

1 IN THE MATTER OF: A Commission of Inquiry into
2 Certain Aspects of the Trial and
3 Conviction of JAMES DRISKELL

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TRANSCRIPT OF PROCEEDINGS AT A STANDING HEARING
before The Honourable Patrick LeSage, Q.C., Commissioner,
held at the Pan Am Room, Winnipeg Convention Centre, 375
York Avenue, in the City of Winnipeg, Province of Manitoba,
on the 4th day of April, 2006.

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APPEARANCES:

- MR. M. CODE and MR. J. DAWE, for the Commission
- MR. A. LIBMAN and MR. J. LOCKYER, for Mr. James Driskell
- S. PINX, Q.C and MR. P. COPELAND, for AIDWYC Manitoba Inc.
- MR. W. E. OLSON, Q.C. and MR. R. OLSON, for the Province of Manitoba
- MS. K. CARSWELL and MS. S. HANLIN, for the Winnipeg Police Services and Members
- MR. R. TAPPER, Q.C. and MR. C. WULLUM, for Mr. Stuart Whitley
- MR. J. PROBER and MR. B. KING, for Mr. George Dangerfield
- MR. D. ABRA, Q.C. and MR. S. FIELD, for the Estate of Mr. Bruce Miller
- MR. D. GATES, Q.C. and MR. J. KATZ, for the Royal Canadian Mounted Police
- MR. R. WOLSON, Q.C. and MS. S. WOLSON, for the Winnipeg Police Association

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1 APRIL 4, 2006

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3 THE CLERK: This hearing of the Commission of
4 Inquiry is now in session. Please be seated.

5 THE COMMISSIONER: Good morning, and welcome
6 everyone; this being the first hearing day of the inquiry
7 that is referred to as the Driskell Inquiry. I have been
8 asked by the, some representatives of the media if they
9 could have an opportunity at this time to take some
10 photographs of the assembled group, so unless some of you
11 are particularly camera shy, I'm going to allow them, I'm
12 going to give them about four minutes to move anywhere in
13 the area to, for the purpose of taking photographs, after
14 which we will be restricted to fixed cameras. So members
15 of the media, feel free to wander around and take whatever
16 photographs you see fit and appropriate.

17 Okay. Thank you very much, members of the media.

18 Well, again, good morning and welcome. I'm
19 pleased to have been asked to preside at this hearing to
20 inquire into what is referred to in the order-in-council
21 as the conduct of Crown and counsel who conducted
22 and managed the trial of James Driskell, the subsequent
23 appeal and parliamentary reviews of his conviction, and
24 whether that conduct fell below the professional and
25 ethical standards expected of lawyers and agents of the
26 Attorney General conducting prosecutions at that time.

27 Further, to inquire into whether the Winnipeg
28 Police Service failed to disclose material information to
29 the Crown before, during or after James Driskell's trial.
30 If so, to consider whether the nondisclosure contributed to
31 a likely miscarriage of justice in the prosecution against
32 him.

33 I am asked to give advice about whether the
34 conduct of Crown counsel or members of the Winnipeg Police

1 Service should be referred to the Law Society of Manitoba
2 or to the law enforcement review agency or an appropriate
3 independent police service for review and possible
4 investigation by those bodies.

5 The order-in-council further appoints me to
6 consider the role of the RCMP laboratory in the prosecution
7 of James Driskell, and to review any systemic issues that
8 may arise out of its role, to give advice about whether any
9 aspect of this case should be further studied, reviewed or
10 investigated, and by whom, and to make systemic
11 recommendations arising out of the facts of the case which
12 the Commissioner considers appropriate.

13 Further, the order-in-council further advises
14 that I am to consider whether and in what way a
15 determination or declaration of wrongful conviction can be
16 made in cases like this where, as in this circumstance,
17 Crown counsel directs a stay of proceedings following a
18 direction for a new trial pursuant to the provisions, by
19 the Minister of Justice of Canada pursuant to the
20 provisions of the Criminal Code.

21 Now, as in almost all inquiries in this country,
22 the Commissioner must perform his duties without expressing
23 any conclusion or recommendation about the civil or
24 criminal liability of any person or organization, and
25 without interfering in any ongoing police investigation or
26 criminal proceedings relating to the murder of Perry
27 Harder.

28 The report is to be completed by December 31st of
29 this year, and the report will be delivered in a form
30 appropriate for public release, subject only to the Freedom
31 of Information and Protection of Privacy Act and other
32 relevant laws.

33 In conducting the inquiry, the commission is
34 directed, permitted to do the following: To avoid

1 duplication of effort, the Commissioner may review the full
2 judicial record, all files maintained by Manitoba Justice
3 and the Winnipeg Police Service, the report of the
4 Honourable John Enns to the Attorney General, and any other
5 report or analysis about the case. I'm also directed that
6 I may interview any person connected with the case,
7 including current and former employees of both Manitoba
8 Justice and the Winnipeg Police Service, and on my behalf,
9 interviews may be conducted by special counsel referred,
10 referred to in the order-in-council. Those special counsel
11 in this case are Michael Code and Jonathan Dawe, who are
12 counsel to the commission. Those interviews may occur
13 either alone with the commission counsel, or I may be
14 present at those interviews. If conducted alone by special
15 counsel, then they must give me a transcript or a report of
16 each interview.

17 Upon delivering the final, my final report, I
18 must also provide to the Deputy Attorney General all
19 original statements, transcripts and other documents that
20 have been prepared for the, this hearing, this inquiry.

21 Those are the broad descriptors of the
22 order-in-council which authorizes me to preside at this
23 inquiry and to conduct its hearings.

24 I am aware from those who have applied for
25 standing before the commission that I will have the benefit
26 and the assistance of very experienced and learned counsel
27 to assist me in carrying out my role. I will rely on that
28 assistance throughout for a number of reasons, not the
29 least of which is I have never conducted a public inquiry
30 before, and so I will need what guidance and help you can
31 afford me. And if on occasion I slip into a trial mode, as
32 opposed to an inquiry mode, I trust that counsel will
33 remind me that my role is that of a commissioner of
34 inquiry, and not as a adjudicator over a trial.

1 The public will, of course, be welcome to this
2 hearing and the hearings will remain public unless for
3 some, at this time, unknown reason, I exercise the
4 authority that, under the rules to close part of the
5 hearings. As, as I say, at this, certainly, at this
6 stage of what I know of this case, I don't expect that
7 to happen. However, I simply alert you that that is a
8 possibility.

9 The proceedings may be filmed, as they are now,
10 but they will be from fixed, stationary cameras. The
11 opportunity that we have just afforded the media to wander
12 about in the hearing room will now have concluded. That
13 has happened once, and that will be it, and
14 they'll have to use that footage for future pictures
15 of those of you who are here in the hearing room this
16 morning. But they are free to otherwise film this
17 proceeding from film, from fixed camera positions.

18 What we will do this morning, or what I propose
19 we do this morning, is to begin with the issue of standing;
20 that is to determine who will have standing before the
21 inquiry, and that is who will be allowed to participate.
22 After that, I will ask counsel, I would suggest, and
23 preferably in my absence, to sit down and go over the draft
24 rules that counsel and I have prepared for consideration by
25 counsel. If there needs to be further discussion
26 before me on the issue of the rules, then we'll do that
27 after counsel have put their heads together and, and I hope
28 tried to come up with an agreed upon position. We have
29 attempted to draft rules that are broad and yet adequately
30 inclusive.

31 One of the rules that I mention now is that, in
32 the draft rules, is that the commission counsel has an
33 obligation to disclose materials that are available to us,
34 that have been made available, that we believe exist, to

1 counsel so that they will know the background of the
2 hearing. The other side of that coin, because this is
3 an inquiry, is that disclosure will be required of those
4 who are, will be granted standing, of the evidence of the
5 persons that they represent, or any other evidence that
6 they propose to call. So the disclosure is unlike in a
7 criminal trial, but as in a civil trial, it is a two-way
8 street.

9 After we deal with the matter of the rules, or
10 first of all, the standing, then the matter of rules, then
11 I would like to confirm the hearing dates. As you know,
12 today is just a preliminary gathering to resolve issues of
13 standing and disclosure and rules, I should say, and then
14 we will try to set firm dates for the public hearings which
15 will take place.

16 Through commission counsel, we have already
17 suggested dates, and I would hope that they will be, if not
18 convenient, at least tolerable for most people.

19 So at this time, what I would propose to do is
20 simply introduce, slightly more formally, commission
21 counsel, and then we will, I will begin the, I'll ask him
22 to take carriage of the proceedings, and I believe that he
23 is going to call the persons who have applied for standing
24 in order in which they have made their application.

25 So I would like to introduce Michael Code, who is
26 commission counsel in this case. Michael has a very broad
27 and distinguished career and reputation which includes a
28 substantial part of his career as a defence counsel, an
29 administrative lawyer, but also part of his career as an
30 assistant deputy attorney general. With him, as
31 co-commission counsel, is Jonathan Dawe, who works in the
32 same office as Mr. Code in Toronto. A very bright young
33 man who doesn't quite have the years of experience of Mr.
34 Code, but I'm sure he'll make, make up for that by the

1 breadth of his knowledge.

2 Mr. Code.

3 MR. CODE: Thank you, Mr. Commissioner.

4 What I propose to do on the standing applications is go
5 through them in the order in which we received them. I'll
6 be quite brief on each one of them. I think they're all
7 well-founded, and I'll make very short submissions on each
8 one of them and invite my colleagues if they wish to say
9 anything further on each one of them as I go through them
10 one by one.

11 First of all, if I could just set out briefly
12 the test for standing that we've been applying, so
13 that you know the basis for my submissions on each one
14 of the applications.

15 Paragraph seven of the draft rules sets out a two
16 prong test, the first prong being the traditional
17 substantial and direct interest test that's been used by
18 many inquiries, but also a second prong that's a
19 slightly different test, and arguably, a slightly relaxed
20 test, and that is simply whether the applicant's
21 participation may be helpful to the commission in
22 fulfilling its mandate, which is also a test that has been
23 used in some inquiries.

24 The interpretation of these tests, without
25 burdening you with a lot of jurisprudence, a couple of
26 the more helpful comments, commentaries on these
27 tests, for example, in the Arar Inquiry, associate Chief
28 Justice O'Connor set out a number of negative propositions
29 about the substantial and direct interest test by saying
30 that merely being a witness itself does not constitute a
31 substantial and direct interest, nor does having a genuine
32 concern about the issues or having an expertise in those
33 issues. So it's something more than merely being a witness
34 or being an expert or having some concern about the matter.

1 In terms of positive definitions, Justice
2 O'Connor, in another inquiry, the Walkerton Inquiry, said
3 that the definition generally includes anyone whose
4 reputation might be damaged by the findings of the
5 commissioner, and who has a greater interest in the
6 proceedings than an interested member of the public.

7 And in a somewhat similar vein, but in
8 broader language, in the Morin Inquiry, former Justice
9 Kaufman said that the issue is whether the
10 subject of the inquiry may seriously affect an individual.

11 And finally, on the second branch of
12 the test, what I've referred to as the somewhat more
13 relaxed test, Justice Linden, who is now in the midst of
14 the Ipperwash Inquiry, said that the issue under that
15 second branch is whether the applicants represent distinct
16 ascertainable interests come and whose expertise or
17 perspective will be essential if the commission is to
18 fulfill its mandate. So the focus is on the, the, the
19 ability of the party to assist you in carrying out your
20 mandate, under the second branch of that test.

21 So applying those approaches, if I could take you
22 to the nine applications that we've received in the
23 order in which we received them.

24 The first one to come in was from counsel for the
25 Province of Manitoba, Mr. Olson, and his application on
26 behalf of the government, but primarily the Attorney
27 General and present Crown counsel, and he couldn't be
28 here this morning, but his office is represented by
29 Mr. Olson, same name, but different Mr. Olson. He's
30 immediately behind me, and that application obviously
31 is well-founded in my respectful submission. The Attorney
32 General's Department is institutionally responsible for
33 this prosecution, and clearly meets the tests that I've set
34 out for you, and I don't think I need to say anything more

1 on that.

2 THE COMMISSIONER: Mr. Olson, do you have any
3 comment?

4 MR. R. OLSON: No, I don't. I think that's
5 sufficient, Your Honour.

6 THE COMMISSIONER: Standing is granted.

7 MR. CODE: The second application we received was
8 from Mr. Prober on behalf of George Dangerfield. Mr.
9 Prober is at the back of the room, on the right.

10 MR. PROBER: Good morning, Mr. Commissioner.

11 THE COMMISSIONER: Mr. Prober.

12 MR. CODE: His client, Mr. Dangerfield, was the
13 lead prosecutor on both the trial and appeal of the
14 Driskell case, and in my submission, he clearly and
15 obviously meets the test for standing that, that we've been
16 discussing, and I would urge you to grant him standing, Mr.
17 Commissioner.

18 THE COMMISSIONER: Mr. Prober, anything to add?

19 MR. PROBER: No, other than to introduce Mr. Brad
20 King, who will be assisting me throughout the inquiry.

21 THE COMMISSIONER: Okay.

22 MR. KING: Good morning, Mr. Commissioner.

23 THE COMMISSIONER: Morning, Mr. King. Standing
24 is granted.

25 MR. CODE: The third application we received was
26 from Mr. Abra, who's counsel for the estate of Bruce
27 Miller. Mr. Abra is immediately in front of Mr. Prober, on
28 your right.

29 MR. ABRA: Morning, sir.

30 THE COMMISSIONER: Morning, Mr. Abra.

31 MR. CODE: Bruce Miller, who now,
32 unfortunately, is deceased, was the director of
33 Prosecutions for Winnipeg at the time of the Driskell
34 prosecution, in a position senior to Mr. Dangerfield, and

1 reporting directly to the assistant deputy minister. He
2 was involved in a number of aspects of the case that the
3 inquiry will be focused on, and it appears to me from my
4 examination of the file that he's, appears to be involved
5 in issues that will be of concern to the commission, and
6 ought to be granted standing.

7 Mr. Dangerfield would report to him on occasion,
8 and he would send communications to Mr. Dangerfield on
9 occasion, and in my submission, he has a direct and
10 substantial interest, and I would urge you to grant him
11 standing.

12 THE COMMISSIONER: Mr. Abra, anything to add?

13 MR. ABRA: No, I do not, sir. Subject to any
14 questions you have.

15 THE COMMISSIONER: No. Standing is granted.

16 MR. ABRA: Thank you.

17 MR. CODE: The fourth application we received was
18 from Robert Tapper, counsel for Stu Whitley, the Assistant
19 Deputy Attorney General at the time. Mr. Tapper couldn't
20 be here this morning, but he sent Mr. Wullum from his
21 office, and Mr. Wullum is on your left.

22 As the Assistant Deputy Attorney General, Mr.
23 Whitley was overall institutionally responsible for the
24 prosecution service in this province at the time. Mr.
25 Miller reported to him. He would receive communications
26 from Mr. Miller, and occasionally from Mr. Dangerfield, and
27 became involved, it appears, at a critical point in some of
28 the issues that will be the focus of this inquiry, and
29 accordingly, from my examination of the file, I believe he
30 has a substantial and direct interest and meets the test
31 for standing, and I would urge you to grant him standing,
32 Mr. Commissioner.

33 THE COMMISSIONER: Mr. Wullum, anything to add?

34 MR. WULLUM: I have nothing further to add.

1 THE COMMISSIONER: Mr. Tapper and you will be
2 granted standing.

3 MR. WULLUM: Thank you.

4 THE COMMISSIONER: Thank you.

5 MR. CODE: The fifth application we received, Mr.
6 Commissioner, was from James Lockyer and Alan Libman,
7 counsel for James Driskell, and they are both seated
8 on my right, on your immediate left, Mr. Commissioner.

9 James Driskell obviously and clearly meets
10 the test for standing. He is the person whose
11 case was, is the subject of this inquiry, and I would
12 urge you to grant standing to Mr. Lockyer and Mr. Libman on
13 his behalf.

14 THE COMMISSIONER: Anything to add?

15 MR. LOCKYER: May I just say a few words, Mr.
16 Commissioner?

17 THE COMMISSIONER: Absolutely.

18 MR. LOCKYER: On Mr. Driskell's behalf, as
19 commission counsel tells you, Mr. Libman is here with
20 myself to represent Mr. Driskell at this inquiry. Mr.
21 Libman, perhaps more than anyone, has, well, he's played a
22 huge role in the proceedings that have
23 ultimately led us to today.

24 Mr. Driskell is here today, as you can see. He's
25 with, he's here with three really quite formidable people.
26 His mother, Joyce Milgaard, David Milgaard's mother, and
27 Ren Durocher of the John Howard Society; three people who
28 also played an essential role in the
29 proceedings that ultimately got us here today. They always
30 stood by James Driskell and were his best supporters in the
31 time, in his time of need.

32 Mr. Driskell himself, he doesn't just have a
33 personal interest in these proceedings, as happens
34 to so many people who have gone through what he's been

1 through. He's developed an enormous interest and concern
2 about others whom he believes are still in the situation he
3 was in himself not so long ago. So his interest is as much
4 a personal interest as a systemic interest, if I can
5 put it that way. And it's for those reasons that we ask
6 that he be given standing.

7 Thank you, Mr. Commissioner.

8 THE COMMISSIONER: Thank you, Mr. Lockyer. Mr.
9 Libman, anything to add?

10 MR. LIBMAN: No, Mr. Commissioner.

11 THE COMMISSIONER: All right. It goes without
12 saying that standing will be granted to Mr. Driskell and
13 his counsel.

14 MR. CODE: Mr. Commissioner, the sixth
15 application we received was from my colleague, Mr. Gates,
16 from the Federal Department of Justice, acting on behalf of
17 the RCMP. He's on your left.

18 THE COMMISSIONER: Morning, Mr. Gates.

19 MR. GATES: Morning, sir.

20 MR. CODE: And with him is his --

21 MR. GATES: Joel Katz, sir.

22 MR. CODE: Mr. Katz is his colleague,
23 who's --

24 MR. KATZ: Morning.

25 MR. CODE: -- assisting him.

26 THE COMMISSIONER: Mr. Katz.

27 MR. CODE: The RCMP is directly referred to in
28 the terms of reference because of its role in running the
29 forensic lab, and especially the role of one of its
30 civilian employees, Mr. Christiansen (phonetic) in
31 the hair analysis. Mr. Gates stresses that
32 matter in his letter requesting standing, but could I also
33 emphasize the outcome of the RCMP investigation in Swift
34 Current, and the RCMP's role in the witness protection

1 program, which also figure in this case and will be the
2 subject of some inquiry.

3 So for all three of those reasons, I would urge
4 you to grant the RCMP standing through Mr. Gates and Mr.
5 Katz.

6 THE COMMISSIONER: Mr. Gates, anything to add?

7 MR. GATES: No, sir. Thank you.

8 THE COMMISSIONER: All right. Thank you. Well,
9 it goes without saying, again, that Mr. Gates and Mr. Katz,
10 or any other counsel who are replacing them, will have
11 standing on behalf of the RCMP; both in as to their
12 relationship, the RCMP relationship with and operation of
13 the, of the lab, but also in relation to various witnesses
14 with which the RCMP had contact that have very much been
15 connected to this case.

16 MR. CODE: Mr. Commissioner, the seventh
17 application we received was from counsel on behalf of the
18 Winnipeg Police Services, Ms. Carswell, and she is before
19 you on your right.

20 MS. CARSWELL: Sir.

21 THE COMMISSIONER: Good morning, Ms. Carswell.

22 MS. CARSWELL: This is Ms. Hanlin, who will be
23 assisting me in this, this is Ms. Hanlin.

24 THE COMMISSIONER: Hanlin?

25 MS. CARSWELL: Hanlin.

26 THE COMMISSIONER: Okay.

27 MS. HANLIN: Good morning, Mr. Commissioner.

28 THE COMMISSIONER: Good morning.

29 MR. CODE: Mr. Commissioner, the Winnipeg Police
30 Service was the police force responsible for the
31 investigation of the Driskell case, and continues to be
32 responsible for the, the, the ongoing investigation of the,
33 the death of Perry Harder, and the, were also, in addition,
34 responsible for an important review that was conducted in

1 1993, after the appeal had been completed, and for both of
2 those reasons, I would submit that they have a, a clear,
3 substantial and direct interest, and ought to be granted
4 standing.

5 THE COMMISSIONER: Ms. Carswell, anything to add?

6 MS. CARSWELL: No, nothing, Mr. Commissioner.

7 THE COMMISSIONER: All right. Again, it goes
8 without saying that they fill the criteria, and of course,
9 will be granted standing.

10 MR. CODE: The eighth application for standing w e
11 received, Mr. Commissioner, was from Richard Wolson, who's
12 immediately behind me.

13 MR. WOLSON: Morning, Mr. Commissioner.

14 THE COMMISSIONER: Morning, Mr. Wolson.

15 MR. CODE: The application by Mr. Wolson is on
16 behalf of the Winnipeg Police Association and the
17 individual members past and present who were involved in
18 various aspects of the investigation. This
19 application, obviously, to some extent overlaps with the
20 previous one we've, we've just referred to from Ms.
21 Carswell on behalf of the police service, but on my
22 examination of the file, the, the interests of the
23 individual officers and of the police service corporately
24 are sufficiently distinct that it would be appropriate for
25 you, assuming this is what the officers wish, grant
26 separate standing to Mr. Wolson to act on their behalf.

27 There are various issues that will arise, we
28 anticipate, in the, the course of the inquiry where it may
29 be helpful to the inquiry to have a distinct voice on
30 behalf of the police service, institutionally, from Ms.
31 Carswell as well as somebody representing the individual
32 interests of the officers from Mr. Wolson, and unless you
33 need me to go into detail on that, I don't propose to do so
34 at this point.

1 I note that Justice Cory, in the Sophonow
2 inquiry, took a similar approach and granted standing both
3 to the Winnipeg Police Service and to the individual
4 members through their association, and Mr. Wolson, of
5 course, was associated with that inquiry, and he's simply
6 following the same approach that Justice Cory took, and I
7 would recommend it to you because of some of the particular
8 issues that we anticipate arising in this, in this hearing.

9 THE COMMISSIONER: Mr. Wolson?

10 MR. WOLSON: Sir, I have nothing to add unless
11 you wish to hear any submission. Just to introduce to you,
12 should you grant me standing, Sarah Wolson, who will be
13 called to the bar in June of this year, who will assist me.

14 MS. WOLSON: Good morning.

15 THE COMMISSIONER: Well, good morning and
16 welcome --

17 MS. WOLSON: Thank you.

18 THE COMMISSIONER: -- and welcome to the, almost
19 welcome to the, to the profession.

20 MS. WOLSON: Thank you.

21 THE COMMISSIONER: Okay. Well, I --

22 MR. WOLSON: We'll get there, sir.

23 THE COMMISSIONER: I think I can only say if it
24 was good enough for the Honourable Peter Cory, it's good
25 enough for me, and I think I need say no more. Standing is
26 granted.

27 MR. WOLSON: Thank you, sir.

28 MS. WOLSON: Thank you.

29 MR. CODE: The ninth and last, I will always save
30 the best for the last, is, Mr. Pinx is here on behalf of
31 AIDWYC, and of course he ended up having his application
32 arrive last, and he's the one who has to get out of here
33 first because he's got a judge waiting for him
34 in a jurisdiction out of town, so he's going to

1 be driving rather fast, and you may need to phone the judge
2 to get him out of jail when he arrives late. He's
3 here on behalf of AIDWYC, and the application by AIDWYC,
4 very thorough letter and affidavit from Mr. Copeland, that
5 I'm, I'm sure you've, you've read, and Mr. Copeland
6 stresses the systemic issues that are set out in paragraph
7 1(d), (e) and (f) of the order in counsel.

8 In my respectful submission, AIDWYC has a
9 substantial and direct interest and significant expertise
10 in relation to those systemic issues. They have a history
11 of having been granted standing at similar inquiries,
12 Sophonow, Morin and Milgaard, by colleagues of yours,
13 Justice Cory, Justice Kaufman and most recently, Justice
14 McCallum at the, at the Milgaard inquiry.

15 In addition, I would note that we are now in
16 a, have reached the point where four Crown officials or
17 Crown agencies, and three police agencies have been granted
18 standing, so there is a real question of representational
19 balance that I think AIDWYC will also assist on, so I would
20 ask that you grant AIDWYC full standing, not just because
21 of their substantial and direct interest in the systemic
22 issues, but also because they will provide real assistance
23 to the commission with their expertise in the issues that
24 will be before the commission, and will provide some
25 representational balance.

26 So, for all those reasons, I ordered you to grant
27 Mr. Pinx standing on behalf of --

28 THE COMMISSIONER: Mr. --

29 MR. CODE: -- AIDWYC.

30 THE COMMISSIONER: Mr. Pinx, anything to add?

31 MR. PINX: Very briefly, Mr. Commissioner, I
32 thank Mr. Code for his comments.

33 THE COMMISSIONER: Mr. Pinx, I wonder if you
34 could come up to the microphone. Otherwise it can't get

1 recorded.

2 MR. PINX: Firstly, I want to thank Mr. Code for
3 his comments in support of the standing application of, of
4 AIDWYC. If standing, Mr. Commissioner, is granted, we
5 would like to make a very, very brief submission on the
6 issue of funding. And --

7 THE COMMISSIONER: Go ahead and make your
8 submission on funding.

9 MR. PINX: Thank you. I believe you received
10 materials from Mr. Copeland setting out for you --

11 THE COMMISSIONER: I have read all the materials.

12 MR. PINX: -- that the AIDWYC, the Association in
13 Defence of Wrongfully Convicted, is a non-profit
14 organization that, that relies heavily upon those who are
15 prepared to give of their time in respect of assisting in
16 matters of this kind.

17 Counsel, including myself, and I can advise you
18 Ms. Marla Edwards (phonetic) from Toronto, Mr. Phil
19 Campbell (phonetic), Mr. Paul Copeland, have expressed an
20 interest in assisting in respect of this inquiry. Needless
21 to say, counsel have substantial other practices and, and
22 matters that take them away from the normal work that,
23 let's say, is required in an inquiry of this magnitude, and
24 needless to say, the amount of time that would be required
25 to be spent would be significant in preparation for
26 something of this nature.

27 Because of the fact that this organization really
28 does not have the resources available to provide counsel
29 with the necessary financial assistance in devoting their
30 time to this type of project, we would ask that, Mr.
31 Commissioner, you give consideration to making a
32 recommendation to the Attorney General for the Province of
33 Manitoba for financial assistance.

34 I can advise you the intent would be to

1 divide up the responsibilities of this inquiry on a
2 discrete issue basis, and that's why a number of counsel
3 are prepared to participate on various areas depending upon
4 how, of course, those assignments are, are laid out.

5 And so with those comments, my hope is
6 Commissioner would be prepared to make that recommendation.
7 We would also be prepared to provide you with a very, very
8 brief written outline of the areas that we would ask that
9 you give consideration to for, for financial assistance.

10 THE COMMISSIONER: Okay. Well, having regard to
11 the submissions of Mr. Code, the material that has been
12 filed, my own personal knowledge of the organization and
13 its excellent assistance that it has provided to a
14 number of other inquiries, I certainly have no
15 hesitation in granting standing.

16 Now, as to funding, as I understand it, what you
17 are seeking is that I recommend to the Attorney General of
18 Manitoba that, that, that funding be provided.

19 MR. PINX: Correct.

20 THE COMMISSIONER: I understand that has been
21 the case in other inquiries?

22 MR. PINX: Yes, that's my understanding.

23 THE COMMISSIONER: Right. Okay. I'm so prepared
24 to do and will.

25 MR. PINX: Thank you so much. And we would like
26 the opportunity, with your permission, to perhaps provide
27 you with a very brief outline, if you wish, to assist you,
28 perhaps, further in that recommendation, if you so wish,
29 sir.

30 THE COMMISSIONER: Yes. Yes, well, please have
31 it forwarded to me, and, and I should have added that in
32 this case, it's not only because of the fundamental
33 issues, the core issues that will be being reviewed in the
34 inquiry, but also because of the couple of systemic

1 issues that we will be looking at that AIDWYC will bring a,
2 I would hope, a different and an objective perspective.

3 MR. PINX: Thank you so much.

4 THE COMMISSIONER: Thank you.

5 MR. CODE: Mr. Commissioner, that completes the
6 standing applications unless my colleagues have anything
7 they, they wish to add on that issue. And brings us to
8 that, the second order of business this morning, which is
9 the draft rules.

10 THE COMMISSIONER: Yes. Okay.

11 MR. CODE: And in relation to the draft
12 rules, I've had discussions with, in particular, Mr.
13 Wolson, Ms. Carswell and Mr. Prober, and the suggestion is
14 that if counsel could have a meeting, I don't think
15 it'll be a lengthy meeting, to go over the draft rules.
16 Ms. Carswell made a couple of good suggestions to me
17 this morning of amendments that she's suggesting, which
18 seemed like good ones to me, and if we could just have a
19 stand down for what may be no more than a half an
20 hour, an hour at the most, and I'll hear them on the
21 amendments they're proposing, and they may simply wish
22 to have some assurances from me as to how we intend
23 to proceed, and then hopefully we could reconvene and make
24 a joint recommendation to you on any amendments, or
25 interpretive issues or practice issues that arise out of
26 the rules.

27 So if that's agreeable to my colleagues and to
28 you, Mr. Commissioner, that's what I would propose.

29 THE COMMISSIONER: Okay. All right. I
30 should just indicate on the issue of standing, that the
31 public notice that was published in a number of papers
32 recently indicated that anyone who wished to seek standing
33 were required to apply in writing in advance. The persons
34 that we have heard and we have dealt with are the only

1 persons who have filed a request for standing, and for that
2 reason, I assume there are no others that are seeking
3 standing.

4 So we will adjourn to await discussions between
5 counsel. Thank you very much.

6 THE CLERK: Order. This commission of inquiry is
7 stood down.

8

9 (BRIEF RECESS)

10

11 THE CLERK: This commission of inquiry is now
12 recommenced. Please be seated.

13 THE COMMISSIONER: Mr. Code?

14 MR. CODE: Thank you, Mr. Commissioner, and
15 thank you for the, the time to address the rules
16 issues with my colleagues, which was very helpful.

17 So, turning then to the, the rules, the
18 draft rules and the discussions we've had about them, I've
19 circulated a revised draft, and I'm grateful to Mr.
20 Dawe and his computer skills to be able to generate these
21 things in a timely way, which I could never do.

22 You will find three or four revisions, which
23 we're proposing to you consensually on behalf of everyone,
24 I believe, agrees with these revisions, if I could quickly
25 highlight them for you. My colleagues all have copies
26 of this revised draft.

27 Paragraph 11, which is the reciprocal disclosure
28 obligation, which has now been triggered by the grant of
29 standing, and we have made, we've added a sentence in the
30 middle of that paragraph, starting:

31

32 "Documents in the possession or
33 control of a party ..."

34

1 And you see the gist of that is simply if
2 we've already got the documents through the DOJ file, their
3 obligation is simply to produce a list, as opposed to
4 producing yet another copy of the document.

5 And finally, we've, at the end of that paragraph,
6 we've added the words, "for inspection". So that
7 the right to request the originals is a more limited right,
8 not an absolute right to actually have and possess them,
9 but simply to inspect them, which is the traditional
10 approach to originals, so that the party can maintain
11 control of the original.

12 There are similar revisions to paragraph 12, for
13 non-parties. So that's the first revision, and we all
14 jointly --

15 THE COMMISSIONER: It's a wise and
16 sensible suggested change, and I concur with it.

17 MR. CODE: Thank you. The second change is in
18 paragraph 14, and this deals with the claim of privilege.
19 A number of my colleagues pointed out that there's now
20 civil litigation under way, and as a result, they have
21 civil litigation files prepared in anticipation of
22 litigation, which will obviously attract a claim of
23 privilege, and the, since the obligation to disclose in
24 paragraph 11 is very broad, all documents having any
25 bearing on the subject matter of the inquiry, it would
26 clearly cover those privileged documents in the solicitor's
27 litigation file, and so we've amended paragraph 14 to put
28 the obligation on the parties simply to produce a list of
29 the documents over which privilege is claimed, consistent
30 with the civil procedure, rather than the way it was framed
31 in the old rule, paragraph 14, where the obligation was to
32 actually come before you and bring an application to claim
33 privilege.

34 So the previous rule was a bit litigation

1 intensive. This simply makes their obligation to give a
2 list to us.

3 And then in paragraph 15, the obligation is
4 on us, on commission counsel, to commence a challenge to
5 any claim of privilege, based on the list, that we do
6 not accept.

7 THE COMMISSIONER: I think that's as it should
8 be, and I commend counsel for that, for that
9 suggestion.

10 MR. CODE: The one consequential revision to
11 paragraph 15, paragraph 15 is essentially a new paragraph.
12 It used to all be found in paragraph 14, but it allows
13 that, that challenge to the claim of privilege by
14 commission counsel to be brought before the commission, but
15 if the party requests that it be brought in the Queen's
16 Bench in relation to a claim of solicitor client privilege,
17 that procedural right to have the claim adjudicated in the
18 Queen's Bench is maintained, but they simply have to make
19 that request to commission counsel in a timely way.

20 So you see, there's, the language has been
21 changed to require that the party make the request to us
22 that we bring the challenge in the Queen's Bench in a
23 timely way.

24 THE COMMISSIONER: And I think that makes sense
25 as well, and I must say when I had suggested to
26 commission counsel that that sort of procedure be
27 incorporated in the rules, I did give some thought as to
28 what the technical avenue is for getting into the Court of
29 Queen's Bench, and I'll have to leave that to the creative
30 imagination of counsel, because I'm not a hundred percent
31 sure, but it may be in the form of a challenge of a
32 subpoena if we got to that stage for
33 production of documents, but I'm just assuming there
34 is some door to open, some avenue to get it into the

1 Court of Queen's Bench. If none exist, then you'll be
2 stuck with me, but, and then you can move to quash my
3 ruling, but I just want you to know that it's not
4 without a, a few little difficulties.

5 MR. CODE: Hopefully, an application for a
6 declaration or something like that might do it, but we'll,
7 we'll cross that bridge when we reach it.

8 The, the final --

9 THE COMMISSIONER: You did say when we reach
10 it, not breach it.

11 MR. CODE: I hope we never reach it, but the
12 final change is paragraph 18, Mr. Commissioner. The
13 old paragraph 18 is the paragraph that requires us to
14 produce either transcripts or summaries of the witness
15 interviews, and especially if we're not calling the witness
16 there's a mandatory obligation to produce a transcript or
17 an interview, and we've made a minor change to the
18 language in the last sentence of paragraph 18 to make
19 it mandatory that the transcript be provided if there is a
20 transcript. So, the words, if available, have been
21 added to make it clear that a summary won't do if we have a
22 transcript.

23 THE COMMISSIONER: Okay.

24 MR. CODE: So those were all the changes that
25 were agreed to and that we recommend to you, and --

26 THE COMMISSIONER: I concur in them all.

27 MR. CODE: Thank you. The final issue in
28 relation to the rules was a number of concerns were
29 expressed by a number of my colleagues that focus on
30 paragraphs 16, 18 and 27, and just to generally describe
31 the issue for you, Mr. Commissioner, paragraph 16 is the
32 power to conduct interviews at the pre-hearing stage for
33 what I told my colleagues were two purposes: One, for
34 investigative purposes, in order to find facts and discover

1 facts that aren't in the documents; and secondly, to
2 whittle down the witness list to the ones who are really
3 essential.

4 And paragraph 18 is related to that second
5 purpose, because if the decision is made that a witness is
6 not particularly important or essential, then the
7 transcript of the interview or a summary, a witness
8 statement from the interview, can be tendered and relied on
9 at the hearing without ever calling the witness.

10 And then the final procedural step is paragraph
11 27, which allows a party to challenge commission counsel's
12 decision about the necessity of calling any witness. And
13 the gist of my friends' concerns, without wanting to speak
14 on their behalf, was that if a witness is going to be
15 examined outside of the public hearing and then have his or
16 her statement tendered at the hearing without any chance to
17 question that witness, they wanted an absolute right,
18 rather than the paragraph 27 discretionary right, they
19 wanted an absolute right to be able to call that witness or
20 have an opportunity to cross-examine that witness, and,
21 I opposed that position, and took the position that
22 we had to be able to keep control over the decision as to
23 which witnesses to call, and urged my friends to save
24 the debate on this issue to another day when we have a real
25 factual context, but it's very difficult to discuss
26 the procedural fairness of these three provisions without
27 having a real set of facts before us.

28 And I reminded my colleagues that paragraph 37 of
29 the rules does provide for ongoing revision to the rules if
30 they prove not to be working well. So I urged my
31 colleagues to put their objection on the record, and they
32 have put it on the record, certainly, with me, and I'm
33 putting it on the record again. They may wish to speak to
34 this. And if a set of facts arises that, where what they

1 fear has happened and they want to revisit the issue and
2 address it, I've told them that I'm more than welcome to,
3 to reengage the discussion on this point at a future time
4 when we have a real set of facts rather than simply
5 hypothetical fears on the point.

6 So that's all I have to say on the point, and
7 I don't know whether any of my friends wish to address you
8 on the matter before we move on to the other issues on
9 our agenda.

10 MR. PROBER: Good afternoon, Mr. Commissioner.
11 Mr. Code has more or less accurately put my concerns, but
12 not in the detail that I had voiced them. My concerns were
13 focused primarily on 16, paragraph 16 and 18. My concern
14 was, sir, that paragraph 16 provides that you, as
15 Commissioner, may be present at interviews behind closed
16 doors without other parties who have been granted standing
17 present. And when you're there at these interviews, if
18 you're there at these interviews, there doesn't appear to
19 be the provision that a transcript be prepared, or any sort
20 of record of that interview, and my concern is that the
21 commission may make certain findings or come to certain
22 conclusions based on those behind closed door interviews.

23 It does provide if you're not present. Then a
24 transcript will be provided to you, and, I gather, to us.
25 So I raise that as a concern.

26 In paragraph 18, it does say in the fourth line:

27

28 The Commissioner may consider the
29 information in the witness
30 statement or transcript when
31 making his final findings,
32 conclusions and recommendations.

33

34 So it appears that interviews can take place

1 behind closed doors, and you can make recommendations,
2 findings, final findings, conclusions and recommendations
3 based on those. And it may, or we may or may not have the
4 right to have that particular witness, who was interviewed
5 behind closed doors, called.

6 There's a discretion in paragraph 27, I certainly
7 acknowledge that, but my position to Mr. Code in our
8 meeting was that if it is the case that there are private
9 sessions held, not only would they fly in the face of a
10 public inquiry, it wouldn't be public, but it may well
11 adversely affect my client's rights, depending on whether
12 or not findings, recommendations or conclusions are made in
13 relation to that interview. And it seems, with the
14 greatest of respect, that if that's going to be the case,
15 then we should not depend on the discretion of the
16 commission to call the witness, but rather be entitled to
17 have that witness called if the interview or the transcript
18 is going to be relied on.

19 Those were my concerns. They remain my concerns,
20 and I don't know that they are hypothetical concerns
21 because the rules are not hypothetical. They are set out
22 here.

23 It may well be that you never attend a private
24 interview behind closed doors. It may well be that when
25 Mr. Code and I, if the occasion ever arises, discuss the
26 issue of calling that witness, that it, the issue of
27 his being or her being called may never arise because Mr.
28 Code may say well, it's clear that the person should be
29 called.

30 So those are my concerns, Mr. Commissioner. I
31 just put them on the record at this stage. Thank you.

32 THE COMMISSIONER: Okay. Thank you, Mr. Wolson.

33 MR. PROBER: Prober.

34 THE COMMISSIONER: I'm sorry?

1 MR. PROBER: Prober.

2 THE COMMISSIONER: Oh, Prober. I'm --

3 MR. PROBER: No problem. Thank you.

4 THE COMMISSIONER: I apologize. I apologize. My
5 apologies.

6 MR. PROBER: If you had mixed me up with anybody
7 else at the counsel table, I wouldn't mind, but Mr.
8 Wolson.

9 THE COMMISSIONER: It reminds me of one time I
10 did that in a court room, and the counsel who I misnamed
11 said to me: Let me assure you, Your Honour, neither of us
12 would be flattered by your error.

13 Anyone else have any comments on that topic?

14 Mr. Code, what do you have to say about Mr.
15 Prober's comment about two things in particular; one
16 is that there's not a transcript, but more specifically,
17 that I be present, and although I must say that I had
18 assumed that I would probably not be present at these
19 interviews?

20 MR. CODE: Dealing, dealing with that issue
21 first, and Mr. Prober expressed it much more strongly
22 than he, than he did here, that there's --

23 THE COMMISSIONER: Very articulately, I might
24 add.

25 MR. CODE: -- there's no way you should ever be
26 attending an interview, is the way he put it quite
27 forcefully. So he's putting a strong position on the
28 record that you ought not to attend these interviews, and I
29 certainly assured him that although the order-in-council
30 provides that you may attend the interviews,
31 and not wanting to contradict the order-in-council, we put
32 it in the rules so the rules would be consistent with the
33 order-in-council, but I did assure him that based on my
34 discussions with you, I thought it highly unlikely you

1 would be attending the interviews, which again, is why I
2 suggested that these concerns at this stage were
3 likely hypothetical, and we ought to await a real fact
4 situation if and when it emerges.

5 So I certainly urge you to take counsel's
6 admonitions into account in making the decision as to
7 whether or not you ought to attend interviews. They
8 feel quite strongly that you ought not to, and I'm sure
9 you'll take that into account in deciding whether to
10 attend.

11 On the -- there's nothing we can do about it. The
12 order-in-council expressly provides that you may attend the
13 interviews, and I think I know why it was put in there, but
14 it, it seems that it's an unlikely event that we
15 shouldn't worry about at this stage when it doesn't
16 appear it's going to arise.

17 The second point of whether you have a --
18 you must get a transcript if the Commissioner attends,
19 and Mr. Prober's concern about that; I don't read the
20 rule that way. I think he's misread it. The
21 paragraph 16, as I read it, clearly gives rise to an option
22 to either produce a transcript or a report, regardless of
23 whether the Commissioner does or doesn't attend. So I
24 think he simply misread the rule in that regard.

25 What will trigger a transcript is if there is a
26 subpoena used. If a witness insists on being subpoenaed,
27 then that means their evidence must be taken under oath.
28 And certainly, if a witness is being compelled by subpoena
29 and their evidence is being taken under oath pursuant to
30 the Evidence Act, then there would obviously be a
31 transcript in those circumstances. So I don't think
32 that concern that the right to a transcript is different,
33 depending on whether the Commissioner attends or doesn't
34 attend, is well taken. I think he's just misread

1 the paragraph in that regard.

2 And I certainly assured my friends that I
3 would try to keep these interviews as informal as possible
4 and not use the subpoena power unless the witness,
5 himself or herself, insists on it. There may be some
6 witnesses who are uncooperative, where we need to use the
7 subpoena power, but it will certainly be used sparingly as
8 far as I'm concerned. And I think that gave my friends
9 some comfort in that regard.

10 So if those first two points of Mr. Prober's are
11 either hypothetical or just based on a misreading of
12 the rule, what his real concern comes down to,
13 as I understand him at the end of the day, is not with
14 interviews per se, and he was very clear and fair,
15 having conducted some inquiries himself, that the
16 interviewing function is normal in commissions of inquiry
17 because they are investigative in nature, and you've got to
18 go out and conduct interviews in order to learn the facts
19 and carry out your investigative mandate. His concern,
20 fundamentally, is with you relying on ex parte interviews
21 that he has not been a participant in, has not had a right
22 to challenge or cross-examine on.

23 And I reminded him that the order-in-council
24 is quite clear in paragraph 4(a) that the function
25 of, of the public hearings, where he will have the right to
26 cross-examine, is if there are issues of accountability or
27 issues of credibility, and if any of these
28 witnesses who testify or are interviewed ex parte outside
29 of the public hearing contradict his client on any
30 important matter on which his client intends to testify,
31 then there will be a live issue of credibility, and he
32 shouldn't have much difficulty convincing you under
33 paragraph 27 that that is a witness who ought to be heard
34 at the public inquiry.

1 So I take that last concern of his as being
2 one that is well taken, but that is provided for in
3 paragraph 27, and again, I invite you to await a real
4 factual context before deciding that issue that we've,
5 we've set up a procedural mechanism to deal with.

6 THE COMMISSIONER: Well, the issue raised by Mr.
7 Prober is one that has, certainly has merit. I can
8 advise the hearing that it is not my intention to
9 participate in any of those interviews. I'm not
10 undertaking that I will not, but it certainly is not my
11 intention to do so. If I were to participate in one of
12 those interviews, I can virtually assure you that if asked,
13 I would have the person attend to be examined. I think,
14 however, the likelihood of those two events occurring are
15 highly unlikely, and I therefore do not think it is
16 necessary at this time to revise the draft rules, but
17 the point is a very valid, legitimate point.

18 So I will not make any change.

19 MR. CODE: I take it then, if there are no
20 further issues on the rules to, to be addressed, that what
21 we will ask Mr. Giasson to do at the end of today's hearing
22 is to issue the revised draft of the rules as the
23 rules of the inquiry as presently advised, and we will then
24 have a working set of rules to work with, subject to the
25 paragraph 37 power to revise them at any time, should new
26 issues arise, and I'm sure they will.

27 THE COMMISSIONER: Okay, it's so directed.

28 MR. CODE: Thank you. That then completes
29 the second order of business on our four point agenda.

30 The third order of business is the paragraph 11
31 disclosure obligation, which now falls on my friends, and I
32 simply want to formally note for the record that the
33 reciprocal disclosure obligation under paragraph 11 is now
34 engaged, and we urge all parties to produce a copy of all

1 their relevant documents to the commission, and the
2 procedural way we want to do this is to have them produce
3 the photocopy of the files to Mr. Giasson, and he will
4 then set about having them printed, copied and distributed
5 in the same manner in which the first wave of disclosure
6 went out of the Department of Justice files. So we will
7 take responsibility for copying and circulating them if the
8 parties would please produce them to us in a timely way.
9 And obviously, any lists of privileged documents should be
10 produced at the same time pursuant to the new procedure
11 that we've just agreed to in paragraph 14.

12 There are files out there that we don't have
13 that we haven't seen, and I mentioned some of them already;
14 Mr. Driskell's file with his solicitor, and the RCMP files
15 in Saskatchewan, and the, with the witness protection
16 programs. So we know there are documents out there that we
17 are still waiting for, and it -- we obviously can't get
18 underway with the interviews until those documents are
19 produced.

20 So we haven't put a firm deadline on that, but
21 I would simply ask you to stress to the parties the,
22 the importance of trying to stay on schedule, and this next
23 step, the paragraph 11 reciprocal disclosure obligation, is
24 one that should be done in a timely way.

25 I should say that Ms. Carswell was very helpful
26 in jumping the gun and getting us some of the files from
27 the 1993 Winnipeg Police Service homicide review; the
28 transcripts of those interviews, which we have, and
29 we will give those to Mr. Giasson for him to get
30 working on right away. And I was grateful to her for
31 producing those in a very timely way, and I ask that my
32 colleagues do the same.

33 And if there's anything you want to add on
34 that --

1 THE COMMISSIONER: No, I would, I guess simply
2 reiterate counsel's comments. I know December 31st,
3 the date to have the report filed before seems like an
4 awful long way, long time from now. However, time does
5 fly, and so I ask each counsel to make every effort to, in
6 a timely fashion, to effect disclosure, because before we
7 know it, July is going to be here, and our hearings, and I
8 would be very concerned if we had to delay proceedings
9 because there had not been disclosure, either from the
10 material that commission counsel is obliged to disclose, or
11 that any counsel who has standing here has not been able
12 for whatever reason to disclose. So I ask you to make
13 every effort to accomplish that as quickly as possible,
14 okay?

15 MR. CODE: The fourth issue, Mr.
16 Commissioner, on our agenda is the hearing dates, and it
17 was our intention to use this appearance today as an
18 opportunity to confirm the hearing dates or adjust them if
19 there were any submissions to that effect. So if I could
20 just formally review those dates, we've had
21 discussions between counsel about the hearing dates, and
22 what we are proposing is the following, so that
23 this can now all become public, is five four day weeks in
24 the summer commencing the week of July 17th. So that would
25 be a four day week, Monday to Thursday.

26 The second week would be the week of July 24th.
27 Again, a four day week, Monday to Thursday.

28 The third week is the week of July 31st. Again,
29 a four day week, Monday to Thursday.

30 The fourth week is the week of August the 7th,
31 except that the Monday, the 7th is a civic holiday, so
32 that week would start on Tuesday, the 8th, and run through
33 to the Friday, the 11th. So again, a four day week
34 starting on the Tuesday and concluding on the Friday.

1 And then the fifth and last week of the summer
2 block is the next week, Monday, August the 14th; a four day
3 week from Monday to the Thursday.

4 So we have 20 hearing days set aside in the
5 summer over July and August, and the hope was that we
6 could complete at least the adjudicative facts of the
7 inquiry, the who, what, when and where of what happened in
8 this case during that 20 day block of time, but out of
9 an abundance of caution, we preserved an additional
10 week in September as a spillover to provide for another,
11 an additional four days, Monday, September the 18th to
12 Thursday, September the 21st, in the event that there were
13 additional witnesses to adjudicative facts who we hadn't
14 completed in the summer block of time. In the alternative,
15 that four day block in September would be used for the
16 systemic issues, and I'll address those in a
17 moment. So the week of September the 18th; a four day
18 week for either conclusion of the adjudicative facts, or
19 the commencement and completion of the systemic issues
20 relating to, for example, the RCMP crime lab, the use of a
21 stay, the issues and, and any other systemic that may need,
22 may need to be addressed.

23 That would then leave the final
24 two days of September, the 28th and the 29th that we
25 blocked off, for final submissions, on the understanding
26 that if we needed a third day for final submissions, we
27 would sit on the Saturday, the 30th.

28 And of course, what this is all being driven by,
29 trying to complete the public hearings and submissions
30 in September, is our deadline in the order-in-council
31 requiring us to submit the report by the end of the year.
32 So the idea was to leave the three months of October,
33 November and December for the writing of the report.

34 Now, my colleagues, as I understood them,

1 are all agreeable to those dates. They're not
2 asking that they be changed. They've still got them
3 protected in their calendars, and while everybody is
4 concerned about the disclosure issues you've just
5 addressed, we are going to make our best efforts to,
6 to live by those dates, and there are various
7 significant consequences if we don't, because Mr. Giasson
8 has booked the Convention Centre for those dates. And
9 those are the dates that are available for this
10 hearing room.

11 But my colleagues have expressed a concern,
12 and it strikes me as a reasonable one; that if
13 we use that week of the 18th for, at a minimum, for the
14 systemic issues, that we're then giving counsel no more
15 than a weekend and three working days to get ready for
16 submissions on the 28th. And Mr. Lockyer, who, together
17 with AIDWYC, may be more concerned about the systemic
18 issues than some of the other parties are, took the
19 very strong view that that's simply not fair to properly
20 prepare submissions on the systemic issues, which
21 may be important if you're going to make significant
22 findings and recommendations about the RCMP lab, for
23 example, or about the use of the stay, that's
24 something counsel should be able to develop careful written
25 submissions on, and three, four days is not
26 sufficient to prepare those kinds of submissions on complex
27 systemic issues. So that is the one issue in
28 relation to the hearing dates that I wanted to bring to
29 your attention.

30 Mr. Giasson, in his usual efficient manner,
31 immediately went to work trying to find out if there were
32 available dates here at the Convention Centre in October or
33 November, and I can advise my colleagues, having reviewed
34 these dates with you, Mr. Commissioner, and checked

1 your calendar, that we have three blocks in October, if I
2 could ask you to all check your calendars, that would be
3 available both to Mr. Commissioner, and to the
4 Convention Centre.

5 The first block is four days in the second week
6 of October; the 9th, 10th, 11th and 12th. So the Monday to
7 the Thursday, although I note that that Monday, the 9th is
8 Thanksgiving Day, so the reality is it's three days;
9 the 10th, the 11th and 12th, immediately following
10 Thanksgiving.

11 And then in the third week of October, the 17th
12 and the 18th, the Tuesday and the Wednesday.

13 And then finally, at the very end of
14 October, what's really the fifth week of October, the
15 Monday and the Tuesday, the 30th and the 31st.

16 So three blocks of time in October, and in
17 November, there's one block of time that is available both
18 to the Convention Centre and to Mr. Commissioner, and that
19 is the second week of November; the 6th, 7th and the
20 8th, the Monday, Tuesday, Wednesday is available.

21 So could I ask for your views, Mr.
22 Commissioner, on whether we should adjust the date for
23 final submission, and ask for the views of my colleagues on
24 those new blocks of suggested dates?

25 THE COMMISSIONER: Okay. Who would have comment
26 on first, on the issue of the 28th and 29th as to the
27 timeliness, appropriateness of having submissions so close
28 to the, potentially fairly recent, what would then be
29 recent issues, the systemic issues, that I expect we
30 would probably be dealing with in, in the week of September
31 18th, and then would 28th and 29th be too tight, or could
32 we even consider having submissions on the factual issues,
33 and then systemic issues later? That may not be a good
34 idea. I don't know. But who has any comment on,

1 on the, first of all, on the 28th, 29th, as to whether
2 that's a bit premature?

3 MR. LOCKYER: Certainly, I was the one who
4 felt it was premature, and still do, Mr.
5 Commissioner. I thought we might even keep the 28th and
6 29th aside as, as potential systemic issue days as well.

7 And then I would feel a month would be nice
8 period of time to reflect and prepare written
9 submissions thereafter; so towards the end of October,
10 early November.

11 I'm available all the days that my friend has --

12 THE COMMISSIONER: Okay.

13 MR. LOCKYER: -- has --

14 THE COMMISSIONER: All right. Ms. Carswell?

15 MS. CARSWELL: Yes, Mr. Commissioner, I
16 suspect it may not happen often, but I agree with Mr.
17 Lockyer. I think those dates might be
18 premature if we're still hearing evidence in that week of
19 September. It would be very difficult with the press if
20 counsel's other obligations as well as these to prepare
21 submissions for those dates.

22 I do think it's a good idea to keep them open in
23 case we run out of time and need more dates for the
24 evidence, though, and I can make myself available on any of
25 the dates my learned friend has just indicated. I'll have
26 to do some juggling, but I can do that. Thank you.

27 THE COMMISSIONER: Okay. Mr. Wolson.

28 MR. WOLSON: Good afternoon, Mr. Commissioner.
29 I don't have a problem at all, and I think it may
30 be a good idea to delay the final submissions.

31 In terms of availability, I'm expected to be out
32 of the country in the first two sets of dates that were
33 suggested by my friend.

34 THE COMMISSIONER: So the week of the

1 10th and the week of the 17th of October?

2 MR. WOLSON: That is so.

3 THE COMMISSIONER: Okay. All right.

4 MR. WOLSON: And I suppose the other issue
5 is even if this facility weren't available, it's possible
6 that we could convene in another facility, although it may
7 not be convenient, it is possible, I'm sure, to find
8 another place if, for instance, the first week of October
9 were desirable.

10 THE COMMISSIONER: Okay.

11 MR. WOLSON: Thank you.

12 THE COMMISSIONER: Okay. If we were to eliminate
13 the week of the 10th and the week of the 17th of October,
14 should we then reserve October 30th, 31st and October, and
15 November 6th, 7th and 8th?

16 Mr. Prober?

17 MR. PROBER: It's something that I think
18 could be changed, but I have trials set for October 30th
19 and 31st. Those should be changed without difficulty.

20 The problem I have is starting on November 6.
21 There's a murder trial involving other counsel, at least
22 two other counsel, not including Crown counsel. I
23 expect to have assistant counsel on that, but it may be
24 difficult for me to be available at that particular time.
25 So, I just raise that, but I'll do what I can in terms of
26 rescheduling what I have in my diary now.

27 THE COMMISSIONER: All right. Yes.

28 MR. R. OLSON: Thank you, Mr. Commissioner.
29 Obviously, the other Mr. Olson unfortunately couldn't be
30 here today, and I can't commit him to any of those dates at
31 this time. He does have several other things scheduled
32 during those dates, so some of them are penciled in, and he
33 may be available or able to change what he already has
34 marked down, but I can't commit him to any of those dates

1 at this time.

2 And perhaps in follow up to Mr. Prober's
3 comments, it might be best to have everyone review their
4 dates when they get back to the office, and get back to Mr.
5 Code within a day or two, if that's possible.

6 THE COMMISSIONER: Okay. All right.

7 MR. CODE: Well, from listening to
8 my colleagues, it looks like the October 30th and the 31st
9 would be doable for everybody, with the possible exception
10 of Mr. Olson. And perhaps what I can suggest, in
11 light of what we've heard, is that we keep the dates, the
12 28th and the 29th of September, potentially, as you've
13 suggested, to deal with final submissions on adjudicative
14 facts, and pencil in October 30th and 31st, subject to Mr.
15 Olson's calendar, for final submissions on systemic issues.
16 It may well be that if Mr. Olson knows what it is we're
17 aiming to do on those two dates that that'll assist him in,
18 in knowing whether he can get other counsel to assist on
19 the systemic issues, or whether he can get out of his other
20 commitment for those two days.

21 It looks, from discussing his calendar with,
22 my colleague, that he's got an ongoing matter
23 for about three weeks, so the issue would be whether
24 he could get out of it for two days to do the
25 systemic issues.

26 So I think that's the best I can suggest at
27 this time, is that we, we try and keep the 28th and the
28 29th for at least part of the final submissions, and
29 reserve the 30th and the 31st for the final submissions on
30 systemic issues. The 30th and the 31st are good days
31 in the sense that if, for Mr. Lockyer's point that he would
32 like a month to prepare submissions on the systemic issues
33 after the evidence is complete on those points. That would
34 give him exactly that period of time.

1 So I think those are the only suggestions I
2 can usefully make.

3 THE COMMISSIONER: All right. All right.

4 MR. CODE: There are --

5 THE COMMISSIONER: All right. All
6 right. Anyone else any comment?

7 I think then what I would do is we would reserve
8 this space then for October 30, 30th and 31st in addition
9 to the dates that we've already mentioned.

10 MR. CODE: And I'll confer with Mr. Olson --

11 THE COMMISSIONER: Okay.

12 MR. CODE: -- about the state of his calendar in
13 relation --

14 THE COMMISSIONER: All right.

15 MR. CODE: -- to those days.

16 THE COMMISSIONER: All right. Okay.

17 MR. CODE: The, two other sort of sub issues
18 related to scheduling: In relation to the systemic
19 issues, I raised with my colleagues, the need
20 to get experts retained and ready to come and appear before
21 you in that September 18th block of time to address the
22 systemic issues, and I suggested the format that had been
23 used by a number of inquiries quite effectively, was
24 to retain an expert to prepare a report on the systemic
25 issues, and then have a panel come and critique the report
26 or discuss the report rather than having an adversarial
27 hearing or sworn evidence, which systemic issues don't tend
28 to lend themselves to sworn evidence, so I proposed to my
29 friends that I would circulate suggested names in the very
30 near future of experts who we could retain to look into the
31 systemic issues, and to ask them to hold those four days in
32 September to come and address the systemic issues in some
33 kind of a panel discussion. And obviously, I'll consult
34 with them about the identity of those individuals.

1 So that is the present plan,
2 subject to your wishes, Mr. Commissioner, that we get on
3 with retaining those experts in a timely way so that they
4 can do the work they need to do to be ready for September
5 18th.

6 THE COMMISSIONER: Okay.

7 Yes, and I guess I would say to counsel as well,
8 if, if you look at paragraph 1(f) of the order-in-council,
9 that is an area that not everyone here is going to have
10 any particular strong interest or view in. I mean some of
11 you may well have an interest or view, but it will be
12 less personal or less engaged in the issue. And that is
13 the, if is to consider whether and in what way a
14 determination or declaration of wrongful conviction can be
15 made in cases like this, where Minister of Justice orders a
16 new, orders a new trial, and Crown counsel subsequently
17 directs a stay of proceedings. So that's an issue
18 that probably not all of you are going to have the same
19 degree of interest in.

20 So even if there are some conflicts with
21 dates, I'm sure we can work around that. And also, if you
22 don't have -- Mr. Code has indicated that we are looking
23 at this point as to see what sort of person, or
24 persons we might get to comment on that topic.

25 It's not, I don't think we have any specialist on
26 that topic in this province or in this country; maybe not
27 in North America. I don't know. But it's a matter that if
28 you and your client have a particular interest
29 in it, if you would share any suggestions as to who or the
30 type of person that might be retained, such as an academic,
31 and would it be an academic with, you know, a background in
32 criminology, someone who is an expert in the criminal law,
33 and perhaps has opposed or in conjunction with criminology,
34 a matter who has a person, sort of person who has a

1 particular interest in civil rights. I don't know if
2 this is a human rights issue. Not sure I know the
3 difference between civil rights and human rights all the
4 time, but suggestions as to the type of person that we
5 might consider retaining to do a background paper.

6 And as I say, I expect some of you will have a
7 greater interest in this than others, and I think
8 when we -- if we are forced by time to have to bifurcate
9 some of the process, that is one that probably could be
10 separated off from the others for the purpose of
11 submissions.

12 I'll just make that general comment.

13 MR. CODE: In relation to the other systemic
14 issue in paragraph 1d, the RCMP lab, I stressed to
15 my colleague, Mr. Gates, that obviously it -- we want to
16 appoint somebody who would be able to work effectively with
17 the chief administrator of the RCMP lab, that obviously,
18 he's the, whoever we appoint is going to need to have a
19 contact person in the RCMP lab, and I'll obviously try to
20 liaise with Mr. Gates in that regard to make sure that
21 the commission's expert works effectively with the
22 person in charge of the RCMP lab.

23 THE COMMISSIONER: Okay. All right.

24 MR. CODE: The last aspect of scheduling
25 that I wanted to raise is the always delicate subject of
26 the sitting hours of the commission, on which everyone
27 always has personal styles and tastes and wishes. And a
28 number of my colleagues are busy criminal lawyers who have
29 busy criminal practices that require phone calls and
30 meetings with clients, and sending instructions to students
31 and juniors who are appearing in court for them. So
32 the issue of when do we start and when do we finish got
33 discussed, and I've gotten back to them with your
34 counterproposal, if I could call it that, that we start at

1 9:30 and conclude at 4:45 unless there's a witness who's
2 just about to finish and everybody wants to get the witness
3 finished, in which case, on rare exceptions, we might sit
4 on till five o'clock if everyone concurred.

5 So I don't know if any of my colleagues want
6 to address that issue before you as to the preferred
7 sitting hours.

8 THE COMMISSIONER: Can everyone live with 9:30
9 till 4:45? And I could assure you if that's
10 what we decide, I will do my very best to ensure that both
11 of those times are punctually kept. I don't
12 like sitting beyond 4:45, and would do it only on the
13 consent of everyone. If it was, if some party wanted
14 to go beyond 4:45, it would only be on the consent of
15 everyone, and I would suggest 9:30 in the morning, and then
16 a 15 minute break at about 11:15, or when, I'm not sure
17 what time the custom is to break for lunch. But,
18 what, what's the custom in Winnipeg?

19 UNIDENTIFIED PERSON: 12:30.

20 MR. PROBER: About 11 o'clock in the morning till
21 2:00.

22 UNIDENTIFIED PERSON: We have long winters here.

23 THE COMMISSIONER: It's long winters and long
24 breaks.

25 12:30 is the normal, all right. Well, then if we
26 went from, I'm not sure what the halfway point would be,
27 but nine, 9:30 to five to 11:00, 10 to 11:00, somewhere
28 around there, and then a 15 minute break, and then resume
29 thereafter and continue to 12:30.

30 And then what time do you usually
31 take for a lunch break? Aside from the 11:00 to 2:00?

32 MR. WOLSON: We usually come back at 2:00.

33 THE COMMISSIONER: From 12:30 till 2:00?

34 MR. WOLSON: That's the norm.

1 THE COMMISSIONER: Well, it's generous. I'll --

2 UNIDENTIFIED PERSON: It's much worse out
3 in BC, I can tell you.

4 THE COMMISSIONER: If that's, if
5 that's the consensus, I will abide by it. But if it was a
6 little shorter, it might even, I might even enjoy it more,
7 but we'll say 12:30 till 2:00.

8 UNIDENTIFIED PERSON: Could I counter with
9 1:45?

10 THE COMMISSIONER: We'll see how it
11 unfolds. But at the moment, it'll be 12:30 till 2:00,
12 and then if we start slipping behind, it'll be 12, it'll be
13 1:45, or whatever, and if we get really behind, it'll
14 be shorter.

15 MR. LOCKYER: (Inaudible).

16 THE COMMISSIONER: Okay. Are there any other
17 matters with which to deal this afternoon?

18 I then would like to say thank you to all of you
19 for obviously what was a very worthwhile and productive
20 effort in reviewing those draft rules, and the suggestions
21 with which you have presented me, and also to thank you for
22 your courtesy, understanding and patience today, and I hope
23 in the weeks to come. Good luck to all of you. Thank you.

24 THE CLERK: Order. This commission of inquiry is
25 now adjourned.

26

27 (PROCEEDINGS ADJOURNED)

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I hereby certify the foregoing pages of printed matter, numbered 1 to 42, are a true and accurate transcript of the proceedings, transcribed by me to the best of my skill and ability.

PAMELA M. MOORE
COURT TRANSCRIBER

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