that a prosecutorial stay might be an appropriate disposition in its decision in the Milgaard reference and a stay was used in that case before the Minister of Justice recognized and apologized for Mr. Milgaard's wrongful conviction after his DNA exoneration. Although prosecutorial stays have traditionally been immune from judicial review, the current position is that they can be challenged as an abuse of process, but that the courts will generally defer to legitimate exercises of prosecutorial discretion. Provincial policies with respect to the use of prosecutorial stays generally see them as an issue of prosecutorial discretion and do not usually provide helpful guidance for prosecutors about when stays should be entered, or when the prosecutor should use alternatives such as calling no evidence to produce a not guilty verdict or withdrawing the charges. A number of provinces, however, have indicated that they may reconsider their policies in light of the detailed proposals in the Lamer inquiry report. These proposals will

⁷⁶ Newfoundland Crown Manual October, 2005 Topic 460

be discussed in the fourth part of this report, but first I will examine in greater depth the alternatives to prosecutorial stays.

III. Understanding the Significance of the Alternative Remedies of New Trials, Charge Withdrawals or Calling No Evidence

The significance of the use of prosecutorial stays under section 579 after a new trial is ordered under section 696.3 can only be fully appreciated in light of alternative remedies or options that could be used by Crown counsel. As discussed above, the main alternative to the use of a prosecutorial stay are 1) the conduct of a new trial or 2) the withdrawal of the charges or 3) a decision by the prosecutor to call no evidence, resulting in a not guilty verdict for the accused.

New Trials

One alternative remedy that will be available in some cases is to allow the new trial to proceed. This option was used when the Minister of Justice in May 2004 ordered a new trial for Rodney Cain who had been convicted of murder in 1985. The Crown was able to prosecute that case and in June 2006, a jury, after three days of deliberation, acquitted Mr. Cain of murder but convicted him of manslaughter.⁷⁷ In any new trial, the Crown would have to prove guilt beyond a reasonable doubt and a failure to satisfy this high standard would result in a not guilty verdict. In jury trials, the jury will simply announce their verdict on each count. There is nothing in present trial procedures to allow for the determination and declaration of a wrongful conviction.

In Mr. Driskell's case the Crown determined that it would not be proper to proceed with the new trial. Crown counsel Robert H. Morrison Q.C. explained this decision by stating: "The Crown is ethically entitled to proceed with a criminal trial only where there is a reasonable likelihood of a conviction. Our ethical obligation to ensure the standard is met continues throughout and at every state of a prosecution". Mr. Morrison elaborated by stating:

When assessing whether there is a reasonable likelihood of conviction we, as Crown Attorneys, have to be mindful of our critical role. Crown Attorneys are said to have a quasi-judicial function. We have obligations of objectivity and fairness. And so, even where there is evidence pointing to guilt, if we conclude at any stage that our ethical standard is not met, then we are obliged to discontinue a prosecution.

In making this assessment he stressed that "the issue of our ethical standard involves analysis of the totality of the evidence and the logical and expected weight of it...Practical realities of the evidence, considered through the lens of experience must, obviously, also be taken into account....In the final analysis, my view is that no reasonable jury could now have sufficient confidence in the testimony of Zanidean and Gumieny so as to convict Mr. Driskell of the murder on the standard of proof beyond a reasonable doubt"⁷⁸ The standard of not prosecuting when there is no reasonable prospect of conviction represents best and common standards in Crown charge screening and the

⁷⁷ "Retrial finds man guilty of manslaughter" Toronto Star June 24, 2006.

⁷⁸ Letter of Robert H. Morrison Q.C. to Clerk of the Manitoba Queens Bench March 5, 2005.

situation presented in Mr. Driskell's case may well re-occur in future cases where new trials have been ordered under section 696.3 of the Code. In other words, it may not always be possible to have a new trial and this raises the issue of alternative dispositions.

Withdrawal of Charges

One alternative disposition would be for the Crown to withdraw charges in cases where there is no reasonable prospect of conviction. Some might argue that a withdrawal would be preferable to a prosecutorial stay because it would remove the sword of Damocles over the accused. A withdrawal would certainly remove the present ability of the prosecutor under s.579(2) to revive proceedings within a year without laying a new information or preferring an indictment, but it might not otherwise protect the accused from subsequent proceedings. In a 1990 case, the Supreme Court held that a new information could be laid after the prosecutor had withdrawn an information at the start of the trial before evidence was adduced against the accused. In other words, the accused could not plead *autrefois acquit* after the withdrawal of charges.⁷⁹ In an earlier case the Supreme Court held that a withdrawal after the accused had pleaded barred the prosecution proceeding by summary conviction, but did not prevent a proceeding by indictment that, unlike the proceeding by summary conviction, was not statute barred.⁸⁰ A similar procedure in which the Crown withdrew an information on a summary conviction offence and proceeded by indictment has been upheld under the Charter as a legitimate exercise of prosecutorial discretion barring evidence of bad faith or improper motive.⁸¹ These cases suggest that the withdrawal of charges will not generally constitute a verdict of acquittal or allow the accused to plea *autrefois acquit*.⁸²

Although it will not generally prevent subsequent proceedings, a withdrawal of charges may nevertheless be perceived in some cases to be more of an exoneration than a prosecutorial stay because it does not indicate as clearly as a stay that the proceedings could be revived. It is possible that Crown counsel could say that he or she was withdrawing charges because the accused is innocent and the charges should never have been laid in the first place. Much would depend on how the withdrawal was presented to the accused and the public.

There is some confusion about whether judicial approval is required before charges are withdrawn by the Crown. Canadian authority seems to suggest that charges can be withdrawn without judicial approval prior to the entry of plea or the preferring of

⁷⁹ *R. v. Selhi* [1990] 1 S.C.R. 277. See also *R. v. Bourque* (1999) 140 C.C.C.(3d) 435 (N.B.C.A.).

⁸⁰ *R. v. Karpinski* (1957) 117 C.C.C. 241

⁸¹ *R. v. McArthur* (1995) 102 C.C.C.(3d) 84 (Sask.C.A.)

⁸² To the same effect see Stanley Cohen *Due Process of Law* (Toronto: Carswell, 1977) at 163; Ulrich Gautier "The Power of the Crown to Reinstitute Proceedings After the Withdrawal or Dismissal of Charges" (1978-79) 22 Crim.L.Q. 463 at 471; Philip Stenning *Appearing for the Crown* (Montreal: Yvon Blais, 1986) at 249. The Newfoundland Crown Manual for example provides that "if a charge is withdrawn, it is possible for the Crown to substitute other charges arising out of the same transaction or to even to re-lay the same charge at a later date. A withdrawal of a charge is not the equivalent of a determination of the merits of a criminal charge" Newfoundland Crown Manual October, 2005 appendix D.

an indictment.⁸³ In contrast, “most authority holds that after a plea has been entered and especially after evidence has been called, leave of the Court is required before the Crown may withdraw the charge.”⁸⁴ The possibility that the prosecutor may seek or have to obtain judicial approval of a decision to withdraw a charge is relevant because it opens the possibility that the judicial approval could provide a means for a judicial determination and declaration that a wrongful conviction has occurred or some judicial amplification and approval of the prosecutor’s decision. The possibility of judicial involvement both with respect to the withdrawal of charges or the decision to offer no evidence distinguishes these procedures from the prosecutorial stay which is clearly a decision that is not subject to judicial approval.

Calling No Evidence

Another alternative to the prosecutorial stay is the calling of no evidence. This remedy, unlike either a withdrawal of charges or a prosecutorial stay, protects the accused from subsequent recommencement of proceedings because it produces a not guilty verdict that can be used to plea *autrefois acquit*.⁸⁵ In essence, the calling of no evidence will result in the same plea, a not guilty verdict, as would occur should the Crown be unable to prove guilt beyond a reasonable doubt at a new trial. In a legal sense, the calling of no evidence resulting in a not guilty verdict clearly restores the presumption of innocence that was lost when the successful applicant was originally convicted. The sociological or practical meaning of calling no evidence and a not guilty verdict may, however, depend on the circumstances, including statements made by Crown counsel about why no evidence was called and statements made by the judge about the meaning of the resulting not guilty verdict.

As with the option of withdrawing charges, there is some uncertainty about whether judicial approval is required when the Crown decides to call no evidence. The United Kingdom’s Crown Prosecution Service Guidelines respecting Termination of Proceedings reflects the ambiguity of the situation when it provides that the prosecutor should provide advance notice in writing to the clerk of the Crown court of the intention to offer no evidence:

The judge has a discretion whether to accept the prosecution’s decision and counsel may be reluctant to adopt a course not approved by the judge. But in practice, a court cannot compel the prosecution to proceed if the prosecution decide to offer no evidence.

It is indeed difficult to imagine the judge refusing any reasonable explanation by the prosecutor of his or her decision not to call evidence.

⁸³ *R. v. Osborne* (1975) 25 C.C.C.(2d) 405 (N.B.C.A.); *R. v. Blasko* (1975) 29 C.C.C.(2d) 321 (Ont.H.C.J.); *R. v. Carr* (1984) 54 N.B.R. (2d) 99 (N.B.C.A.); *R. v. McMullen* (1983) 60 N.S.R.(2d) 440 (T.D.).

⁸⁴ Tim Quigley *Procedure in Canadian Criminal Law* 2nd ed (Toronto: Carswell, 2006) at 16.4. For an argument that leave of the court is required in all cases see David Vanek “Prosecutorial Discretion” (1987-88) 30 Crim.L.Q. 219 at 224-232. For a rebuttal of this argument see J.A. Ramsay “Prosecutorial Discretion: A Reply to David Vanek” (1987-88) 30 Crim.L.Q. 378.

⁸⁵ *R. v. Riddle* (1978) 48 C.C.C.(2d) 365 at 379-380 (S.C.C.)

As was the case with withdrawing charges discussed above, possible judicial involvement in approving a decision not to call evidence raises the possibility that such a procedure could be used as a means to determine and declare that a wrongful conviction exists. Even if the judge simply accepts the Crown's decision not to call evidence and explains the importance of the not guilty verdict, judicial involvement could play a positive role in the exoneration process. As will be discussed in the fifth part of this report, there are some cases where judges have gone beyond explaining the not guilty verdict and have declared that a wrongful conviction has occurred and/or have apologized to the accused on behalf of the justice system. The courts carry much authority and prestige in our society and some judicial involvement in undoing a prior conviction by the courts may be necessary to make clear both to the successful section 696.1 applicant and to society at large that the person is innocent.

Summary

I have examined four possible responses to an order for a new trial under section 696.3. They are 1) a prosecutorial stay under section 579, 2) a new trial, 3) a withdrawal of charges by the prosecutor, and 4) calling no evidence and a resulting verdict of not guilty. The first two dispositions are united in not precluding subsequent proceedings and in not producing a plea of *autrefois acquit* that will bar subsequent prosecutions. In contrast, the last two dispositions will result in a verdict that will preclude subsequent proceedings. At the same time, the not guilty verdict that will result from a decision by the prosecutor to call no evidence and may result from a trial may not, depending on the circumstances, amount to a determination or declaration of a wrongful conviction.

Another difference between the alternative dispositions is that the prosecutorial stay like the *nolle prosequi* does not require any judicial approval while both charge withdrawal and the calling of no evidence may, depending on the stage of the process, require some judicial approval. The issue of judicial involvement is relevant because it may provide a basis for judicial involvement in a determination or declaration of a wrongful conviction. Alternative means for determining and declaring wrongful convictions will be examined in greater depth in the fifth part of this report. The next section, however, will outline the principles that should govern Crown counsel's choice of alternative responses to an order for a new trial under s.696.3 of the Criminal Code.

IV. A Proposed Approach to the Choice Between Prosecutorial Stays and Calling No Evidence in Section 696.1 Cases

As discussed above, a prosecutor has four potential options when faced with an order for a new trial under section 696.3. The first is to proceed with a trial, but in some cases this will not be possible because there will be no reasonable prospect of conviction because of various factors including the age of a case. In my view, it would not be advisable for the prosecutor to proceed with a trial without regard to the prospect of a conviction just because the Minister of Justice has ordered a new trial. Such an approach would abdicate the prosecutor's role to screen charges and to ensure that justice is done. It would also impose significant costs on the accused, including the possibility of

conviction despite the prosecutor's judgment that there is no reasonable prospect of conviction.

A second option is to withdraw charges. As a technical matter, this may not be possible where a Minister of Justice has ordered a new trial or appeal under s.696.3 because such an order does not overturn the conviction which remains *res judicata*.⁸⁶ In any event, a withdrawal of the charges would not generally be an appropriate disposition because, as discussed above, it would leave the convicted person open to subsequent prosecution and would not produce a court verdict. At the same time, I acknowledge that withdrawal of charges may signal in a symbolic sense that the prosecutor either accepts the convicted person's innocence or has concluded that a subsequent prosecution is not in the public interest. That said, the practical distinction between a withdrawal of charges and a prosecutorial stay is minimal.

The rest of this section will focus on the principles that should guide the prosecutor's choice between the third and fourth possible procedures that can be used in response to an order for a new trial under s.696.3. These options are the entry of a prosecutorial stay under s.579 or the calling of no evidence and the subsequent entry of an acquittal. As discussed above, the use of the prosecutorial stay does not produce any verdict or judicial involvement in the case and leaves the accused open to further proceedings. On the other hand, the calling of no evidence will produce a not guilty verdict that will bar subsequent proceedings. In determining the choice between these two options, we are fortunate to have the learned reflections of the former Chief Justice of Canada in his recent report.

The Lamer Report

Chief Justice Lamer is his recent inquiry report on three Newfoundland cases was critical of the use of a prosecutorial stay of proceedings under section 579 after the Court of Appeal had overturned Randy Druken's murder conviction and ordered a new trial. In that case, the decision to enter a stay was taken after three Crown Attorneys and one outside Crown Attorney from Ontario gave their opinion supporting such a disposition on the basis that there was no reasonable prospect of conviction, but that further investigation of Mr. Druken was warranted. Chief Justice Lamer, however, found that their advice was in some cases infected by tunnel vision about Randy Druken's guilt and in other cases by a misapprehension of the facts. He concluded that a subsequent police investigation to determine whether there was further evidence against Randy Druken:

was another futile exercise. It produced nothing. It did prevent Randy Druken from obtaining an acquittal. The message from Inspector Brown and his colleagues should have been clear to DPP, Tom Mills. There was no prospect of recommencement of the proceedings against Randy Druken. Mr. Mills should have done the right thing and directed a Crown Attorney to appear on the charge

⁸⁶ I am assuming here that the Minister of Justice does not have the power to nullify the previous conviction and this is why the Minister of Justice only has the power to refer the case back to the courts.

but call no evidence. This would result in an acquittal. Instead, the investigation was needlessly prolonged and the stay of proceedings expired ten days later.⁸⁷

Chief Justice Lamer noted that practices on the use of prosecutorial stays varied throughout Canada, but he stated that “the most preferable” was an Ontario policy as represented in an opinion that an Ontario Crown Attorney, Tara Dier, had provided to the Newfoundland government on the Druken case. Ms. Dier had written that “it would be inappropriate to enter a stay of proceedings if there is no prospect whatsoever of recommencement. In this case some reasonable likelihood that additional evidence implicating Randy Druken will come to light is required.”⁸⁸ Chief Justice Lamer contemplated a slightly higher standard to justify the use of the prosecutorial stay, namely that “there be a reasonable expectation that the prosecution will be pursued in the future.”⁸⁹ This standard recognizes that the prosecutorial stay leaves a person open to further proceedings and should only be used with there is a reasonable expectation that the prosecution will indeed be recommenced.

Chief Justice Lamer remarked that the use of a stay under s.579 is an easy and “nothing to lose” choice for the Crown because “the former accused may be charged with the same offence for the same conduct at any time.” In contrast, the accused, especially one “that has been convicted and spent years in prisons” has much to lose because “a stay of proceedings may leave an impression with the public that the charge is being ‘postponed’ or ‘the authorities’, in the broad sense, still believe in the validity of the charge.”⁹⁰ Chief Justice Lamer quoted with approval AIDWYC’s submission that a stay is not an exoneration and can leave the accused in ‘limbo’ and that it ‘indelibly tarnishes the defendant’. He added that while AIDWYC “speaks largely from the perspective of a person who had been wrongfully convicted”, the validity of its observations “extends to an accused who cannot be exonerated but for whom it is unreasonable to expect any future prosecution in relation to the charge in question.”⁹¹

Chief Justice Lamer considered the DPP’s defence of the stay as a remedy that leaves the person in the same position as any other person who enjoys the presumption of innocence as “legally correct but practically unrealistic.”⁹² Chief Justice Lamer was speaking about prosecutorial stays in general but his comments about a stay placing a person in legal limbo and tarnishing a person’s reputation are particularly apt in the context of a person who has been convicted, but has received an order for a new trial from the Minister of Justice because there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

Chief Justice Lamer concluded that “in contrast to a stay of proceedings, a statement by the Crown, in open court, that it has no evidence to present often carries the

⁸⁷ Lamer Report at 315

⁸⁸ *ibid* as quoted at 313

⁸⁹ *ibid* at 319

⁹⁰ *ibid* at 317-318

⁹¹ *ibid* at 318

⁹² *ibid* at 319

implicit message that this person should not have been charged.”⁹³ Justice Kaufman in his Truscott report also contemplated that a new trial in which the Crown agreed to call no evidence could also serve as a form of exoneration for an actually innocent person.⁹⁴ I would only add that much would depend on the actual content of what Crown counsel and the judge said in open court. It is possible to imagine circumstances in which the Crown attempted to justify the decision not to call evidence either on the basis of a recognition of innocence, or alternatively, on the very different basis that there was no reasonable prospect of conviction. In the latter case, the Crown’s rationale for calling no evidence might be essentially the same rationale as was given for the decision to enter a prosecutorial stay under s.579 in Mr. Driskell’s case. In the latter scenario, the decision to call no evidence would result in an acquittal, but no determination or declaration that a wrongful conviction occurred.

Justice Lamer recommended the following guidelines to govern Crown selection between prosecutorial stays, withdrawal of charges and the calling of no evidence. It should be noted that these guidelines apply generally and not only with respect to cases where a new trial has been ordered under s.696.3:

It is the prerogative of the Crown Attorney to withdraw charges, to enter a stay of proceedings or to call no (further) evidence and request an acquittal. This broad prosecutorial discretion is not ordinarily subject to judicial review, which imposes an even greater obligation on the Crown Attorney to ensure that it is exercised in a fair and principled manner. The following are guidelines to assist in achieving that goal:

- 1) A withdrawal of charges is appropriate where the Crown Attorney decides that;
 - i) Reasonable and probable grounds did not exist to lay the charge;
 - ii) There is no probability of conviction; or,
 - iii) It is not in the public interest to proceed with the charge
- 2) A Stay of Proceedings is appropriate where there is a reasonable likelihood of recommencement of proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen. It is not a basis to stay proceedings merely because a judge has made a ruling unfavourable to the Crown.
- 3) It is appropriate for the Crown to start a trial but to elect to call no further evidence, and request an acquittal, where there is no probability of conviction nor a reasonable likelihood of recommencement of proceedings.
- 4) Where the Crown has called evidence, it is appropriate to call no further evidence, and request an acquittal, where the Crown Attorney determines that the evidence is so manifestly unreliable that it would be dangerous to convict.

⁹³ *ibid* at 319

⁹⁴ Truscott Report at para 2133

Chief Justice Lamer's proposed guidelines also stress the importance of the Crown Attorney consulting with senior Crown officials and providing reasons, generally in open court, for the exercise of the discretion between these three different remedies. He notes, however, that "the public reasons for a stay of proceedings may be limited by the confidentiality of an ongoing investigation. Still, they should be articulated in the reasons provided to the Senior Crown Attorney."⁹⁵

The Lamer guidelines are very helpful in understanding the appropriate prosecutorial response to an order for a new trial under s.696.3. They suggest that a prosecutorial stay should only be used if 1) there is a reasonable likelihood of recommencement of the proceedings and 2) it is necessary to conduct a police investigation because of unforeseen circumstances. These guidelines recognize that a prosecutorial stay leaves the convicted person subject to further proceedings and does not give rise to a special plea of *autrefois acquit*.

Chief Justice Lamer's reference to unforeseen circumstances giving rise to a police investigation is of particular significance in the s. 696.1 context because in all such cases, there will be extensive investigation by the federal Minister of Justice or a person delegated by him or her before an order for a new trial is made. Such mandatory investigations under the inquisitorial powers provided by the *Inquiries Act* should alert the investigating police force to the fact that the case is being re-considered. In other words, orders by the Minister of Justice of a new trial under s. 696.3 should never come out of the blue. In all such cases, the relevant police forces should be well aware that the case is being reconsidered and they should generally be able to commence and often complete any needed re-investigation before the Minister of Justice makes a decision whether to order a new trial. This advance warning should generally place the prosecuting authorities in a good position shortly after a new trial has been ordered to decide whether there is sufficient evidence to justify a new trial or alternatively whether they should call no evidence so that the convicted person can have the matter settled with a not guilty verdict. Further police investigations after the order for a new trial under s.696.3 should only be necessary in rare cases.

The Lamer guidelines favour the calling of no evidence over a prosecutorial stay both when there is no probability of conviction and no reasonable likelihood of recommencement of proceedings and also when Crown counsel determines that the evidence is so manifestly unreliable that it would be dangerous to convict. The latter ground is of particular relevance in cases in which the Minister of Justice has ordered a new trial under s.696.3 because in such cases the Minister of Justice will already have determined that the conviction is dangerous or unsafe because there is a reasonable basis to conclude that a miscarriage of justice likely occurred. The Lamer guidelines favour the accused's interests in a final not guilty verdict while only recognizing society's interests in allowing recommencement in cases where there is a reasonable likelihood of recommencement of proceedings after a police investigation.

⁹⁵ Lamer report at 322-324.

Some Suggested Additions to the Lamer Guidelines to Tailor them for Cases in which a New Trial Has Been Ordered Under Section 696.3

I would propose only a few additions to Chief Justice Lamer's guidelines in order to tailor them to the unique and extraordinary circumstances of orders under s.696.3 by the Minister of Justice for a new trial. In cases where there is a reasonable likelihood of recommencement and a further police investigation is necessary, I would suggest that the decision to enter a prosecutorial stay should generally be made by the Attorney General or the Director of Public Prosecutions in jurisdictions with a DPP. The prosecutorial stay in the s.696.3 context should be an extraordinary remedy that is used only in cases where there is a need for additional investigation and a reasonable likelihood of recommencement of proceedings. Requiring that the stay be entered by the highest official should increase deliberation before it is entered and help to focus responsibility and accountability for the exercise of an extraordinary power that will delay and perhaps prevent the Minister of Justice's order of a new trial. Given that the order for a new trial has been made at the highest level within the federal Department of Justice, it is appropriate that the entry of the prosecutorial stay at the provincial level also be made at the highest level. The involvement of the Attorney General or the Director of Public Prosecutions should also help ensure that the police re-investigation is treated as a matter of the highest priority.

I would also suggest that the Attorney General or the DPP should first allow the successful s.696.1 applicant to make written submissions to him or her about the appropriateness of using a prosecutorial stay as opposed to other remedies.⁹⁶ The successful applicant may well have information that will assist in the exercise of prosecutorial discretion, in particular information about the reliability of the evidence. Chief Justice Lamer found that the decision to enter a prosecutorial stay may reflect the phenomena of tunnel vision which may make police and prosecutors unwilling to admit mistakes and to abandon the case against the accused. In such circumstances, the use of the prosecutorial stay provides an attractive means to keep the case open even while the prosecutor must acknowledge that there is no reasonable likelihood of conviction at present. Giving the accused person an opportunity to make representations provides an opportunity, albeit no guarantee, for the prosecutorial authorities to look at the case in a new light and to confront fundamental problems with the case that might otherwise not be confronted if a prosecutorial stay is used to defer the difficult issue of whether the person who has been convicted is innocent and should receive a not guilty verdict. In addition, allowing the convicted person to make representations before the prosecutorial stay is entered recognizes that the successful s.696.1 applicant has a reasonable expectation that he or she will receive another day in court, but that a prosecutorial stay will delay if not prevent such a day in court.

Both my proposals that a prosecutorial stay should only be entered by the Attorney General (or the DPP, as the case may be) and after hearing submissions from

⁹⁶ Edwards observes that up to the 19th century, the Attorney General would hold hearings and hear from the parties before issuing a *nolle prosequi*. Edwards *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 236.

the affected parties accords with the common law origins of the prosecutorial stay in the *nolle prosequi*. Although neither procedures are required under the strict terms of s.579, they are appropriate given that a prosecutorial stay will pre-empt and prevent a new trial that has been ordered by the Minister of Justice under s.696.3. If the extraordinary remedy of a new trial is to be delayed or displaced by a prosecutorial stay, then there should be accountability at the highest levels for such a decision and the successful s.696.1 applicant should be heard in the matter.

A third addition that I would recommend be added to Chief Justice Lamer's guidelines is that any decision to pre-empt the order for a new trial under s.696.3 with a prosecutorial stay should be revisited as soon as possible and in any event within one year after its entry. This revisiting should allow the Attorney General or the DPP to decide whether the police re-investigation has either yielded enough evidence to justify a new trial or whether the investigation has failed to yield such evidence. As suggested above, police re-investigation should rarely be required after a matter has been fully investigated by the Minister of Justice before an order for a new trial is made under s.696.3 of the Code. In those rare cases where further police investigation is justified, it should in almost all cases be completed in a year's time.

A time limit of no more than one year on the use of the prosecutorial stay should have a number of salutary effects. One benefit is to limit further periods of delay and legal uncertainty for the successful s.696.3 applicant. In other words, any legal limbo experienced by the applicant should be temporary. Successful s.696.3 applicants will already have endured long delays and in many cases years of imprisonment under circumstances that the Minister of Justice has determined indicate a reasonable basis for concluding that a miscarriage of justice has likely occurred. Another benefit is to help ensure that the police re-investigation is a matter of the highest priority for the police. A third benefit is that re-visiting the stay within a year prevents the deeming provisions of s.579 (2) from coming into effect and depriving the court, at least in the absence of a new information being laid, from considering the case. Section 579(2) deems that "the proceedings shall be deemed never to have been commenced." As will be discussed in greater detail below, there is jurisprudence from two Courts of Appeal which holds that once proceedings are deemed never to have been commenced a year after the entry of the stay, courts then lose jurisdiction and become unable to consider the matter further.⁹⁷ Such a result risks placing the successful s.696.1 applicant in a permanent legal limbo in which he or she will never receive a definitive verdict. In addition, the legal fiction in s.579(2) that the proceedings never were commenced severely discounts the experience of a convicted person who has been able to demonstrate to the satisfaction of the Minister of Justice that there are reasonable grounds to believe that a miscarriage of justice likely occurred.

Summary

⁹⁷ *R. v. Smith* (1992) 79 C.C.C.(3d) 70 (B.C.C.A.); *R. v. Dufresne* (1990) 75 C.R.(3d) 117 (Que.C.A.) discussed *infra*.

The guidelines proposed by Chief Justice Lamer in his recent Newfoundland report provide a valuable and principled basis for deciding the appropriate prosecutorial response to an order for a new trial under s.696.3 of the Criminal Code. They suggest that a prosecutorial stay should only be used "where there is a reasonable likelihood of recommencement of proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen." This recognizes that the prosecutorial stay leaves the convicted person vulnerable to further proceedings. I would only add that the unforeseen circumstances that should necessitate an additional police investigation after a new trial has been ordered under s.696.3 should be rare given the extensive investigation by the Minister of Justice and his or her delegates that will proceed an order for a new trial.

The Lamer guidelines also suggest that the appropriate prosecutorial disposition "where there is no probability of conviction nor a reasonable likelihood of recommencement of proceedings" or where the evidence is so manifestly unreliable that it would be dangerous to convict is not a prosecutorial stay, but rather the calling of no evidence resulting in a verdict of acquittal. I would only add that the interest in settling the matter with a not guilty verdict is only greater in the s.696.1 context in which the Minister of Justice has concluded that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. In many and perhaps all such cases, the evidence will be so manifestly unreliable as to make the conviction dangerous and in such cases, the Lamer guidelines dictate that calling no evidence to produce a not guilty verdict is to be preferred to a prosecutorial stay. In such circumstances, a not guilty verdict would also be preferable to the withdrawal of charges.

I would suggest that any prosecutorial stay that may be entered after an order for a new trial under s.696.3 in order to allow a police re-investigation into unforeseen circumstances should only be a provisional stay and should be re-visited within a year of its entry and before the proceedings are deemed under s.579(2) never to have been commenced. In other words, the prosecutorial stay should only be used as an interim measure where there is justification for an ongoing police investigation. That police investigation should be a priority and the prosecutorial stay should be revisited within a year of its entry to determine whether or not either a new trial or the calling of no evidence resulting in a not guilty verdict is the appropriate disposition. Rarely, if ever, should a stay under s.579 be the final remedy because such an approach may well deprive the courts of jurisdiction over the case. This would mean that both the convicted person and the public could be left in a permanent legal limbo without the finality of a verdict in a case where there are reasonable grounds to conclude that a miscarriage of justice likely occurred.⁹⁸

⁹⁸ At least two ways to re-open a case after a prosecutorial stay has been expired will be outlined below, but both depend on the exercise of discretion by the executive. For reasons to be explored below, the judiciary has the responsibility to correct wrongful convictions and wherever possible should be given the opportunity to do so.

V. Possible Reforms to Achieve Determinations or Declarations of Wrongful Convictions

Section 1(f) of the Order in Council asks that consideration be given to whether and in what way a determination or declaration of a wrongful conviction can be made in a case where the Minister of Justice has ordered a new trial but a prosecutorial stay has been entered. As necessary preliminary matters, this question raises the issue of how a declaration of a wrongful conviction differs from a prosecutorial stay and a not guilty verdict and on what grounds should a determination that a wrongful conviction has occurred be made.

After these preliminary matters have been explored, I will then examine a variety of possible mechanisms that could be used to determine and declare the existence of a wrongful conviction. As will be seen, there are a number of existing means that could be used to determine and declare a wrongful conviction after a prosecutorial stay has been entered, but most of them depend to some extent on the executive as opposed to the judiciary taking action. The judicial process is not readily designed to determine or declare wrongful convictions. As one American commentator has noted:

Courts virtually never address or rule upon the question of whether the defendant is truly innocent. Instead judges and juries determine that a defendant is 'not guilty' or that a guilty verdict was infected by legal error and must be reversed. Those making these decisions, whether judge or jury, do not answer the question whether they are persuaded (either by a preponderance of the evidence or beyond a reasonable doubt) that the defendant either had no involvement whatsoever in the crime or was involved but lacked the mens rea required to establish criminality. Thus, while any serious evaluation of the quality of criminal justice rendered requires an inquiry into whether the innocent are convicted, an explicit answer cannot be found in the results of the adjudicatory process itself.⁹⁹

The failure of the existing system to exonerate the wrongfully convicted can add insult, in the form of enduring stigma and suspicion, to the already irreparable injury suffered by the wrongfully convicted.

The Distinction Between a Declaration of a Wrongful Conviction and a Prosecutorial Stay or a Not Guilty Verdict

The distinction between a prosecutorial stay and a declaration of a wrongful conviction is great. As discussed above, a prosecutorial stay under s.579 of the Criminal Code simply suspends proceedings. It does not constitute a verdict on the merits or establish the basis for a plea of *autrefois acquit*. It does not provide the accused with a not guilty verdict, let alone a determination of a wrongful conviction. As Chief Justice Lamer has recently recognized, a prosecutorial stay only revives the presumption of innocence in the thinnest and most technical sense. In practice, a stay produces a legal limbo where the accused is vulnerable to subsequent criminal proceedings. Section 579(2) has the further effect of deeming that proceedings never were commenced a year

⁹⁹ Daniel Givelber "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?" (1997) 49 Rutgers L.Rev. 1317 at 1322-23.

after the prosecutorial stay was entered. This creates a legal fiction that attempts to deny that a successful s.696.1 applicant has been convicted and that the Minister of Justice has determined that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

The distinction between a not guilty verdict and a declaration of a wrongful conviction is more complex. For the purposes of double jeopardy, an acquittal is considered to be a finding of innocence. In *R. v. Grdic*, Justice Lamer concluded:

There are not different kinds of acquittals and, on that point, I share the view that "as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence" (see Friedland, *Double Jeopardy* (1969), at p. 129... To reach behind the acquittal, to qualify it, is in effect to introduce the verdict of "not proven", which is not, has never been, and should not be part of our law.¹⁰⁰

Although a not guilty verdict may for some legal purposes amount to a finding of innocence, there is a great practical difference between the two types of findings. Chief Justice Lamer recognized the huge practical distinctions between a not guilty verdict and a finding of innocence when in November, 2003 he considered whether his inquiry's terms of reference and constitutional restrictions on public inquiries would allow him to rule on the factual innocence of Ronald Dalton, Gregory Parsons and Randy Druken. In the course of this ruling, he stated:

A criminal trial does not address 'factual innocence.' The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of the criminal law.¹⁰¹

The above statement by the former Chief Justice recognizes the practical distinctions between an accused who has been acquitted because the state has failed to prove guilt beyond a reasonable doubt and an innocent person who has been wrongfully convicted. Professor Stuesser made a similar point when he argued that "there is a difference between innocent accused such as David Milgaard, Guy Paul Morin, Thomas Sophonow and those persons who are found not guilty, such as O.J. Simpson."¹⁰² Professor Quigley notes that a not guilty verdict covers a range of circumstances "from complete innocence to proof just short of beyond a reasonable doubt..."¹⁰³ Justice Hickman, the former Chair of the Marshall Commission, has stressed that the label "wrongful conviction" should not be applied to cases in which an appellate court corrects an error but "should be reserved for those situations in which there is a suspected failure

¹⁰⁰ [1985] 1 S.C.R. 810 at para 35.

¹⁰¹ Lamer Inquiry Annex C.

¹⁰² Lee Stuesser "Admitting Acquittals as Similar Fact Evidence" (2002) 45 C.L.Q. 488 At 500

¹⁰³ Tim Quigley *Procedure in Canadian Criminal Law* 2nd ed at 22.6.

or breakdown” of the system so that “there cannot be a fair trial, and neither a trial court nor an appellate court would have before it the facts necessary to remedy the wrong.”¹⁰⁴

The Association in Defence of the Wrongly Convicted has repeatedly stressed the distinction between the wrongful conviction of the innocent and the acquittal of people in cases where guilt cannot be proven beyond a reasonable doubt. It argued in submissions to the Lamer inquiry that:

it is not the Association in Defence of those whose convictions are overturned on appeal, or those whose charges are stayed once a new trial is ordered or those wrongly acquitted. AIDWYC’s interests are narrowly focused on the ‘wrongly convicted’ - a settled term of art in Canadian jurisprudence that refers to persons who are found guilty of crimes they did not commit: factually innocent persons....it is difficult to comprehend the purpose of a public inquiry into errant homicide prosecutions unless it is driven by the same concerns that bottom AIDWYC’s participation. A public inquiry into why a guilty man was successfully convicted has as much social utility as one into why a plane did not crash or a mine did not have an accident.¹⁰⁵

In submissions to the Milgaard Inquiry, AIDWYC and David Milgaard argued that a wrongful conviction “refers to the conviction of a person who is factually innocent. It is not, and has never been, the conviction of ‘a person found guilty when he should not have been found guilty’”. AIDWYC points out that in *Burns and Rafay*, as well as some other cases, the Supreme Court had equated wrongful convictions with the conviction of “innocent individuals”¹⁰⁶

Although it is undeniable that wrongful convictions have occurred, the term is not used in the Canadian Criminal Code or related jurisprudence. The term that is generally used in Canadian criminal law is a miscarriage of justice which is both a ground for allowing an accused’s appeal from a conviction under section 686(1)(a)(iii) and a ground for the Minister of Justice to order a new trial or an appeal under section 696.3 of the Code. A miscarriage of justice would include a wrongful conviction, but it would also include other injustices such as an unfair trial. This point is confirmed by Justice Kaufman in his report on the Truscott case.¹⁰⁷ A wrongful conviction is a sub-category of the broader concept of a miscarriage of justice and refers to the conviction of those who are innocent.

Courts do not usually recognize the concept of innocence as part of the regular trial process. A common definition of a wrongful conviction would be the conviction of an innocent person. A related term that is often used, especially with regards to DNA exonerations, is factual or actual innocence. I prefer the simple term innocence because of the danger that actual innocence will be associated with the often unrealistically high

¹⁰⁴ Hon. T. Alexander Hickman “Wrongful Convictions and Commissions of Inquiry: A Commentary” (2004) 46 Can J. of Criminology and Criminal Justice 183 at 184.

¹⁰⁵ AIDWYC submission Oct 17, 2003

¹⁰⁶ Submissions to the Commission of Inquiry into the Wrongful Conviction of David Milgaard on Behalf of David Milgaard, Joyce Milgaard and AIDWYC

¹⁰⁷ Kaufman Truscott Report at paras 163-164, 2074.

standards that are achieved in DNA exonerations and because the term factual innocence might be interpreted to exclude those who may be guilty of some other misconduct other than that charged. A wrongful conviction is the conviction of a person who is innocent of the offence for which he or she was convicted.

In many cases, the wrongfully convicted have a powerful and very practical interest in being exonerated by a declaration of a wrongful conviction and of their innocence. A simple not guilty verdict will often not be a sufficient recognition of the grievous harms caused by a wrongful conviction. Adrian Grounds of the University of Cambridge, a leading researcher into the devastating effects of wrongful conviction, has reported how many of the people he interviewed:

reported continuing apprehension and fear when out in public. One reported an attempt to burn his house down...for many of the interviewed men, money was not a motivating factor. They were much more preoccupied with their need for exoneration- a public acknowledgement that they were innocent and an apology. An Appeals court decision that the conviction must be quashed because it is 'unsafe' does not provide this.¹⁰⁸

In an affidavit filed in support of a Charter challenge to a stay of proceedings, Gregory Parsons stated:

This stay of proceedings has left a cloud of suspicion hanging over my head and many members of the public have the impression that I must have had something to do with my mother's death.¹⁰⁹

On the eve of hearing the Charter challenge, the stay was withdrawn in Mr. Parsons' case and the Attorney General offered no evidence producing a verdict of acquittal. Mr. Parsons subsequently sought an exoneration and a declaration of innocence from the Lamer inquiry. Chief Justice Lamer made the following conclusions:

It is possible for a person to commit a criminal offence, to be tried and to be acquitted even though the person is actually guilty. A finding of 'not guilty' may mean no more than the Crown has not been able to prove its case 'beyond a reasonable doubt'. This is not such a case.

Gregory Parsons played no part whatsoever in the murder of his mother, Catherine Carroll. He is completely innocent. His innocence was established by DNA evidence which placed another male at the scene of the murder. That individual ultimately was apprehended, confessed and was convicted.¹¹⁰

¹⁰⁸ Adrian Grounds "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46 Can J. of Criminology and Criminal Justice 165 at 172, 178.

¹⁰⁹ Affidavit of Gregory Parsons para 6, April 2, 1998.

¹¹⁰ Lamer Inquiry at 70.

The general public, including those who interact with the wrongfully convicted, may need a more formal and official exoneration than a not guilty verdict to truly restore a person who has been wrongfully convicted to full standing in the community. Once a person has been convicted and imprisoned, something more than a not guilty verdict may be needed to fully and truly restore the presumption of innocence.

There are some weighty arguments against the concept of determining and declaring that an innocent person has suffered a wrongful conviction. In *Gridic*¹¹¹, the Supreme Court held that a not guilty verdict should be considered as a determination of innocence and it expressed concerns about introducing a third verdict of “not proven” into Canadian criminal law. In other words, there is a genuine concern that determinations and declarations of wrongful convictions could degrade the meaning of the not guilty verdict and create two classes of people who have been convicted: those who have “gotten off” because the Crown could not prove their guilt beyond a reasonable doubt and those who have been declared to be innocent.

Writing in 1988, Peter MacKinnon argued that “we may not be able to prevent suspicion that lingers, but there ought not to be *official* pronouncements of probable guilt, whether implicit in assessments of ‘innocence in fact’ for the purpose of cost awards, or anywhere else.” He argued that Donald Marshall, Susan Nelles and Thomas Sophonow would not be eligible for compensation under an approach that required the establishment of innocence. He argued that it was better to provide compensation for all found not guilty as opposed to those proven innocent.¹¹² I would note, however, that this argument was made before the full extent of wrongful convictions in our justice system was recognized and that innocence as opposed to a not guilty verdict remains a requirement for compensation.

Even before the extent of wrongful convictions were recognized, there was a strong argument that the justice system broadly conceived implicitly recognized a “third verdict” of actual innocence. Article 14(6) of the International Covenant on Civil and Political Rights¹¹³ contemplates a distinction between not guilty verdicts and miscarriages of justice that deserve compensation by providing a requirement of compensation when a final conviction has subsequently been reversed “on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.” In addition, the current federal/provincial guidelines on compensation for the wrongfully convicted provide that “compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty).”¹¹⁴ Although arguments can be made that all accused who receive not guilty verdicts should receive some compensation and that it could undermine the presumption of innocence to introduce a “third verdict” based on factual innocence,¹¹⁵ the

¹¹¹ [1985] 1 S.C.R. 810 at para 35

¹¹² Peter MacKinnon “Costs and Compensation for the Innocent Accused” (1988) 67 Can. Bar Rev. 489 at 498-499.

¹¹³ 21 U.N. GAOR Supp 15 U.N. Doc A/6316 CST 1976, No.47.

¹¹⁴ Guidelines for Compensation of Wrongfully Convicted or Imprisoned Persons no date

¹¹⁵ MacKinnon “Costs and Compensation for the Innocent Accused” (1988) 67 Can. Bar Rev. 489 at 498-499.

present reality is that such compensation is generally restricted to those who can demonstrate that they have been wrongfully convicted and are innocent.¹¹⁶ Even apart from the issue of compensation, the public draws a distinction between those who have received a not guilty verdict because the state could not prove their guilt beyond a reasonable doubt and innocent people who are victims of wrongful convictions.

I accept that there is some danger that determinations and declarations of wrongful convictions could erode the integrity of the not guilty verdict. For that reason, I think it is vitally important that the person who receives a not guilty verdict should be able to make the decision whether to seek a determination of whether he or she was wrongly convicted. Determinations of innocence should not be foisted on a person who has been acquitted. Such an approach would have the undesirable effect of introducing a third verdict and diminishing the value of a not guilty verdict.

Possible Standards for Making a Determination and Declaration of a Wrongful Conviction

Once it is accepted that in some cases those who have received a not guilty verdict or a prosecutorial stay have a legitimate and compelling interest in obtaining a determination and a declaration that they have been wrongfully convicted, this raises the issue of how a wrongful conviction and the convicted person's innocence should be proven. The Supreme Court dealt with this issue somewhat indirectly in 1992 when it decided the *Reference re Milgaard* [1992] 1 S.C.R. 866. During the course of the hearing the Court determined that these guidelines should be followed.

(a) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, *the Court is satisfied beyond a reasonable doubt* that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground, we would consider advising that the Governor in Council exercise his power under s. 749(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, to grant a free pardon to David Milgaard.

(b) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, *the Court is satisfied on a preponderance of the evidence* that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground, it would be open to David Milgaard to apply to reopen his application for leave to appeal to the Supreme Court of Canada with a view to determining whether the conviction should be quashed *and a verdict of acquittal entered*, and we would

¹¹⁶ H. Archibald Kaiser "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989) 9 Windsor Y.B Access to Justice 96.

advise the Minister of Justice to take no steps pending final determination of those proceedings.

(c) The continued conviction of David Milgaard would constitute a miscarriage of justice if there is new evidence put before this Court which is relevant to the issue of David Milgaard's guilt, *which is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict.* If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground we would consider advising the Minister of Justice to *quash the conviction and to direct a new trial* under s. 690(a) of the *Criminal Code*. In this event it *would be open to the Attorney General for Saskatchewan to enter a stay if a stay* were deemed appropriate in view of all the circumstances including the time served by David Milgaard.¹¹⁷

In 1992, the Court was not convinced beyond a reasonable doubt that David Milgaard was innocent of the murder of Gail Miller. It also concluded that it was "not satisfied, on the basis of the judicial record, the Reference case and the further evidence heard on this Reference, on a preponderance of all the evidence, that David Milgaard is innocent of that murder." It then ruled:

Third, we are satisfied that there has been new evidence placed before us which is reasonably capable of belief and which taken together with the evidence adduced at trial could reasonably be expected to have affected the verdict. We will therefore be advising the Minister to quash the conviction and to direct a new trial under s. 690(a) of the *Criminal Code*. In light of this decision, it would be inappropriate to discuss the evidence in detail or to comment upon the credibility of the witnesses.

In 1997, however, a DNA test exonerated Mr. Milgaard and he received an apology from the federal Minister of Justice. Another person was subsequently convicted of the murder for which Mr. Milgaard had been wrongfully convicted. It should provide some pause that such a clearly innocent man as Mr. Milgaard could not in 1992 satisfy the burden of proving his innocence beyond a reasonable doubt or even on a preponderance of the evidence.

Although the Milgaard standards articulated by the Supreme Court obviously command careful attention, a number of questions can be raised about whether they provide an appropriate standard for making a determination and a declaration of a wrongful conviction today. One contextual factor is that the *Milgaard* guidelines were articulated in 1992, a year after the Court had found that extradition to face the death penalty did not violate the Charter and before most of the recent wrongful convictions in Canada had been discovered. As discussed in the first part of this report, the Supreme Court in 2001 changed its approach to extradition and the death penalty in large part because of subsequent learning about wrongful convictions including Mr. Milgaard's DNA exoneration. As such, it is an open question whether the Supreme Court would

¹¹⁷ *Reference re Milgaard* [1992] 1 S.C.R. 866 at 868 (emphasis added)

apply the same standards today.¹¹⁸ The precedential value of the *Milgaard* standards are also suspect because they were crafted not in the present context of s.696.1 applications or a regular appeal but in the course of a unique reference question being directed at the Court that asked it whether Milgaard's continued conviction constituted a miscarriage of justice.

The first guideline articulated by the Court in *Milgaard* required Milgaard to prove his innocence beyond a reasonable doubt in order to obtain a free pardon. In principle, it is difficult to justify requiring an individual to bear the burden of proof beyond a reasonable doubt. Such a high standard of proof in all other contexts is only imposed on the state with its superior resources and coercive powers. Although it is possible to posit cases in which an individual could satisfy such an extraordinary burden, such cases will generally be limited to DNA exonerations. Practically, the first Milgaard standard would restrict declarations of wrongful convictions to DNA exonerations in cases involving sexual assaults or other similar encounters between the perpetrator and the victim. As the Supreme Court has subsequently reminded us in *Burns and Rafay*, it would be a mistake to rely on advances in forensic science as the sole corrective or marker of wrongful convictions.

Another problematic aspect of the first Milgaard standard is its linking of proof of innocence beyond a reasonable doubt with a free pardon. Although a person who receives a free pardon is deemed under s.748(3) of the Criminal Code "never to have committed the offence in respect of which the pardon is granted", there is an element of a legal fiction in this deeming provision. The word pardon implies that a person has done something wrong. Pardon is not commonly thought to be synonymous with exoneration or innocence. Finally, it is problematic to rely on the executive through the Governor in Council to exonerate an individual who has been able to discharge the extraordinary burden of proving his or her innocence to a court beyond a reasonable doubt.

The second standard articulated in the *Milgaard Reference* requires the convicted person to establish innocence on the "preponderance of the evidence", a standard similar to the balance of probabilities standard that the person would have to bear in a civil action or in criminal cases where a reverse onus has been held to be a reasonable limit on the presumption of innocence. Such a standard is a more familiar one in our legal system and could serve as a basis for distinguishing not guilty verdicts and declarations of wrongful convictions. At the same time, the balance of probabilities standard could often be a difficult standard for a convicted person to satisfy especially in cases where it remains clear that a crime has been committed; where there is no DNA evidence; and where the

¹¹⁸ I have found surprisingly little commentary on the Supreme Court's decision in *Reference re Milgaard*. One article, however, commented that "The Supreme Court's decision, in response to the minister, was not helpful. In saying that Milgaard's innocence is not more likely than his guilt, the court was suggesting that they were unable to make even a probabilistic judgment about Milgaard's responsibility for Gail Miller's death. Not innocent, not guilty and not deserving of compensation. Saskatchewan is spared the embarrassment of a new trial, the police and prosecutors of Saskatoon are spared the embarrassment of an inquiry into their conduct and David Milgaard is released from jail. Substantial political finesse, but little in the way of legal principle." Neil Boyd and Kim Rossmo "David Milgaard, the Supreme Court and Section 690: A Wrongful Conviction Re-visited" *Canadian Lawyer*. February, 1994 28 at 32.

perpetrator remains at large. In most wrongful conviction cases, there will be reasonable and probable grounds to charge the person and circumstantial evidence that is suggestive of the person's guilt. Such evidence will make it more difficult for the person to establish innocence on a balance of probabilities.

The second Milgaard standard links proof of innocence on a preponderance of evidence with the verdict of an acquittal. This standard is in my view preferable to the first Milgaard standard because it provides a judicial remedy and does not rely on the cabinet issuing a pardon. On the other hand, the idea that a person who establishes his or her innocence on a balance of probabilities should receive an acquittal risks undermining the principle that an acquittal is the appropriate disposition when the state fails to prove guilt beyond a reasonable doubt. Proof of innocence by the accused on a balance of probabilities should not be conflated with the failure of the Crown to prove guilt beyond a reasonable doubt. The former standard places a significant burden on the individual, a standard similar to that satisfied by those who receive compensation for wrongful convictions. An accused who establishes innocence on a balance of probabilities should be entitled to more than a not guilty verdict. Such a person should receive a clear declaration of innocence and a clear declaration that a wrongful conviction has occurred.

The third Milgaard standard suggests that a new trial should be ordered if new evidence could reasonably have been expected to affect the verdict. This standard incorporates the traditional standard that the state must prove guilt beyond a reasonable doubt and is more consistent with the tests used by the courts with respect to appeals, including matters involving both new evidence¹¹⁹ and disclosure violations.¹²⁰ The third Milgaard standard is not, however, connected to the determination or declaration of a wrongful conviction, but rather to the safety of the verdict and the need for a new trial.

The third Milgaard standard is also problematic because of its apparent acceptance that a new trial might legitimately be pre-empted by a prosecutorial stay. This reference to a prosecutorial stay should now be read in light of the guidelines articulated by Chief Justice Lamer in his Newfoundland report. As discussed above, Chief Justice Lamer (who was a member of the Milgaard panel) indicated that prosecutorial stays should only be used where there is a reasonable likelihood of recommencement of proceedings. Chief Justice Lamer has now suggested that the calling of no evidence and a not guilty verdict is appropriate in cases where there is no reasonable likelihood of recommencement or a successful prosecution or cases where the evidence is so manifestly unreliable that it would be dangerous to convict.

Justice Kaufman in his report on the Truscott case accepted that proof of any of the three standards outlined in the *Milgaard Reference* could justify the Minister of Justice in ordering a new trial under s.696.3.¹²¹ In practice, this suggests that the focus will often be on the third Milgaard standard which places the lowest burden on the accused. Although Justice Kaufman did not offer explicit criticism of the Milgaard

¹¹⁹ *R. v. Palmer* [1980] 1 S.C.R. 759.

¹²⁰ *R. v. Dixon* [1998] 1 S.C.R. 244 ; *R. v. Talifer* [2003] 3 S.C.R. 307

¹²¹ Hon. Fred Kaufman *Truscott Report* April 2004 at paras 163-164, 2074

standards, his decision that the third and lowest standard should govern can be interpreted as implicit rejection of the high burden that the first and second standard place on the convicted person. At the same time, his task was not to determine whether a wrongful conviction occurred, but to determine whether there was a reasonable basis to conclude that a miscarriage of justice likely occurred.

Should a decision be made to devise a procedure to determine the existence of a wrongful conviction, the second Milgaard standard is the most likely standard that will be used. Such a standard would require the convicted person to establish innocence on a balance of probabilities and would be compatible with the standard that the person would have to discharge in administrative or civil proceedings. A balance of probabilities standard would create a meaningful distinction in law between a not guilty verdict that would occur when the state failed to prove guilt beyond a reasonable doubt and a declaration of a wrongful conviction. It would also avoid the possible injustice of requiring the accused to prove innocence beyond a reasonable doubt, an exacting standard that would probably limit declarations of wrongful convictions to DNA exonerations.

I recognize that even a balance of probabilities standard would place an onerous burden on a person to establish innocence and that it might not be possible for every person who has been wrongfully convicted to satisfy that demanding standard. An alternative and lower standard would be the third Milgaard standard, but it seems to be directed more at the safety of the verdict and the possibility of a wrongful conviction than an actual determination that a wrongful conviction has occurred.

Before I examine the range of processes that have or could be used to determine and declare a wrongful conviction, there is one point that I wish to repeat and underline. Given the difficulties of establishing that a wrongful conviction has occurred and the risks of diminishing the meaning of a not guilty verdict, any process to determine and declare a wrongful conviction should only be initiated at the request of the person whose conviction has been overturned.

Processes of Determining and Declaring a Wrongful Conviction

In considering possible means to make determinations and declarations of a wrongful conviction, it is necessary to consider informal, administrative and judicial avenues for exoneration. Informal methods have been used more frequently than formal methods in part because the existing criminal justice system is oriented around the requirement of proof of guilt beyond a reasonable doubt and not guilty verdicts. The Sophonow case is a good example where informal actions by police and prosecutors resulted in an exoneration. Another example would be the apology offered by the federal Minister of Justice after David Milgaard's DNA exoneration. Administrative means of exoneration include the granting of a free pardon by the Governor in Council and declarations of innocence by public inquiries which technically remain part of the executive even though they are usually headed by sitting or retired judges. It is important to consider possible judicial mechanisms for exonerations through existing or perhaps

new procedures. Finally, it is possible to contemplate some creative hybrid mechanism to determine wrongful convictions that may, like public inquiries, involve elements of the executive and judicial processes or perhaps elements of the executive and informal processes.

The criteria for choice between informal, administrative and judicial means for determining whether a wrongful conviction has occurred will depend on a number of factors. The choice made by the previously convicted person may depend on the practicalities and politics of the particular situation. If the executive is willing to declare that the person is innocent, this may well be the most effective means to achieve a declaration of a wrongful conviction. At the same time, the executive may be unwilling or reluctant to declare that the person has suffered a wrongful conviction. One factor may be the persistence of tunnel vision which caused the wrongful conviction in the first place. Another factor may be concerns about liability.

From a constitutional perspective, there is much to be said for judicial determinations and declarations of wrongful convictions. The whole s.696.1 process is designed to respect the separation of powers and ultimate judicial responsibility for convictions by limiting the Minister of Justice to references of miscarriage of justice cases back to the courts. Even in systems where there is an independent criminal case review commission, such commissions can only refer cases back to the courts for similar reasons. If a miscarriage of justice must return to the courts to be corrected, this begs the question of why the courts should not see the matter through to an exoneration. In *Burns and Rafay*,¹²² the Supreme Court stressed that wrongful convictions were matters within the inherent domain of the judiciary because they affect the basic operation of the justice system. Constitutional principles of separation of powers and ultimate judicial responsibility for wrongful convictions suggest that careful consideration should be given to possible ways in which the courts might make determinations and declarations of wrongful convictions rather than the process being left to either formal or informal executive processes. The availability of a formal judicial process may also encourage greater informal and administrative recognition of innocence.

A. Informal Means of Determining and Declaring a Wrongful Conviction

Apologies by Police and Prosecutors

In his comprehensive and helpful paper, *Convicting the Innocent A Triple Failure of the Justice System*, Bruce MacFarlane Q.C. suggests that the "government may wish to

¹²² The Court stressed it was concerned with "the narrower aspects of the controversy are concerned with the investigation, prosecution, defence, appeal and sentencing of a person within the framework of the criminal law. They bear on the protection of the innocent, the avoidance of miscarriages of justice, and the rectification of miscarriages of justice where they are found to exist. These considerations are central to the preoccupation of the courts, and directly engage the responsibility of judges 'as guardian[s] of the justice system'. We regard the present controversy in Canada and the United States over possible miscarriages of justice in murder convictions (discussed more fully below) as falling within the second category, and therefore as engaging the special responsibility of the judiciary for the protection of the innocent." *United States of America v. Burns* supra at para 71.

consider issuing an apology to the person wrongfully convicted. An apology goes well beyond a simple reversal of the conviction or the granting of a pardon: it publicly confirms that something went wrong in the case, and that the accused ought never have been convicted in the first place.”¹²³ As an example, Mr. MacFarlane cites the following apology provided by the Winnipeg Police in 2000 to Thomas Sophonow:

A recent police investigation has demonstrated that you were in no way involved in this crime, and a review of that police investigation by my department supports that conclusion.

You were arrested, charged and imprisoned for a crime that you had not committed. I cannot begin to even understand the anguish that you must have felt as you went through this process. I wish, therefore, to extend to you, on behalf of the Province of Manitoba, my full and unqualified apology for your imprisonment under these circumstances, as well as the lengthy struggle you subsequently endured to clear your name.¹²⁴

The full impact of this apology can only be understood in the context of the case. On appeal after his third trial, Mr. Sophonow was acquitted by the Manitoba Court of Appeal because of its concerns about ordering a fourth trial and because Mr. Sophonow had already served 45 months in prison. As Justice Cory observed in his Sophonow inquiry,

From the time of his acquittal by the Manitoba Court of Appeal in 1985, Thomas Sophonow has sought exoneration. For 15 years he was thought of by his co-workers as a murderer. This opinion was shared by his neighbours and many others. Truly, he bore the mark of Cain.¹²⁵

The Sophonow case demonstrates the power of apologies and exonerations as announced by police, prosecutors and the province responsible for the prosecution. It also demonstrates the human costs for the wrongfully convicted when these apologies are not made or are delayed.¹²⁶

One obstacle to apologies, however, may be reluctance on the part of police and prosecutors to admit that they made mistakes. Another obstacle may be a concern that an admission of a wrongful conviction may have implications with respect to liability and compensation. Melvyn Green has written about how “Crown culture” and “tunnel vision” may affect prosecutorial conduct in the aftermath of a wrongful conviction. He argued that:

Prosecutorial resistance to righting wrongful convictions is deeply ingrained. There is a profound reluctance to acknowledge even the possibility of error, and an equally profound reluctance to admit any responsibility for a miscarriage of justice once incontrovertibly exposed. This posture is an endemic form of institutional denial that inhibits the reforms necessary to eliminate further wrongful convictions.¹²⁷

¹²³ Bruce MacFarlane Q.C. “Convicting the Innocent” (2006) 31 Manitoba Law Journal 431.

¹²⁴ Ibid at 485.

¹²⁵ *The Inquiry Regarding Thomas Sophonow* Introduction

¹²⁶ Another example would be the 1997 press release in which the federal Minister of Justice recognized that “a terrible wrong” and a “wrongful conviction” had been done to David Milgaard and offered apologies. News Release July 18, 1997 at http://www.milgaardinquiry.ca/June1_06JoyceMilgaard.shtml

¹²⁷ Melvyn Green “Crown Culture and Wrongful Convictions: A Beginning” (2005) 29 C.R.(6th) 262.

The Lamer inquiry has confirmed that police and prosecutors who have been involved in wrongful convictions are often subject to a form of tunnel vision that makes it difficult for them to accept that the accused is innocent. Although some police and prosecutorial agencies and provinces have made apologies, these obstacles make reliance on apologies by the state a less than an ideal mechanism for determining and declaring the existence of wrongful convictions. Such a conclusion, however, does not diminish or devalue the importance of such exonerations or apologies when they are made.

Civil Society Reviews and Exonerations

Another way of obtaining a determination and a declaration of a wrongful conviction is to rely on private or civil society groups for such determinations or declarations. A declaration of innocence is often implicit or explicit in the very important work done by the Association in Defence of the Wrongfully Convicted and other such groups. For example AIDWYC explains its choice of cases in the following manner:

While we recognize that there are many cases in which the reasonableness of a guilty verdict may be questioned, AIDWYC has chosen to devote itself exclusively to cases in which the Board is convinced—and will be able to prove—that the accused is *factually innocent*. This process ensures quality control of all cases and speaks clearly to the integrity of our process.

*FACTUAL INNOCENCE is where proof exists (through DNA or other means) that the person was not involved in any way with the murder.*¹²⁸

Another means outlined by MacFarlane is the use of private panels of judges or other eminent persons reviewing the case. He comments that such an approach “has the advantage of being focused and speedy” but that it “lacks full transparency”. At the same time, however, he notes that such obstacles can be overcome by crafting a public process and using eminent people.¹²⁹ Such an approach was taken when evidence, including evidence from recanting witnesses, was presented in a public forum to the Hon. Fred Kaufman in the Lenard Peltier case. Justice Kaufman was persuaded by this new evidence and made recommendations to this effect, but it did not result in clemency being granted to Mr. Peltier. AIDWYC has also hosted conferences where other retired judges have stated their belief in the innocence of particular persons.¹³⁰

Although civil society groups serve an invaluable role in correcting wrongful convictions, reliance on them may not be the optimal method of determining and declaring a wrongful conviction. They have less official status than the police and prosecutors and may be viewed by some as having an interest in a case in which they have invested their time and credibility. In any event, a private exoneration will generally not have the same impact as an official one, except perhaps if it is conducted by a

¹²⁸ http://www.aidwyc.org/index.cfm/cj_id/1114/la_id/1.htm

¹²⁹ Bruce MacFarlane “Convicting the Innocent” *supra* at 484.

¹³⁰ “Judicial accountability urged in wrongful conviction cases” *Globe and Mail* June 13, 2005.

particularly eminent person. Another possibility is that state officials may agree to abide by the outcome of an ad hoc process.

B. Administrative Means of Determining and Declaring a Wrongful Conviction

The Section 696.1 Process

The section 696.1 process is designed to collect the relevant evidence and apply it against the statutory standard of whether “the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.”¹³¹ I have been advised that the Criminal Conviction Review Group interprets this reference to a miscarriage of justice as synonymous with a wrongful conviction, but also that they take the position that only the Governor in Council can declare a person factually innocent in the form of a free pardon. The statutory standard of a reasonable basis to conclude that a miscarriage of justice likely occurred is seen as an intermediate position between guilt and factual innocence.

The Minister of Justice has limited powers under s.696.3 that do not explicitly include declarations of wrongful conviction. A Minister who declared the existence of a wrongful conviction when exercising this power might be criticized for pre-judging a matter that was before the courts. At the same time, I note that then Minister of Justice Irwin Cotler was quoted by reporters at the time that he ordered a new trial under s.696.3 as saying that Mr. Driskell had been “vindicated in his innocence. In my view, yes, this was a wrongful conviction. On a personal level, I can say to (Driskell) I’m sorry both for him and his family that he had to endure this miscarriage of justice.”¹³² These statements seem to constitute a declaration of a wrongful conviction after a lengthy investigation of the matter and suggest that some Ministers of Justice may go quite far in using the section 696.1 process as a means for declaring that a wrongful conviction has occurred, even though they are legally limited to referring the case back to the courts. I would add, however, that the official federal Department of Justice press release in this matter explicitly stated that the Mr. Driskell’s successful s.696.1 application did not constitute a finding of innocence and that the Minister of Justice did not have the power to make such a finding.¹³³

¹³¹ Criminal Code section 696.3(3) (a).

¹³² Dan Lett and Leah Janzen “Driskell Free at Last” Winnipeg Free Press March 4, 2005.

¹³³ Minister of Justice Cotler’s statements in the official press release released by the Department of Justice were more restrained and more in line with his limited legal powers than his statements as quoted in the press above. He is quoted in the official press release as stating that he “has concluded that a miscarriage of justice likely occurred in Mr. Driskell’s case. Accordingly, I am granting the application for ministerial review, quashing the conviction, and ordering a new trial” He added that Mr. Driskell had been “clearly denied... the right to a full and fair hearing. They so seriously prejudiced the fairness of the original trial and the validity of the original conviction that the only appropriate remedy is to quash the conviction and grant a new trial.” The official press release went on to disclaim the idea that the Minister was determining that Mr. Driskell was innocent when it stated: “When rendering a decision on an application for ministerial review, the Minister is not making a finding of guilt or innocence. The Minister

Free Pardons

Section 748 of the Criminal Code provides for the Governor in Council to grant either free or conditional pardons. In *Reference re Milgaard*¹³⁴, the Supreme Court suggested that a free pardon would be the appropriate disposition should Mr. Milgaard be able to prove his innocence beyond a reasonable doubt to the Court. Section 748(3) of the Criminal Code provides:

Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.

The National Parole Board describes a free pardon granted under the royal prerogative of mercy as follows:

A free pardon is a formal recognition that a person was erroneously convicted of an offence. Any consequence resulting from the conviction, such as fines, prohibitions or forfeitures, will be canceled upon the grant of a free pardon. In addition, any record of the conviction will be erased from the police and court records, and from any other official data banks.

The sole criterion upon which an application for a free pardon may be entertained is that of the innocence of the convicted person.

In order for a free pardon to be considered, the applicant must have exhausted all appeal mechanisms available under the *Criminal Code*, or other pertinent legislation. In addition, the applicant must provide new evidence, which was not available to the courts at the time the conviction was registered, or at the time the appeal was processed, to clearly establish innocence.¹³⁵

Under section 607 of the Criminal Code, a free pardon is, like *autrefois acquit*, a special plea in defence of a criminal charge. The Supreme Court has also recognized that a free pardon is distinct from other pardons because only a free pardon deems that the conviction has never occurred.¹³⁶

The royal prerogative of mercy was historically closed intertwined with the correction of miscarriages of justice, but the trend is towards greater separation of the two

has no legal power to make such a finding. The Minister is simply returning the matter to the courts in circumstances where there is a reasonable basis to conclude that a miscarriage of justice likely occurred. Ultimately, the courts will decide the issue of the applicant's guilt or innocence." Department of Justice Canada "Minister Orders New Trial in Manitoba Murder Case" March 3, 2005 at http://canada.justice.gc.ca/en/news/nr/2005/doc_31408.html

¹³⁴ [1992] 1 S.C.R. 866

¹³⁵ National Parole Board "Clemency and Pardons" at http://www.npb-cnrc.gc.ca/infocntr/policym/man_14_e.htm#14_2

¹³⁶ *Re Therrien* [2001] 2 S.C.R. 3 at para 121.

processes.¹³⁷ This is understandable because the very word pardon suggests that the person has done something wrong. In an article examining the work of the Self Defence Review, Gary Trotter, before his recent appointment to the bench, observed that the judge conducting the review recommended the grant of free pardons in three cases, two on the strength of evidence that established on a balance of probabilities that the women were acting in self-defence and one on the basis of a reasonable doubt as to her liability for the death of the victim. In all three cases, however, the applicants were not granted a free pardon in large part because the Ministers determined that such relief was not justified on compassionate or public protection grounds.¹³⁸ Trotter concludes that such an approach was unfair to the women because it judged them on their character and future danger and not on their culpability. His conclusions cast doubt on the adequacy of the pardon process as a means of determining wrongful convictions.

Peter Howden, a sitting judge, has written that “‘mercy’ requests presume the guilt of the petitioner....applications alleging miscarriages of justice presume that the applicant was wrongly convicted of a criminal offence. They do not presume guilt and request mercy...”¹³⁹ Jean Teillet has similarly argued that a pardon “does not mean that the conviction is wiped out or that the person was wrongly convicted....A pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity.”¹⁴⁰ All of this commentary is very skeptical of the pardon process as a means of determining and declaring the existence of a wrongful conviction.

Even if a free pardon was awarded on the grounds of clearly established innocence as suggested by the National Parole Board’s policy manual, this process would still be questionable from a separation of powers perspective. In other words, a branch of the executive government would be nullifying an act of the judiciary in convicting a person. In addition, it is not clear that the National Parole Board would have an oral hearing in order to determine eligibility for a free pardon or that it would have investigative powers similar to those provided to the Minister of Justice or his or her delegate under s.696.1. Allan Manson has written:

In dealing with a pardon application, there are no limits on the information the executive can consider in deciding whether to grant a pardon. Equally, there is no stipulated requirement to hear or consider any specific material. While the exercise of the prerogative power remains entirely within the discretion of the Governor General on the advice of the Minister, there is now a limited

¹³⁷ Gary Trotter “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2001) 26 *Queens L.J.* 339 at 353-354.

¹³⁸ *ibid* at 392.

¹³⁹ Peter Howden “Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process” (2002) 21 *Windsor Y.B. Access to Justice* 569 at 593.

¹⁴⁰ Jean Teillet “Exoneration for Louis Riel: Mercy, Justice or Political Expediency?” (2004) 67 *Sask.L.Rev.* 359 at 376.

opportunity for judicial review. Some procedural obligations may be imposed either through the common law doctrine of fairness or s.7 of the Charter.¹⁴¹

Even though a free pardon would in law deem the person never to have committed the offence, the very word pardon suggests that the person is being excused and forgiven for doing something wrong. In the United Kingdom and New Zealand free pardons have been used in cases where the innocence of the person is not clear.¹⁴² Although Stephen Truscott originally requested a free pardon in reliance on the Supreme Court's statement in the *Milgaard Reference* that a free pardon would be the appropriate disposition when innocence was proven beyond a reasonable doubt, he noted that the term pardon was "ambiguous" and abandoned the request when it became clear that the Ontario Attorney General would not consider a pardon to be an exoneration.¹⁴³

Although the free pardon process is offered as a mean to declare innocence, it is suspect in part because the word pardon implies forgiveness for wrongdoing and because there is some evidence that applicants will be judged on their character as opposed to their culpability. In addition, it is not clear whether there would be an adequate process to determine whether a wrongful conviction actually occurred. Finally, the free pardon process is also suspect on constitutional separation of powers grounds because it is issued by the executive and not the judiciary.

Public Inquiries

In Australia a number of declarations of wrongful convictions have been made by royal commissions. In Canada, some commissions of inquiry have contributed to the exoneration of the wrongfully convicted. For example, the Commission on the Donald Marshall case heard extensive evidence and reached different factual conclusions than the Court of Appeal that heard the reference. Its conclusions affirmed Mr. Marshall's innocence, as did those of the Kaufman Inquiry into the Guy Paul Morin case and the Cory Inquiry into the Thomas Sophonow case. The Lamer inquiry determined that it was not authorized by its terms of reference to make determinations and declarations of factual innocence¹⁴⁴, but the former Chief Justice also ruled that it was constitutionally permissible for public inquiries to make determinations of factual innocence. He distinguished a finding of factual innocence from a finding of factual guilt which would be covered by the constitutional prohibition on Canadian inquiries making determinations of criminal or civil liability. He also analogized the position of a public inquiry mandated

¹⁴¹ Alan Manson "Answering Claims of Injustice" (1992) 12 C.R.(4th) 305,

¹⁴² David Cole and Alan Manson *Release from Imprisonment* (Toronto: Carswell, 1990) at 403-404; A.T.H. Smith "The Prerogative of Mercy, the Power of Pardon and Criminal Justice." [1983] Public Law 398

¹⁴³ In his reply to the Attorney General's submissions on the s.696.1 application, Truscott stated "any ambiguity in the eyes of the government or the public about Steven Truscott's innocence is unacceptable. Consequently, we have become distinctly uncomfortable about our request that a free pardon be considered as a possible remedy for his case."

¹⁴⁴ Lamer Inquiry at 7-8, 175. The inquiry, however, did conclude "that there was no reliable evidence" on which to base the prosecution of Randy Druken. It also declared Gregory Parsons to be "completely innocent" *ibid* at 70.

to determine factual innocence with those who might be asked by a government to determine the accused's factual innocence as part of a compensation process.¹⁴⁵

Commissions of inquiry are called only in a few cases at the government's discretion. As one Australian commentator has observed "unfortunately their employment is often associated only with high profile or highly publicized cases. Many and perhaps the majority of victims of wrongful convictions will not stimulate sufficient media or other attention to ignite a royal commission into their case."¹⁴⁶ Although Canada has been a world leader in holding public inquiries into wrongful convictions, there are a number of wrongful convictions in Canada that have not been subject to public inquiries. Public inquiries are expensive and are not meant to be routine. As such, public inquiries are an inadequate mechanism to make determinations and declarations of wrongful convictions.

The Compensation Process

Present guidelines for compensation of the wrongfully convicted require proof of factual innocence as a pre-requisite to compensation. The present guidelines, which are under review, provide that such proof will generally be obtained either by the grant of a free pardon or "a statement by the Appellate Court, in response to a question asked by the Minister of Justice... to the effect that the person did not commit the offence." The guidelines contemplate that the later question could be asked under the predecessor to what is now s.696.2. The present guidelines also recognize that these routes :

may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal has been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence. The guidelines go on to provide that the provincial government could appoint "either a judicial or administrative inquiry to examine the matter of compensation in accordance with the considerations set out below", including the requirement of innocence. This raises the possibility that a government's determination that a person was eligible for compensation could provide a means to determine and declare the existence of a wrongful conviction. In other words, the provincial government could appoint independent fact-finders and perhaps even public inquiries to make findings relevant to the compensation process, including findings related to the determination of a wrongful conviction. That said, the compensation process in Canada remains ad hoc and has not yet been regularized. It has not emerged as a reliable or frequent means to make determinations or declarations of wrongful convictions.

C. Judicial Means of Obtaining a Determination and Declaration of a Wrongful Conviction

¹⁴⁵ Lamer Ruling November, 2003 Annex C of Lamer Report

¹⁴⁶ Lynne Weathered "Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia" (2005) 17 Current Issues in Criminal Justice 203at 213

As discussed above, there is much to be said in principle for having determinations and declarations of wrongful convictions come from a court rather than through informal and/or executive processes. The judiciary bears the ultimate responsibility for a wrongful conviction and the independent courts are in a better position than the executive to make determinations of wrongful convictions. At the same time, however, a barrier to judicial determinations of wrongful convictions is that the judicial system has not been designed to exonerate the accused. In addition, there may be specific problems related to a lack of jurisdiction of the judiciary to make determinations and declarations of a wrongful conviction, especially in cases where a prosecutorial stay has been issued.

As Part of Interim Release Pending a Section 696.1 application or Pending a New Trial or Appeal

Judges are increasingly granting bail pending a s.696.1 application to the federal Minister of Justice. This practice, first used in *R. v. Phillion*¹⁴⁷, was also used in the Driskell case when on January 8, 2004, Justice Scurfield of the Manitoba Queens Bench ordered Mr. Driskell's release. He applied a higher test for the grant of interim release than used in *Phillion* on the basis that Mr. Driskell's application to the Minister of Justice was at a more preliminary stage than Mr. Phillion's. This test required the applicant to establish "on a balance of probabilities that there is new, reliable evidence that is sufficiently material to raise very serious concerns as to the reliability of the original conviction."¹⁴⁸ Although this is a high standard, it is not one that is the equivalent to a declaration or a determination of a wrongful conviction. Indeed, Justice Scurfield specifically stated:

My function is limited to determining if it is appropriate to release Mr. Driskell from custody pending the result of a more formal investigation. It is not my job to determine if Mr. Driskell is innocent of the crime for which he has been convicted....For the purposes of this application, there is no need for me to decide whether or not Mr. Driskell was wrongfully convicted.¹⁴⁹

It thus appears that the present ability of judges to grant interim release or bail pending a s.696.1 application will not produce a determination or declaration that a wrongful conviction has occurred.

In the preliminary stages of a s.696.1 application, there may often not be enough evidence to make a determination and declaration of a wrongful conviction. There will be more evidence available after an investigation is completed and the Minister of Justice has made an order either for a new trial or a new appeal under s.696.3 and at this stage I would not preclude the possibility that a judge might be in a position to make a determination and a declaration that a wrongful conviction has occurred. By that time, however, the convicted person may already have been granted interim release. In addition, the judge on an interim release application may understandably be reluctant to

¹⁴⁷ [2003] O.J. no. 3422

¹⁴⁸ *R. v. Driskell* 2004 MBQB 3 at para 18

¹⁴⁹ *ibid* at paras 8, 48. See also *R. v. Unger* 2005 MBQB 238 to the same effect.

make a determination or declaration of a wrongful conviction for fear of pre-empting the task of the trial judge or the Court of Appeal after the Minister of Justice has decided the application. In short, interim release pending the determination of a s.696.1 application or pending a new trial or appeal ordered under s.696.3 constitute an important and salutary development with respect to wrongful convictions, but this process itself will not likely lead to determinations and declarations that wrongful convictions have occurred.

Determinations by Courts of Appeal under Section 696.3(2)

The present federal-provincial guidelines on compensation for the wrongfully convicted require that the person be declared to be innocent. The guidelines contemplate a number of ways for such determinations to be made including the granting of a free pardon or as a result of a judicial or administrative inquiry commissioned by the government. They also contemplate that a Court of Appeal could be asked to make a determination and declaration of whether the person is innocent under the predecessor to what is now section 696.3(2) of the Code. Section 696.3(2) provides that:

The Minister of Justice may, at any time, refer to the court of appeal, for its opinion any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

The predecessor of this section was section 690(c) of the Code which provided that the Minister of Justice can upon application for the mercy of the Crown:

refer to the Court of Appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion.

The guidelines on compensation contemplate that the Court of Appeal could be asked to provide its views on the innocence of the accused in the course of hearing an appeal.

To my knowledge, Canadian appeal courts have not declared that a person is innocent or the victim of a wrongful conviction, but nothing would preclude such statements in appropriate cases. There are some precedents from the willingness of English Court of Appeal to make determinations and declarations of wrongful convictions. In the case of Peter Fell who was imprisoned for 17 years on the basis of a false confession, the Court of Appeal stated that:

the longer we listened to the medical evidence, and the longer we reviewed the interviews, the clearer we became that the appellant was entitled to more than a conclusion simply that this verdict is unsafe...since our reading of the interviews and the evidence we have heard leads us to the conclusion that the confession was a false one, that can only mean that we believe that he was innocent of these terrible murders, and he should be entitled to have us say so.¹⁵⁰

In another case, the Court of Appeal expressed its "great regret that as a result of what has now been shown to be flawed pathological evidence the appellant was wrongly convicted and has spent much a very long time in jail."¹⁵¹ In appropriate cases, appeal courts in Canada could make similar declarations either in the course of a regular appeal or in response to a specific question asked by the Minister of Justice under s.696.3(2).

¹⁵⁰ *R. v. Fell* 2001 EWCA Crim 696 at para 117

¹⁵¹ *R. v. Nicholls* 1998 EWCA Crim 1918

A slight change of wording in s.696.3(2) as opposed to the old s.690(c) may limit the ability of the Minister of Justice to ask a Court of Appeal to make a determination and declaration of a wrongful conviction. Although the Minister retains the ability to refer questions to the Court of Appeal “at any time” under the new section, the question must now be “in relation to an application under this Part”. Taken literally this could deprive the Minister of the ability to refer the question of innocence to a Court of Appeal once the application under Part XX1.1 of the Code has been completed. Those who have been acquitted after a new trial or those, such as Mr. Driskell, who has received an order for a new trial that was pre-empted by a prosecutorial stay may be unable to ask the Minister of Justice to refer the question of innocence to a Court of Appeal under s.696.3(2) because they would no longer qualify under section 696.1 as a person who has been convicted of an offence. Although the ability of Courts of Appeal to make determinations and declarations of wrongful convictions may be especially helpful in the context of appeals ordered under s.696.3, it is not helpful with respect to a person who has received an order for a new trial that has resulted either in a new trial or a not guilty verdict.

Judicial Apologies

In a number of Canadian cases, judges have apologized on behalf of the administration of justice to those who have been wrongfully convicted. For example, Justice Forestell apologized to Peter Frumusa after the Crown withdrew two murder charges after the Court of Appeal had ordered a re-trial. Justice Stayshyn apologized to Gordon Folland in 1999 after the Crown entered a stay of proceeding after the Ontario Court of Appeal had overturned his sexual assault conviction.¹⁵² Justice Watt apologized in 2000 to Kulan Karthiresu after the Crown stayed proceedings after the Ontario Court of Appeal had set aside his second degree murder conviction and ordered a new trial.¹⁵³

Judicial apologies are a flexible instrument because they could be made at any time during a case. As discussed above, judicial apologies have been made both when Crown counsel withdrew charges and when they issued a prosecutorial stay under s.579.¹⁵⁴ They could also be made after Crown counsel decides to call no evidence and a verdict of acquittal is recorded. The public should accept a judicial apology as an official recognition that an error had been made with respect to the person’s conviction. Judicial apologies are consistent with the idea discussed above that miscarriages of justice are a matter within the inherent domain and responsibility of the judiciary.

Civil Actions

¹⁵² “Wrongly convicted man given apology” Toronto Star May 22, 1999.

¹⁵³ James Lockyer and Philip Campbell Correspondence to Chief Justice Kennedy re Clayton Johnson Feb. 14, 2002.

¹⁵⁴ As will be discussed below, however, courts may not have jurisdiction over the case and may be precluded from issuing such apologies after a prosecutorial stay has expired under s.579(2) and proceedings are deemed never to have been commenced.

Another possible means of achieving a judicial determination and declaration of a wrongful conviction are civil actions by the convicted person against the police officers or prosecutors responsible for the wrongful conviction. Although prosecutors are no longer absolutely immune from suits for malicious prosecutions, a successful action must demonstrate 1) an acquittal 2) no reasonable and probable grounds to bring the prosecution and 3) that the prosecution was motivated by malice or an improper purpose.¹⁵⁵ In many wrongful conviction cases, the convicted person would have difficulty establishing all three factors. In his report on the Sophonow case, Justice Cory concluded:

It is sufficient to note that potential claimants in an action for malicious prosecution would be unlikely to succeed in demonstrating that a lack of reasonable and probable grounds and malice against the police or prosecutors. Such an action could only succeed in exceptional circumstances where malicious or unlawful conduct has been established.¹⁵⁶

In addition, the use of prosecutorial stay might make it impossible to establish the first element of the tort of malicious prosecution.¹⁵⁷

Other alternative civil actions include suing for negligent investigations or misuse of public office¹⁵⁸ or suing a defence lawyer in negligence.¹⁵⁹ The police should have a duty of care towards those subjected to a negligent investigation that contributed to a wrongful conviction. There are no policy reasons, especially as related to indeterminate liability, to defeat such a duty of care. The duty of care on the police when they conduct investigations will likely be clarified by the Supreme Court in the upcoming case of *Hill v. Hamilton-Wentworth Regional Police Services Board*.¹⁶⁰ A five judge panel of the Ontario Court of Appeal unanimously accepted that police officers owed a duty of care to a suspect and that harm to the suspect from a negligent investigation was reasonably

¹⁵⁵ *Nelles v. Ontario* [1989] 2 S.C.R.170; *Proulx v. Quebec*[2001] 3 S.C.R.9.

¹⁵⁶ *The Inquiry Regarding Thomas Sophonow* at Compensation

¹⁵⁷ In Canada, there is some authority that only a withdrawal of charges as opposed to a prosecutorial stay will be considered a judgment in favour of the plaintiff for the purpose of bringing a malicious prosecution action. *Fancourt v. Heaven* (1919) 18 O.L.R. 492. There is, however, some Australian authority for the proposition that a *nolle prosqui* while not establishing innocence does establish that proceedings were terminated in the accused's favour for the purpose of a malicious prosecution suit. *Gilchrist v. Gardiner* (1891) 12 L.R. (N.S.W.) 184. See generally I.R. Scott "Criminal Prosecution and Tort: The Effects of Nolle Prosequi on Actions for Malicious Prosecutions" (1973) 2 Anglo-American L.Rev. 288.

¹⁵⁸ *Odhavji Estate v. Woodhouse* [2003] 3 S.C.R. 263.

¹⁵⁹ For an argument that civil litigation against defence lawyers is not a proper way to deal with a wrongful conviction and that it can constitute a collateral attack on the criminal verdict see Paul Calarco "The Ontario Court of Appeal Gives a Green Light to Re-Litigate Criminal Convictions by Suing Your Lawyer." (2000) 31 C.R.(5th) 129. An attempt by the Birmingham Six to challenge their wrongful convictions by bringing a civil action against the police alleging assault was stopped by the courts as an abuse of process with Lord Denning making the infamous statement that the prospect of a wrongful conviction "is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further..." *McIlkenny v. Chief Constables of the West Midlands* [1980] Q.B. 283 at 323. Witnesses, however, may be immune from suit for testimony that contributed to a wrongful conviction. *Reynolds v. Kingston* [2006] O.J. no 2039 (Div.Ct.).

¹⁶⁰ *Hill v. Hamilton-Wentworth Police* (2005) 259 D.L.R.(4th) 676 (Ont.C.A.) at paras 68-69 leave to appeal granted [2005] SCCA No. 511.

foreseeable. The Court of Appeal stated while its conclusions were at odds with those of the House of Lords¹⁶¹, it was consistent with the Supreme Court's refusal to strike out negligence claims against a police chief in *Odhavji Estate v. Woodhouse*.¹⁶² The Court of Appeal stated that there would be "no alternative remedy for the loss suffered by a person by reason of wrongful prosecution and conviction". It also concluded that there would be no concerns about indeterminate liability or liability for legitimate policy choices.¹⁶³

Although civil actions are a possible vehicle for determining and declaring wrongful convictions and are increasingly being used for such purposes in the United States¹⁶⁴, they will impose onerous costs on the convicted person. Donald Marshall attempted to sue the police after his wrongful conviction but soon abandoned the lawsuit for lack of funds. In any event, civil actions whether for malicious prosecution or negligent investigations could be decided without determining whether there was a wrongful conviction. If the case is settled, defendants often insist that the terms and amount of the settlement not be publicly disclosed and this may defeat the ability of civil actions to make public determinations and declarations about wrongful convictions. If this case is litigated, the courts could determine issues of malice or negligence without necessarily deciding whether a wrongful conviction has occurred.

Determinations of a Wrongful Conviction After a Prosecutorial Stay

Section 1(f) of the Order in Council asks the Commissioner to consider whether and in what way a determination or declaration of a wrongful conviction can be made where a stay of proceedings has been entered under s.579. As discussed above, informal declarations of a wrongful conviction through an apology or an announcement by the province, police or prosecutors could be made at any time. Both the Sophonow and Milgaard cases provide example of this type of declaration of a wrongful conviction that can occur years after the case has ended. In addition, a declaration of a wrongful conviction could emerge through the compensation process or the grant of a free pardon or through a public inquiry that had been authorized by its terms of reference to make such a finding or through some form of civil society process. The section 696.1 process has resulted in mixed messages on the subject for Mr. Driskell with Minister of Justice Cotler being quoted in the press as recognizing a miscarriage of justice, but with Manitoba officials explaining that the prosecutorial stay was not a recognition of innocence.¹⁶⁵

¹⁶¹ *Hill v. Chief Constable of Yorkshire* [1988] 2 All E.R. 238; *Brooks v. Commissioner of Police for the Metropolis* [2005] UKHL 24.

¹⁶² [2003] 3 S.C.R. 263

¹⁶³ *Hill v. Hamilton-Wentworth Police* (2005) 259 D.L.R.(4th) 676 (Ont.C.A.) at paras 68-69 leave to appeal granted [2005] SCCA No. 511.

¹⁶⁴ In the United States, the rise in civil suits have been related to the inadequacy of compensation statutes. Adele Bernhard "Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated" (2004) 52 Drake L.Rev. 703; Brandon Garrett "Innocence, Harmless Error and Federal Wrongful Conviction Law" [2005] Wisconsin L.Rev. 35.

¹⁶⁵ Dan Lett and Leah Janzen "Driskell Free at Last" Winnipeg Free Press March 4, 2005

As suggested above, a judicial determination of a wrongful conviction is on constitutional grounds preferable to an administrative determination. This raises the question of whether courts would have jurisdiction to make a determination of a wrongful conviction after the entry of a prosecutorial stay. As suggested above, it is probably no longer possible for the Minister of Justice to direct a reference under section 696.3(2) to ask the Court of Appeal to make a determination of whether Mr. Driskell has suffered a wrongful conviction. Mr. Driskell could bring a civil lawsuit, but as discussed above, this would be costly and may not even address the question of whether there has a wrongful conviction.

The fact that more than a year has passed since the entry of the stay in Mr. Driskell's case means that the proceedings are deemed never to have commenced pursuant to section 579. Two Courts of Appeal have considered the ability of courts to consider matters after a prosecutorial stay has been entered. In both cases, the Courts of Appeal have determined that the courts no longer have jurisdiction over the cases that have been subject to a prosecutorial stay.

In *R. v. Smith*¹⁶⁶, the British Columbia Court of Appeal held that the court was functus and unable to consider a Charter challenge after the accused objected to the use of a prosecutorial stay under section 579 of the Criminal Code. The Court of Appeal relied on its early and criticized 1967 precedent of *R. v. Beaudry*¹⁶⁷ which held that a verdict of an acquittal was a nullity because it was rendered after the Crown had entered a stay after the jury had returned a verdict of not guilty at the direction of the judge. Hollinrake J.A. concluded:

Here, the direction to the clerk of the court to enter a stay is a statutory administrative discretion given to the Attorney-General which is outside the direction or control of the judge. That is what *Beaudry* tells us. When the stay has been entered there is no contest between the individual and the state. The prosecution has come to an end. The position of the accused as against the state is the same as if he had never been charged. The individual is not put at jeopardy by the stay. On the contrary, the jeopardy he faced as an accused in an ongoing prosecution has come to an end. It may be that if in this case a new indictment is preferred, an argument could be made that the action of the Crown in staying and then preferring a new indictment, gives rise to Charter violations. However, at the moment a stay is entered, and assuming the matter stops there, I can see no possible violation of the accused's Charter rights. In my opinion, *Beaudry* is still the law when the Crown directs a stay of proceedings be entered.... In my opinion, when the stay was entered, the Provincial Court judge became functus with respect to this charge and he has no jurisdiction to proceed further in the matter of *R. v. Smith*.¹⁶⁸

¹⁶⁶ (1992) 79 C.C.C.(3d) 70 (B.C.C.A.)

¹⁶⁷ [1967] 1 C.C.C. 272 at 274-275.

¹⁶⁸ *R. v. Smith* (1992) 79 C.C.C.(3d) 70 at 80-81 (B.C.C.A.)

In *R. v. Dufresne*¹⁶⁹, the Quebec Court of Appeal considered whether it or a superior court would have jurisdiction to make damage or cost orders after a new trial had been ordered by the Supreme Court in part because of state misconduct, but the Crown entered a stay under s.579(1) of the Code. The Court of Appeal concluded:

Qu'il suffise de dire qu'après une étude des effets de l'art. 579(1) du Code criminel, et une revue de la doctrine et de la jurisprudence applicables, il a déclaré n'avoir pas juridiction pour les entendre et en adjuger. Il est maintenant acquis que, par l'écoulement d'une année depuis le dépôt du "nolle prosequi", la procédure attaquée en Cour supérieure n'existe plus, puisque, par l'effet de l'art. 579(2) du Code criminel, "les procédures sont réputées n'avoir jamais été engagées"...

Dans l'état actuel du dossier, et toujours par l'effet de l'art. 579(2) du Code criminel, la dénonciation, la citation à procès, bref toute la procédure entreprise a été annulée; elle est, comme le dit l'article précité, "réputée n'avoir jamais été engagée". Il y a donc un vacuum total. D'autre part, absolument rien ne permet de croire que le Procureur général entreprendra, dans un avenir proche ou éloigné, une nouvelle poursuite et, même si on pouvait assimiler la requête de l'appelant à une quelconque demande d'injonction contre un accusateur éventuel, encore faudrait-il qu'on démontre de sa part une menace ou quelque velléité de reprendre les hostilités, ce qui n'a pas été fait. ..

par le dépôt d'un "nolle prosequi", le juge a perdu momentanément juridiction sur le dossier, tel qu'il existait alors; par l'écoulement d'une année depuis ce dépôt et par l'opération de l'art. 579(2) du Code criminel, il a maintenant totalement perdu juridiction. Et, d'abondant, il est évident que la Cour d'appel ne peut s'ériger en tribunal de première instance pour entendre une demande qui, si elle était accueillie, aurait pour effet de faire revivre un dossier désormais inexistant et, comme je l'ai souligné précédemment, pour prononcer d'avance l'invalidité de toute procédure qui pourrait être entreprise dans l'avenir..¹⁷⁰

The above cases decided by the British Columbia and Quebec Courts of Appeal suggest that it may well be impossible for a person in Mr. Driskell's position to reopen a case to obtain a determination or a declaration of a wrongful conviction once a stay has been entered and expired under s.579.¹⁷¹ Both cases suggest that the expiry of a prosecutorial stay results in a legal vacuum unless the prosecutor decides to recommence proceedings.

The prospect that no court would have jurisdiction to make a determination or a declaration of a wrongful conviction after the entry of a prosecutorial stay lends support

¹⁶⁹ (1990) 75 C.R.(3d) 117

¹⁷⁰ *ibid* at paras 23, 32, 35.

¹⁷¹ The Newfoundland Crown Policy Manual October, 2005 Appendix D accepts this reading of these cases when it provides: "Once a stay of proceedings has been directed by the Crown, the court which had been dealing with the matter becomes *functus officio*, i.e. without jurisdiction to further deal with the matter."

to the argument made in section 4 of this report that a prosecutorial stay should only be provisional in cases in which a new trial is ordered under s.696.3. A year after the entry of a prosecutorial stay, the proceedings are deemed under s.579(2) never to have taken place. The result is a total procedural vacuum which leaves the formerly convicted person without a judicial forum or a judicial remedy (apart from civil litigation) should Crown counsel not recommence proceedings.

It is possible, however, that the Supreme Court of Canada could refuse to follow the above two Court of Appeal decisions and hold that a superior court was not functus and had some jurisdiction to consider claims under the Charter. In the civil case of *Doucet-Boudreau v. Nova Scotia*¹⁷², a majority of the Court rejected arguments that a trial judge was functus after having issued a remedy under s.24(1) of the Charter in a minority language rights case. Although the case is not exactly analogous, the Supreme Court has demonstrated some creativity and flexibility with respect to claims brought under the Charter.¹⁷³ Although the possibility of judicial intervention cannot be completely dismissed, the two Court of Appeal decisions discussed above suggest that someone in Mr. Driskell's position may have great difficulty in achieving a judicial determination or declaration of a wrongful conviction. He might be required to bring a civil action that will raise the issue or else have to seek such a ruling from the executive through the free pardon or compensation processes. Any decision by the province to declare that a wrongful conviction has occurred would be voluntary.

Another option in cases where a stay has been entered and expired is for the Crown to relay charges and then to offer no evidence so that a person in Mr. Driskell's position can obtain a not guilty verdict, and the possibility of a judicial determination and/or apology for a wrongful conviction. It is possible to recharge a person in Mr. Driskell's position because the prosecutorial stay, like the *nolle prosequi*, does not produce a plea of *autrefois acquit* and because under s.579(2) the proceedings are deemed never to have been commenced. If charges were re-laid then it would be open to the Crown as a matter of prosecutorial discretion to offer no evidence. There is some irony in this prosecution. One of the reasons why the prosecutorial stay may be objectionable to someone in Mr. Driskell's position is that it leaves a cloud over their head and the possibility of re-opening the case. At the same time, the case could be re-opened and a decision made to call no evidence so as to produce a verdict of an acquittal. At such a hearing, a judge would not be required to make a determination of whether a wrongful conviction had occurred or offer a judicial apology, but it is possible that a judge might do so. As with an apology, however, this mechanism would depend on the discretion of the government, in this case the discretion of the Attorney General to re-lay charges and offer no evidence.

After Calling No Evidence

As suggested in part 4 of this report, the calling of no evidence by the prosecutor in cases where a new trial has been ordered under s. 696.3, but there is no reasonable

¹⁷² [2003] 1 S.C.R. 3

¹⁷³ *Gamble v. The Queen* [1988] 2 S.C.R. 595.

prospect of conviction is to be preferred to the entry of a prosecutorial stay as a means to achieve a judicial termination in miscarriage of justice cases. The effects of calling no evidence on the accused, however, may depend on the particular circumstances of the case. I have been informed that the calling of no evidence by the Crown in Manitoba is relatively rare. One case has, however, been recently reported in the media and it provides some information about the procedure. In 1988, a Crown attorney, Ms. Clarke, decided to call no evidence in a case in which Mathew Lovelace faced drug charges. The transcript of the procedure has been reported as follows:

Ms. Clarke: The Crown will be proceeding to trial at this point, and has no evidence to call.

The Court: Enter a dismissal- acquittal

Ms. Clarke: Thank you.

Court Reporter: Did you say 'acquittal'?

The Court: Acquittal

Ms. Clarke: I believe that completes this afternoon's matters.

Clerk of the Court: Order. All rise.¹⁷⁴

Although it is doubtful that a case in which a new trial had been ordered by the Minister of Justice would be handled in such a routine matter, the above passage is relevant because it demonstrates the bare bones structure of the Crown's decision to call no evidence. It is even possible that Crown counsel could explain the decision to call no evidence with reasons very similar to those that were used to justify the use of a prosecutorial stay in Mr. Driskell's case. In other words, Crown counsel could stress that no evidence was being called not because the accused was innocent, but because there was no reasonable prospect of conviction. Indeed the new Lamer guidelines support this possibility by suggesting that a decision to call no evidence is appropriate when there is no reasonable possibility of either a successful prosecution or the recommencement of a case. Although calling no evidence will produce an acquittal, there is no guarantee that it will result in a determination or declaration of a wrongful conviction.

A New Judicial Procedure to Determine and Declare a Wrongful Conviction

The possibility that a prosecutorial stay or the calling of no evidence will not produce a determination and declaration of a wrongful conviction raises the issue of whether a new procedure should be recommended that will allow judges to make determinations that a wrongful conviction has occurred. Such a process could also feed into revisions to the compensation process and could in some cases provide an alternative to costly public inquiries as a means of recognizing and learning from wrongful convictions.

The most likely judicial forum for a determination and a declaration that a wrongful conviction has occurred is either at the conclusion of a new trial or appeal that is ordered under s.696.3 of the Criminal Code or in a case in which the Crown decides to call no evidence at a trial or withdraw charges. As outlined above, there is some

¹⁷⁴ Bruce Owen "Ghost in the Machine" *Winnipeg Free Press* June 11, 2006.

authority for the proposition that the prosecutor can seek judicial approval before calling no evidence or withdrawing charges. Indeed, the involvement of the judiciary with respect to the calling of no evidence or the withdrawal of a charge distinguishes these remedies from the prosecutorial stay that, absent a Charter or abuse of process challenge, is considered to be a matter of prosecutorial discretion that does not involve the judiciary. Indeed, the lack of judicial involvement in a prosecutorial stay under section 579 of the Criminal Code is one of the main reasons why its use is problematic in cases of possible wrongful convictions.

Building on the precedent of prior judicial involvement in cases where the prosecutor offers no evidence or decides to withdraw charges after plea, as well as the willingness of judges to offer apologies in some cases, judges could be asked by the defence to determine whether they have sufficient grounds to make a determination and a declaration that a wrongful conviction has occurred after a verdict of an acquittal has been entered. This procedure should only be invoked on the request of the defence in order not to undermine the integrity of the not guilty verdict. At the same time, however, the previously convicted person may have a pressing interest in obtain a more complete exoneration that will be produced by the not guilty verdict.

Although an innocence hearing procedure could be formalized through amendments to the Criminal Code as legislation in relation to criminal law and procedure, it might also be undertaken by judges on the basis of their inherent powers under the common law. Judges have not hesitated to develop creative remedies with respect to bail pending a 696.1 application or with respect to the award of appropriate and just remedies under the Charter.¹⁷⁵ With respect to any new innocence hearing, the court may have jurisdiction under the common law as it relates to control of its own process and the approval of the prosecutor's decision to withdraw charges or to offer no evidence. Once jurisdiction is recognized under the common law, the court would also have jurisdiction to make a determination of innocence as part of its broad remedial powers under s.24(1) of the Charter.¹⁷⁶ The stigma that follows conviction has been recognized as harm that falls under s.7 of the Charter¹⁷⁷ and courts might take a similar approach to the stigma created in a miscarriage of justice case.

One possible approach at an innocence hearing would be to allow the formerly convicted person an opportunity to establish innocence on a balance of probabilities or a preponderance of evidence as contemplated under the second *Milgaard* guidelines. Such a standard would logically distinguish a verdict of not guilty, which is the result of the Crown failing to prove guilt beyond a reasonable doubt, and a declaration of a wrongful conviction, which would require an additional finding made by the court at the request of the accused. In some cases, the Crown might consent to this innocence application, in

¹⁷⁵ Section 679(7) provides statutory jurisdiction to grant bail after the Minister of Justice has made an order under s.696.3, but the courts have found jurisdiction to grant bail both under the common law and the Charter before such an order is made. *R. v. Phillion* [2003] O.J. no. 3422 (Sup.Ct.J. per Watt J.). See also *R. v. Driskell* 2004 MBQB 3 and *R. v. Unger* 2005 MBQB 238 but note that the Crown did not challenge jurisdiction in either of the Manitoba cases.

¹⁷⁶ *Doucet-Boudreau v. Nova Scotia* [2003] 3 S.C.R. 3; *R. v. Dunedin Construction* [2001] 3 S.C.R. 575.

¹⁷⁷ *R. v. Vaillancourt* [1987] 2 S.C.R. 636; *R. v. Finta* [1994] 1 S.C.R. 701.

other cases it might oppose the application and in some cases it could take no position. Such a request by the previously convicted person would come with a fair share of risks. A finding by the court that innocence had not been established could be more damaging to the formerly convicted person than even a prosecutorial stay. It should be recalled that in 1992 and before a DNA exoneration was obtained, the Supreme Court found that David Milgaard had not established his innocence on a balance of probabilities. As I have suggested in the first part of this report, wrongful convictions are not limited to cases of "actual innocence" as revealed by DNA exonerations.

There are several arguments that can be made against innocence hearings to determine and declare a wrongful conviction. One argument would be that such a process would take up too much judicial and prosecutorial time and constitute a second trial. In my view, this argument should be rejected on the basis that the new innocence hearing would only be held in a small number of cases. The judicial system has been able to deal with the additional work that comes from decisions to grant interim release pending a s.696.1 application and innocence hearings should not consume more time. Indeed, it is likely that less people will run the risk of an adverse determination at an innocence hearing than would attempt to seek bail pending their s.696.1 application. Aside from these pragmatic factors, I would also argue that the justice system owes a person whose conviction has been reversed through the extraordinary and onerous s.696.1 process an opportunity to establish their innocence.

There are other more compelling objections to innocence hearings. One concern is that an innocence hearing could impose too high a burden on the accused to demonstrate innocence on a balance of probabilities. An alternative would be to require the Crown to establish guilt, but this would run the risk of re-trying an accused whose conviction has been overturned.

An even more serious objection to innocence hearings is that they could undermine the meaning of the not guilty verdict. Declarations of innocence could create two classes of innocent people: those who received a not guilty verdict and those who received a finding of innocence. They could introduce a third verdict into the criminal justice system.

The above objections to innocence hearings all deserve serious consideration. Nevertheless, I would note that this process would only be undertaken at the request of the previously convicted person. It would be up to that person to decide whether to risk going beyond or behind the not guilty verdict. I would also note that a third verdict of innocence already to some extent exists in any system which ties compensation to proof of innocence. Article 14(6) of the International Covenant on Civil and Political Rights has already created two classes among the acquitted: those found not guilty who do not receive compensation and innocent victims of miscarriages of justice who do receive compensation. Finally, I would note that the concept of exoneration is compelling and widely accepted in popular culture. For better or worse, the public believes there is a difference between a not guilty verdict and a determination of innocence.

A final serious objection to innocence hearings is that they are too formal and legalistic and that they place an unrealistic burden on the formerly convicted person to establish innocence. It should always be open for the previously convicted person and the government to devise some other less formal method of determining whether a wrongful conviction had occurred in preference to the new legal procedure that I have outlined. For example, a person or group of persons agreed upon by the parties, perhaps including a retired judge, could be appointed to determine and make declarations of wrongful convictions. Such a process would not necessarily apply the formal legal standard of requiring proof of innocence on a balance of probabilities. It may also be possible that a judge may be willing to make apologies and explanations in the course of entering a not guilty verdict that will make a formal application for an innocence hearing unnecessary. The government can apologize and recognize that the person is innocent. I would not want to preclude all of these creative possibilities. That said, however, I believe that it is important that the legal system provide a successful s.696.1 applicant with the choice of a more formal judicial process to determine and declare whether a wrongful conviction has occurred. It may be that few applicants will avail themselves of this somewhat risky process and others may be able to negotiate less formal but satisfying alternatives. Nevertheless, the legal system should provide a remedy for the insult of stigma and suspicion endured by those who have already suffered the irreparable injury of a miscarriage of justice.

Conclusion

In this report, I have stressed the significance of an order by the Minister of Justice under section 696.3(3)(a)(i) that a new trial should be held. Such an order is only made if the Minister concludes that there is a reasonable basis to conclude that a miscarriage of justice has *likely occurred*. The making of such an order means that the conviction is unsafe and that the convicted person may well be a victim of a miscarriage of justice. In my view, such a conclusion provides the successful applicant a reasonable expectation of a day in court. It also places obligations on Attorneys Generals as Ministers of Justice generally either to hold a new trial in which they will have to prove the convicted person's guilt beyond a reasonable doubt or to call no evidence and obtain a verdict of acquittal in cases where there is no reasonable prospect of conviction or the evidence is so unreliable that it would be dangerous to convict. The successful s.696.1 applicant has a legitimate interest in obtaining a new verdict. It is not acceptable that in three of the four cases in which a new trial has been ordered under section 696.3 that the successful applicant has not received a day in court or the finality of a verdict.

The use of a prosecutorial stay under section 579 of the Criminal as a response to an order of a new trial under section 693.3(3)(a) should only be reserved for cases where the accused is still under active investigation by the police as the perpetrator of the relevant crime. Moreover, I suggest that a prosecutorial stay in such cases, following the traditions concerning the use of *nolle prosequi* in England, should only be entered with the agreement of the Attorney General or the DPP and after hearing representations from the successful s.696.1 applicant. However useful and common prosecutorial stays may be in the ordinary course of justice, they are an extremely problematic device in a case

where a new trial has been ordered because there is a reasonable basis to conclude that a miscarriage of justice has likely occurred.

The entry of a prosecutorial stay under section 579 as a response to the order of a new trial under section 693.3(3)(a) should place significant obligations on the state to use all reasonable efforts to conclude its investigation of the convicted person as soon as possible and within a year. I recommend that a stay under section 579 should be re-visited as soon as possible and in any event before the proceedings shall be deemed under section 579(2) never to have commenced within a year after the entry of the stay. The purpose of re-visiting the stay should be to decide in light of the police investigation whether the appropriate disposition is for the prosecutor to offer no evidence so that the convicted person obtains a not guilty verdict or whether enough evidence has been produced to justify the conduct of the new trial ordered by the Minister of Justice. There should be a very strong presumption that a successful applicant under s.696.1 should never be left in limbo with a prosecutorial stay as the final disposition of the case. The only cases that I can imagine where a stay would be justified as the final remedy a year after it has been entered would be a case in which the police still have the convicted person under active and fruitful investigation and they have justified to the Attorney General or the DPP the reasons why the investigation should be allowed to continue. Once the investigation is completed, Crown counsel could still relay the charges and conduct a new trial because the prosecutorial stay does not bar subsequent proceedings. If the completed investigation does not justify a new trial, the Crown should still offer the person an opportunity to have no evidence called so as to produce a not guilty verdict. A successful applicant under s.696.1 should never be left in a permanent legal limbo produced by a prosecutorial stay.

The above recommendations restricting the use of a stay under section 579 and recommending a re-visiting of this remedy within a year of its entry, however, will not necessarily produce a determination or a declaration of a wrongful conviction as contemplated by paragraph 1(f) of the order in council. In order to achieve such a result, reform is needed because the criminal justice system at present is not designed to make determinations or declarations of wrongful convictions. To be sure, a person's innocence can be determined and declared by various state officials and it might emerge from an application for a free pardon or for compensation. Nevertheless, these procedures are uncertain, untested and dominated by members of the executive who may be unwilling to recognize a person's innocence and their responsibility for a wrongful conviction. In my view, there is a need for a judicial procedure that can, at the request of the previously convicted person, make determinations and declarations that a wrongful conviction of an innocent person has occurred. In reaching this conclusion, I do not mean to diminish the possibility that the executive may recognize the previously convicted person's innocence through an apology or other means, but rather to make the argument that reliance cannot be placed on the executive to make such determinations.

When devising new means to achieve determinations and declarations of wrongful convictions, however, it is vitally important not to erode the foundational principles of proof of guilt beyond a reasonable doubt including the obligations outlined

above and proposed in the recent Lamer report that Crown counsel should call no evidence resulting in a not guilty verdict when there is no reasonable likelihood of recommencement of proceedings or when the evidence is so manifestly unreliable that a conviction would be dangerous. At the same time, the previously convicted person may have a strong and compelling interest in a greater exoneration than may be provided by a not guilty verdict. Not providing a judicial vehicle for exoneration claims risks adding insult and enduring suspicion and stigma to the injury of a miscarriage of justice.

In order to distinguish exonerations from not guilty verdicts, the defence should have an opportunity to establish innocence or the occurrence of a wrongful conviction at an innocence hearing. In order to protect the integrity of the not guilty verdict, any innocence hearing to determine and declare a wrongful conviction should only be undertaken at the request of the previously convicted person and after a not guilty verdict has been obtained either as a result of a new trial or the calling of no evidence.

In cases where a prosecutorial stay has been entered under s.579, the convicted person may well be forced to seek exoneration through other less satisfactory means such as applications for free pardons, informal exonerations, civil lawsuits or requests that the Attorney General re-commence proceedings with a new charge with a view to offering no evidence. This less than ideal state of affairs underlines the need for prosecutorial stays only to be used as provisional measures after a new trial has been ordered by the Minister of Justice on the basis of reasonable grounds to believe that a miscarriage of justice has likely occurred. Successful s.696.1 applicants should not be left in the legal limbo of the prosecutorial stay. They deserve their day in court and the finality of a verdict. They also, in my view, deserve an opportunity to seek a judicial determination and declaration of whether they are a victim of a wrongful conviction.

Appendix G

**REPORT
ON
FORENSIC SCIENCE MATTERS
TO THE
COMMISSION OF INQUIRY
RE: JAMES DRISKELL**

DOUGLAS M. LUCAS MSc, DSc (Hon)

August 17, 2006

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I. INTRODUCTION

James Driskell was convicted at Winnipeg, Manitoba in June, 1991 of the murder of Perry Harder. Following a review of the conviction by the Minister of Justice for Canada, a new trial was ordered in March, 2005, however, Crown Counsel directed a stay of proceedings. On December 07, 2005, The Honourable Patrick LeSage, QC was appointed a Commissioner to inquire into certain aspects of the trial including *"the role of the RCMP Laboratory in the prosecution of James Driskell, and to review any systemic issues that may arise out of its role."*¹

On May 01, 2006, I was retained by the Commission Counsel, Michael Code, to review and prepare a report on the forensic science aspects of the Commission's mandate.² This is my report.

A. Context

Mr. Harder disappeared from the Winnipeg area on June 16, 1990. His body, in an advanced state of decay, was discovered on September 30, 1990 in a shallow grave. There was evidence of disturbance of the body by animals. At the autopsy it was determined that Mr. Harder had been shot in the chest with a .22 cal. firearm. Constable CW Pearson of the Winnipeg Police Department Identification Section submitted items of physical evidence to the RCMP Forensic Laboratory Services (FLS) Laboratory in Winnipeg on several dates including October 12, 1990 when the ones of interest to this review were submitted.³ The submission document stated that

"There are suspects in this case, but no arrests at this time. A van has been seized that is believed to have been used to transport the body to the grave site."

Most of the items were received by Mr. Tod Christianson, a Hair and Fibre Section Specialist in the Laboratory. They included purported known hairs of Mr. Harder from the grave site and items from a van that had been owned by Mr. Driskell including a carpet and vacuumed debris from its cargo area. Mr. Christianson was requested to examine a hair, the vacuumed debris and the cargo area carpet from the van for any hairs similar to those believed to be Mr. Harder's. He was also asked to examine some fabric and debris from the grave site and articles of clothing believed to be Mr. Harder's for any fibres similar to those used in the construction of the cargo area carpet from the van.

¹ Order in Council re: Driskell Inquiry, December 07, 2005

² Letter of Retainer, M Code to D Lucas, May 01, 2006. (A copy of my CV is on file with the Commission.)

³ "Request For Analysis/Examination of Exhibits" form prepared by Constable CW Pearson dated 90-10-12

Following his examinations, Mr. Christianson reported to Cst. Pearson that one hair from the vacuumed debris and two from the van carpet were consistent with those believed to be Mr. Harder's but no fibres similar to those of the carpet were found on any of the exhibits examined.

Mr. Christianson testified about his examinations and findings at the trial of Mr. Driskell in June, 1991. He explained what he meant by "consistent with":

*"So if the hair is consistent, that means it either came from the same person as that known sample or from somebody else who has hair exactly like that."*⁴

On June 06, 2002, microscope slides (presumably as prepared by Mr. Christianson) containing the known (K) hairs and the three questioned (Q) hairs which Mr. Christianson had found to be consistent with the Ks were submitted to the UK Forensic Science Service (FSS) Laboratory in Birmingham, England. There, the hairs were analyzed for mitochondrial DNA (mtDNA) by Mr. John Edward Bark, an experienced DNA analyst. He concluded that his findings:

*"---provide extremely strong support for the proposition that the hairs from the van originated from three individuals, none of whom was Perry Harder."*⁵

B. Process

This review has involved reading (or re-reading) a number of technical research papers and other documents dealing with forensic hair comparisons, reviewing relevant FLS policies and procedures, and examining relevant documents from Mr. Christianson's personnel file.⁶ A meeting was attended in Toronto on June 08, 2006 with Dr. John Bowen, FLS Chief Scientific Officer, Jon Dawe (Assistant Commission Counsel) and David Gates QC (RCMP FLS Counsel). Dr. Bowen subsequently provided a number of documents and facilitated my visit to FLS Winnipeg June 26-28, 2006. A second meeting with Mr. Dawe in Toronto occurred on July 28, 2006.

In Winnipeg, the FLS Winnipeg Hair and Fibre (H&F) Section laboratory file (90-1296) was examined in detail with Mr. Christianson on June 27, 2006. He also provided a tour and description of the areas in the Laboratory in which he had performed his examinations. During this visit, Mr. Wayne Greenlay (the current General Manager of FLS Winnipeg and FLS Regina), and Mr. James Cadieux (currently the FLS National Case Manager but in 1990/91 the FLS Winnipeg H&F Section Head) were also interviewed and provided very helpful insights into the

⁴ Transcript of Testimony of Tod Christianson in R. v. Driskell pp. 148/149

⁵ FSS Statement of John Edward Bark re: James Driskell, 02 December, 2002, p. 5

⁶ A list of all the papers, files and documents reviewed is provided at the end of this report.

Laboratory operations, both as they were in 1990/91 and as they are today.

As with any review such as this, it has been important to attempt to assess the work that was done in the context of what was generally accepted practice in forensic science in the 1990/91 time period. This was a time of considerable change in forensic science due in part to the impact of the then rapidly developing discipline of DNA profiling and, perhaps even more significantly, the growing influence of accreditation requirements on laboratory management and operations. Some comparisons with the way things are generally done in forensic science laboratories in 2006 are provided throughout this report.

II. FORENSIC HAIR COMPARISON⁷

A. Background

Although there are a few references in the early twentieth century scientific literature to papers dealing with the microscopic comparison of hairs for forensic science purposes, this type of examination did not become common until around the middle of the century. As an increasing number of forensic scientists developed experience and expertise with these examinations and created a larger body of scientific literature, such comparisons became well established as one of the common types of trace evidence examinations (paint, glass, soil, fibres etc.) A recent review of the subject lists one hundred literature references about hair examinations.⁸

Until the introduction of DNA profiling in the late 1980s, the generally accepted method for comparison of hairs was microscopic examination. Even after DNA analysis became more common, it was not widely used on hair because hair does not lend itself to nuclear DNA (nDNA) analysis unless there is tissue attached to the hair root. In addition, the early technique for DNA analysis - Restriction Fragment Length Polymorphism (RFLP) - was not very sensitive and success rates with hair were low. After the mid-1990s, when much more sensitive PCR (Polymerase Chain Reaction) techniques became the norm, application of DNA analysis to hair became more common in forensic science.

Another type of DNA, mitochondrial DNA (mtDNA) which can be applied to the hair shaft, was introduced to forensic science in 1994 by the FSS in the UK and in 1996 by the FBI in North America. Because it is a complex and expensive process, mtDNA is not widely used (as

⁷ It is important for the reader to know that I have never performed hair and fibre examinations. My knowledge of the subject is general only and is derived from my experience as a forensic laboratory director, as an accreditation inspector, and as a consultant.

⁸ Houck, MM and RE Bisbing; "Forensic Human Hair Examination and Comparison in the 21st Century"; Forens. Sci. Review, Vol. 17, 51-66 (2005). This is a very useful source of general information on this subject for anyone who wishes to learn more about it.

compared with nDNA) and only a relatively few laboratories have the capability to perform this type of analysis. (For example, the number of laboratories reporting nDNA results in a large international forensic proficiency testing program is about 125 whereas the number reporting mtDNA is only about ten.⁹) Neither FLS nor the Quebec or Ontario forensic laboratories analyze mtDNA.

B. Microscopic Examination of Hair

Examination of hair in forensic science is used to determine if an item is a hair (as opposed to a synthetic fibre), whether it is human or animal, the part of the body from which it originated (e.g., scalp, pubic, facial, other body part), and race (e.g., Caucasian, Oriental, Negroid.) Comparison of hairs for the purpose of possible association or elimination of a common source, is based on comparison of macroscopically and microscopically visible characteristics. The two charts on the following page¹⁰ illustrate the types of characteristics normally examined. These have been shown by research and experience to be useful for the discrimination of hairs between individuals.

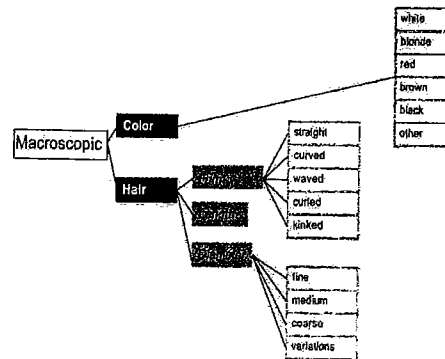
Because there is a degree of variability in the (for example) scalp hairs of an individual, in practice a good "*known*" sample of hair must be representative of the range of variation across the various regions of the individual's scalp. This requires that a large number of hairs (up to one hundred) be collected from the scalp by both combing and pulling. The K hairs are then examined macroscopically and by low power microscopy to select a smaller number (6 - 10) that are representative of the range. These are then mounted on microscope slides and the Q hairs are compared with them using a comparison microscope at about 200x to 400x magnification. Significant differences in characteristics result in eliminations. Q hairs which a skilled examiner determines to have the same arrangement, distribution, and appearance of microscopic characteristics as one or more of the K hairs along their entire length, are deemed to be microscopically similar.¹¹

Since the comparisons are strictly visual, the validity of the results is very much dependent on the training, experience and judgement of the examiner, as well as on the quality of the samples. It is generally accepted, however, that well trained and experienced hair examiners can effectively determine that a Q hair did not originate from the same source as a K sample or, assuming a valid sample, that they are microscopically similar and could have originated from the same source (or another source with the same characteristics.) Since it is known that two

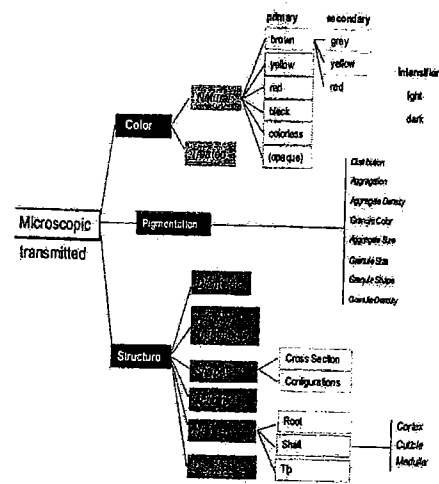
⁹ Personal communication, Collaborative Testing Services Inc., Sterling, Virginia

¹⁰ From the above Houck and Bisbing review pp. 56/57

¹¹ Deedrick, DW; "*Hair, Fibres, Crime, and Evidence*"; Forens. Sci. Communications, Vol. 2 Number 3 (2000)



Macroscopic Hair Characteristics



Microscopic Hair Characteristics

individuals can have hairs that are microscopically indistinguishable, coincidental "matches" can occur. Thus, regardless of the examiner's expertise, it can never be stated on the basis of microscopic comparison that two hairs did come from the same individual.

The significance of a conclusion of microscopic similarity cannot be expressed in any numerical fashion as, for example, with DNA profiles or with conventional blood groups. There are no equivalent databases of microscopic hair characteristics to permit population distribution statistics to be determined. Because the observable characteristics vary within the hair from an individual and because they change with age and treatment, such databases would be neither practical nor useful.

The above description represents the general view of microscopic hair comparison in forensic science in 2006 and as it was in 1990/91. The only change has been a reduction in the number of cases to which it is applied, e.g., those in which nDNA analysis is not possible or is not successful, and in the number of examiners performing microscopic hair examinations. The FLS Laboratories, for example, stopped performing microscopic hair comparisons in 2001/2002.¹² Some hair examiners may also now express their conclusions more conservatively than they did in earlier times.

C. DNA Analysis of Hair

As noted above, human hairs can be analyzed for mtDNA and, if there is any tissue attached, for nDNA. The latter is much more discriminating than the former however, because the hairs typically encountered in forensic casework are more likely to be telogen (dormant or degenerative growth phase) rather than anagen (active growth phase)¹³, they may have little or no nucleated material and therefore be less amenable to successful nDNA analysis.

Mitochondrial DNA varies less between individuals than does nDNA and is therefore much less discriminating. Also, unlike nDNA which is inherited from both parents, mtDNA is inherited only from the maternal side. As a result, siblings and relatives linked on the maternal side have the same mtDNA profile and cannot be differentiated by mtDNA. In addition, it is possible (although not common) for an individual to have two different mtDNA sequences.¹⁴

III. HAIR AND FIBRE EXAMINATIONS IN THE HARDER CASE

¹² Dr. John Bowen, personal communication

¹³ Houck, MM and RE Bisbing; "Forensic Human Hair Examination and Comparison in the 21st Century"; Forens. Sci. Review, Vol. 17, 51-66 (2005), p. 61

¹⁴ FSS Statement of John Edward Bark re: James Driskell, 02 December, 2002, p. 10

A. Mr. Christianson's Qualifications

Tod Christianson graduated from the University of Manitoba with a four year BSc degree in chemistry in 1984. During his undergraduate years, he spent two summers as an intern in the H&F Section of FLS Winnipeg. Following graduation in 1984, he joined the RCMP as a civilian member and was assigned to the H&F Section of FLS Winnipeg. He then began a formal understudy training program in the Laboratory with two experienced examiners, D Ogilvie and D Doll, serving as his mentors.¹⁵

In 1984 (and in 1990/91), FLS was a large forensic laboratory system consisting of six operational laboratories in Vancouver, Edmonton, Regina, Winnipeg, Ottawa and Halifax. It had a strong central scientific and administrative support staff at its headquarters in Ottawa. Each discipline had a Chief Scientist responsible for ensuring appropriate common standards within the discipline across the entire system. Training was one of the functions for which the Chief Scientist had oversight responsibility. In the H&F discipline in the mid-1980s, the Chief Scientist was Barry Gaudette, an internationally respected hair and fibre specialist.

Although training in hair and fibre examination was done on an understudy basis in most forensic science laboratories, FLS was atypical (for a non-accredited lab¹⁶) in that its training program was formal and structured. In addition to a Methods Manual, the discipline had a written Training Manual¹⁷ which included a separate Instructor's Guide.

The training program had an expected average duration of fifteen months and was divided into four phases:

- | | |
|---------|--|
| Phase 1 | Introduction, Microscopy and Hair Identification - approx. 2 ½ months. |
| Phase 2 | Hair comparison - approx. 4 months |
| Phase 3 | Fibre Identification and Comparison, Textile Examination, Physical Matching and Physical Comparison - approx. 6 months |
| Phase 4 | Further Study, Research Project and Preparation for Court Testimony - approx 2 ½ months. |

¹⁵ Statement of Tod Christianson to Commission Counsel, 17 May, 2006

¹⁶ Accreditation of North American forensic laboratories began in 1982 but by 1990 the number of accredited labs was still relatively small. In Canada, the Ontario Centre of Forensic Sciences was the first to be accredited in 1993 by ASCLD/LAB. FLS labs began preparation for accreditation in the mid- to late 1990s and the first lab to be accredited by the Standards Council of Canada was FLS Edmonton in 2000. FLS Winnipeg was accredited in September, 2001.

¹⁷ Hair and Fibre Section Training Manual (including Instructor's Guide); Revised version February, 1985 with subsequent revisions in 1987, 1988 and 1989. A similar version would have been in place in 1984.

Each phase included reading assignments, practical exercises, twenty-one practical examinations and four written examinations in addition to instruction in, and practice of, basic skills. Practical test # 21 (the final test) required comparison of one hundred Q hairs with one K sample. This test was considered to be a major challenge for all understudies. It was prepared and graded by the Chief Scientist. Mr. Christianson received a grade of 41 out of a possible 50 on it.

For the time (and indeed even today), this was an impressive training program.

Mr. Christianson received above passing grades (the passing grade was 70%) on all of his written and practical examinations and was therefore certified by Mr. Gaudette as having completed the training program in October, 1985. As a result he was recommended by his Section Head and Lab Manager at FLS Winnipeg for promotion from Forensic Science Laboratory Specialist (FSL) 1 to FSL 2.¹⁸ This was the journeyman level (i.e., fully functional but non-supervisory) within FLS.

Mr. Christianson's annual Performance Evaluations prepared by his Section Head were reviewed for the years 1985 through 1992. They indicate a progression from "*satisfactory progress*" through "*fully satisfactory*" and "*valued member of the System*" to "*performed consistently above the level of his peers*." By 1989, he was considered as qualified for promotion to FSL 3 if an opening arose.

Although they are post 1991, there are records in Mr. Christianson's personnel file of two hair proficiency tests which he took. Both were prepared and graded by the Chief Scientist in Ottawa. The 1994 test consisted of ten Q scalp hairs and two Ks. Mr. Christianson reported no Type II errors (incorrect associations) and two Type I errors (incorrect eliminations.) In the 1996 test (five Qs and two Ks), he reported no errors. Records for both of these tests were reviewed. He also remembers a third test in which he had no Type II errors and one Type I error. During an interview, Mr. Christianson explained the Type I errors as being attributable to his conservative approach to his H&F work.

After completing his H&F training, Mr. Christianson took a Fibre Microscopy Course from McCrone Associates in 1989 and a Forensic Infrared Spectroscopy Course at Queen's University in 1990.

I am satisfied that Mr. Christianson was fully qualified to perform the H&F examinations in the Harder case.¹⁹

¹⁸ Tod Christianson Personnel File

¹⁹ In 1992, FLS merged the H&F Sections in all its laboratories with the Serology Sections thus creating new Biology Sections. Mr. Christianson began cross training in DNA analysis but continued performing H&F examinations until 1999. When FLS was reorganized in 2002 and the Biology Section in Winnipeg was closed, he became the Case Manager of the Case Receipt Unit in Winnipeg, the position he currently occupies.

B. Hair and Fibres Section Methods Manual

As with its training procedure, FLS was also atypical for a non-accredited lab in that it had a formal written Methods Manual.²⁰ In addition, general standard operating procedures (SOPs) for practices such as exhibit handling, note keeping, report reviews etc., existed in written form in the Laboratory Services Manual (LSM).²¹ Although accredited labs are now required to have such documents, it was still quite common in 1990/91 for forensic labs to have less formal SOPs, either unwritten and transmitted by word of mouth, or often in the form of individual collections of written procedures, memos or copies of literature papers.

The section on hair examinations in the Methods Manual consists of about thirty pages covering such topics as, contamination prevention, exhibit searching, macroscopic examination, microscopic examination, cosmetic treatments of hair, sample conclusions, testimony and an extensive bibliography. The methods described are well-written, thorough and are, for the most part, in keeping with what was the general practice of microscopic hair comparison at the time.

Minor departures from what was then general practice include the following:

1. Magnification - The Methods Manual states that:

"100x and 125x are the magnifications most commonly used. Higher magnifications are used when more detail is required. Lower magnifications are used when a wider field of view is required."²²

This magnification is lower than many hair examiners would use. Various literature references recommend magnifications of 40x - 400x^{23,24}, 40x - 250x²⁵, and 300x²⁶. On the other hand, much

²⁰ Hair and Fibre Section Methods Manual (1983 with revisions in 1984 and 1986)

²¹ Laboratory Services Manual (28 April, 1993): Chapter 2 "Laboratory Operations - General". This version is identified as an "Update and Revision" of an earlier version.

²² H&F Methods Manual, IILC.4.b

²³ Houck, MM and RE Bisbing; "Forensic Human Hair Examination and Comparison in the 21st Century"; Forens. Sci. Review, Vol. 17, 51-66 (2005), p. 58

²⁴ Deedrick, DW; "Hair, Fibres, Crime, and Evidence"; Forens. Sci. Communications, Vol. 2 Number 3 (2000)

²⁵ Houck, MM and B Budowle; "Correlation of Microscopic and Mitochondrial Hair Comparisons"; J. Forens. Sci., Vol. 47, 1-4, (2002), p.2

²⁶ The Centre of Forensic Sciences; "Hair Information Sheet" (ca 2004)

of the research by Barry Gaudette (the principal author of the Manual) was performed with a magnification of 100x, e.g.,²⁷ which had proven satisfactory.

2. **Contamination Prevention** - in the section on "*Contamination Prevention*"²⁸, there is no reference to wearing gloves during examinations. There are, however, requirements that "*Lab coats are always worn when handling exhibits*" and "*A different clean lab coat is used for examining clothing from the suspect(s) than is used for examining clothing from the victim(s)*". Prior to the late 1980s, it was not common practice for forensic scientists to wear protective gloves when examining exhibits. It is therefore not surprising that they were not mandated in a manual prepared in the early to mid-1980s. The practice became more common in the late 80s/early 90s and is now virtually universal.

3. **Verification** - There is no reference in the Manual to a verification procedure for "*positive*" comparisons. It was common practice in some forensic science disciplines, e.g., firearms/toolmarks, latent prints, for such comparisons to be observed and verified by a second qualified examiner. In some laboratories in which there was more than one qualified hair examiner, this was also the practice for hair/fibre examinations e.g.,²⁹. It was not, however, universal practice in 1990/91.

4. **Conclusions** - In the section on "*Sample Conclusions From Hair Comparison*"³⁰ five possible conclusions are described: "*Strong Positive*"; "*Positive*"; "*Negative*"; "*Strong Negative*"; and "*Inconclusive*." The latter three are quite straight forward. The suggested wordings for "*Strong Positive*" and "*Positive*" conclusions are, however, identical:

"The human scalp hairs removed from exhibit O are consistent with having originated from the same person as the hairs in exhibit K (reportedly from the accused.)"

No criteria are provided in the Manual for distinguishing between "*Strong Positive*" and "*Positive*" conclusions. The only difference appears to be that the following "*Remarks*" could be included with a "*Strong Positive*" conclusion:

"At present, hair is not a positive means of personal identification. However, in

²⁷ Gaudette, BD and ED Keeping; "*An Attempt at Determining Probabilities in Human Scalp Hair Comparison*"; J. Forens. Sci., Vol. 19, 599-606 (1974), p. 603

²⁸ H&F Methods Manual, II.C

²⁹ Houck, MM and B Budowle; "*Correlation of Microscopic and Mitochondrial Hair Comparisons*"; J. Forens. Sci., Vol. 47, 1-4, (2002), p. 1

³⁰ H&F Methods Manual, Appendix III-1

this case, because of the large number of hairs in agreement between the questioned hair and the known sample (and/or because of the unusual characteristics possessed by both the questioned hair and the known sample), the possibility that the hairs removed from exhibit O originated from anyone other than the accused would be extremely remote."

While all forensic hair examiners would agree with the first sentence, not all would agree with the final expression. Because of the lack of population distribution data for microscopic hair characteristics, there was no unanimity among hair examiners in the 1990/91 period about ways to express the significance of a "positive" hair comparison. Some would go no further than "could have come" while others (particularly those who specialized exclusively in hair and fibre comparisons) would use phrases such as "remote possibility."

Currently, it is more common to see conclusions in such cases expressed along the lines:

*"Hair comparisons are not a basis for absolute personal identification. It should be noted, however, that because it is unusual to find hairs from two different individuals that exhibit the same microscopic characteristics, a microscopic association or match is the basis for a strong association."*³¹

or:

*"The Q hairs are microscopically similar to the K hairs and could have come from that source or another source with similar hairs."*³²

5. Testimony Guidelines - In the section on "Guidelines Concerning Testimony"³³, the advice provided is that "conclusions should be stated in the same way they are written in the laboratory report." It goes on:

"When asked to elaborate on these conclusions or when directly or indirectly asked questions as to the significance of hair comparison evidence, a response such as the following should be given:

"When careful examination by a qualified examiner indicates that a questioned hair is consistent with a known hair, there are two possibilities. Either the hair actually originated from that source, or there was a coincidental match. Since it

³¹ Deedrick, DW; "Hair, Fibres, Crime, and Evidence"; Forens. Sci. Communications, Vol. 2 Number 3 (2000)

³² The Centre of Forensic Sciences; "Hair Information Sheet" (ca 2004)

³³ H&F Methods Manual, Appendix III-5

is possible for two different people to have hairs which are indistinguishable by present methods, it is known that coincidental matches can occur in forensic hair comparison. However, based on my knowledge and experience as a hair examiner, I am of the opinion that such coincidental matches are a relatively rare event. The explanation that the questioned hair actually originated from the known source is generally the more likely of the two."

As with the wording of conclusions discussed above, not all examiners would have agreed with the last two sentences.

C. Mr. Christianson's Examinations³⁴

Mr. Christianson received the exhibits from Cst. Pearson of the Winnipeg Police Department on October 12, 1990, probably in Room 250³⁵ in the Laboratory. During this transfer process, there would have been discussion about the case and the nature of the examinations to be performed. There would also have been some "triage" of the items to select those most likely to provide useful information. Most of the exhibits were then stored in the walk-in freezer of the Laboratory (Room 243) until removed for examination.

There are no dates on Mr. Christianson's work notes indicating when the examinations were performed³⁶ but he remembers working on the case between Christmas and New Years and believes he probably performed most of the hair examinations in early January, 1991.³⁷

There are a number of changes or corrections (overwrites or scratch outs) in the handwritten notes. These were acceptable in 1990/91 but would not meet the accreditation requirements of today; changes may only be made with single, initialled strikeouts.

Two apparent inconsistencies in his work notes were discussed with Mr. Christianson. The "Exhibit Work Sheet" for exhibit 36 (fabric from the grave site) is checked as "negative" for fibres but the "Fibre Data Work Sheet" for this exhibit indicates three fibres that were not consistent with the van carpet. The "Exhibit Work Sheet" for exhibit 141 (the van carpet) indicates 24 scalp hairs but the hair comparison work sheet lists 25 hairs of which two are

³⁴ Most of this information is derived from a review of Mr. Christianson's laboratory case file and personal discussion with him on June 27, 2006.

³⁵ Copies of the floor plans of FLS Winnipeg are included as an Appendix to this report.

³⁶ Such dates were not required by the H&F Methods Manual nor by the LSM. It was not common in non-accredited labs for such dates to be included in the work notes. They are now required by accreditation programs and by the FLS Quality Manual Section 8.2.2

³⁷ Personal Statement of Tod Christianson to Commission Counsel, 17 May, 2006

animal. Mr. Christianson was unable to offer any explanation for these minor inconsistencies. They may, however, provide an indication of the thoroughness of the case file review process described below.

The procedures used were essentially those which Mr. Christianson had been trained to use and which are outlined in the Methods Manual. The K hairs would have been laid out on a white enamel tray on a table in Room 212. Mr. Christianson remembers being somewhat surprised that the K hairs in exhibit 42 from the grave site were in quite good condition considering their origin and opined that they constituted a good sample. He would have macroscopically selected from the mass in exhibit 42 six hairs covering the range of macroscopic characteristics e.g., length and colour, and mounted these individually on 25 mm x 100 mm microscope slides marked "A" to "F". Fifteen to twenty of the remaining hairs would then have been mounted on a 75 mm x 100 mm microscope slide (the "*bulk mount*"). Each slide would have been marked with the file and exhibit numbers, the number of hairs, their lengths and his initials as required by the Methods Manual.³⁸

The carpet from the cargo area of the van (exhibit 141) was examined in Room 211 using a low power mobile microscope. The twenty-five hairs observed were removed with bare fingers or forceps. Although Mr. Christianson explained that he does not know any details about the van (e.g., make, model, year) or its usage, based on his previous experience with carpets from the trunks of vehicles, he was surprised at the number of hairs recovered from this type of exhibit. These Q hairs were mounted individually on 25 mm x 100 mm microscope slides and labelled.

Most of the other exhibits were examined in Room 210 using a stereo microscope. Nine hairs were recovered from exhibit 134 (vacuumed debris from the van), one of which turned out to be animal. These also were mounted and labelled individually. Twenty-one Q fibres were found on seven of the exhibits (36, 60, 76, 78, 93, 115, and 134) but, although they required a significant amount of microscopic comparison work, none were subsequently found to be consistent with the fibres of the van carpet. Mr. Harder's clothing, exhibits 115 (a jean jacket) and 116 (a sweat shirt), were in such poor condition that Mr. Christianson did not bring them into the H&F Section area but chose to examine them in Room 130, a storage area in the basement. Nothing of interest was found on them. There would have been little value in looking for fibres from Mr. Harder's clothing on the exhibits from the van because the sweat shirt was not an outer garment and the jean jacket would have been of blue denim fibres which are ubiquitous and of little evidential value.

One hair (exhibit 140) recovered from the van by the police was submitted in a separate vial and was mounted as the other Q hairs.

The microscopic comparisons of the mounted Q hairs with the mounted K hairs would have been made at a magnification of 100x–125x using a comparison microscope in Room 214.

³⁸ H&F Methods Manual, III.C.2.a.iv

The process is described in the Methods Manual.³⁹ This detailed work would have been done over the course of several days because it is quite intensive and visual fatigue can limit effectiveness. Comparisons which were not clear-cut would have been revisited, sometimes several times. Eventually, Mr. Christianson concluded that hair Q5 from exhibit 134 was consistent with K hair A from exhibit 42, hair Q13 from exhibit 141 with a hair on the bulk mount (this hair would have been marked on the slide with a pen), and hair Q29 from exhibit 141 with another hair on the bulk mount. These comparisons would have been 1:1 along the entire length of the hairs. Although hair Q29 was described in his notes as "broken", Mr. Christianson believed that the break must have been just above the root allowing an almost complete 1:1 comparison or he would have not called it "consistent". These examinations and conclusions were as described in the Section Manual:

"If the questioned hair fits within the range of characteristics of the known sample and also is similar in all major characteristics to at least one hair with the known sample, its characteristics varying in a similar manner along the length of the shaft and across the diameter (cross-section), then the questioned hair is said to be consistent with having originated from the same person as the known sample."⁴⁰

All of the other Q hairs were sufficiently different from the Ks to be marked as "not consistent" with the Ks. The Section Manual states:

"If the dissimilarities between the questioned hair and the known sample are not quite so marked as in III.C.4.f.i, but are still sufficient for elimination purposes, it is stated that the questioned hair is not consistent with the known sample."⁴¹

There is minimal detail about the observations on the Q hairs in Mr. Christianson's work notes. He advised that this was normal practice in the H&F Section (and in many other forensic laboratories) at the time. The Methods Manual states:

"Questioned hairs are described only to the extent that they are dissimilar to a standard sample" and "If a questioned hair is similar to one or more hairs from a known sample, this is noted and only the length of the hair, the condition of the root, and any unusual features are described."⁴²

³⁹ Ibid, III.C.4

⁴⁰ Ibid, III.C.4.f.iv

⁴¹ Ibid, III.C.4.f.ii

⁴² Ibid, III.C.4.d

Mr. Christianson believed that this policy was changed sometime later, possibly in the mid-1990s, and the same "Hair Data Worksheet" form used to describe K hairs was then used to describe Q hairs as well. (This was confirmed through review of the two proficiency tests performed by Mr. Christianson described above; the one done in 1994 has the brief descriptions of the Q hairs seen in his notes in the Harder case but the later test in 1996 has the Q hairs described in more detail on the same form as the Ks (but in somewhat less detail than the Ks.)

The current LSM states that:

*"Case Notes will record in detail all examinations, testing and analyses done in the case, and include the interpretation of data obtained. Notes are made at the time of observation and are incorporated in the Working File in their original format."*⁴³

No photographs were taken of the "consistent" hairs. Mr. Christianson stated that it was not H&F Section practice to photograph positive comparisons (and it was not required by the Methods Manual) because such photos had "the potential to be misleading." While such photographs were sometimes taken in other forensic laboratories during this period, they were not common practice.

Mr. Christianson also advised that no one else in the Section looked at the hairs he examined. As discussed above, this was not required by any policy in effect at the time. He believes that sometime in the mid- to late 1990s, probably after the Kaufmann report⁴⁴, it did become normal practice for another H&F examiner to look at forensically significant comparisons under the microscope.

Several of the exhibits received (122-127) were not examined; these had been taken from Mr. Harder's truck. Mr. Christianson had been informed that Mr. Driskell was known to have been in this truck and so believed there would be no evidential value in finding hairs or fibres attributable to Mr. Driskell on these exhibits. The absence of such fibres also would be of no value since "absence of evidence is not evidence of absence."

No K hairs were received from any suspects or other potential sources of hair in the case. While it would be normal practice to request such samples, and Mr. Christianson believes such a request would have been made, such samples are not always provided.

There is only one notation in the work notes about a discussion with an investigator. It deals with a discussion about Mr. Christianson's reasons for not performing some examinations that had been requested. It was not then normal practice to record conversations or discussions

⁴³ Laboratory Policies and Procedures Manual (June 17, 1998 with subsequent revisions); Chapter 2 "Laboratory Operations - General", I.1.d

⁴⁴ Kaufmann, The Honourable Fred; "The Commission on Proceedings Involving Guy Paul Morin", 1998

with investigators in the work notes. This practice changed following the Kaufmann Report.

D. Mr. Christianson's Report

Mr. Christianson's Forensic Laboratory Report dated 91.01.09 is in the standard, structured format described in the LSM which suggested sections headed "GENERAL", "PURPOSE", "METHODS", "RESULTS", "CONCLUSION", "REMARKS", and "DISPOSITION OF EXHIBITS"⁴⁵, except that it does not contain sections labelled "METHODS", "RESULTS", or "DISPOSITION OF EXHIBITS". The disposition of the exhibits is included in the "REMARKS" section of Mr. Christianson's report, and his results are incorporated into the "CONCLUSION" section.

The "PURPOSE" of the examinations is stated in the Report to be:

"To examine Exhibits 134, 140, and 141 for the presence of any scalp hairs consistent with having originated from the same individual as the known scalp hair samples, Exhibits 42 and 48, purportedly from the deceased" and "To examine Exhibits 20, 36, 44, 47, 60, 76, 78, 93, 94, 95, 115 and 116 for the presence of any textile fibres consistent with those employed in the construction of Exhibit 141."

It was not common practice in most forensic laboratories in 1990/91 to include such an explicit statement of purpose in their reports. Since most labs direct their reports to the investigator, the purpose would be considered implicit rather than being explicitly stated. The "PURPOSE" stated reflects the examinations requested by the investigator.

The wording of Mr. Christianson's conclusions follows the guidelines provided in the Methods Manual as discussed above.

"a. Scalp hairs consistent with having originated from the same person as the known scalp hair samples, Exhibits 42 and 48⁴⁶ purportedly from the deceased, were found as follows:

Exhibit 134: one (1) scalp hair
Exhibit 141: two (2) scalp hairs

b. No textile fibres consistent with those employed in the construction of Exhibit 141 were found on any of Exhibits 20, 36, 44, 47, 60, 76, 78, 93,

⁴⁵ Laboratory Services Manual (28 April, 1993): Chapter 2 "Laboratory Operations - General", J.2

⁴⁶ According to his work notes, Mr. Christianson did not use the known hairs in Exhibit 48 for his comparisons.

94, 95, 115 or 116."

There was nothing particularly distinctive about the K hairs; they were described in his notes as "blonde" to "medium warm brown", 75 to 105 mm in length, the pigment was small and uniform, the texture was smooth, etc. Mr. Christianson advised that he considered the comparisons to be "Positive" but not "Strong Positive" as described in the Manual. He explained that his interpretation of "consistent with" was that "the chances are not very high that the hairs originated from different sources."⁴⁷ Based on the microscopic characteristics described, many hair and fibre examiners would have agreed with this explanation although most would have added that the basis for this conclusion was that the hairs were "microscopically similar", or some such description.

The two page Forensic Laboratory Report is briefer than what would have been the general practice in such a case in many forensic labs in the 1990/91 period. Mr. Christianson stated that it was normal practice in the FLS to not include mention in the Report of, for example, non-matching scalp hairs such as the seven in exhibit 34, the one in exhibit 140, and the twenty-two on exhibit 141. The policy about reports in effect in 1991 included the following guidelines⁴⁸:

"RESULTS – states briefly the results obtained from the analysis of physical evidence or hypothetical data."

"CONCLUSION – fully addresses the PURPOSE of the analysis and states the forensic significance that the analyst was able to deduce from the results obtained."

It was more general practice in forensic labs in this period to include in their reports information about all their findings, such as the number of hairs found on an item, even those which were not consistent with the knowns. Such information may or may not be of any value to anyone in a particular case, something which is often unknown to the forensic scientist.

The current FLS Policy Manual describes a similar format for reports except that the word "briefly" has been deleted from the description of "Results", and the "Conclusion" is to describe:

"The forensic significance that the examiner was able to deduce from the results obtained in answering the purpose of the analysis or examination of the exhibit material. When applicable, significance is discussed in terms of associations"

⁴⁷ Personal discussion with Mr. Christianson, June 27, 2006

⁴⁸ Laboratory Services Manual (28 April, 1993): Chapter 2 "Laboratory Operations – General" J.2.a.4 and 5

which can or cannot be drawn between:

1. parties involved in the occurrence which led to the request for analysis,
2. locations of the occurrence which led to the request for analysis and/or
3. objects involved in the occurrence which led to the request for analysis."⁴⁹

E. Supervisory Review of the Case File

It is normal practice now in forensic laboratories for laboratory reports to be subjected to an "administrative review" (for editorial correctness and consistency with laboratory policy) and a "technical" or "peer review" (a review of the notes, data and other documents which form the basis for a scientific conclusion.⁵⁰) A technical review can only be adequately performed by someone with the relevant technical qualifications; an administrative reviewer does not require such qualifications.

In 1990/91, the LSM required what were essentially administrative reviews by both the Section Head and the Assistant Laboratory Manager of all reports issued by their staff.⁵¹ Both of these reviews were for "congruence between PURPOSE and CONCLUSION", "correct spelling and grammar" and, in the case of the Assistant Laboratory Manager, for "readability from the recipients perspective." The review of the report by the Section Head also included "scientific validity" in its requirements. It is not clear how scientific validity could be assessed from a review of only the Laboratory Report.

The Section Head was also required to:

*"Review and initial the work notes of at least 10% of the requests for analysis received by each specialist and technologist in your section on a bi-monthly basis."*⁵²

This would constitute a technical review. James Cadieux, Mr. Christianson's Section Head at the time of the Harder case, advised that he performed technical reviews on most of the H&F Section

⁴⁹ Laboratory Policies and Procedures Manual (June 17, 1998 with subsequent revisions): Chapter 2 "Laboratory Operations - General", J.2.a.4/5

⁵⁰ Glossary in the ASCLD/LAB Accreditation Manual (2003)

⁵¹ Laboratory Services Manual (28 April, 1993): Chapter 2 "Laboratory Operations - General" J.4.&5

⁵² Ibid, section 1.4.a

case files and would have done so in the Harder case. This review would not, however, have required him to examine the evidence hairs (his initials would have appeared on the relevant case notes if he had). Because this review was limited to a paper review, both Mr. Christianson and Mr. Cadieux agreed that it would not have been capable of validating Mr. Christianson's conclusions because of the minimal descriptions in the work notes of the Q hairs.

In the Harder case file, these reviews were documented with the initials of the Assistant Lab Manager and the date 91-01-09 on the main file copy of Mr. Christianson's Laboratory Report and those of the Section Head dated 91-01-11 on the H&F Section file folder. The master case file folder (containing the case files prepared by each of the Sections involved in the case) bears the initials of the Assistant Lab Manager and the date 90-10-03 (the date the master file was opened) and the initials of the FLS Winnipeg Lab Manager dated 91-10-11. The former indicated confirmation that the case met the requirements for acceptance i.e., it originated with an authorized user agency and dealt with a criminal matter, while the latter indicated a review of the Laboratory Report made during a scheduled Quality Review by the Lab Manager.

The current Policy Manual requires four different reviews to be conducted before a final report is released.⁵³ Three of these are essentially administrative reviews and the fourth is technical. The technical review is described as:

*"A complete reinterpretation of the data and observations that have been collected in the Working File. This review assesses the validity and adequacy of the tests applied in the case, the reliability of the data collected, the soundness of the interpretation of that data and the degree to which conclusions answered the original question." Also, "the reviewer must have appropriate scientific or technical knowledge and experience."*⁵⁴

F. Mr. Christianson's Testimony

Based on the transcript of Mr. Christianson's testimony at the trial of Mr. Driskell⁵⁵, his testimony was, for the most part, quite straight forward and in accordance with what most other hair and fibre examiners with the same observations would have given at the time.

In direct examination, he accurately described his qualifications and there was no challenge to them. He described the items he examined as they were listed in his report (including exhibit 48 which, as noted above, he did not examine), and the examinations he made

⁵³ Laboratory Policies and Procedures Manual (June 17, 1998 with subsequent revisions): Chapter 2 "Laboratory Operations - General", I.1.1.2

⁵⁴ Ibid, section B.6 "D-Review"

⁵⁵ Transcript of Testimony of Tod Christianson in R. V. Driskell (Date unknown)

of them. His description of the Q hairs he compared with the K hairs and his conclusions about them ("consistent with") were also in accordance with his report.

In response to a question from Crown counsel about what he meant by "consistent" he responded:

*"And when I say that a hair is consistent, as I have in this case, that means that the hairs have all of the features that the known samples have, within normal biological variation, and there's nothing, nothing that you would -- that you can't account for. So that if there was some feature, for example an abnormal colour or something like that, that would cause that hair to be eliminated. So, it falls exactly within the range of the variation of the known sample with no unaccounted for differences whatsoever."*⁵⁶

As sometimes happens in oral testimony, what was said in the above paragraph and what was intended do not quite gibe. During our interview, Mr. Christianson agreed that what was intended was that all of the characteristics observed in the Q hairs could be found within the K sample rather than the reverse.

He then went on to testify:

*"And the point about this type of analysis is that it's not a positive identification, all right, because the only way you could do that is to look at all the hairs from all the person's head (sic) that exist, and that's an impossibility. But I can tell you, based upon my experience, that the chances of just accidentally picking up a hair and having it match to a known sample are very small. So if the hair is consistent, that means it either came from the same person as that known sample or from somebody else who has hair exactly like that."*⁵⁷

This statement is in accordance with his training and would be agreed with by virtually all hair examiners, with the exception of the mention of the chances of a random match being "very small", which some might not agree with.

In cross-examination, Mr. Christianson quite properly responded in the affirmative to a suggestion that "you can't make a positive examination but you could narrow it down considerably?"⁵⁸ He then went on, in response to questions about population distribution of hairs, to say that he didn't know what the numbers would be and that:

⁵⁶ Ibid p. 148

⁵⁷ Ibid pp. 148/149

⁵⁸ Ibid p. 151

"In fact, I specifically address only the questioned hairs and the known sample that I'm dealing with, and I conduct my comparison only on those, and I don't consider the possibilities of other people, only the standards that I am looking at."

This is an important point and one that is often not recognized by some hair examiners or by persons reading or hearing their conclusions. Hair examiners can generally quite accurately distinguish between hairs with differing microscopic characteristics. That is what they do in the laboratory. This is quite a different thing, however, from distinguishing between hairs from different people, particularly if the population of potential sources is large or unknown.

During cross-examination, Mr. Christianson also acknowledged that he could not determine how or when the hairs got onto the van carpet, and that he did not receive known hairs from any other source. He also explained why he did not look for hairs similar to Mr. Driskell's in items from the grave site or in Mr. Harder's vehicle.⁵⁹ These explanations were quite reasonable.

There is one example of unfortunate wording that might be interpreted as indicating a possibility of bias on Mr. Christianson's part. In outlining a discussion with the investigator he testified:

*"And so the idea was to try and establish some association between the deceased and the accused's vehicle, which I believe was a van."*⁶⁰

It is not clear whether this is a description of the investigator's "idea" or Mr. Christianson's. If the latter, it would have been more appropriate to say that his objective was to look for hairs on the van carpet and compare them with hairs from the grave site. If the former, it reasonably describes what the investigator was looking for.

In an attempt to assist the court in understanding the significance of his "consistent with" conclusion, Mr. Christianson provided a presumably well-meaning but not particularly relevant analogy:

"And in order to give you a sort of a guideline or a rule of thumb to determine how much weight to put on that, you can look around the room and just see how many people even have similar hair styles. If you look at one hair and you examine those 20 features, it's got even more information than you can see by looking at different lengths of hair and different colours and different hair styles. That's not to say that you can't accidentally meet somebody or two people on the

⁵⁹ Ibid p. 155

⁶⁰ Ibid p. 155

street that have exactly the same kind of hair, just like sometimes you accidentally mistake one person for another, but the chances are not very high. So that's basically what hair comparison is like."⁶¹

The relevance of hair styles to microscopic hair comparison is not particularly apparent.

G. The FSS mtDNA Report

As noted in the Introduction, microscope slides containing the K hairs and the three Q hairs which Mr. Christianson had found to be consistent with the Ks were submitted to the UK Forensic Science Service (FSS) Laboratory in Birmingham, England in June, 2002. There, the hairs were analyzed for mtDNA by Mr. John Bark. In his report, Mr. Bark stated that:⁶²

"The techniques employed are extremely sensitive. Wherever possible a sample is tested twice. Obtaining the same result from two independent tests provides confidence that the sequence obtained relates to the item under test and has not arisen from contamination during the analysis."

Further:

*"Where a mitochondrial DNA sequence differs at one or more positions the results indicate that the hair and the reference sample are from different individuals. The strength of this conclusion increases with the number of differences."*⁶³

He reported that hair Q5 (from the vacuumed debris) had four differences from the K hairs, Q 13 (from the carpet) had nine differences from the Ks, and Q 29 (from the carpet) had five differences from the Ks. Each of the Qs also had multiple differences from each other.⁶⁴ As a result, Mr. Bark concluded that:⁶⁵

"The mitochondrial DNA findings do not support the proposition that the hairs found in the van originated from Perry Harder." (Emphasis in the original)

"The findings provide extremely strong support for the proposition that the hairs

⁶¹ Ibid p. 149

⁶² FSS Statement of John Edward Bark re: James Driskell, December 02, 2002, p. 3

⁶³ Ibid, p. 4

⁶⁴ Ibid, p. 6

⁶⁵ Ibid, p. 5

from the van originated from three individuals, none of whom was Perry Harder."

It should be noted that "extremely strong" is the highest of seven rankings of support used by the FSS to explain the value of a "match or non-match."

Since microscopic hair comparison and mtDNA analysis are based on totally different parameters, it is not surprising that the latter sometimes provides a different conclusion from the former. Hair examiners, including Mr. Christianson, acknowledge that more than one person can have hairs that are microscopically similar. What is surprising is that the mtDNA results in this case indicate that the Q hairs likely came from three different persons, all of them different from the source of the K hairs.

During our discussion on June 27, 2006, Mr. Christianson stated that he was very surprised by Mr. Bark's findings. Despite the considerable thought he has given to the mtDNA conclusions, he is unable to explain the differences.

The only possible explanations for the different conclusions⁶⁶ (assuming that the hairs examined by Mr. Christianson and Mr. Bark were the same hairs) are:

1. Mr. Christianson's findings of similar microscopic characteristics for the hairs were incorrect, or
2. Mr. Bark's analyses were not correct, or
3. The microscopic similarities of the hairs was a chance occurrence.

As discussed above, so far as is known, no one other than Mr. Christianson has actually looked at the hairs under a microscope and his work notes are not sufficiently detailed to permit an assessment of the validity of his observations. The only way to confirm his observations would be for another qualified examiner to examine the hairs microscopically. Given their history and the fact that at least some portion of them has been removed for the mtDNA analysis, a second microscopic examination may not be feasible or even helpful.

While the FSS work notes have not been examined, the quality assurance procedures of the FSS are well known to be very thorough. The differences between the hairs as reported by Mr. Bark are quite clear and are based upon "two independent tests".

⁶⁶ Although the possibility of the hairs being contaminated, before or during their original collection, during Mr. Christianson's examination of them, or during their removal from the slides for the mtDNA analysis, is real, it would be expected that such contamination would be limited to the surface of the hairs. I would assume that the FSS protocol for their mtDNA analysis would ensure that any such contamination is removed. Even if it was not removed, it would seem unlikely that such contamination would be from three different persons. I have not therefore considered contamination as a possible explanation.

The possibility of the conclusions being a chance occurrence seems remote but must be considered.

IV. POTENTIAL SYSTEMIC ISSUES

As noted in the Introduction to this report, one of the mandates of the Commission is:

“to consider the role of the RCMP Laboratory in the prosecution of James Driskell, and to review any systemic issues that may arise out of its role.”

To assist in this regard, I was asked to “report on any systemic concerns that arise from your review.”⁶⁷ Although I have described in the body of the report a few practices or procedures which I believe were not generally accepted in the forensic science community in 1990/91 (and certainly not in 2006), none of them, in my opinion, rise to the level of being considered “systemic issues.”

There are, however, a few matters which the Commission may wish to discuss as potential systemic issues and, possibly, to make recommendations about. These will be discussed here.

A. The Value of Microscopic Hair Comparison

Insofar as the RCMP FLS is concerned, this topic is no longer relevant. In April 2001, FLS decided to phase out microscopic hair comparison and the last case was reported in April, 2002.⁶⁸ Also in 2002, FLS went through a major restructuring as a result of which FLS Winnipeg ceased operations in all forensic science disciplines except Toxicology.

Hair examinations in FLS are now restricted to determining whether they are of human or animal origin; if human whether they possess a root sheath suitable for DNA analysis; and, if suitable, the body area of origin.⁶⁹ These examinations are made in the Evidence Recovery Units (ERUs) which are located in FLS Vancouver and Ottawa. (An example of changes in procedures between 1990/91 and 2006 is provided by the fact that, although microscopic hair comparisons are no longer made, ERU examiners, who determine only the suitability of a hair for nDNA analysis and the body area of origin, are required to “submit the hair(s) and work notes to

⁶⁷ Letter of Retainer, M Code to D Lucas, May 01, 2006

⁶⁸ FLS Memo from the Acting Program Manager Evidence Recovery and Biology Services, “Summary of Policy Changes re: Forensic Hair Examinations” (July 16, 2003)

⁶⁹ Evidence Recovery Unit Methods Guide (May 01, 2003 with subsequent revisions)

another Search Technologist/Search Coordinator for peer review.”⁷⁰)

While some other forensic labs may have adopted a policy similar to that of FLS with respect to hair comparisons, such comparisons continue to be performed in many labs. The basis for this is articulated in the 2005 Review by Houck and Bisbing:⁷¹

“Despite the clamoring of a few legal experts for the wholesale demise of forensic hair examinations [89,90]⁷², a considered microscopical analysis of hairs by a qualified forensic hair examiner can add immeasurable value to both the investigative and judicial phases of a case. The literature of hair microscopy and genetics is rich and full; multiple sciences, including anthropology, biology, chemistry, histology, and molecular biology, contribute to this peer-reviewed literature. Forensic hair examiners would be wise to immerse themselves in it.”

They went on:

“Mitochondrial DNA has galvanized the use of hair as evidence and, when combined with microscopical examination, has enhanced its significance. Microscopy is not a ‘screening’ test and mtDNA analysis is not a ‘confirmatory’ test – Either method can provide probative information to an investigator. One approach is not superior to another as both analyze different characteristics.”

Another paper by different authors from a mtDNA laboratory states⁷³:

“We have observed cases where the microscopic evaluation was discordant with respect to mtDNA analysis, however, we have observed many cases in which the microscopic evaluation was concordant with respect to the mtDNA analysis. In these cases, a microscopic evaluation performed by an experienced examiner was extremely useful in limiting the number of hairs which were then recommended for DNA testing. Therefore, we advocate hair microscopy as an adjunct to DNA testing, if the examiner is experienced and understands the

⁷⁰ Ibid, section IV.2.F.1.e

⁷¹ Houck, MM and RE Bisbing; “Forensic Human Hair Examination and Comparison in the 21st Century”; Forens. Sci. Review, Vol. 17, 51-66 (2005), p. 63

⁷² Citation 89 in the original is: Starrs J, “From bad to worse: Hair today — Scorned tomorrow”; Scientific Sleuthing Review 21:1; 1997. Citation 90 is: Strauss MAT, “Forensic characterization of human hair I”; Microscope 31:15; 1983

⁷³ Melton, T, G Dimick, B Higgins, L Lindstrom and K Nelson; “Forensic Mitochondrial DNA Analysis of 691 Casework Hairs”; J. Forens. Sci., Vol. 50, 73-80 (2005), p. 80

limitations of this largely descriptive science. Because of the high cost of mtDNA analysis, it is likely that hair microscopy will long be a useful tool for screening of large numbers of hairs prior to submission and we urge the continued training and availability of hair examiners to aid the DNA testing community."

Although these two sets of authors have somewhat different takes on the usefulness of microscopic hair comparison, they agree that it still has a place in forensic science. Another laboratory states an intermediate view of the value of such comparisons⁷⁴:

"Forensic hair microscopy is good for exclusionary purposes. Within limits of the factors that affect the significance, it can be good for inclusionary purposes (though it never individualizes)." (Emphasis in the original)

Cases in which results are required quickly, appropriate samples are available, and the possible number of sources is known and limited, are the types of cases where microscopic hair comparison can be useful.

As discussed above, experienced hair examiners are very good at discriminating between hairs with different characteristics. For example, in his seminal research on the topic, Barry Gaudette⁷⁵ reported that 366,630 comparisons were made between 861 hairs from 100 different individuals and only nine pairs were found to be indistinguishable.

However, the usual question in forensic science is not "*Are these two hairs indistinguishable?*", rather it is "*Are these two hairs from the same person?*" - quite a different challenge. Mr. Gaudette recognized this difference in a later paper when he stated:

"In my research, the population considered was not a population of people, but rather a population of hair comparisons." ⁷⁶

This distinction has not always been understood by some hair examiners and recipients of their results.

For example, in his original paper, Mr. Gaudette concluded that:

"---if one human scalp hair found at the scene of a crime is indistinguishable

⁷⁴ The Centre of Forensic Sciences; "*Hair Information Sheet*" (ca 2004)

⁷⁵ Gaudette, BD and ED Keeping; "*An Attempt at Determining Probabilities in Human Scalp Hair Comparison*"; J. Forens. Sci., Vol. 19, 599-606 (1974)

⁷⁶ Gaudette, BD; "*A Supplementary Discussion of Probabilities and Human Hair Comparison*"; J. Forens. Sci., Vol. 27, 279-290, (1982)

from at least one of a group of about nine dissimilar hairs from a given source, the probability that it could have originated from another source is very small, about 1 in 4500."

This statement has been frequently cited, generally misunderstood, and never widely accepted in forensic science e.g.,⁷⁷. In Gaudette's paper, however, he reported that there were nine pairs of hairs from thirteen of the 100 persons in the study that could not be discriminated. One of the sources had at least one hair similar to three of the other sources and two sources had hairs similar to at least two other sources.

Houck and Budowle compared the results of cases in the FBI Laboratory between 1996 and 2000 in which both microscopic comparisons and mtDNA analyses of hairs were performed⁷⁸. There were 170 microscopic hair comparisons which were analyzed for mtDNA. Of the 80 hairs which were microscopically associated, nine were excluded by mtDNA (about 11%). None of the 19 microscopic exclusions were associated by mtDNA.

During our discussion on June 27, 2006, Mr. Christianson stated that he believed that the chances of two "consistent" hairs being from two different persons are somewhere between 1 in 100 and 1 in 1,000. His basis for this belief is his experience and the 100 hair test he and all other FLS understudies were required to take. The apparent difference between the studies cited and Mr. Christianson's experience may be due to the fact that in most hair cases examined in a forensic laboratory, the hairs are not from a random population, and the number of potential sources is usually limited.

Current views in forensic science about the significance of microscopic hair comparison have been summarized by Deedrick⁷⁹:

"The range of opinions concerning hair examinations includes:

Nothing about hair is comparable to the specificity of fingerprints, and at best, the probability of establishing identification from hair is no greater than the probability of determining identification using the ABO blood group system;

Research studies have shown that hairs from two individuals are

⁷⁷ Barnett, PD and RR Ogle; "Probabilities and Human Hair Comparison"; J. Forens. Sc., Vol. 27, 272-278 (1982)

⁷⁸ Houck, MM and B Budowle; "Correlation of Microscopic and Mitochondrial Hair Comparisons"; J. Forens. Sci., Vol. 47, 1-4, (2002)

⁷⁹ Deedrick, DW; "Hair, Fibres, Crime, and Evidence"; Forens. Sci. Communications, Vol. 2 Number 3(2000)

distinguishable; that no accidental or coincidental matches occurred; and that such accidental or coincidental matches would, in actual casework, be a relatively rare event; and

The significance of a hair match is a median point between the above statements."

In his report on the Morin Inquiry, Judge Kaufmann explored the issue of the use of microscopic hair comparisons quite extensively.⁸⁰ His formal recommendation was that:

"Trial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt. Evidence that shows only that an accused cannot be excluded as the donor of an unknown hair (or only that an accused may or may not have been the donor) is unlikely to have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt."

In his discussion of the recommendation he added:

"Nothing that I have said is intended to inhibit the informed use by investigators of hair comparison evidence for investigative purposes. Similarly, nothing that I have said is intended to inhibit the use of this evidence for exclusionary purposes or to discriminate from within a finite group of persons who could have contributed an unknown hair." (Emphasis in the original)

B. Impartiality in Forensic Science Laboratories

As discussed above, the forensic science work in the Harder case was performed, at the request of the Winnipeg PD, in the Winnipeg Forensic Laboratory of the Forensic Laboratory Services component of the RCMP. The H&F Section Head reported to the Manager of FLS Winnipeg who reported to the Assistant Commissioner FLS in Ottawa who in turn reported to the Deputy Commissioner National Police Services.

The FLS mission in 1990/91 was, and today is⁸¹:

"---supports the mission of the RCMP by continuously providing scientific and technical assistance to the Canadian criminal justice system through the delivery of a quality forensic service in a timely manner."

⁸⁰ Kaufmann, The Honourable Fred; *"The Commission on Proceedings Involving Guy Paul Morin"* (1998), pp. 311 - 324

⁸¹ Laboratory Services Manual: Chapter 2 *"Laboratory Operations - General"* (28 April, 1993)

"The primary users of this service are Canadian law enforcement agencies involved in criminal investigations. Other users include government agencies whose mandate includes a law enforcement function."

"The ultimate users of this service are the criminal courts."

There is nothing apparent in any of the material that I have reviewed related to the Harder case that suggests in any way that the examinations, conclusions or testimony were somehow influenced by the fact that FLS Winnipeg was a component of a police agency. It is a fact, however, that, although there are many excellent forensic laboratories within law enforcement agencies, there have been instances of problems with some others e.g., the FBI Laboratory⁸² and the Houston PD Laboratory⁸³. There have also been problems in forensic laboratories that were not part of law enforcement agencies. Examples of these are described in the Kaufmann Report.⁸⁴

In addition to law enforcement agencies, forensic labs are also administratively situated within prosecutor's offices, coroner/medical examiner's offices, health or other government departments, universities and colleges. Some lab systems are themselves a separate department of government or even a semi-autonomous government agency. There are also some private forensic labs. Most are funded directly by some level of government; others operate on a cost recovery basis or on a contractual arrangement with their clients. Regardless of organizational structure or method of funding, the vast majority of their work is for law enforcement agencies and the funding is therefore from government, whether directly or indirectly.

In most of the cases where there have been problems in forensic labs, the structure or administrative location of the laboratory had little or nothing to do with the cause. In the case of the Houston PD, for example, the problems were due in part to inadequate funding and partly to an almost total lack of scientific leadership. In the FBI Laboratory, one of the problems was the inability of some of the examiners, who were also sworn Special Agents with field investigation backgrounds, to distinguish between the standards of the field investigator and those of the laboratory examiner. In other labs, problems have related more to the competence or specific performance of individual examiners rather than to the structure of the laboratory.

In the Harder case, the work was performed by a qualified examiner using procedures that were well established and accepted. The staff and management of FLS are all civilians and

⁸² Bromwich, Michael R; *"The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases"*, (April 1997)

⁸³ Bromwich, Michael R; *"Fifth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room"*, (May 11, 2006)

⁸⁴ Kaufmann, The Honourable Fred; *"The Commission on Proceedings Involving Guy Paul Morin"* (1998), pp. 256-291

there is strong scientific leadership. FLS Winnipeg is in a separate building, remote from any other police building.

If there is any issue associated with a competent forensic laboratory being within a law enforcement agency, it is primarily one of a perception of a lack of impartiality. After thoroughly considering this topic, Judge Kaufmann did not make any recommendation about the administrative location of a forensic laboratory. He did say, however:

"Since I am not convinced that removal of the Centre from its placement within the Ministry would have appreciable effect on its impartiality, the real issue is the appearance of impartiality. Dr. Tilstone framed the issue well: independence does not guarantee impartiality; but it can assist in removing an entrenched and deeply rooted perception of bias or level of distrust which exists." (Emphasis in the original)

There is no question about the importance of objectivity and impartiality on the part of forensic scientists. They are virtues that may be elusive but which must be continuously strived for and for which forensic scientists and their supervisors must be constantly alert. Whether, a forensic scientist is within a law enforcement agency or some other more independent entity, makes little or no difference. Their principal clients will be law enforcement officers and the primary function, in the first instance at least, will be to assist investigations. As noted by William Rodger, the former Director of the Strathclyde Police Laboratory in Glasgow⁸⁵:

"The function of the forensic scientist is to assist with the investigation of crime, which is carried out primarily by police officers. The forensic scientist, therefore, assists the police officers. To state that in no way to state that the integrity of the forensic scientist is suspect."

There may be some management/logistical advantages to the laboratory being within a law enforcement agency; there undoubtedly are some to being outside of law enforcement. History, tradition, local politics, personnel, personalities and "depth of pockets" are examples of factors that impact on the location of a laboratory. Objectivity and impartiality are not among these factors; they are a given regardless of the organization.

C. Communication of Forensic Science Information

One of the challenges faced by all forensic scientists is how to effectively articulate the results and the significance of their examinations. This is particularly difficult for types of evidence for which definitive results or population statistics are not available. Most trace evidence types, including hair comparisons, are of this type.

⁸⁵ Rodger, WJ; "Does Forensic Science Have a Future?"; J. Forens. Sci. Soc., Vol 24 #4, (1984)

As noted above, Mr. Christianson's Report in the Harder case was very brief and contained only his conclusions with no indication of how they were arrived at. It was, however, in accordance with FLS policy at the time. His testimony also was generally similar to what most other hair and fibre examiners with the same observations would have given at the time.⁸⁶

In his report on the Morin Inquiry, Judge Kaufmann made several recommendations about the wording of reports and testimony. He suggested that they should use language "*which is not potentially misleading*", and should not use terms such as "*match*" and "*consistent with*" in the context of hair and fibre comparisons. He specifically recommended that:⁸⁷

"Certain language enhances understanding and more clearly reflects the limitations upon scientific findings. For example, some scientists state that an item 'may or may not' have originated from a particular person or object. This language is preferable to a statement that an item 'could have' originated from that person or object not only because the limitations are clearer, but also because the same conclusion is expressed in more neutral terms."

I, and I suspect many other forensic scientists, are not among those who would use "*may or may not*" in a report. It is an absolutely meaningless expression that could be said by anyone without even making any examinations. Having said that, I do not have any perfect suggestion to make for expressing the significance of a hair comparison. The most commonly accepted one currently is along the lines of:

"The Q and K hairs are microscopically similar and could have originated from the same person or from another person possessing hair with the same microscopic characteristics. Microscopic hair comparison is not a means of personal identification."

The basis for and limitations of hair comparison should be included in all reports and testimony.

⁸⁶ I have also been provided with partial transcripts of testimony by Mr. Christianson and Mr. Cadieux in three other cases. In a 1995 case (R. v. Starr), Mr. Christianson's testimony was very similar to that in the Harder case. During cross examination in response to a specific question he did go a bit further in explaining what chances being very small meant when he said "*Based on my experience it would be less than .1 percent.*"

In a 1992 case (R. v. Unger and Houlahan), Mr. Cadieux's testimony was similar to Mr. Christianson's in the Harder case. In cross examination, when asked to give a probability, he carefully referred to a published study without saying whether he agreed with it or not and quoted the Gaudette figure of one in forty-five hundred. In a 1997 case (R. v. Sanderson), Mr. Cadieux described hairs as being "*microscopically consistent*" He also referred to the preference for DNA analysis where possible and was not asked about probabilities. Otherwise his testimony is similar to the earlier cases.

⁸⁷ Kaufmann, The Honourable Fred; "*The Commission on Proceedings Involving Guy Paul Morin*" (1998), pp. 343/344

D. Internal and External Review

The limitations of the internal review of Mr. Christianson's work have been discussed above, as have the changes which have been made in the FLS policies dealing with case review.

In 1990/91, there was essentially no external general review of FLS work although there were periodic reviews made by headquarters staff from Ottawa. For non-accredited forensic labs, this was a common situation.

In 2006, this situation has changed dramatically. All FLS labs are now accredited by the Standards Council of Canada which requires that they have an extensive internal review system in place and that they undergo an intensive external review every two years. ASCLD/LAB accredited labs have similar requirements but are normally only audited externally every five years. There currently are over three hundred forensic science laboratories accredited by ASCLD/LAB.

Testimony monitoring is sometimes done by peer observation when feasible but is more commonly based on written requests for comment from prosecutors, defence counsel and judges.

Proficiency testing is mandated in accredited labs with each examiner being tested at least once per year. The tests are generally external and open (i.e., it is known that it is a test.) Blind tests (i.e., it is not known that it is a test) are extremely difficult to produce for many types of examinations and are therefore much less common.

Disclosure of complete forensic laboratory case files was not a common occurrence in 1990/91 but is much more common today and the contents of the files are significantly more comprehensive.

V. SUMMARY (The relevant section of this report appears in brackets.)

1. In 1990/91, when the Harder case was investigated, microscopic hair comparison was widely used and accepted in forensic science. Nuclear DNA was rarely used for hair comparison, and mtDNA had not yet been introduced for this purpose. (II.A)

2. It was (and still is) generally accepted that well trained and experienced forensic hair examiners can effectively determine that a questioned hair did not originate from the same source as a known sample or, assuming valid samples, that they are microscopically similar and could have originated from the same source (or another source with the same microscopic characteristics.) Regardless of an examiner's expertise, it can never be stated that two hairs came from the same individual to the exclusion of all others. (II.B)

3. Mr. Christianson was well trained and fully qualified to perform the hair and fibre examinations in the Harder case. (III.A)

4. The methods Mr. Christianson used for his examinations were well documented in a Methods Manual and were, with minor exceptions, generally accepted in forensic science. The exceptions were use of lower magnifications than commonly employed, no requirement for protective gloves during examinations, and no requirement for independent verification of conclusions. (III.B)

5. Mr. Christianson's work notes, although in accordance with FLS procedures and general practice in the field at the time, were less detailed than what would be expected in an accredited lab today. This limited his supervisor's ability to validate the results based on his review of the work notes and report. (III.C. and E)

6. The conclusions provided in Mr. Christianson's Forensic Laboratory Report were expressed in terms that were in accordance with FLS guidelines at the time i.e., "*consistent with having originated from the same person*". The basis for the conclusion i.e., microscopic comparison, was not provided. (III.D)

7. The Laboratory Report was very brief and did not mention the other hairs that were recovered from the exhibits. (III.D)

8. Mr. Christianson's testimony was quite straight forward and in accordance with what most forensic hair and fibre examiners, given the same observations, would have provided at that time. He acknowledged that microscopic hair examination does not provide a positive identification and that he could not provide population distribution numbers. The only testimony that some examiners might not agree with is his statement that the chances of a random match between hairs from two different sources are "*very small*." (III.F)

9. Since microscopic hair comparison and mtDNA analysis are based on totally different parameters, it is not unexpected that they will sometimes produce different conclusions. It is, however, surprising that the three hairs which were considered "*consistent with*" the known sample by Mr. Christianson, were considered by the mtDNA analyst Mr. Bark as not only different from the known sample but also different from each other i.e., they were from three different sources. (III.G)

10. Either Mr. Christianson's observations were incorrect, the mtDNA results were incorrect, or the microscopic similarity of the questioned hairs to the known sample was a chance occurrence. The possibility of the latter seems remote but must be considered. (III.G)

11. Microscopic hair comparison continues to be a useful technique in forensic science for exclusionary purposes and may be helpful for inclusionary purposes in certain circumstances. (IV.A)

12. There is nothing apparent in any of the material reviewed to suggest that the forensic examinations, conclusions or testimony in the Harder case were influenced in any way by the fact that they were performed in a laboratory that is part of a law enforcement agency. (IV.B)

13. Reviews, both internal and external, of forensic science laboratories and their work have increased significantly since 1990/91. (IV.D)

VI. REFERENCES

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FSS Statement of John Edward Bark re: James Driskell, 02 December, 2002

Letter of Retainer, M Code to D Lucas, 01 May, 2006

Order in Council re: Driskell Inquiry, 07 December, 2005

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Summary of Discussion of Tod Christianson with D Lucas, 27 June, 2006

Supplementary Report of Cst. CW Pearson 90/10/17

Transcript of Testimony of Tod Christianson in R. v. Driskell (Date unknown)

B. RCMP FLS Documents

Case Receipt Unit SOP: "*Case Receipt and Exhibit Handling*" (16 August, 2003)

Evidence Recovery Unit Methods Guide (17 March, 2006)

Evidence Recovery Unit Learning Guide (02 March, 2006)

FLS Winnipeg Lab File 90-1296

FLS Winnipeg Quality Manual Supplement (02 March, 2005 with revisions in 2006)

Hair and Fibre Section Methods Manual (1983 with revisions in 1984 and 1986)

Hair and Fibre Section Training Manual (Including Instructor's Guide); (Revised Version February, 1985 with subsequent revisions in 1987, 1988 and 1989)

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ibid: Chapter 5 "*Research and Development*" (19 February, 2006)

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Tod Christianson Personnel File (relevant portions only)

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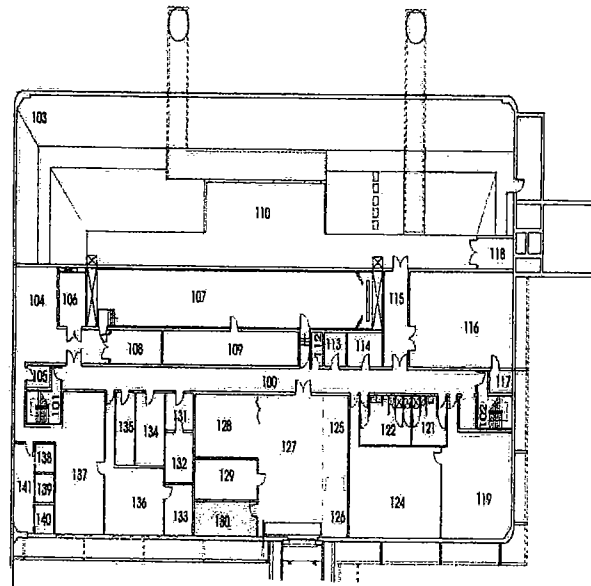
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Transcript (partial) of testimony of Tod Christianson in R. v. Starr (1995)

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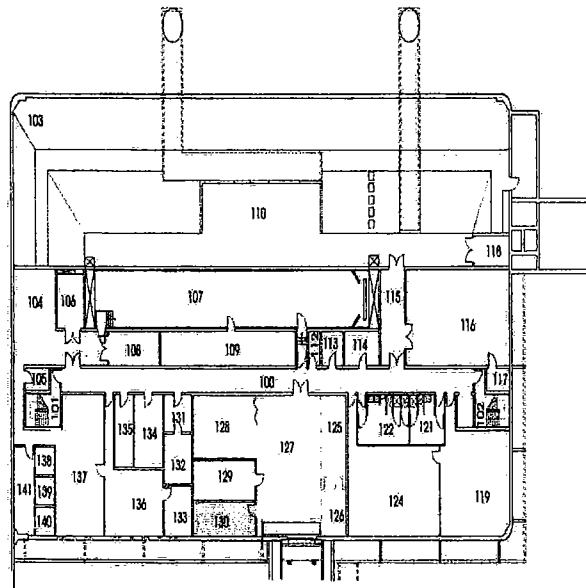
Transcript of testimony of James Cadieux in R. v. Sanderson (1997)

APPENDIX
FLS Winnipeg Floor Plans⁸⁸



Main Floor

⁸⁸ FLS Winnipeg "Quality Manual Supplement" (2006-06-07). Yellow "Hi-Lited" areas are the former H&F Section. The doors between Room 212 and 203 , 212 and 220, 208 and 205 did not exist in 1990/91



Lower Floor

**Addendum to Report on
Forensic Science Matters
to the Commission of Inquiry re: James Driskell**

Douglas M. Lucas MSc, DSc (Hon)

September 11, 2006

It has been brought to my attention that the discussion of the microscopic hair analysis and the mitochondrial DNA test results at pp. 23-24 of my August 17, 2006 Report may not have been entirely clear, and is capable of being misinterpreted. In particular, the concern has been raised that my observation that "[t]he possibility of the conclusions [i.e., Mr. Christianson's conclusions that three questioned hairs were microscopically similar to the hairs from the grave site] being a chance occurrence seems remote but must be considered" (at p. 24; see also p. 33) might be misread as implying that the other two possibilities set out at p. 23 are more likely explanations. This, I should emphasize, is not the point I was attempting to make. Accordingly, in order to clarify my meaning, I have prepared this addendum to my Report expanding on the discussion at pp. 23-24.

The three possible explanations for the apparently divergent conclusions reached by Mr. Christianson and Mr. Bark listed at p. 23 of my Report arise as a matter of logic. The first possibility – namely, that the three questioned hairs were in fact microscopically dissimilar, and that Mr. Christianson erred in concluding otherwise – cannot be ruled out. However, as I explain at p. 23 of my Report, the lack of detail in Mr. Christianson's work notes as to the characteristics of the questioned hairs makes it impossible to assess the validity of his observations from the paper record. The only way of definitely confirming or refuting this possibility would be for another qualified hair examiner to re-examine the hairs using a comparison microscope. If this kind of re-examination had been performed

at the time, it would have given some measure of confidence that Mr. Christianson's microscopic observations were verifiable. However, as explained elsewhere in my Report (pp. 10, 15, 19), the RCMP FLS protocol at the time did not mandate microscopic re-examination of "positive" comparisons by a second qualified hair examiner, and this was apparently not done in this case. Since some or all the hairs have now been consumed by the mtDNA analysis,¹ it may, as stated at p. 23 of my Report, no longer be feasible to conduct a microscopic re-examination of the hairs. As explained elsewhere my Report (pp. 7-8), Mr. Christianson appears to have been a well-trained and generally competent hair examiner. However, the possibility that his observations were inaccurate cannot be ruled out.

The second logical possibility that must be considered is that Mr. Bark's mtDNA analyses were incorrect. As I note at p. 23 of my Report, I have not had an opportunity to examine Mr. Bark's work notes, nor am I an expert in the area of DNA analysis. However, the scientific principles on which mtDNA analysis is based are well-understood, and there is no inherent reason to be sceptical of the general validity of mtDNA analysis. The FSS is a highly reputable forensic laboratory system that is well known to have very thorough quality assurance procedures. Further, as I indicated at footnote 66 on p. 23 of my Report, in the circumstances the possibility that Mr. Bark's results were affected by contamination seem unlikely. While I am not in a position to conclusively eliminate any possibility of error in the FSS mtDNA results, there is no concrete evidence supporting this possibility and it seems to me to be highly unlikely.

¹ Mr. Bark's report does not set out the precise amount of the hairs that were consumed in the mtDNA analysis. However, in their 2005 paper, which I refer to at p. 25 of my Report, Melton et al. note that in their tests of 691 hair samples, the length of hair consumed ranged from 0.2 cm to 4.6 cm, with an average of 1.9 cm \pm 0.83 cm, and that 37.9 % of the tested hairs were entirely consumed in the testing.

I should add that since preparing my Report I have had an opportunity to read the September 8, 2006 letter from Dr. Terry Melton of Mitotyping Technologies to Mr. James Lockyer, and agree with Dr. Melton's observations on the issue of contamination.

The third remaining logical possibility is that both sets of results are "correct" – that is, that the three Q hairs were not Mr. Harder's hairs (as indicated by the mtDNA test results), but were nevertheless microscopically similar to his hairs (as Mr. Christianson concluded). By characterizing this possibility as "remote", as I do in my Report, I do not mean to imply that this is a less likely possibility than the prospect of error in either the mtDNA or the microscopic comparison results. Indeed, the Houck and Budowle study I refer to at p. 27 of my Report raises the possibility that the occurrence of microscopically similar hairs in the population may be considerably higher than was once believed. While the prospect of Mr. Driskell's van containing hairs from three different people that were all microscopically indistinguishable from Mr. Harder's hairs can still be characterized as a "remote" likelihood, it is not so remote that it can be eliminated from consideration. In contrast, as I noted at footnote 66 of p. 23 of my Report, in the circumstances the prospect that the FSS mtDNA results resulted from contamination is, in my view, so unlikely that "I have not ... considered [it] as a possible explanation" [emphasis added]

To sum up, while the three logical possibilities stated in my Report for the different examination results in this case can all fairly be described as "unlikely" when viewed in isolation, one of them must be true. I believe incorrect mtDNA results is the least likely of the three. The other two possible explanations are coincidence, or incorrect microscopy observations by Mr. Christianson. While the possibility of coincidence may

appear remote, it cannot be eliminated. Accordingly, it is not the case, in my view, that accepting the accuracy of the mtDNA results necessarily leads to the conclusion that Mr. Christianson erred in concluding that three of the Q hairs were microscopically similar to the K hairs. It is possible that both examiners' conclusions are correct since they are based on totally different parameters.



BIRMINGHAM
LABORATORY

Appendix I

LAB REF L02/296
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400038241
Pinkofsky Lockyer
Re James Driskell

STATEMENT OF WITNESS

STATEMENT OF JOHN EDWARD BARK

Age of witness (if over 21 enter "over 21") OVER 21

Occupation of witness FORENSIC SCIENTIST

The Forensic Science Laboratory, Trident Court, Birmingham Business Park,
BIRMINGHAM, B37 7YN

This statement (consisting of 13 pages each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it, anything which I know to be false or do not believe to be true.

(Criminal Justice Act 1967, S.9; M.C. Act 1980, 5A (1A), 7B; M.C. Rules 1981, R.70)

Dated the 2nd December 2002

Signature

I hold a Bachelor of Science degree and have worked as a Forensic Scientist since 1968. I have reported mitochondrial DNA cases since 1994.

ITEMS RECEIVED

On 6th June 2002 the following items were received in a securely sealed packet at the Birmingham (Trident Court) laboratory of the Forensic Science Service:

Sample from Exhibit 42 - Hair from graveside 90-3-189 973

44 slides bearing hairs referring to a number of Exhibits - 4, 12, 42, 134, 140, 141,

10 slides bearing textile fibres.

Specifically the following slides bearing hairs were amongst those received

Hair 5 from Exhibit 134 90-1296

Hair 13 from Exhibit 141 90-1296

Hair 29 from Exhibit 141 90-1296

Signature

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Pinkosky Lockyer
Re James Driskell

Continuation of statement of John Edward Bark

I have examined the hairs from Exhibit 42, the hairs 5 (exhibit 134), 13 (exhibit 141) and 29 (exhibit 141) with the aid of scientific support staff. Their involvement is described in the Forensic Examination Record (exhibit JEB1) that accompanies this statement. A full record of the work undertaken is contained in case notes made at the time of the examination and these are available for inspection, if necessary, at the laboratory.

INFORMATION

I understand that during the investigation into the death of Perry Harder a number of hairs were recovered from inside a van which had been owned at the time of Mr Harder's disappearance by James Driskell.

Hairs found at the grave site were used as a representative sample of the head hair of the deceased. On comparison three of the hairs from the van were found to be microscopically consistent with hairs from Mr Harder.

The three hairs together with a sample of hair from the grave have been submitted to determine if, by mitochondrial DNA analysis, the three hairs and the hair from the grave could be from the same person, namely Perry Harder.

TECHNICAL ISSUES

DNA is a component of every part of the body. Parts of the DNA differ between individuals, and by identifying these differences, it is possible to distinguish between most people.

Mitochondrial DNA (mtDNA) can be used where there is insufficient DNA available for normal DNA profiling. It is different from that normally used in forensic cases as:

Signature

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LAB REF L/02/296
300037203
400038241
Pinkofsky Lockyer
Re James Driskell

Continuation of statement of John Edward Bart

i) it is inherited only from one's mother, and therefore all individuals who are related by a maternal link will have the same mtDNA profile;

ii) it varies less between individuals, and therefore more individuals chosen at random from the population will have the same mtDNA profile.

Further information about these techniques is given at the end of this statement

EXAMINATION AND RESULTS

The techniques employed are extremely sensitive. Wherever possible a sample is tested twice. Obtaining the same result from two independent tests provides confidence that the sequence obtained relates to the item under test and has not arisen from contamination during the analysis. Where this procedure could not be carried out it is noted in the full results which are given in a list and summarised in a table at the end of this report.

Hairs from van

A mtDNA sequence was obtained from each of the three hairs (No 5 from exhibit 134, Nos 13 and 29 from exhibit 141).

Hair from grave site.

Four hairs were analysed separately to obtain the mtDNA sequence from this sample. In one of the tests on two hairs, contaminating DNA was observed in a negative sample used to detect contamination. Although this DNA was different to that found in the hairs the results from the hairs were given less weight and a further two hairs were tested. In all tests the sequence from the

Signature 

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Re James Driskell

Continuation of statement of John Edward Bark

hairs was consistent. The sequence obtained is assumed to be that of the victim Perry Harder.

COMPARISONS

Differences seen in the mitochondrial DNA sequence at position 309 are not used when making comparisons as variations at this position can be present within the hairs of an individual.

Where a mitochondrial DNA sequence differs at one or more positions the results indicate that the hair and the reference sample are from different individuals. The strength of this conclusion increases with the number of differences.

The three hairs from the van each gave a different sequence and the number of differences is sufficient to conclude that the hairs originated from three different individuals.

The sequence of the hair at the grave site was different to that of each of the three hairs from the van.

The number of differences is sufficient to conclude that the hair 13 from the carpet, exhibit 141 from the van, did not originate from the same person as the hair from the grave site.

The number of differences is sufficient to provide extremely strong support for the proposition that the hair 29 from the carpet, exhibit 141, and the hair 5 from the vacuuming, exhibit 134, of the van did not originate from the same person as the hair from the grave site.

Signature

Page No 4



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LABORATORY

LAB REF L02/296
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Pinkofsky Lockyer
Re James Driskell

Continuation of statement of John Edward Bark

CONCLUSION

The mitochondrial DNA findings do not support the proposition that the hairs found in the van originated from Perry Harder.

The findings provide extremely strong support for the proposition that the hairs from the van originated from three individuals, none of whom was Perry Harder.

Signature

Page No 5

Summary Table of Mitochondrial DNA Results

| Sample | 13 | 143 | 146 | 152 | 153 | 195 | 200 | 309.1 | 309.2 | 315.1 | 16189 | 16213 | 16223 | 16224 | 16235 | 16278 | 16291 | 16293 | 16311 | 16319 |
|----------------------------|----|-----|-----|-----|-----|-----|-----|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Hair 5 Ex 134 | A | G | T | T | T | A | A | n | n | n | T | G | C | T | G | C | T | G | T | A |
| Hair 13 Ex 141 | G | A | T | T | G | C | G | c | c | c | C | A | T | T | A | T | C | A | T | G |
| Hair 29 Ex 141 | G | G | C | C | A | T | A | n | n | n | T | G | C | C | A | C | C | A | C | G |
| Hair from grave Exhibit 42 | A | G | T | T | A | T | A | C | C | C | T | G | C | T | A | C | C | A | T | G |

Summary

There are 4 differences between the sequence of the hair 5 and the hair from the grave
 There are 9 differences between the sequence of the hair 13 and the hair from the grave
 There are 5 differences between the sequence of the hair 29 and the hair from the grave

Notes

- A G C and T indicate where bases differ between samples
- indicates base missing from sequence
- n indicates base not determined
- lower case indicates bases not confirmed
- .1 or .2 indicates additional base to reference sequence

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Continuation of statement of John Edward Bark

LISTING OF mtDNA RESULTS

The following list details the results obtained in this case, relates them to the mitochondrial DNA sequence first published in the scientific journal Nature by Anderson et al. in 1981 and identifies the differences to that sequence. The numbers refer to the position of the bases along the DNA chain.

The result of the test shows the chemical base at each link in the DNA chain i.e. the sequence of the bases. Occasionally the test will fail to produce a result for some of the bases. To indicate how complete the sequence results are, the following convention has been adopted. Where only one of the two tests has produced a result for the base at a particular position the result is recorded as 'unconfirmed'. If neither test has produced a result at that position the base is recorded as 'not determined'.

Hair 5 Exhibit 134 Vacuuming from van

The bases at 428 positions on the mtDNA chain were determined from both samples of DNA extracted from hair 5. The results obtained were in agreement.

Sequence obtained between bases 30 - 271, and 15998 - 16400.

The bases at positions 16094, 16380-2, 16390 were not determined.

The sequence was unconfirmed at positions 182, 249-251, 15998-16159, 16228, 16268, 16343, 16344, 16348, 16355-16400

Differences to published sequence at positions:

263 G
16235 G
16291 T
16293 G
16319 A

Hair 13 Exhibit 141 Carpet from van

The bases at 387 positions on the mtDNA chain were determined from both samples of DNA extracted from hair 13. The results obtained were in agreement.

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Sequence obtained between bases 30 - 407, and 16183 - 16400.

The bases at positions 311, 16380-2, 16390 were not determined.

The sequence was unconfirmed at positions 57, 63-68, 85, 86, 88, 103, 272-407, 16364-16400

Differences to published sequence at positions:

73 G
143 A
153 G
195 C
200 G
263 G
309.1 additional c
309.2 additional c
315.1 additional c
16189 C
16213 A
16223 T
16278 T

Hair 29 Exhibit 141 Carpet from van

The bases at 411 positions on the mtDNA chain were determined from both samples of DNA extracted from hair 29. The results obtained were in agreement.

Sequence obtained between bases 30 - 271, and 16160 - 16400.

The sequence was unconfirmed at positions 201 - 271, 16390

Differences to published sequence at positions:

73 G
146 C
152 C
263 g
16224 C
16311 C

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Reference sample of hair from Exhibit 42

The bases at 781 positions on the mtDNA chain were determined from at least two individual hairs from exhibit 42. The results obtained were in agreement.

Sequence obtained between bases 30 - 407 and 15998 - 16400.

The bases at positions 85, 86 and 88 were not determined.

Differences to published sequence at positions:

263 G
309.1 additional C
309.2 additional C
315.1 additional C

The remaining bases that were determined matched the sequence published by Anderson.

Note: The base change at 263 and the additional base at 315.1 are extremely common in the population and are of virtually no value when comparing samples. They are recorded for completeness only.

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TECHNICAL ISSUES

Background

DNA (deoxyribonucleic acid) is a complex chemical found in all living cells. However, it is made up from only four basic building blocks (bases). The arrangement of large numbers of these four bases over long lengths of the DNA chain allows it to act as a coded recipe for all the other components that make up our bodies.

When the DNA of individuals is examined, differences can be found between the make up of their DNA chains. Several techniques are available to demonstrate these differences and rely on inherited alterations to the chain at various points.

The highest concentration of DNA is found in the nucleus of cells in the form of chromosomes. This chromosomal DNA gives rise to the great majority of differences between individuals and is a mixture of DNA from the father and mother of the individual. Only one example of the chromosomal DNA is found in each cell.

A second type of DNA is found distributed throughout a person's cells inside particles called mitochondria. Several copies of this DNA are present in each mitochondrion and many mitochondria can be present in a cell, depending on the tissue. In badly degraded or old tissue where the single example of chromosomal DNA has broken down, it is possible to find sufficient intact parts of the mitochondrial DNA for analysis.

Mitochondrial DNA is much shorter in length than the chromosomal DNA and consequently has less features with which to observe differences between individuals. It is therefore likely to be less discriminating than chromosomal DNA. Furthermore, mitochondrial DNA is received from one's mother and does not show paternal characteristics. This means that brothers and sisters will have the same mitochondrial DNA type as their mother and also any other relative linked through the female line. Changes to the DNA type, through the natural process of mutation, occur at a slow rate. On average many generations are required before the sequence is altered by a single base.

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Analysis

The mitochondrial DNA can be regarded as a circular chain with approximately 16569 links (the chemical bases). In the mitochondrial DNA analysis detailed in the statement only a part of this chain is examined to identify the order (or sequence) in which the four bases occur along the chain. The technique can then be used to demonstrate differences between individuals.

Sequencing

With this test about 780 bases of the chain are examined and the DNA bases are read sequentially. Although most bases in the mtDNA chain do not differ from person to person, this part of the chain shows on average approximately 1 in 100 bases that do differ between two unrelated individuals. Some of the sites of the bases in this region are particularly useful for discriminating whereas others rarely differ.

The DNA in old and degraded samples often breaks down to shorter lengths. Therefore the length of sequence which can be determined will depend on the state of the particular sample.

General

The technique of DNA amplification using the Polymerase Chain Reaction (PCR) is applied to the extracted DNA. In this technique minute amounts of DNA are copied many millions of times in a chemical reaction to provide sufficient DNA for analysis.

After the DNA has been analysed, differences between individuals are seen as different bases present at a particular position along the chain. The sequence is recorded as a string of letters. The letters used are the first of each of the four bases - Adenine, Cytosine, Guanine, and Thymine. A short length of sequence might therefore appear as

TCA CCC ATC AAC AAC CG etc.

different person as

TCA CTC ATC AAC AAC CA

and that of a

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Each base position is numbered according to international convention, based on a known standard sequence published in the scientific press.¹ As sequences differ by only a few bases between individuals only the differences between sequences are noted down.

Interpretation

Although a sample will match with the person from whom it originated (or from a maternally related individual) a match could be found with unrelated people.

To gauge the value of a match an assessment must be made of how often the sequence is found in the general population. The sequence from the sample is compared with those in several collections of sequences. For example the Forensic Science Service has data from unrelated British Caucasian (white-skinned) individuals. Further information may be available from other data published in the scientific literature.

Samples that do not have the same sequence are normally from different individuals. However, when using relatives as reference material it is theoretically possible that a sequence might differ by one base between generations. Under these circumstances it might be unwise to infer an elimination. The more differences there are between sequences, the less likely it is that the sample and the reference material have any ancestral link.

When comparing hairs with other body samples it has been observed that the sequence in a hair may differ by one base on rare occasions. It is thought that this is due to the individual nature in which hairs develop. The occurrence of this phenomenon should be considered when making comparisons.

It is also possible that an individual could have both original and altered DNA (as a consequence of the natural mutation) present in their body and therefore they may appear to carry two types of mitochondrial sequence. This phenomenon is known as 'heteroplasmy'. Again, this is likely at only one point on the sequence for any particular individual but should be considered when making comparisons for elimination or inclusion of the individual.

¹ Anderson, S., Bankier, A.T., Barrell, B.G., deBruijn, M.H.L., Coulson, A.R., Drouin, J., Eperon, I.C., Nierlich, D.P., Roe, B.A., Sanger, F., Schreier, P.H., Smith, A.J.H., Staden, R., Young, I.G. (1981). Sequence and organization of the human mitochondrial DNA genome. *Nature*, 290, 457-465.

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An assessment of the value of a match or non-match is made, based on the characteristic features of the sequence and its observation in the population, using the following verbal scale:

inconclusive
weak
moderate
moderately strong
strong
very strong
extremely strong

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Client Ref: James Driskell
Manitoba Criminal Justice
Pinkofsky Lockyer



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Identifying Mark for this document: JEB1

The Forensic Science Service

FORENSIC EXAMINATION RECORD

This form relates to the internal document GS191

NOTE: Work was carried out by trained assistants using established procedures. A full record of the contribution made by assistants is contained in the case file which comprises of notes made at the time of the examination.

Number of assistants used: 1

If assistants used please state:

| Name | Brief details of work done: |
|-----------|---|
| D H Mann | DNA extraction |
| J Brookes | DNA amplification, DNA sequencing |
| P Virdee | DNA extraction, DNA amplification, DNA sequencing |

Criminal Justice Act 1967, s. 9; Magistrates Court Act 1980, 5A(3A) & 5B; Magistrates Court Rules 1981, R.70:

I identify this exhibit as that referred to in the statement made and signed by me.

Name (BLOCK CAPITALS) John Edward BARK

Signature

Date 2 December 2002

For court use only:

| | |
|-------------------------------------|-------------------|
| R. v. _____ | |
| Exhibit No. _____ | |
| Signed: _____ | Date: _____ |
| Justice of the Peace/Clerk to _____ | Magistrates Court |