

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

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The Honourable Patrick LeSage, Q.C. Commissioner

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 before the Commission sitting  
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Volume 24

INQUIRY PROCEEDINGS

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Mr. R. Wolson, Q.C.	For the Winnipeg Police Association and certain members
Mr. J. Kennedy, Q.C.	For the Association in Defence of the Wrongly Convicted

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1 Thursday, September 21, 2006

2 Upon commencing at 9:06 a.m.

3 MR. DAWE: Thank you. Thanks to our  
4 distinguished panel for attending. I should  
5 just note for the record I am advised,  
6 Mr. Wolson is not here, but I've been advised  
7 he's sent a message and he's content that we  
8 start without him. So I think in the interest  
9 of time, rather than formally introducing all of  
10 our distinguished panelists, I will just rely on  
11 the fact that we have their biographies in the  
12 materials that have been passed out, and we will  
13 jump straight into it, since we're much more  
14 interested in what they have to say about the  
15 issues.

16 As you will see, we've circulated a revised  
17 list of questions, which essentially have  
18 changed the order or the questions slightly, and  
19 added a new question, question 4. And what  
20 we've also done is divided the questions, there  
21 is six in total, into three groups. So the way  
22 I propose to proceed is that we'll have the  
23 panelists address each of the questions in the  
24 first group. And then once they've had their  
25 say, we'll then at that point invite counsel to

1 comment on the questions in that area, before  
2 you move on to the next group of questions.

3 As you will see, the questions in the first  
4 group, questions 1, 2 and 3, all deal  
5 specifically with the issue of microscopic hair  
6 comparison in evidence. The question is whether  
7 it should be admissible, and if it should be,  
8 what should the safeguards be, both in the lab  
9 and court room.

10 The second group of questions, questions 4  
11 and 5, broaden the inquiry by raising a more  
12 general issue of how the courts and forensic  
13 science community should deal with the problem  
14 of so-called junk science, or science techniques  
15 where doubt is cast on them.

16 Question 4 deals with this question  
17 retrospectively, how should the lab respond to  
18 new information that casts doubt on work done  
19 that was done in the past. Whereas question 5  
20 is more prospective, what standard should  
21 forensic scientists and jurists adopt to ensure  
22 that evidence that is presented as scientific  
23 has an adequate foundation.

24 And then the last area deals with the issue  
25 of lab independence, and specifically this issue

1 of whether there is a problem with having labs  
2 affiliated with the prosecutorial arm of the  
3 state.

4 So to deal with the first issue first, the  
5 first question deals really with the issue of  
6 microscopic hair comparison, and I will sum it  
7 up like this: Has so much doubt now been cast  
8 on this technique that it should no longer be  
9 admitted in criminal trials. I think we can  
10 probably easily deal with questions 1 and 2  
11 together. If you think the evidence should be  
12 admissible in some circumstances, what are those  
13 circumstances and what safeguards should be put  
14 in place in terms of what judges and juries are  
15 told about this evidence, to prevent it from  
16 being misunderstood or misused.

17 So I invite Doug to comment on this and  
18 then he can elicit responses from the rest of  
19 the panel.

20 MR. LUCAS: Thank you, Mr. Dawe.

21 Well, with respect to the first question, I  
22 tried to deal with it to some extent in my  
23 report. And there is a kind of a summary at the  
24 bottom of page 33 where I said microscopic hair  
25 comparison continues to be a useful technique in

1 forensic science for exclusionary purposes, and  
2 may be helpful, may be helpful for inclusion  
3 purposes in certain circumstances. And it's  
4 probably a narrow band of circumstances,  
5 particularly where DNA, for example, isn't  
6 possible, and where the potential population of  
7 sources of hair is very, very limited.

8 I think this question is probably moot with  
9 respect to the RCMP laboratory system, because  
10 they no longer do microscopic hair comparison.

11 But I thought to open the discussion, I'd  
12 ask Professor De Forest, who is probably the  
13 only person on the panel who has actually done  
14 microscopic hair comparisons, to explain what  
15 his experience is with what is happening now. I  
16 think there are other labs that have followed  
17 the policy of the RCMP and have stopped, but  
18 there certainly are some that still do  
19 microscopic hair comparison for certain  
20 purposes. Peter.

21 DR. DE FOREST: Thank you, Doug. I guess I will  
22 start off by saying that I think it's a mistake  
23 to throw out the baby with the bath water, so to  
24 speak, that there is an important role to be  
25 played by the microscopic hair comparison. It



1 cannot be done after the digestion of samples by  
2 techniques, or preparation for the mitochondrial  
3 DNA, but you can certainly envision situations  
4 where a mitochondrial comparison shows a  
5 correspondence. But recognizing that the  
6 probabilities are quite modest with  
7 mitochondrial DNA, if you had gone ahead and  
8 destroyed the samples for that purpose, then you  
9 can go back and get a second bite at the apple  
10 and do the microscopical. And so there can be  
11 exculpatory evidence that's overlooked. I think  
12 that the defence attorney should give some  
13 attention to the idea that the mitochondrial  
14 association may not mean that much, and going  
15 further and having the microscopical comparison  
16 could rule out the association made by the  
17 mitochondrial DNA.

18 Having said that, the technique to do a  
19 proper microscopic comparison is very, very time  
20 consuming. It requires a lot of education and  
21 training on the part of the examiner. It  
22 requires good scientific environment for it to  
23 be done in. And part of the problem certainly  
24 is ascribable to what I regard as the gross  
25 underfunding of forensic science. Forensic

1 science in terms of the laboratories that are  
2 available to the prosecution, but also and very  
3 seriously, the funding available to the defence  
4 bar to challenge these things. I think in the  
5 case at hand here, a good cross-examination  
6 could have undercut the impact of the evidence  
7 presented in this case.

8 The other thing is the context in which the  
9 evidence occurs. And if you have garbage, if  
10 you are receiving garbage, you're going to, you  
11 know, it's garbage in, garbage out. The idea of  
12 getting a reasonable or meaningful result from  
13 hairs taken from a van, of unknown history or  
14 very poorly characterized history, four months  
15 after an event, is just asking for trouble.  
16 It's not leading to something that really has  
17 the potential of really edifying us very much.  
18 So I think I'll stop with that.

19 MR. LUCAS: Dr. Tilstone, you have reviewed a  
20 great many laboratories, and what's your take on  
21 the current status of microscopic hair  
22 comparison in forensic laboratories, in North  
23 America at least?

24 MR. TILSTONE: I think that the principle was  
25 well expressed by you in your report in one of

1 the accounts you gave of what happens. Pretty  
2 well all hair examiners in crime labs today  
3 would say that the reliability of their testing  
4 depends on the size of the known sample that  
5 they have to work with. And the recommended  
6 sample size really is dependent on the examiner,  
7 but probably no one would say less than 30, and  
8 most would say as you expressed in your report,  
9 something around a hundred hairs from a known  
10 source is preferable. And the reason for this  
11 is that within an individual, there is quite a  
12 range in the characteristics in the hairs that  
13 the examiner is depending on to draw his or her  
14 conclusions.

15 To me, looking at it from the point of view  
16 of scientific reliability, that immediately  
17 tells us that there is an intrinsic problem in  
18 microscopical hair examination in regard to  
19 forming a reliable conclusion of identity  
20 between recovered evidential hairs and the  
21 particular sources. Because of that fundamental  
22 variety, it just seems scientifically illogical  
23 to say you need a hundred samples to adequately  
24 characterize the known, and then be prepared to  
25 draw a conclusion about 1 or 2 or 3, or

1 certainly very few recovered evidential hairs.

2       What you can do, is if those hairs are  
3 quite clearly different in their characteristics  
4 from the characteristics, or the range of  
5 characteristics that are being observed in the  
6 known set, it's quite legitimate to draw a  
7 conclusion that they could not have come from  
8 that source. Going beyond the conclusion they  
9 could not have come from that source I think is  
10 getting into very difficult territory.

11 MR. LUCAS: Do you get a feel for what  
12 laboratories have done? Have they reduced the  
13 number of cases in which they are doing  
14 microscopic hair comparison, or stopped  
15 completely?

16 MR. TILSTONE: There has been a steady and  
17 continuing trend to move away from  
18 time-consuming objective tests that used to be  
19 the, I guess the bread and butter of the trace  
20 examiner, everything from hair to paint and  
21 glass and fibres. I think the reason why people  
22 are moving away from that is not entirely  
23 scientific. I think there's no doubt that  
24 well-trained examiners can in fact produce  
25 reliable objective evidence in terms of this

1 range of physical testing of associative  
2 evidence. But it's time consuming, and it's  
3 very difficult to draw meaningful comparisons or  
4 come to meaningful conclusions in the same way  
5 that can be done, for example, with DNA testing.

6 MR. LUCAS: Dr. Mayer, what is the situation  
7 with your laboratory in Ontario with respect to  
8 hair comparison?

9 DR. MAYER: We have gone through a similar  
10 situation, namely, the Commission into the  
11 Wrongful Conviction of Guy Paul Morin in  
12 Ontario, and where hair played a role. It  
13 certainly played a role in the prosecutorial  
14 process. It certainly was very much the subject  
15 of scrutiny at the end of the day where we're  
16 looking at whether the findings that were  
17 generated as a result of examination of a single  
18 necklace hair, as the media at the end of the  
19 day called it, and what the impact, the  
20 implication was for our own laboratory.

21 And it is clear that since that inquiry,  
22 the report was handed down by Judge Kaufman in  
23 1998, we understood very quickly that we had  
24 problems with that particular type of  
25 examination and analysis, and we, in a very

1 proactive manner, moved very curtly to ensure  
2 that not only the forensic science practitioners  
3 that operated within our own laboratory  
4 understood what the limitations were associated  
5 with that type of examination, but also to  
6 ensure that the justice enterprise, the justice  
7 sector, was made aware of those limitations.  
8 And that at the end of the day meant that, over  
9 time, we were very careful in choosing the words  
10 that were inserted into our reports to convey  
11 the findings and the conclusions that were  
12 associated with the examination.

13 And ultimately, today, we are at a point  
14 where we clearly recognize that this type of  
15 work is not sufficiently probative. It may have  
16 some exclusionary value, that is a consistent  
17 picture that has emerged. But in terms of our  
18 ability to establish identity, we knew then we  
19 could not do it, and we know today there are  
20 many issues that are linked to comparing  
21 samples, especially when the samples are limited  
22 in nature, and especially when we are trying to  
23 very carefully ensure that the prejudicial value  
24 of the results of our work does not outweigh the  
25 probative value.

1           And I find words, simple words such as  
2 "consistent with" were a problem then for many  
3 laboratories, including Central Forensic  
4 Sciences, because when one uses a word such as  
5 consist -- or a phrase such as "consistent  
6 with," very often, the other side would feel  
7 that, well, we have clear-cut evidence that, in  
8 fact, there is a match, that the items have  
9 originated from the same source.

10           And as Mr. Alan Gold in Ontario put it  
11 some time ago, and I'll paraphrase it, the words  
12 "consistent with" may suggest that there is a  
13 lack of difference, but they are not proof of  
14 identity.

15           And I find this industry has recognized at  
16 some level there are problems with the  
17 conclusions and results, and has tried to couch  
18 those findings and conclusions in a variety of  
19 terms and words, rather than come forward in a  
20 very plain language and draw everyone's  
21 attention to the limitations associated with  
22 that. And we have to do this sooner than later.  
23 MR. LUCAS: I used to think that "consistent  
24 with" was a very good phrase to use, because it  
25 meant something to me. But I eventually came to

1 realize what it meant to me may not be the same  
2 what it means to other people. And I found that  
3 within our own laboratory, where some people  
4 thought it was a very strong conclusion and used  
5 it that way, and others felt it was a weak  
6 conclusion and used it that way, so the  
7 receivers of that information would be totally  
8 confused as to what it meant.

9 Mr. Neufeld and Mr. Bromwich, what is your  
10 experience with microscopic hair comparison?

11 MR. BROMWICH: I think I can be very quick  
12 because I probably have less experience with  
13 microscopic hair comparison than anybody in the  
14 room. I really don't have views on it. I do  
15 want to talk, as we get into some of the other  
16 questions, about the adequate way to respond  
17 when flaws are found with a particular  
18 scientific technique, and I think that's where I  
19 can be most helpful. I'm informed by the views  
20 of others, but I don't have any free-standing  
21 independent views on microscopic hair  
22 comparison.

23 MR. NEUFELD: Well, at the Innocence Project, we  
24 have now had, I guess as of currently, probably  
25 two dozen cases where people were initially



1 included through hair microscopy and ultimately  
2 exonerated to the satisfaction of all parties  
3 involved through post-conviction DNA testing.  
4 We have gone back and looked at those cases, we  
5 have deconstructed them, and I think there are  
6 several conclusions that are relevant to the  
7 point that you are asking us about.

8         There is no question, and I think everyone  
9 in the room would agree, that DNA is a far more  
10 robust forensic science that is hair microscopy.  
11 It is speculative, actually, to suggest that  
12 hair microscopy still can play a useful role in  
13 the forensic science or criminal justice  
14 adjudicatory process for the following reasons.  
15 One, we know from the most recent study, which  
16 you referred to, Doug, in your report by Max  
17 Houck and Bruce Bedowle, that even when you have  
18 the best hair examiners, the most competent,  
19 that in about 10 per cent of the cases would  
20 they declare a consistency or similarity or  
21 match, whatever words you want to use, when you  
22 do the mitochondrial DNA testing, you get a flat  
23 out exclusion. That's the best examiners.

24         I don't know of any data, Peter De Forest,  
25 to suggest that there is a similar reaction when

1 you get a DNA match, where you then did hair  
2 microscopy and you were able to exclude  
3 somebody. You may have anecdotal data, I don't  
4 know it, but I've never seen any published data  
5 anywhere to suggest that converse. If you did,  
6 then perhaps it would be very useful for that  
7 purpose. But in the absence of that, it is so  
8 vulnerable in so many ways. I mean, for  
9 instance, to say, well, yes, it could be useful  
10 as a screen in cases of obvious visual  
11 exclusion. I don't think anybody disputes that.

12 The problem is, what do you do if it's not  
13 completely obvious, if it's getting to the point  
14 where you need to look at things microscopically  
15 because it's not obvious to the naked eye.  
16 My concern, and not as a defence attorney, but  
17 as somebody who wants to get to the truth here,  
18 is that you can equally make an erroneous  
19 exclusion as you can make an erroneous  
20 inclusion. And although erroneous inclusions  
21 lead to the conviction perhaps of an innocent  
22 person, erroneous exclusions tell the police to  
23 leave this person alone who, in fact, may be the  
24 real perpetrator committing serious violent  
25 crime. And in those situations, microscopy

1 doesn't add anything to the mix.

2       The other problem is, when you say that  
3 mitochondrial DNA is not that discriminating,  
4 it's not as discriminating as nuclear DNA, but I  
5 don't know, Peter, what's the current power of  
6 exclusion on hair? I mean, it's over 99  
7 percentile, isn't it? It's over 99 per cent.  
8 And certainly, 99 per cent, if you can declare  
9 that somebody is a match with a 99 per cent  
10 exclusion rate, that is much more probative  
11 evidence, much more than anything you could ever  
12 get from hair, because hair has no database from  
13 which one can give a statistical opinion.

14       So I actually don't see any reason, given  
15 what we know now about mitochondrial DNA and  
16 what it's shown us about hair microscopy and all  
17 those DNA exonerations involving hair microscopy  
18 from all over the country, from all over North  
19 America, that it actually continues to serve any  
20 significant roll, other than an early screening  
21 device.

22 MR. LUCAS: Actually, in that Houck and Bedowle  
23 study, they did look at the few exclusions that  
24 hair had done, and the mitochondrial didn't  
25 reverse any of those, but there was a very

1 limited number of them.

2 Peter, do you want to add anything?

3 DR. DE FOREST: I guess, clearly I disagree in  
4 terms of the utility of forensic microscopical  
5 hair comparison when it's done properly. I  
6 mean, the problems that we're seeing here -- and  
7 I'm not sure that I would agree that the Bedowle  
8 study there was evidence of the best comparisons  
9 that were done. But there are a lot of areas  
10 where physical evidence does not give numbers,  
11 or where it doesn't give numbers that can be  
12 related to a fixed kind of database. But  
13 clearly the mitochondrial DNA, you know,  
14 depending on the type, and I'm not a DNA expert  
15 by any stretch of the imagination, but this is  
16 not very highly discriminating, and it's quite  
17 conceivable to be able to get individuals that  
18 have the same type. Some of these things occur  
19 in the order of a few per cent, certainly, some  
20 of the more common mitochondrial types. When  
21 you get into the same maternal line, of course,  
22 they are all the same, there's no  
23 differentiation at all. But, again, I think  
24 that because of, you know, if you're happy with  
25 99 per cent or something, you know, and that's

1 as far as you want to go, fine. But I think  
2 that the idea of a follow-up, you know, a  
3 confirmation of the mitochondrial type inclusion  
4 using the microscopical approach is clearly  
5 warranted, and one should not be reporting  
6 mitochondrial results without some kind of  
7 qualification that there could have been a  
8 microscopic comparison done which might have  
9 lead to an exclusion.

10 There are a number of areas of physical  
11 evidence where things aren't like DNA, where we  
12 can't say that it's one in umpteen billion. And  
13 that doesn't mean that the techniques aren't  
14 useful, if the limitations are explained. And  
15 this is of course a very, very important thing,  
16 limitations of the conclusions must be made  
17 clear so everybody really understands what  
18 you're saying there. And maybe an analogy that  
19 might be useful would be to think of several  
20 kinds of physical evidence, each of which might  
21 have maybe a 90 per cent exclusion rate being  
22 applied to a particular case. That would be  
23 analogous to doing STR typing, where you take  
24 one locus, then a second locus and third locus  
25 and so forth, and you're accumulating things.

1 You know, a single locus in STR is not going to  
2 mean anything, or might not mean very much. But  
3 if it contributes to a larger picture by being  
4 integrated with other information, that's  
5 valuable.

6 So there isn't really this huge gap between  
7 the reasoning process and developing information  
8 of value when we look at the DNA versus other  
9 forms of evidence. If we do understand the  
10 limitations of what each of these contributors  
11 to the overall picture means, and make that  
12 very, very clear, then I think we can get a lot  
13 of information from physical evidence.

14 And I raised the issue of funding before.  
15 I think it's a very, very important thing for  
16 both prosecution and defence, that we do not  
17 have adequate funding. And there are a lot of  
18 things where the physical evidence that's  
19 available in cases is not being utilized, it's  
20 not being recognized, and there's a lot of  
21 potential for exculpation that's being  
22 overlooked.

23 MR. DAWE: If I may, I would like to change the  
24 focus very slightly and have you comment, all of  
25 you, on the issue of the presentation of this

1 kind of evidence, both of the way it was done in  
2 the past and how it should be done in the future  
3 if it's omitted.

4 And what we see is that, we have seen in  
5 this case certainly, that around the time frame  
6 that we're looking at in the late 1980's, early  
7 1990's, this evidence was being presented to  
8 juries. Juries are being told that a finding  
9 that a questioned hair and a known hair were  
10 consistent was highly probative on the issue of  
11 identity. They were being told things it is  
12 very likely it came from the same person, or the  
13 chances of it not coming from the same person  
14 were remote. So I'd really like to have people  
15 comment on whether that kind of evidence, with  
16 benefit of hindsight now, can still be seen as  
17 appropriate, in light of what we now know? And  
18 if it isn't, what would be the way to express  
19 this issue of probabilities to juries now if  
20 this evidence is going to be admitted?

21 MR. LUCAS: Well, I attempted to deal with this  
22 to some extent in my report on pages 30 and 31.  
23 But if indeed the evidence is to be adduced,  
24 clearly juries should be told what the process  
25 is, that it's based solely on the microscopic

1 examination of the characteristics that are  
2 available. They should also be told what the  
3 limitations of that process are. And certainly  
4 it should be explained that microscopically  
5 similar hairs can be found on more than one  
6 individual.

7 As Mr. Neufeld has said, there's very  
8 limited literature on what the reliability of  
9 this is. But the one study, which is very  
10 limited, shows something of the order of 10 to  
11 15 per cent of the time that the microscopically  
12 similar hairs did not in fact come from the  
13 particular source. I guess the other, it  
14 depends a little bit on whether you see the  
15 glass as half empty or half full. It perhaps  
16 means that 85 per cent of the time it does mean  
17 they did come from -- that their proficiency  
18 testing studies over many years which showed  
19 something of the order of 10 per cent of the  
20 time the hairs that were called as  
21 microscopically similar did not come from a  
22 particular source.

23 And indeed, in a study that's been  
24 discussed in this forum that Barry Gaudette did,  
25 a very massive study, he found something like 13



1 people out of 100 had hair that couldn't be  
2 distinguished from at least one of the other  
3 hairs, so they need to be told that.

4 Peter, you are the only one who actually  
5 reports hairs. How do you describe it to  
6 juries?

7 DR. DE FOREST: I hope it's clear that my  
8 position here is not defending the way that this  
9 is applied in cases. I'm really talking about  
10 the potential here, and the potential for  
11 improving this and utilizing it as a valuable  
12 tool to learn more about the value of various  
13 evidence here. And clearly there is some  
14 problems in this case with the relevance of even  
15 doing this. If mitochondrial typing had been  
16 concordant in this case, what would it really  
17 mean? I don't think it would mean that much.  
18 But in any case, I have sort of forgotten where  
19 you were.

20 MR. LUCAS: How do you explain to jurors the  
21 microscopic results --

22 DR. DE FOREST: There is no one size fits all  
23 thing here. It depends on the case. We had a  
24 committee that the FBI set up, about 20 some  
25 years ago now, that was only funded for a couple

1 of years. We were going to establish things  
2 with international representation. It was going  
3 to really improve this field. And then the  
4 funding dried up and the progress stopped. But  
5 at that time, for example, we had arrived at a  
6 consensus standard that a known sample consists  
7 of about 100 hairs. And then now, obviously,  
8 you can't do a thorough examination on all the  
9 100 hairs, there has to be some culling down  
10 process. But the culling down process is not  
11 something that one size fits all either. You  
12 have to look at the nature of the range of  
13 variation in that known set. And that's a major  
14 thing in terms of the interpretation and value  
15 of hair comparisons. Because, you know, you can  
16 have a very, very large range of variation which  
17 weakens the comparison, makes it much more  
18 difficult to carry out, and to extract from that  
19 the "representative sample" that's going to  
20 allow you to make this workable with a smaller  
21 number.

22 And my understanding in this case is that  
23 there were six hairs that were selected as being  
24 representative. That is really a pretty small  
25 sample, but I haven't seen what the overall

1 range of variation is.

2 But, basically, the evidence has to be  
3 reported in a way that is consistent with the  
4 value. There's not a one size fits all thing.  
5 It doesn't mean the same thing in every case. I  
6 think that you look at the context of how the  
7 evidence is, the larger context, both physical  
8 and your questions that have been posed, and it  
9 has to be looked at in terms of what the sample  
10 is like, the unknown sample and the known  
11 sample, what the variation in the known set is.  
12 So it's a highly variable thing requiring some  
13 real thinking and very careful, you know,  
14 application of scientific reasoning and that  
15 kind of thing.

16 MR. LUCAS: Joel, when people in your lab do  
17 report a hair comparison, how do they express it  
18 and how do they explain it to juries?

19 DR. MAYER: I'd like to open by saying that it  
20 is key, it's critical, it is essential that  
21 forensic scientists understand what the  
22 difference is between findings and conclusions  
23 or opinions. It is key that forensic scientists  
24 share that with the criminal justice system.  
25 Very often I find that at the end of the day,

1 when a forensic science laboratory issues a  
2 report, what we see are the conclusions. But we  
3 do not, either as practitioners or clients,  
4 understand what the underpinnings of those  
5 conclusions are.

6 And to answer this narrow question, we  
7 would report findings related to hair, or any  
8 other physical matches, as an instance where  
9 there are similarities, but we would try to take  
10 this further by sharing with the clients in what  
11 areas do we see those similarities. Are these  
12 with respect to colour, with respect to size,  
13 with respect to a certain shape and so on?

14 Because at the end of the day, if one omits that  
15 critical piece of information, that conclusion  
16 can become very misleading and can be perceived,  
17 understood, to carry much greater weight than  
18 the forensic science practitioner intended it to  
19 carry.

20 And at the end of the day, we try to share  
21 with juries in a variety of other areas what the  
22 findings are and where fact stops and where the  
23 theory and conclusions then begin. And so we  
24 try to point to what were the results of the  
25 examination before we, in fact, state what the

1 conclusions are. And we would say  
2 microscopically similar in the case of hairs  
3 with respect to colour or with respect to one  
4 feature or another.

5 And from that point on, I think it can open  
6 it up to a discussion, as opposed to instances  
7 where perhaps in this case, we had a conclusion  
8 that was expressed in court repeatedly. And  
9 that conclusion does not lend itself to any  
10 debate or discussion as to what was the  
11 foundation for that conclusion. And I see that  
12 to be a problem. Because at the end of the day,  
13 there's some mythical infallibility associated  
14 with generating a conclusion. And it becomes  
15 then a truly adversarial process to see who will  
16 break down first and admit that there's a  
17 problem with conclusion, rather than deal with  
18 the facts and the findings.

19 MR. LUCAS: Bill, do you want to add something?

20 MR. TILSTONE: I think there's a fundamental  
21 scientific principle that really guides us  
22 through how far you can go and the kind of  
23 language you can use. And it was expressed very  
24 well in some pre-circulated material that Dr De  
25 Forest produced. And that is that the value of

1 microscopical examination of hairs depends very  
2 much on the a priori potential of this technique  
3 to exclude. And the issue here, the keyword in  
4 this is exclude, because it's a fundamental  
5 scientific principle that any test can only  
6 reliably, absolutely, do one thing, and that is  
7 say that there are differences and therefore  
8 these things are different.

9       And if you carry out testing in any  
10 scientific field that does not find any  
11 differences between set A and set B, you then  
12 have to search for why there are no differences.  
13 Is it because they are the same? Is it because,  
14 in fact, the test you use has a very low a  
15 priori potential to exclude? Is it because  
16 there's an extremely wide variation intrinsic to  
17 the samples that you're looking at? These are  
18 just some of the instances you have.

19       If we begin with that scientific principle  
20 and look at something like hair, which is  
21 dependent on observations that to a certain  
22 extent are subjective, and is dependent on  
23 examining materials which show a wide variation  
24 within an individual, far less between  
25 individuals, then I guess we're left with the

1 situation that has perhaps much less a priori  
2 potential to exclude them than we would like.  
3 And in those circumstances, the only thing I  
4 think is scientifically justifiable as a  
5 conclusion from a forensic lab in regard to  
6 microscopical hair examination is to say the  
7 questioned hairs could not have come from the  
8 known source. And in the absence of being able  
9 to make that definitive assertion, a report then  
10 has to go ahead and explain what the limitations  
11 are on any implications or inferences that  
12 someone would care to draw in regard to the  
13 possibility of them having had a common origin.  
14 DR. MAYER: If I may, my sense is I may not have  
15 answered your question completely, Doug. I  
16 touched on the aspect of identifying the  
17 findings and the microscopic similarity, but at  
18 the end of the day, what is the conclusion? And  
19 certainly in our environment, we find that we  
20 again stress and emphasize with our clients that  
21 we cannot determine identity from hair  
22 examination. Where we can exclude, that becomes  
23 an obvious conclusion, we point that out. And  
24 where in fact those similarities are such that  
25 it gives reason to stop and think, we again

1 share with the clients that there may be an  
2 association, however, we cannot take it any  
3 further than that.

4 And in fact, I can share with you that  
5 microscopic hair examination is coming to a halt  
6 at the Centre of Forensic Sciences, because we  
7 recognize it can be a triage mechanism, if you  
8 will, of some kind to determine what techniques  
9 may be applied, such as mitochondrial DNA, for  
10 instance. But certainly it's becoming more of a  
11 triage type of technique, and certainly we are  
12 stopping this kind of work almost altogether.

13 MR. LUCAS: The second part of this question is  
14 how should trial judges instruct juries on this  
15 point. And it would be --

16 MR. DAWE: Before we go on, I think Peter had a  
17 comment he wanted to make.

18 MR. NEUFELD: Yes, it was on the last question,  
19 if I could. You know, as the other speakers  
20 have said, there are two components to hair  
21 microscopy. The first is the observations to  
22 see whether two hairs are similar or dissimilar.  
23 And the second one is, is if you can conclude  
24 that they are similar, what kind of probative  
25 inferences can be drawn from those observations.



1 And what we're discussing now is the second  
2 question. And I think frankly, that you, Doug  
3 Lucas, and I think Joel may also have made the  
4 same point, which is that you said in your own  
5 laboratory someone would say, well, it's  
6 consistent. But to me consistent meant one  
7 thing and to someone else in the laboratory,  
8 consistent meant something else. And actually  
9 that crystallizes why all of these kinds of  
10 conclusions and inferences that forensic  
11 scientists have been making about hair  
12 inclusions and about other kinds of trace  
13 evidence are fundamentally flawed. And the  
14 reason is, particularly when you're talking to a  
15 judge or a jury, they have to have some kind of  
16 hard data from which they can draw an inference  
17 of guilt or non guilt.

18 And one of the things that happened with  
19 DNA, for instance, is that there were academy  
20 committees in the United States, there are  
21 plenty of peer-reviewed articles here in Canada  
22 and England, as well as United States, sort of  
23 validating the legitimacy of databases, which  
24 enabled someone to draw a statistical inference  
25 about the meaning of a match, or the meaning of

1 an inclusion.

2 There is nothing comparable like that for  
3 hair. Each of the speakers has given slightly  
4 different answers about he and his people and  
5 his laboratory would respond to point two. That  
6 doesn't make sense from a legal perspective,  
7 okay. It doesn't make any sense at all.  
8 Because what you really need, if you're going to  
9 be using words such as the likelihood of a  
10 coincidental match is remote, is unlikely.  
11 Words such as remote and unlikely are  
12 statistical inferences. They are. They are  
13 another way of saying, one in a hundred or one  
14 in a million. And what's extraordinary is your  
15 own recognition that to you, consistent might  
16 mean something as modest as one in 10, but to  
17 somebody else consistent might mean one in a  
18 thousand.

19 And in science, in real science, they would  
20 never accept people giving opinions such as  
21 remote or unlikely, unless there was a solid  
22 validated statistical database from which a  
23 person can draw that inference, as they do in  
24 DNA.

25 And consequently, if that committee that

1 got together a number of years ago didn't just  
2 include people from the forensic science  
3 community, but also included professors of  
4 statistics, they would have said to you then  
5 that to go down this path where you say anything  
6 more than I can't exclude, okay, is  
7 unscientific. And it's completely inappropriate  
8 whether it's hair or fibres or tool marks or any  
9 other kind of trace evidence to get to that  
10 second question. To say anything more than I  
11 can't exclude or I can exclude. Because when  
12 you do that, the danger of misleading the fact  
13 finder is so extraordinary.

14 And given the fact that even though there's  
15 great dissent within the scientific community as  
16 to what terms like unlikely and remote mean,  
17 that it's completely inappropriate, and it was  
18 inappropriate to do it for all these years. And  
19 I guess there's an awareness now, fortunately,  
20 in the scientific community, that in the absence  
21 of reliable statistical databases for any of  
22 these disciplines, question two should not be  
23 answered before a court of law.

24 MR. LUCAS: Is it your suggestion then that in  
25 the absence, if there is no population data on

1 which statistics can be based, and by population  
2 I mean population of that type of evidence, that  
3 it shouldn't be adduced?

4 MR. NEUFELD: That the statistical end of it  
5 shouldn't be introduced. What I'm saying is  
6 there should be no prohibition per se of someone  
7 looking at a tool mark, or hair, or fibre, and  
8 saying based on my analysis, assuming you meet  
9 reliability tests and assuming you have an  
10 examiner who knows what the heck he is doing,  
11 assuming all those things, okay. In the best of  
12 all worlds a person can say, I can't exclude  
13 them. But they should not be able to then give  
14 that second layer of opinion.

15 And by the way, that's not my opinion. I  
16 have discussed this issue with the chairs of the  
17 statistics departments of a half a dozen  
18 universities. And no matter what their position  
19 is on other criminal justice issues, they were  
20 unanimous on this one, that without a valuable  
21 statistical database, forensic scientists should  
22 not be able to use words such as remote or  
23 unlikely.

24 MR. LUCAS: If that were accepted, then firearms  
25 examiners could, for example, never say that

1 this bullet came from this gun?

2 MR. NEUFELD: In the absence of a database,  
3 that's correct.

4 DR. MAYER: I'd like to weigh in just very  
5 briefly.

6 Peter, I don't have an issue with what you  
7 said, and I'm certainly on side with the concept  
8 that forensic science laboratories have to  
9 understand what the limitations are, and express  
10 those limitations and, in fact, be very careful  
11 about expressing opinions that involve the  
12 expression of the probability of some kind. But  
13 it seems to me that the higher test is that of  
14 beyond a reasonable doubt. And if, in fact, at  
15 any point there is no certainty that these two  
16 items, two hairs came from the same source, I  
17 think it becomes very much a secondary question;  
18 what is the likelihood that, in fact, there is  
19 an inclusion where one should not have taken  
20 place? Because at the end of the day, if the  
21 primary test of beyond reasonable doubt, or the  
22 primary test of presence or absence of certainty  
23 is not met, anything beyond that I think can be  
24 expressed in terms of probability that is not  
25 truly measured, because in some instances

1 measurement science cannot always step into it.  
2 But judges and juries and the criminal justice  
3 system should understand that, well, it's  
4 somewhere between this and that, but what is the  
5 bottom line? The bottom line is, there is no  
6 certainty.

7 In the area of DNA, you can do that in  
8 terms of numerical information. And I would  
9 certainly suggest that forensic science  
10 laboratories in the area of firearms today  
11 should sit up and take notice of what's  
12 happening in areas where, in fact, we have  
13 physical comparison and so on, and begin to  
14 develop and devote as much resources into trying  
15 to find out a mechanism to, in fact, express  
16 their findings, and something that to inch a lot  
17 closer to a measurement science.

18 MR. BROMWICH: Can I make two quick points,  
19 really getting back to Doug's original question,  
20 which is how this kind of evidence appropriately  
21 presented? I think there are two forces that  
22 converge really from opposite ends of the  
23 process that are conducive to bad information  
24 being produced in court. And this is a result  
25 of really reviews that I've done over the last

1 10 years with the FBI lab and the police  
2 department lab.

3 First is the generally totally inadequate  
4 level of training that's given to examiners  
5 about how to phrase both their reports and how  
6 to phrase their testimony in court. Words, as  
7 we have already heard and as we know as lawyers  
8 and participants in the criminal justice system,  
9 really matter. And the way that conclusions are  
10 expressed make a huge difference in terms of the  
11 impact on the system and the impact on a jury in  
12 a particular case.

13 Many examiners who I have personally  
14 interviewed never went through a mock trial,  
15 never learned how to testify using phrases that  
16 were understood and that were meaningful. They  
17 didn't know how to do what they were being asked  
18 to do.

19 Second, what we found in really both  
20 investigations that I have been a part of is the  
21 total lack of communication between prosecutors  
22 and lab scientists who testify. So frequently  
23 there is not even a meeting between the forensic  
24 scientist who testifies and the prosecutor who  
25 puts him on the stand, sometimes not even a

1 phone call. So there is virtually no  
2 opportunity for the prosecutor who is  
3 responsible for putting on the evidence to  
4 understand what the science is and what the  
5 limitations of the science are before the  
6 examiner takes the stand. And that results in a  
7 very awkward and horrible situation where a  
8 lawyer who has never met with a witness starts  
9 pushing that witness on the witness stand to  
10 reach conclusions that the scientific evidence  
11 doesn't permit.

12 So those are the two sets of sort of  
13 systemic problems that I see converging on this  
14 issue of how scientific evidence of this sort is  
15 presented, and it really has the potential in  
16 many cases do taint the presentation of such  
17 evidence.

18 MR. LUCAS: The second part of question two  
19 deals with how should trial judges instruct  
20 juries on this point. And I think it would be  
21 presumptuous for four of us on this panel to  
22 have any comment on that, so I'll throw that  
23 over to Peter and Mike.

24 MR. NEUFELD: Well, actually it continues a  
25 point that I was making before, when you said,



1 well, how should it be expressed in a court of  
2 law? And frankly, you should know that there  
3 are plenty of jurisdictions in the United  
4 States, for instance, that say that an expert  
5 cannot give an opinion about inclusion unless he  
6 can give some statistical weight to the meaning  
7 of that match. In other words, it can be modest  
8 as in the case of ABO testing where you can say  
9 I can exclude 40 per cent of the population or  
10 something like that, but at least you can  
11 exclude it with some kind of valid statistical  
12 limit.

13 We draw a distinction between evidence  
14 which is beyond the can of lay people and that  
15 which is not. So it can be argued that these  
16 disciplines which are beyond the can, because  
17 obviously lay people are not capable of  
18 microscopically analyzing hairs and including  
19 and excluding, the same with firearms or tool  
20 marks or what have you. But, for instance, with  
21 identification testimony, we allow someone to  
22 testify that, yes, that's the man I saw robbed  
23 me of my pocket book. And obviously we don't  
24 have to provide an estimate of what is the  
25 likelihood that that conclusion is accurate and

1 reliable as opposed to a mistake? We don't have  
2 that, and we allow that testimony to come in, in  
3 the States, because it's not beyond the can,  
4 juries can use their own experience, life  
5 experience, what have you, to appreciate the  
6 likelihood that it's a reliable identification  
7 versus an unreliable identification.

8 DR. DE FOREST: But the science out there  
9 disputes that.

10 MR. NEUFELD: I understand that. But the reason  
11 judges allow it is because they draw that  
12 distinction. But when it comes to things like  
13 hair microscopy, because lay people are not  
14 equipped to analyze it that way, in many courts  
15 if you can't draw a statistical inference, then  
16 the danger of the expert simply saying, I can't  
17 exclude him, which as you say might be very weak  
18 evidence but to others might be very powerful  
19 evidence, should be kept out just for the reason  
20 that you articulated, which is that there's no  
21 way that the jury can get a handle on the  
22 probative value of that evidence.

23 MR. LUCAS: Mike, do you want to add anything on  
24 that?

25 MR. BROMWICH: Yeah, that goes a little further

1 than I'm prepared to go. I do think there is a  
2 big risk that when you present technical  
3 subjects to a jury, they are going to be cloaked  
4 with the mystique that will prevent members of  
5 the jury from independently analyzing the  
6 robustness of the conclusion.

7 I think the best solution for that, though,  
8 is not to, at the outset, exclude all such  
9 evidence that may not have a statistical  
10 database, but instead to make sure, and this is  
11 obviously a huge and tall order, to ensure that  
12 there are resources made available to the  
13 defence bar so that at least they have the  
14 ability to bring in their own experts and take  
15 issue, both as on an advisory capacity in terms  
16 of helping the lawyers cross-examine the  
17 government expert and putting their own experts  
18 on the witness stand.

19 I think the other thing that's vital that  
20 we've seen does not happen in a lot of instances  
21 is the ability to, at the discovery stages of  
22 the process, get a hold of all of the underlying  
23 information that forms the basis for the  
24 forensic scientist's testimony. It's shocking  
25 really in how many cases that does not happen.

1 And what that does is obviously to disable  
2 defence counsel from appropriately challenging  
3 the evidence that's presented.

4 MR. NEUFELD: Michael, just so there's no  
5 confusion, I'm not suggesting that in the  
6 absence of statistical databases that no  
7 forensic scientific evidence is admissible.  
8 There's all kinds of forensic scientific  
9 evidence which doesn't deal with the issue of  
10 identity, which is extremely helpful to the fact  
11 finder. I am only talking about that subset of  
12 forensic science where someone is trying to  
13 offer certain forensic scientific evidence to  
14 demonstrate that this person committed this  
15 crime.

16 MR. BROMWICH: I understand.

17 MR. NEUFELD: And when it comes to identity,  
18 identity is itself a statistical issue, which is  
19 why DNA has become such a very powerful  
20 probative piece of evidence, because it can  
21 create and generate numbers such as one in a  
22 billion, one in a trillion, what have you. And  
23 so there is a difference and I think the  
24 difference is important.

25 DR. DE FOREST: May I comment on that? Let me

1 give an example of where I think that explaining  
2 the evidence without being able to assign  
3 numbers to it can be useful to the fact finder.  
4 And the example I would give is one of fibres.  
5 There are a lot of variations in fibres out in  
6 the environment. There is no manufacturer of  
7 garments that makes one garment and so,  
8 therefore, we don't ever try to imagine that  
9 finding a fibre that matches a certain garment  
10 means that it came from that garment. But  
11 there's a huge variation in the fibre  
12 population.

13         There have been a number of studies done  
14 that are basically like this. I'll use one kind  
15 of example and generalize it to other kinds of  
16 studies. Somebody goes to a theatre after it's  
17 closing or before it opens, or whatever it is,  
18 before it's been cleaned, and they take sticky  
19 tape and they take fibres off all the seats in  
20 the theatre. And then they pick by some  
21 convention, it can be done a number of times,  
22 some target garments, and they look for, and  
23 they might be fairly common garments, they look  
24 for fibres among all the thousands of things  
25 that have been taken from the theatre seats that

1 would be confused or be indistinguishable from  
2 fibres from the target garment. And perhaps  
3 surprisingly, it's rare to find a  
4 correspondence.

5 Now, that doesn't lend itself to providing  
6 statistics that apply to the instant case, but  
7 one can explain to a jury how these kinds of  
8 things are done and it gives it a meaning. So I  
9 think there are many, many examples where we  
10 can't provide rigorous statistical data, but  
11 where the findings can be very, very valuable.

12 THE COMMISSIONER: I wonder if I can just make a  
13 comment because of the example that was used of  
14 identification of an individual, eye witness  
15 identification. And as most of you know, the  
16 courts have, for decades and decades, all given  
17 a strong, and in latter years even stronger  
18 caution to themselves as a fact finder, or to  
19 the jury, that there are significant risks  
20 involved in relying on that eye witness  
21 identification. But yet we wouldn't think, or  
22 judges wouldn't think of doing that with a  
23 scientific identification, or at least we don't  
24 normally.

25 We are a nation that still has a fairly

1 high regard for authority. And a scientist, in  
2 that respect, giving evidence, is an authority  
3 figure. And I agree with many of the comments  
4 that they are far too seldom adequately  
5 challenged on their findings.

6 Anyways that's an aside. It doesn't really  
7 add much, but --

8 MR. LUCAS: Thank you, Mr. Commissioner.

9 Perhaps we should go on to question 3, which is  
10 the last one in this group.

11 MR. DAWE: We may be able to deal with this  
12 relatively briefly, but what I'd just like to  
13 hear your comments on is the issue of safeguards  
14 in the lab and what should the minimal standards  
15 be for how these comparisons are made. And  
16 we've set out some of the possible things that  
17 might be asked for such as adequacy of record  
18 keeping, and peer review by another examiner,  
19 and even possibly, and this is something that  
20 may be more contentious, the issue of whether  
21 these examinations, because they have a certain  
22 amount of subjectivity involved, whether they  
23 should be done on a blind basis, where the  
24 examiner actually gets down, looks in the  
25 microscope, doesn't know the background of the

1 case and doesn't know how the positive result  
2 will help the Crown's case. So I'd like to get  
3 comments on that.

4 MR. LUCAS: I think the first part of this  
5 question deals with the level of detail that  
6 should be in the examiner's work notes and  
7 reports. And I suppose the short and quick  
8 answer to that is, there should be enough to  
9 permit another qualified individual to do an  
10 adequate technical review and decide whether or  
11 not the conclusion was, the observations justify  
12 the conclusion.

13 Bill, do you want to comment on that?

14 MR. TILSTONE: I absolutely agree with you,  
15 Doug, and I've never been able to understand the  
16 reluctance of some examiners to maintain  
17 complete records of all of the observations that  
18 they've made and the results of all the tests  
19 that were conducted. I think that the records  
20 should be very specific, and unless they are  
21 specific and unless the information recorded is  
22 sufficient that any other properly trained and  
23 experienced examiner would understand what was  
24 done, understand the results that were obtained,  
25 and be able to come to or draw a conclusion from



1 it, they are meaningless. I couldn't agree more  
2 with you.

3 If I may address the other issue, which was  
4 the question of information and whether things  
5 should be tested blind or not. I have to say I  
6 am kind of changing my view in this one with  
7 time. I think it is absolutely critical for the  
8 laboratory, or someone in the laboratory to have  
9 as much information about the circumstances of a  
10 case as they possibly can. If they do not have  
11 that full knowledge, then they do not have an  
12 understanding of the critical questions that are  
13 posed to which the lab is seeking to find  
14 answers.

15 However, if the way that the testing is  
16 conducted in the lab could in some way be  
17 divorced from those who make those decisions, I  
18 think that this would be something that's well  
19 worth pursuing.

20 DR. DE FOREST: That's a very good point I  
21 think, as Bill points out, the context is very  
22 important in defining the scientific question.  
23 And too often I think the questions that are  
24 going to be addressed scientifically in  
25 laboratories are defined by investigators who

1 don't understand the scope and how to formulate  
2 questions and so forth. I don't think a lot of  
3 evidence gets missed, but I think what Bill's  
4 proposing there, where an oversight by a  
5 scientist defining the problems and then  
6 assigning the analyses blindly is a way of  
7 combining things and getting the best of both  
8 worlds in that and protecting the scientists or  
9 the interpreters from the context effect.

10 MR. BROMWICH: I think it's not enough to say,  
11 as Doug and Bill have and which I agree with,  
12 that you need a substantial level of detail so  
13 that another qualified examiner can review the  
14 file and understand how the conclusions were  
15 reached. You have to go beyond that and make  
16 sure that on an ongoing basis the lab is doing  
17 that by having technical reviews. And then also  
18 by having a performance evaluation system in  
19 place, so that if people aren't keeping adequate  
20 notes, they are called to task for that and that  
21 there are consequences for lab examiners who  
22 don't do a good enough job recording their  
23 observations and keeping sufficiently detailed  
24 case notes so that other qualified examiners can  
25 understand what they've done.

1 MR. NEUFELD: Probably one way to drive the  
2 point home in the context of this inquiry is,  
3 when you read Doug Lucas's report, you see the  
4 difficulty he had understanding what  
5 Mr. Christianson did in the hair microscopy  
6 because it wasn't sufficiently documented in  
7 terms of notes to allow the independent peer  
8 reviewer to come in and replicate what happened.  
9 And when each of these folks said, you know,  
10 it's important to do that, what they are  
11 actually describing is one of the most  
12 fundamental principles of science, which is this  
13 notion of peer review where someone can come in,  
14 look at your documentation, look at your data,  
15 and re-create it and say, yes, he's right or,  
16 no, he's wrong. But when you compare that, the  
17 dearth of data that Christianson provided in the  
18 hair microscopy to what was done at the Forensic  
19 Science Service with respect to mitochondrial  
20 DNA testing, it was very easy for Dr. Melton to  
21 come in and review the original data and  
22 immediately make an assessment, yes, they got it  
23 right. And that can't be overemphasized as  
24 critical to good science, to good forensic  
25 science. It doesn't matter what the discipline

1 is, it has to be there.

2 And just on the issue of blindness, I just  
3 echo what the other folks have said. What we do  
4 at the medical centre is the doctor is the  
5 quarterback, and I guess that's the wrong word  
6 to use in Canada, but is the coordinator, the  
7 traffic cop we would say in New York City, who  
8 does know all the details about the case, and  
9 then refers it out to different laboratories to  
10 do different assays and different clinical  
11 tests. And there's no reason why you can't have  
12 that same model in forensic science, and you  
13 accomplish both ends.

14 But there is no question, there's a great  
15 study that just came out, and I can get you the  
16 cite for it, I'm sure someone else here has it,  
17 published in England a couple of months ago on  
18 confirmation bias. And the danger that if you  
19 don't do these things blindly, you will get  
20 erroneous results again and again and again,  
21 cannot be made clearer in this study.

22 And I'll get a citation for the record for  
23 everybody so they can look at it.

24 DR. MAYER: I can simply reiterate what everyone  
25 has said and what everybody in this industry

1 understands, you must absolutely keep extensive  
2 records and notes of what was done, whether  
3 these are instrument records or personal notes  
4 and observations. And I would take this  
5 further, in this day and age we have to  
6 seriously consider and do our best to apply a  
7 variety of imaging technologies. I very often  
8 hear the argument that what the eye can see and  
9 what the mind can understand cannot always be  
10 captured through a photograph or an image of  
11 some kind. I don't buy that for a moment. I  
12 think imaging and notes are all part and parcel  
13 of ensuring that the information and the  
14 evidence is objectified to the nth degree. And  
15 absent that, I think there will always be issues  
16 and problems, because we're back to, well, this  
17 is what I understood, this is what I saw an  
18 examiner, and this is my conclusion. There's no  
19 way of either applying very close and necessary  
20 supervision to the work of any examiner or  
21 practitioner, but also to make it available for  
22 other qualified examiners or practitioners to  
23 come in and provide a second opinion and review  
24 the information.

25 MR. LUCAS: The last point in this question is

1 really a two-part one, the first part I think we  
2 can deal with very quickly. Should an  
3 examiner's microscopic hair comparison be  
4 visually reviewed by a second examiner, and if  
5 so, in what circumstances? And I don't think  
6 there's anybody who would argue against that,  
7 and I think the profession is pretty clear on  
8 that now. The scientific working group on  
9 materials analysis guidelines just in effect say  
10 that it's desirable to have a second hair  
11 examiner verify every association that may have  
12 a probative value. And I think that represents  
13 the view of the profession, unless anybody wants  
14 to challenge that.

15 MR. NEUFELD: There's one important caveat to  
16 that too, which is that the second person who  
17 views it should not know what conclusions the  
18 first examiner reached when he does it, or you  
19 risk the real problem of confirmation bias.

20 DR. DE FOREST: The second person shouldn't be  
21 junior to the first.

22 MR. NEUFELD: Right.

23 MR. LUCAS: The second part of this question,  
24 should a photomicrographic record of the  
25 comparisons be created and preserved? I think

1 it depends a little bit on what purpose of the  
2 photograph is. If the photograph is to  
3 demonstrate a particular point of something  
4 unusual, it probably can do it very well. But  
5 whether or not a photographic record can be used  
6 to make an accurate comparison is a much more  
7 difficult situation. Peter, do you want to  
8 comment on it?

9 DR. DE FOREST: I was talking to Joel here and I  
10 lost the --

11 MR. LUCAS: Do you think it's possible for an  
12 examiner to make a comparison between two hairs  
13 based only on photographs?

14 DR. DE FOREST: No, I understand that. And I do  
15 take issue with Joel a bit on the -- that you  
16 can always document everything photographically.  
17 I think it's important to document things. We  
18 have image technology that's a dirt cheap now,  
19 we can do all kinds of stuff. But I think what  
20 you are alluding to there is that one could  
21 never make a comparison based on the images. In  
22 other words, there's too much going on with the  
23 microscope where you are making optical  
24 sectioning through the hair, you know, getting  
25 thousands of images from a single hair that are

1 being integrated in your mind, and to capture  
2 that process in a few frames of images is not  
3 possible. So we can document things, we can  
4 show illustrations of how the process works.

5 I do have a philosophical problem with what  
6 I have observed in a lot of hair examiners in  
7 the hay day of hair examination, when they would  
8 come into court with a board showing these  
9 matches. And that can be very misleading. You  
10 can take hairs from a different source and you  
11 can juxtapose them on the comparison microscope  
12 and make an image that looks like they are very  
13 similar. So it oversimplifies the process. But  
14 I do think the documentation for that purpose is  
15 very, very important.

16 DR. MAYER: It creates some serious ethical  
17 issues, in fact, that what we are doing is  
18 manipulating information.

19 DR. DE FOREST: Exactly.

20 DR. MAYER: I'm not saying digital imaging  
21 should be used as a tool towards that end, but  
22 I'm certainly suggesting that imaging as part of  
23 notetaking is critical. It was critical then,  
24 it is critical today, and not just in hairs and  
25 firearms, there are many other sort of physical



1 and comparison areas. So you have to take a  
2 true image, and clearly you cannot rely simply  
3 on that as a means to carry out an examination  
4 analysis, but certainly that captures what was  
5 available as an item and it captures the nature  
6 and type of comparison that was made.

7 DR. DE FOREST: Let me just come back to that  
8 for a minute there. The point I was trying to  
9 make with the misuse of the photographs in court  
10 is the kind of thing that they are trying to  
11 show the jury the similarities. I think that's  
12 wrong. If one brings in a generic set of  
13 photographs showing the kinds of things that are  
14 looked for and the kinds of things that are  
15 considered in hair comparison, I find that much  
16 more palatable than trying to have the jury use  
17 these images to draw their own conclusion. It's  
18 a much more complex process than that.

19 MR. DAWE: Unless anyone else has any comments  
20 on that, I'd like to turn the floor over to my  
21 colleagues to put whatever questions they might  
22 have dealing with the issue of microscopic hair  
23 compares in particular. So I'll let them decide  
24 who wants to go first.

25 MR. KENNEDY: Good morning, members of the

1 panel, Mr. Commissioner. My name is Jerome  
2 Kennedy, I am counsel for the Association in  
3 Defence of the Wrongfully Convicted.

4 One of the issues that particularly caught  
5 my attention as a defence counsel is the issue  
6 of language used in communicating scientific  
7 results to a jury. Basically, and I assume the  
8 situation would be very similar in the United  
9 States as it is in Canada, you have 12 lay  
10 people, who presumably have no scientific  
11 background or very little scientific background.  
12 We're trying to explain complex scientific  
13 results. The effect upon the jury I think has  
14 been referred to by a number of panel members.

15 My question for you is, do you feel that  
16 there is enough discussion, one, in the  
17 scientific community, or between the scientific  
18 community and the legal community, including the  
19 judiciary, to highlight this problem and to try  
20 to come up with some standard terminology?

21 MR. LUCAS: I have always wanted to have a  
22 question that can be answered yes or no, and I  
23 just had one. The answer is no.

24 MR. KENNEDY: Anyone else, before I get to the  
25 second part of my question?

1 DR. DE FOREST: I would agree that there isn't  
2 enough discussion. I'm seeing more of it now  
3 among scientists about the, you know, at  
4 meetings and things, exchanging ideas about how  
5 to communicate more clearly and bring out the  
6 caveats on what is presented. But there's a  
7 ways to go and it's been missing from the  
8 dialogue.

9 MR. BROMWICH: I think the level and the amount  
10 of discussion among the relevant communities has  
11 been historically quite dismal. I think it may  
12 be improving to some extent now, but there's a  
13 long way to go.

14 MR. KENNEDY: I'll give you an example, the word  
15 "consistent with," that's always a word that as  
16 a lawyer has bothered me, yet we will hear  
17 scientists continuously in their reports use  
18 that term. The word "match" I think is somewhat  
19 into, somewhat got into disuse. But scientists  
20 will get on the stand in voir dices and defend  
21 the use of the word "consistent with." As a  
22 lawyer, what you've talked about today, I'm  
23 trying to communicate to the jury in plain  
24 language what that means. And I think as  
25 Dr. Mayer pointed out, I feel there is a

1 prejudicial effect of terminology like that. Is  
2 there a way, or does anyone have any suggestions  
3 as to how we can increase communication between  
4 the scientific community and the legal  
5 community, especially the judiciary in terms of  
6 improving this situation.

7 DR. DE FOREST: Doug and I have been on some  
8 panels that have looked at what's been going on  
9 in some U.K. cases, and there is a way they have  
10 addressed this. They seem to have eliminated  
11 "consistent with" entirely from their vocabulary  
12 and they put something in the form of a  
13 "proposition," and then indicate whether the  
14 evidence supports that proposition or not. And  
15 that may be a better way of at least making the  
16 uncertainty in the issue clearer to the finder  
17 of fact.

18 DR. MAYER: The difficulty with using language  
19 around supporting, strongly supporting, or  
20 likely supporting, however you want to use it,  
21 the notion of proposition is okay, but it  
22 certainly doesn't have the sort of statistical  
23 hallmarks we're all striving for at some level.  
24 And at the end of the day, I think the plainer  
25 the language, the better off everyone is at the

1 end of the day. Tell us what it is, tell us  
2 what you found in language that describes the  
3 results and then --

4 DR. DE FOREST: The caveats.

5 DR. MAYER: Yeah. Well, naturally at the end of  
6 the day, we need to understand what the  
7 conclusions are. And phrases such as consistent  
8 with, my view has always been they take findings  
9 and conclusions and wrap them into one. There's  
10 a problem with that. And I say use plain  
11 language, and that's doable, and there has to be  
12 a lot more dialogue among all the justice  
13 partners to do that. Because very often we're  
14 in a situation where in fact what was understood  
15 is completely different than what was intended.

16 MR. KENNEDY: Mr. Neufeld.

17 MR. NEUFELD: My question just to the other  
18 members of the panel would be, what plain  
19 language do you think reasonably communicates  
20 the probative value of evidence in a way that is  
21 neither vague nor ambiguous?

22 DR. DE FOREST: I think it very much depends on  
23 what the evidence is, but I think that all the  
24 warts and wrinkles that accompany it have to be  
25 made explicit, it has to be explained. I think

1 the simple kind of thing, you know, consistent  
2 with or, you know, one sentence kind of things,  
3 you know, don't convey the complexity that the  
4 jury needs to understand to make the conclusion.

5 MR. LUCAS: Part of the problem is that the  
6 issues that we are trying to explain are  
7 extremely complex. And we probably do ourselves  
8 a disservice by trying to simplify them, you  
9 simplify a very complex problem into something  
10 that is understandable to lay people. And I  
11 don't think we do it very well. So you get sort  
12 of shorthand being used. You mentioned the word  
13 "match," and it is not used really very much I  
14 don't think in forensic science anymore. But in  
15 conversation, it becomes a nice bit of shorthand  
16 to say what it is you're trying to say. And  
17 indeed, I've heard lawyers in this room use the  
18 term "match" for what was done. It just becomes  
19 a habit. We don't have a good way of doing it,  
20 I don't think.

21 MR. KENNEDY: One last question for Mr. Neufeld  
22 before I turn it over to Mr. Lockyer. In all  
23 the cases, sir, in the Innocence Project that  
24 you have reviewed over the years where there  
25 have been wrongful convictions, how often has

1 the misuse of the language, I don't know if  
2 misuse is the proper term, but how often has the  
3 improper, imprecise use of scientific language  
4 contributed, in your experience, to wrongful  
5 convictions?

6 MR. NEUFELD: Well, I mean, first of all, I  
7 would probably guess that about 40 to 45 per  
8 cent of our cases, the misapplication of  
9 forensic science was one of the causes of the  
10 wrongful conviction. When you go back and look  
11 at those cases, both whether it's hair  
12 microscopy or odontology, or conventional  
13 serology, you find that even if you accept the  
14 notion that the science is valid, okay, even if  
15 you accept that as a premise, now you find --  
16 and certainly with serology it is, there's no  
17 question that serology is valid -- the problem  
18 we saw is that the forensic analyst exaggerated  
19 the probative value of the evidence in their  
20 oral testimony in 100 per cent of the cases.  
21 And it wasn't one scientist, it wasn't one  
22 laboratory, I'm talking about 25 different  
23 states, 35 different analysts, it didn't matter.  
24 There was a tendency to, I don't know if it's  
25 the adversarial system, I don't know if it's

1 because you have not just 12 jurors who don't  
2 understand science, but two lawyers and a judge  
3 who don't understand science, that you tend to  
4 push the forensic scientists as much as you can.  
5 And so next thing, you know, one side or the  
6 other is pressuring that person to say something  
7 that perhaps a year later in hindsight he or she  
8 will regret. But whatever the cause is, the  
9 result is not good, the result is a miscarriage  
10 of justice.

11 MR. KENNEDY: Thank you. Mr. Lockyer I'm sure  
12 has some questions. Thank you.

13 MR. LOCKYER: Members of the panel, I just have  
14 one question at the moment which could have  
15 enormous practical consequences in terms of  
16 wrongful convictions in this country. By  
17 preface, there is no question that forensic  
18 science has played an enormous role in wrongful  
19 convictions, both at the front end and the back  
20 end, that the front end has caused them, that  
21 the back end has discovered.

22 In this province, as a consequence of this  
23 case in particular, Mr. Driskell's case, and  
24 also another case -- and many of you on the  
25 panel, or indeed all of you may know this, but



1 in case you don't, I'll quickly tell you -- the  
2 province set up a hair review committee. The  
3 mandate of the hair review committee in short  
4 was that the committee, first of all,  
5 represented all interested parties in the  
6 criminal justice system, and the mandate of the  
7 committee, in essence, was to study all cases in  
8 this province in the last, I think I'm right in  
9 saying 15 years, it may have been 20 years, in  
10 which hair microscopy played a material role in  
11 the prosecution. And insofar as those cases  
12 were identified, that a search would then be  
13 made to find the hairs that had been used to  
14 make the comparisons and that they would then be  
15 subjected to mitochondrial DNA testing.

16 That committee ultimately discovered two  
17 cases that it felt fell within its mandate. In  
18 both cases, the hair were retrieved, and in both  
19 cases mitochondrial DNA, as in the Driskell  
20 case, that the hair microscopy results were  
21 completely and utterly wrong.

22 We also heard about another case where hair  
23 microscopy lead to a wrongful conviction, or was  
24 one of the causes of a wrongful conviction, and  
25 that is the case of Guy Paul Morin.

1           That committee then that was set up in  
2 Manitoba, whether you think -- I don't happen to  
3 believe its mandate was wide enough, but I think  
4 the fact that it was created is a very positive  
5 development. And the fact that it's discovered  
6 two potential wrongful convictions and, indeed,  
7 one of the people is now on release after having  
8 spent 13 years in prison, he was released  
9 shortly after the hair committee produced its  
10 results through mitochondrial testing. That has  
11 been copied, apparently, I'm told in New  
12 Brunswick, although I know really no more than  
13 that. It was done at a secretive level by  
14 government, with no sharing it with other  
15 sectors in the criminal justice system, and they  
16 have announced, although not officially, but  
17 unofficially announced that they found no cases  
18 that were worth re-examining. But beyond that  
19 it's being considered in Ontario, it's being  
20 considered for the past two or three years  
21 setting up such a committee, but no committee  
22 has yet come into being.

23           Now I presume that the hair experts in  
24 Manitoba are probably no worse or better than  
25 the hair experts in British Columbia or Ontario,

1 the Northwest Territories and everywhere else  
2 across the country.

3 So given the results that we've got from  
4 the few cases that have been examined in this  
5 country, and in particular in this province, are  
6 the members of the committee of the opinion that  
7 we are now at the stage where a need for the  
8 re-examination of all cases across the country  
9 in which hair microscopy has played a  
10 significant role has been triggered. That the  
11 Manitoba committee should be no more than an  
12 example of committees across the country in all  
13 the other provinces, that we desperately need an  
14 audit in the whole country in an attempt to  
15 identify all of those cases in which people  
16 continue to languish in jail for crimes they  
17 didn't commit as a consequence of false hair  
18 microscopy comparison?

19 DR. DE FOREST: You know, I think there may be  
20 an advantage in looking at those cases, but I  
21 think it should be done, not across the board,  
22 but based on the context in which the evidence  
23 occurred. And I think that if that's going to  
24 be done, the microscopy itself should be  
25 repeated before the hairs are compromised by

1 digestion and extraction for the mitochondrial  
2 DNA testing. I think it would have been very  
3 informative in this case for the hairs to have  
4 been re-examined microscopically.

5 I haven't had the opportunity yet to point  
6 out that the white shirt and tie that I had  
7 intended to wear this morning are between  
8 Toronto and Winnipeg somewhere, but anyway --

9 MR. LUCAS: Bill, do you have any comment?

10 MR. TILSTONE: I don't know, I don't think any  
11 of us know. I guess I will make two comments,  
12 one as a scientist and one as an individual. As  
13 a scientist, what we're trying to do is use the  
14 best techniques that we possibly can to assist  
15 justice. And inevitably there are two, or at  
16 least two circumstances where this is not always  
17 going to work. One of those is where an  
18 individual errs, and the other one is where the  
19 inexorable march of science scratches it out,  
20 that today's techniques are better than  
21 yesterday's, which are better than the day  
22 before's.

23 This kind of goes on to issue four in  
24 scientific validity and methodology. But if we  
25 know that what we're using today is better than

1 what we used yesterday, and if someone like you  
2 is a committed individual, or the Manitoba  
3 committee as a group of concerned and relevant  
4 individuals finds material evidence that the  
5 shortcomings in yesterday's methods may have  
6 lead to miscarriages of justice that could be  
7 addressed by re-examination and re-testing and  
8 using today's methods, then as scientists we  
9 have to respond positively.

10 As an individual, I must say it troubles me  
11 that we are always going to be in that position  
12 because, while we do the best we can today,  
13 tomorrow we might look back and say, how on  
14 earth did we ever let that sort of approach to  
15 investigation of cases pass through in the old  
16 days? And that then leaves me in the situation  
17 where I don't know. I mean, if you ask me  
18 outside of this room what to do, I would say I  
19 would love to see a situation where, now that  
20 there is a significant advance or there is any  
21 significant evidence of shortcomings, that we  
22 could at least go back and look at what we might  
23 call serious cases, where the questionable or  
24 improved or replaced approach or techniques or  
25 methods would have a value, because the old

1 method produced evidence that was integral to  
2 the decision that was made at trial. But if you  
3 then ask me to say that inside here, I don't  
4 know, because I don't know what constitutes  
5 integral, we don't know the decisions that were  
6 made. I can't comment on the resources that are  
7 available. But I guess as an individual, if it  
8 was at all possible, my personal view would be I  
9 would like us to be able to go back.

10 MR. BROMWICH: I don't know enough about the  
11 underlying facts to be able to answer a question  
12 of whether a province-by-province or nationwide  
13 effort needs to be taken. But I would just make  
14 this observation. I have been surprised and  
15 disappointed how seldom that's done and how  
16 strong the trigger has to be for an institution  
17 or a set of institutions to undertake that kind  
18 of effort that you would think would be the  
19 natural response to problems of the sort that  
20 you're discussing.

21 I know, for example, in the Houston Police  
22 Department crime lab that a group of people,  
23 including Doug Lucas and I, have been  
24 investigating, it was a series of revelations  
25 over the course of more than two years before

1 finally the city summoned up the political will  
2 to go outside the police department and outside  
3 the system, and commission a broad scale  
4 investigation of a wide range of cases that had  
5 been handled by the crime lab. But it took well  
6 over two years. It took a new Police Chief  
7 coming in. It took a new mayor coming in. And  
8 interestingly, and I think very importantly, it  
9 took an unrelenting amount of coverage by the  
10 local newspaper, which literally wrote scores of  
11 stories identifying and highlighting problems in  
12 individual cases. And still, even with a very  
13 committed set of reporters and a committed daily  
14 newspaper editorially supporting an outside  
15 investigation, it still took more than two  
16 years.

17 MR. NEUFELD: From what I understand, at least  
18 with respect to the hair committee, there have  
19 now been four cases, if you include the Driskell  
20 case as well, in Manitoba, where they went back  
21 and looked at cases where there were hair  
22 inclusions, through DNA testing, and in all four  
23 cases there were DNA exclusions; is that right?

24 MR. LOCKYER: That's correct. Two of them were  
25 discovered before the Hair Committee was formed

1 and two were discovered by the Hair Committee.

2 MR. NEUFELD: All right. What I can tell you is  
3 that on a lot less data to warrant an audit like  
4 you are describing, not only did Houston embark  
5 on its vast undertaking under the direction of  
6 Michael here, the FBI, in its own protocol, when  
7 an analyst named Jacqueline Blake, it was  
8 determined that she failed to use positive  
9 controls and negative controls appropriately in  
10 her DNA experiments, they did retesting of the  
11 DNA on all of her casework over the relevant  
12 time frame.

13 In Virginia, when it was learned that there  
14 was serology work that initially included people  
15 now are routinely excluding people through DNA  
16 testing in a half a dozen cases, the governor  
17 ordered a re-examination using DNA technology of  
18 what would be more than a thousand cases.

19 Peter De Forest makes a very good point,  
20 that before you undertake that kind of audit  
21 with DNA, you should first do hair microscopy  
22 again on those cases. And what you should  
23 appreciate is that there are multiple reasons to  
24 embark on that kind of re-examination. Only one  
25 is to perhaps exonerate other wrongfully



1 convicted people. Another one is that perhaps  
2 there were people who were wrongly excluded, who  
3 were out there committing serious crimes, and a  
4 re-examination will reopen the cases and lead to  
5 the closure of cases.

6 But beyond those simple direct reasons,  
7 there are other institutional reasons. One of  
8 the main reasons that the medical centre would  
9 do those kinds of orders is we want to learn  
10 what's going on in our institution, are there  
11 other systemic reforms we need to introduce to  
12 make our processes more reliable?

13 So, for instance, you would want to  
14 undertake that kind of re-examination, a  
15 retrospective re-analysis of hairs to find out,  
16 my God, if it's something that's widespread, is  
17 there something fundamentally flawed in the way  
18 we're training our examiners? Is there  
19 something fundamentally flawed in our  
20 proficiency testing? Are there few cases that  
21 we've seen simply outliers and, therefore, our  
22 system is fundamentally strong? Any institution  
23 needs to do that kind of re-examination when  
24 things crop up like this in order to maintain  
25 the future health and safety of the institution.

1           A statute was passed in the United States  
2 two years ago which now requires every  
3 laboratory system in the country that receives  
4 any federal funding, whenever they uncover an  
5 instance of either misconduct or negligence,  
6 serious negligence in the testing which  
7 undermines the integrity of the result, they  
8 have to undertake some kind of audit or review.  
9 And that audit and review may very well include  
10 a re-examination of a large number of cases.

11 MR. TILSTONE: I think one comment I'd like just  
12 to go back on, I answered your question from the  
13 point of view of the advancement in science, and  
14 on the basis of the situation you were  
15 describing, was based on the ability of  
16 mitochondrial DNA testing to produce a better  
17 quality of scientific evidence than the  
18 microscopical examination that preceded it. And  
19 in that context, I stay with my somewhat guarded  
20 response.

21           I don't think anyone on this panel would  
22 argue with the point that Peter brought up, that  
23 what we're talking about is either institutional  
24 or individual conduct verging on malpractice.  
25 The response should be unequivocal. You know,

1 that cannot be allowed to go without a  
2 retrospective opening of the cases that may have  
3 been mishandled.

4 MR. LOCKYER: I suppose looking -- if I can  
5 respond or just comment on that -- looking at it  
6 not from the point of view of the institution  
7 and its reliability, but look at it from the  
8 point of view of the individual sitting in  
9 prison, he doesn't really care whether the hair  
10 microscopy result was a result of negligence,  
11 malfeasance or just a coincidental match. To  
12 him that makes no difference. At the end of the  
13 day, if he's in there for something he didn't  
14 do, because of whatever reason it is that lead  
15 to the hair comparison result that was used to  
16 incriminate him, it just seems to me that he's  
17 entitled, or she is entitled to a review of the  
18 case. At the systemic level, of course, the  
19 cases that we now know of in Canada, and there  
20 are five of them, one was the Centre of Forensic  
21 Science, four were RCMP laboratory. And of  
22 course the vast majority this country, as you  
23 probably know, is under the jurisdiction, if  
24 that's the right word to use, of the RCMP  
25 laboratories across the country.

1           And we're not of course talking a single  
2 examiner. In those five cases, we're actually  
3 talking a total of four examiners. So it does  
4 seem, and of all the cases that have been  
5 examined, only in one of them, there's one more  
6 case where the mitochondrial results confirmed  
7 the original hair microscopy. So if you look at  
8 it just in terms of law of averages, from the  
9 point of view of my client, Mr. Driskell, it  
10 seems to me here that we do have every reason to  
11 think that we're going to uncover more  
12 miscarriages of justice if we undertake some  
13 kind of order.

14           And I do agree with you, Dr. Tilstone, that  
15 it should be limited to the serious cases. I  
16 think that one has to reflect on the fact that  
17 there are -- that institutional resources are  
18 not without limits. However, if you do focus on  
19 the serious cases, the homicides, the life  
20 sentences kind of cases, and then you see the  
21 results you get, that may enable you to take  
22 matters one step further.

23 DR. MAYER: Just by way of a quick comment,  
24 having gone through this ourselves at the Centre  
25 of Forensic Sciences, having seen other

1 jurisdictions in fact try to deal with issues of  
2 review of cases, or turning back the clock to  
3 determine whether improper science was carried  
4 out, the only comment that I can offer at this  
5 point, not to the issue of whether this should  
6 be undertaken, but once a decision is made that  
7 a review is necessary, I would suggest that  
8 forensic science laboratories, any  
9 self-respecting forensic science laboratory  
10 should not only fully cooperate, but become a  
11 partner in this. They should in fact be part of  
12 what moves the process forward. That's  
13 critical, and that I think at the end of the day  
14 nets much better results.

15 I've seen situations where a siege  
16 mentality develops. And that's very destructive  
17 at the end of the day. And it serves no one's  
18 purpose, and certainly not the individual that  
19 is behind bars. So I say be part of it, be part  
20 of the solution because it always moves things a  
21 lot more effectively.

22 MR. LOCKYER: You know, Dr. Mayer of the Centre  
23 of Forensic Science, I agree with you, is in  
24 fact a part of the consideration now being given  
25 by Ontario, indeed the head of your biology

1 section is on the committee, as indeed is our  
2 organization on the committee. It's just proven  
3 to be a bit slow, but these things can happen.  
4 DR. DE FOREST: I think over the years, clearly  
5 we have learned that the quality of justice  
6 depends on a number of things, but certainly one  
7 very important contributor is a robust defence.  
8 And I think what's lacking from some of these  
9 cases is a robust forensic science defence, that  
10 there needs to be better articulation of  
11 information with the defence bar, there need to  
12 be resources made available to the defence bar  
13 to really scrutinize the level of these things  
14 in the case.

15 I mean, I look at what Peter Neufeld and  
16 Barry Scheck have done over the years in New  
17 York State, it's improved the laboratory system.  
18 So the defence has a major contribution to make  
19 in making forensic science better. It doesn't  
20 mean that we're off the hook and we don't have  
21 to work on it as well, because I think we do.  
22 But there is a resource issue there that affects  
23 both the government laboratories and the defence  
24 access to expertise.

25 MR. LUCAS: I guess as the last member of the

1 panel, I can say only that I agree with most of  
2 what has been said. Like Bill, I am a little  
3 bit schizophrenic; however, as a scientist in  
4 principle, I think I support that idea  
5 completely. But as a former public service  
6 manager, I flinch a little bit when I think of  
7 the complications of doing it. But they did  
8 focus, and I think it has to be focused, that  
9 would be my point, in some way that it's not an  
10 open-ended investigation of a lot of things that  
11 really didn't need investigation in the first  
12 place, but focused on those things that are  
13 potentially serious problems.

14 MR. LOCKYER: Thank you very much.

15 MR. DAWE: Before we take the recess, I just ask  
16 to make sure that none of my other colleagues  
17 have any points they want to raise. In  
18 particular, Mr. Gates I think is probably the  
19 person who may have an interest in this.

20 MR. GATES: Thank you very much, gentlemen. My  
21 name is David Gates. I am a lawyer with the  
22 Federal Department of Justice. I am here at  
23 this inquiry representing the RCMP, which  
24 obviously includes the crime lab.

25 I have two questions, and they are actually

1 quite different ends of the spectrum. The first  
2 one, I'd like to go back, Mr. Bromwich, to a  
3 point that I think you first raised, but then  
4 Mr. Neufeld picked up on in responding to a  
5 subsequent question.

6 Obviously, as scientists you are focused on  
7 the scientific component of the dilemma that  
8 brings us to this inquiry and has brought us to  
9 other inquiries. But I wonder if I can get you,  
10 and perhaps, Mr. Bromwich, you can start, sir,  
11 to focus on how science is received, understood,  
12 and applied in the criminal justice system?

13 Because I suspect you all have some experiences,  
14 some thoughts and some ideas on that.

15 Mr. Bromwich, I was particularly taken by  
16 your analysis of the dynamic that can occur in  
17 terms of a lack of communication between a  
18 prosecutor and a scientist in advance of the  
19 scientist giving evidence, leading to perhaps a  
20 lack of understanding on the part of the  
21 prosecutor about the scientific evidence to be  
22 presented. And then both you and Mr. Neufeld  
23 made what I thought was a very important point  
24 about one side or the other, in the adversarial  
25 system, then pressing the scientist to a



1 conclusion that she or he made, not actually  
2 really want to make, but is driven by the  
3 moment. Mr. Bromwich, do you want to perhaps  
4 expand a little bit upon where you were coming  
5 from when you introduced that idea?

6 MR. BROMWICH: Sure. I think based on my  
7 experience, both doing the review of the FBI lab  
8 and of the Houston Police Department crime lab,  
9 and my general experience as a criminal lawyer,  
10 both as a prosecutor and a defence lawyer, it's  
11 a pervasive problem. I think prosecutors are  
12 vastly undereducated in terms of forensic  
13 science. I think defence lawyers are vastly  
14 undereducated in forensic science.

15 One of the reasons that the FBI lab's  
16 evidence went unchallenged really for decades is  
17 because it had a blue chip, gold edged  
18 reputation, that seemingly intimidated defence  
19 lawyers from even entering into a dialogue with  
20 FBI witnesses.

21 The number of times we learned that  
22 terribly significant evidence was not even  
23 challenged in court by defence lawyers was  
24 stunning to us, as we reviewed a large number of  
25 cases.

1           What we found in Houston is a set of  
2 institutional problems where there is a terribly  
3 inadequate level of communication pretrial  
4 between the prosecutor on the one hand and the  
5 forensic science witness on the other hand, as  
6 well as an almost total lack of education,  
7 except in rare instances, of defence lawyers  
8 representing their clients where forensic  
9 science is a critical component in the case.

10           I actually met in Houston with a group of  
11 defence lawyers and asked them what accounts for  
12 the fact that, given the pervasive and highly  
13 publicized problems we have now uncovered with  
14 various aspects of the crime lab's operations,  
15 including DNA, serology, even some in controlled  
16 substances, why wasn't this evidence challenged  
17 in court? And the honest ones among them, and  
18 most of them were being honest, said, we fell  
19 down, we did not do our job, we were not  
20 sufficiently educated on scientific issues, and  
21 so we were disabled from helping our clients in  
22 the way that they needed to be helped.

23           So I think it is a pervasive problem,  
24 certainly in the United States, in the criminal  
25 justice system. The lack of education of

1 prosecutors, the lack of education as well as  
2 the lack of adequate access to resources by  
3 defence counsel, and then the other point is the  
4 total, almost total in some cases lack of  
5 communication between prosecutor and forensic  
6 science witness, which leads to things happening  
7 on the witness stand that in the presence of  
8 such communication would be less likely to  
9 occur, because the prosecutor knows what the  
10 forensic scientist is going to testify to and  
11 knows the limits of what the forensic scientist  
12 feels comfortable testifying to. That's the  
13 sort of thing that needs to be discussed  
14 up-front. But particularly in very busy and  
15 hard-pressed district attorney offices, where  
16 it's my experience the level of trial  
17 preparation generally is not that high, it  
18 really comes home to roost in the area of  
19 forensic science.

20 MR. LUCAS: Another issue can be added to that,  
21 Mike, I think in Houston anyway, although it's  
22 less of an issue here, I think, is almost total  
23 lack of disclosure.

24 MR. BROMWICH: Right, exactly.

25 MR. NEUFELD: I don't know what the rule on

1 disclosure is here in Canada, but in the United  
2 States, for instance, there is less discovery,  
3 much less discovery in a criminal case when life  
4 and liberty is at stake than there is in a civil  
5 case where someone is suing for a thousand  
6 dollars.

7 DR. DE FOREST: Especially in New York State.

8 MR. NEUFELD: Well, in the whole United States,  
9 under the Federal rules as well. Obviously, it  
10 would be great if you could have a tazer gun,  
11 and every time a lawyer steps out of line, you  
12 could zap him.

13 MR. GATES: You might need a lot of tazer guns.

14 MR. NEUFELD: I mean, metaphorically, that tazer  
15 gun though is in the hands of the judge who is  
16 there to sustain and overrule objections. But,  
17 unfortunately, the judge also, when it comes to  
18 hard science is relatively illiterate and  
19 doesn't know instinctively when to step in.

20 One of the things that would be very  
21 useful, obviously, for judges, which we do have  
22 now is there's a whole effort to bring science  
23 to the Federal judiciary, and there are ongoing  
24 programs to let them know about the latest  
25 scientific advances and how these things should

1 most effectively and properly be communicated to  
2 fact finders, so there is an ongoing educational  
3 process.

4       The one problem is, I don't think we're  
5 ever going to adequately either educate lawyers  
6 and judges on these issues, because it's not  
7 just about education, it's also funding, it's  
8 also the case loads that a lot of lawyers have  
9 that make it almost impossible. And what makes  
10 much more sense, at least what we've seen, is  
11 since all these problems occur upstream,  
12 literally, they get exploited in the court room  
13 but the problems occur somewhere along in the  
14 process. From the moment there's a crime, there  
15 are people processing a crime scene, items go to  
16 a laboratory, determinations are made what  
17 should be tested, determinations are made what  
18 should go into reports, determinations are made  
19 what notes should be retained, et cetera, et  
20 cetera, et cetera. It makes much more sense to  
21 put in the fix upstream, because there are so  
22 many inherent problems with what goes on in the  
23 court room, for what everyone says. And if you  
24 can introduce much greater controls upstream,  
25 then you will avoid a lot of the dangers that

1 you are alluding to right here.

2 DR. DE FOREST: I hope my nuance defence of hair  
3 microscopy is appreciated here. I have done a  
4 lot of defence work over the last 30 years of  
5 challenging prosecution work. And just to pick  
6 up on a point that Michael Bromwich mentioned,  
7 the idea of taking a long time to rectify  
8 things, I had some cases with a particularly  
9 egregious -- which is a word I don't normally  
10 use, I learned it from Barry -- anyway, FBI hair  
11 examiner in the days when they were agents. And  
12 I called his supervisor, I said he can't say  
13 these things in court, this is totally  
14 unjustified. And the response was, well, you  
15 have to understand, he really believes this. It  
16 was Oklahoma cases from that thing there. We  
17 had plenty of warnings for a number of years and  
18 the system didn't respond to the warnings.

19 MR. DAWE: We have reached the point where I  
20 really think we need to give the reporter a  
21 break, and so I'll just have everybody hold  
22 their thoughts for the next 20 minutes and come  
23 back at ten after 11:00.

24 (Proceedings recessed at 10:50 a.m. and  
25 reconvened at 11:10 a.m.)

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\*\*\*21 starting back at 11:10.

MR. CODE: I believe Mr. Gates had the microphone and was in the middle of asking questions. We are missing a few panelists.

THE COMMISSIONER: I think we can probably --

MR. GATES: Thank you very much. Just by way of follow-up to the last question that I posed to the members of the panel, Mr. Neufeld, I believe it was you, sir, who referred to what sounds like a very interesting study from the United Kingdom around confirmation bias. And I wonder if we can combine that with what I understood to be a comment from one or two of the members of the panel about the important role that the media can play in keeping these sorts of issues front and centre in the minds of the public and decision makers. But let me come at this from a slightly different twist. If the risk that we will be unduly or inappropriately influenced by CSI and NCIS, and the popular portrayal of forensic science as inextricably connected with individuals who are involved in line investigation, and that that is doing a

1     disservice to where it is I understand all of  
2     you gentlemen are suggesting that we need to be  
3     going.

4     MR. NEUFELD: I don't think for a moment that  
5     really good forensic scientists are at all  
6     influenced by those silly TV shows, I don't. I  
7     think the public might be, but I don't think  
8     that the scientists are. But what good  
9     scientists often are influenced by is the  
10    importance of the case, and that is the whole  
11    issue of confirmation bias.

12           The study that I was alluding to, which I  
13    should flesh out a little bit because it is a  
14    great study, what the scientists did is they  
15    took five of the top fingerprint examiners in  
16    the world and they went back for each one of  
17    them and identified, dug up a case that they had  
18    handled five years earlier, a case where they  
19    had declared a match on fingerprints between a  
20    known and unknown fingerprint, a latent and a  
21    reference sample. And they went back and got a  
22    group of people to re-examine those prints to  
23    make sure, yes, they were in fact matches, there  
24    is no question they were matches, they were real  
25    good matches. And now five years later, without



1 telling them that these were old cases that they  
2 handled, they instead came to each of the  
3 examiners with a phony cover story. The phony  
4 cover story was, you all heard about how this  
5 guy Mayfield in the United States, who was a  
6 lawyer, was wrongly accused of being one of the  
7 Madrid train bombers, terrorists, because a  
8 latent fingerprint recovered from the bag near  
9 the scene that had detonator caps was wrongly  
10 attributed to him by three different examiners  
11 at the FBI laboratory. And it has now been  
12 proven, right, to a more certainty that they  
13 made this error.

14 So we now want you, Mr. Smith in England,  
15 or Mr. Jones in France, to look at these prints,  
16 these are the prints from the Mayfield case, and  
17 you tell us whether or not it was correct to say  
18 that it was an exclusion, or were these other  
19 gentlemen right at the FBI initially who said it  
20 was a match?

21 What is so fascinating is, of course, they  
22 all said, four of the five I think, four of the  
23 five said, no, no, it is clearly an exclusion.  
24 But the case that they were looking at that they  
25 were calling an exclusion now were cases where

1 each of them five years earlier had said it was  
2 a match, when in fact it was a match. So it is  
3 a lovely study to show the dangers of  
4 confirmation bias and how if you tell somebody  
5 in advance what we think the conclusion should  
6 be, there is a real good chance that that's what  
7 the conclusion will be.

8 So even very qualified people can succumb  
9 to that kind of confirmation bias, or examiner  
10 bias. There is a wealth of literature on the  
11 role of examiner bias and why people on this  
12 panel were addressing the need for blind testing  
13 whenever possible. And that's really a real  
14 concern.

15 The only CSI factor that I have ever seen  
16 is that there were an increase of 500 to 1,000  
17 per cent in applicants to forensic science  
18 programs in both Masters and undergraduate,  
19 because they all thought they would end up with  
20 the blonde in the convertible. You have all  
21 seen that I'm sure. What has happened is that  
22 after six months, when they realize it is hard  
23 work, those folks will drop out, hopefully they  
24 will drop out. I am not as worried about that.  
25 MR. GATES: Mr. Lucas, my second question I will

1 direct to you, sir, and to whoever else you may  
2 wish to draw into the discussion.

3 Is hair microscopy junk science?

4 MR. LUCAS: No. That's another one of those yes  
5 or no questions.

6 MR. GATES: Then let me ask --

7 MR. LUCAS: Someone else may want to expand on  
8 that.

9 DR. DE FOREST: As I tried to articulate here,  
10 it is the way it is applied, the way the  
11 training, the education of the scientist doing  
12 the work is accomplished, and this has been a  
13 long time failing that I have been concerned  
14 about for over 30 years. It just never got the  
15 support to rise to the level where it was given  
16 the adequate training and education. In  
17 addition, there seems to be in the actual  
18 practice of it a lack of awareness of the  
19 context in which the hairs occur. Like the  
20 example of the van in this case where they had  
21 lain there, if they had lain there, there were  
22 hairs there that were found after a period of  
23 four months. So there are a number of things  
24 that impact this, and a lack of appreciation for  
25 the range of variation within the various

1 samples, the condition of the samples.

2 I have had cases where they vacuum a car  
3 out and then they search through a bunch of  
4 hairs and they find one that changes the course  
5 of the investigation. And it is a trash yard.  
6 If it had been looked at properly, you would  
7 recognize it had been beaten up and been lying  
8 in that environment for a long time, and is  
9 totally non contemporaneous with the event under  
10 concern. So there is a lack of education, a  
11 lack of awareness to the limitations, and it is  
12 being applied inappropriately.

13 MR. LUCAS: I didn't mean to be flippant, but I  
14 always thought the phrase junk science was an  
15 oxymoron. If it is science, it can't be junk.  
16 What I do think there is, is junk testimony, and  
17 quite often there is a lot of that.

18 DR. MAYER: If I may, when one deploys a  
19 microscope, I think this is a legitimate way of  
20 enhancing one's ability to look at some features  
21 and note some observations that otherwise one  
22 would not be able to do. And I agree that once  
23 you take it beyond that, into the  
24 interpretation, into delivering the message to  
25 the concerned individuals of what the

1 significance of those observations is, this is  
2 where we have a problem. And to be fair, when  
3 it comes to hair analysis, as I look back, I  
4 don't expect in the last 20 to 30 years or so,  
5 nothing much had been improved or advanced or  
6 researched in the area. In fact, when hair  
7 microscopy and hair examination was being used  
8 by many forensic science laboratories, the  
9 debate as to the usefulness and the significance  
10 of the findings was still raging on. And that's  
11 the wrong way to go about it. That debate  
12 should have taken place first, and once there  
13 was consensus and agreement, then turn around  
14 and employ this technique. So it should have  
15 been validated first.

16         Unfortunately, as I look at it, the  
17 validation was ongoing while the information was  
18 being produced and evidence was given.

19         At the end of the day, is it science? Well  
20 the one element around science that I strongly  
21 am a proponent of is the business of a null  
22 hypothesis. Science has to, before it embarks  
23 on anything, create a paradigm that would enable  
24 that question to be answered; can you reject or  
25 accept the hypothesis, as opposed to coming back

1 with notions of maybe, possibly, consistent  
2 with, I think so, more than likely, less than  
3 likely. That, unfortunately, in my view creates  
4 a potential for a lot of prejudicial information  
5 and evidence going in that can sometimes, and as  
6 we know does in fact, outweigh the probative  
7 value.

8 MR. NEUFELD: The problem with the term junk  
9 science is it is going back to the CSI that you  
10 want to avoid here. There is valid science and  
11 there is invalid science. And I don't want to,  
12 not to pussyfoot on this, but, again, there are  
13 two components to hair microscopy. There is the  
14 observations under the microscope, and I think  
15 we would agree that there is some scientific  
16 basis that has been validated, that people can  
17 make those observations if they are properly  
18 trained and proficiency tested with respect to  
19 inclusions and exclusions. But there is a  
20 second component to the way this technology is  
21 used in a court of law, which is when people  
22 then say, when they can't exclude, that it is  
23 most likely, remotely, remote that it could be  
24 anyone but him, all of that stuff, is a  
25 statistical statement. And frankly, it has

1 never been validated scientifically when  
2 proponents of this technology use that.

3 So to the extent that they are using that  
4 aspect of the science -- or not of the science,  
5 of the methodology, it is invalidated and it  
6 isn't scientific. And it is not a question of  
7 saying, well, there is some debate, there is  
8 some controversy, blah, blah, blah. It isn't  
9 scientific.

10 So if you feel that you need both  
11 components of that to deliver evidence in a  
12 court of law, and you have only validated the  
13 first part, you haven't validated the second  
14 part, then it should be inadmissible.

15 MR. GATES: Thank you very much. Thank you,  
16 Mr. Commissioner.

17 THE COMMISSIONER: Thank you, Mr. Gates.

18 MR. DAWE: Thanks. We can now move to the next  
19 area of questions, although we have already, I  
20 think, largely answered question four in the  
21 discussion that arose out of Mr. Lockyer's  
22 questions, I will just restate the question in  
23 case someone has something they want to add to  
24 it. I will ask you to comment on the issue, to  
25 the extent that you haven't commented already,

1 about what the role of the forensic laboratory  
2 should be in a case, in a situation where some  
3 methodology that has been used has been either  
4 discredited or doubt has been cast on it by some  
5 scientific advance?

6 Dr. Mayer touched on this, and Mr. Bromwich  
7 did as well, to what extent should the  
8 laboratory be taking a leading role in  
9 overcoming some of the political obstacles to  
10 having an audit and retesting? And a related  
11 question I suppose, is, are there steps that  
12 should be taken now to ensure that records are  
13 kept that would permit an audit in the future,  
14 if there is some future development?

15 MR. LUCAS: I think the first thing that needs  
16 to be said about this question is, first of all,  
17 is it a real doubt? What is new? Is it really  
18 casting doubt on what was done, as Bill said,  
19 ten years ago, or is it just extending, going  
20 further along? If indeed there is real doubt  
21 about the reliability of something that was  
22 done, then I don't think there is any  
23 alternative but to go and review what was done  
24 in the past. The complexity of that can be very  
25 enormous, but I don't think that it can be



1 avoided.

2 MR. BROMWICH: I think there are two different  
3 related questions here. One would call into  
4 question the entire investigative technique, and  
5 the one we are talking about here is hair  
6 microscopy. The other one is whether the  
7 practice of the technique that has been so  
8 deeply flawed in a particular institution that  
9 that should trigger a wholesale review. That's  
10 certainly what we have seen in Houston. I mean,  
11 the area that we found the greatest problems  
12 are, number one, DNA, but number two, serology,  
13 which is no longer practiced because it has been  
14 largely supplanted by DNA. But the original  
15 scope of our work and our investigation down  
16 there was to take cases from 1987 up through the  
17 early '90's, when the serology work, the blood  
18 typing work started to die out and be completely  
19 replaced by DNA.

20 What we found in the cases we looked at  
21 that, that they were so pervasive, that there  
22 were a small number of examiners, all of who  
23 were doing terrible work, that we needed to go  
24 back even further in time and really explore the  
25 full body of work that was done by those

1 examiners. That pushed back the beginning point  
2 of our project to 1980. And what we have  
3 encountered in starting to go through those  
4 cases is it is enormously difficult to do, in  
5 large part because the adequacy of the  
6 documentation, the farther you go back in time,  
7 is shocking. There is very little that we can  
8 do to re-evaluate the way in which cases were  
9 analyzed and evaluated because the records are  
10 so poor.

11 So really two different questions; one, the  
12 methodology or the technique that is used on the  
13 one hand, but second, even if it is valid if it  
14 was so badly done, because of bad training or  
15 incompetent examiners, or whatever, that's a  
16 separate set of issues. And in that instance,  
17 certainly I think that once you learn that you  
18 have an examiner or a set of examiners who have  
19 done flawed work, I don't think there really can  
20 be much of a limit to how far you go back and  
21 how comprehensively you go back to try and  
22 examine as many cases as you can.

23 MR. NEUFELD: The last little bit of this is  
24 that, you know, it is really important, as it  
25 was said by other speakers before, to bring the

1 laboratory into the process as much as possible.  
2 What we are talking about here is remediation.  
3 And frankly, if the whole inquiry is done as a  
4 kind of finger pointing, it is not going to help  
5 anybody. That's when people do circle the  
6 wagons, that's when there is resistance to  
7 remediation and improvement. But if you can  
8 actually change the culture and get people to  
9 accept the notion that this isn't about placing  
10 the blame, this is about trying to improve the  
11 institutions so we reduce the risk of this kind  
12 of thing happening in the future, then you will  
13 get more cooperation and, hopefully, you will be  
14 able to move the ball forward.

15 MR. BROMWICH: There are difficulties, though,  
16 and complexities with doing that, Peter, as you  
17 know. And what we found out in Houston,  
18 however -- that's the enterprise that we hoped  
19 to be about, is pointing out systemic issues and  
20 flawed work as a way to fixing things -- but we  
21 found that when the politicians heard about  
22 specific cases that had been badly handled, they  
23 immediately wanted the heads of the examiners on  
24 a silver platter. And that has vastly  
25 complicated our work and vastly complicated our

1 ability to get the kind of cooperation from  
2 individual examiners that we continue to need as  
3 we go through our investigation.

4 MR. LUCAS: Another example of the complexities  
5 that I have talked about, and I shouldn't make  
6 too big an issue of these things, but they are  
7 extremely complex. One thing is, as you go back  
8 far enough, the original records no longer  
9 exist. And trying to deal with handwritten  
10 notes that are now on microfilm form is a very,  
11 very difficult task.

12 MR. DAWE: Unless anyone else has any comments  
13 on that, perhaps we can change the focus a bit,  
14 and rather than looking at how we go about  
15 retrospectively righting wrongs in the past, I  
16 just want to get your comments on the question  
17 of whether we are doing enough now to try to  
18 prevent wrongs from occurring in the future.  
19 And specifically, are we as lawyers and you as  
20 forensic scientists, and the forensic science  
21 community, doing enough to ensure that  
22 techniques that are being made the subject of  
23 evidence in criminal cases, that they are being  
24 scrutinized closely enough for scientific  
25 validity. And it may be that the legal tests

1 that we have are adequate, and you may think  
2 they are being applied adequately, you may think  
3 that the tests are adequate and they are not  
4 being applied adequately, or you may think there  
5 is something missing in the legal tests that we  
6 are applying.

7 I just note parenthetically that the  
8 Daubert standard in the United States, which I'm  
9 sure you are familiar with, has been  
10 essentially, it is a bit more complicated than  
11 this, but it has essentially been adopted in  
12 Canada. The Supreme Court of Canada has said  
13 that the Daubert factors are also factors that  
14 must be considered under the applicable standard  
15 for admissibility of evidence, opinion evidence  
16 here.

17 MR. LUCAS: Just perhaps to begin that,  
18 Mr. Neufeld, you mentioned I think how many hair  
19 cases that you have looked at in your project.  
20 Was it 24 or something like that?

21 MR. NEUFELD: We have had a couple of dozen  
22 cases where people were initially included  
23 through hair microscopy, where DNA testing later  
24 on exonerated somebody. And I would note that  
25 in most of those cases, it is not through

1 mitochondrial DNA testing. It is more often the  
2 situation where, let's say it is a sexual  
3 assault case, semen was deposited, and it  
4 happened in the 1980s, so they couldn't do DNA  
5 testing, and serology, of course, was not as  
6 discriminating or as robust, so sometimes you  
7 got no result from the serology, sometimes you  
8 have got an inclusion but it is a weak  
9 inclusion. And instead they relied on hairs  
10 recovered from, let's say the pubic area of the  
11 victim, or head hairs, or other shed hairs on  
12 the bedding of the victim, and they used those  
13 to -- and they get attributed to the suspect who  
14 is indicted and convicted. So then we are doing  
15 a nuclear DNA testing on semen 15 or 20 years  
16 later which excludes the person.

17 One more thing I would like to say about  
18 Daubert is that the Daubert Standard has been  
19 fabulous at creating a very active judicial  
20 intervention gatekeeping function in civil  
21 litigation in America. It has been fabulous.

22 In the criminal justice system, it has been  
23 a complete failure. It has been a complete  
24 failure largely because of some of the things  
25 that Mike Bromwich talked about before. But if

1 you just look at nothing but the data of how  
2 often a Daubert challenge is made, it is mind  
3 boggling. The number of times -- 95 per cent of  
4 cases handled in the Federal Courts, or 90 per  
5 cent are criminal, as opposed to -- or are  
6 civil, and same with the State courts, it is a  
7 huge disparity. Yet 90 per cent of all Daubert  
8 cases are in civil litigation, like toxic torts,  
9 what have you, product liability, and fewer than  
10 5 per cent are in criminal cases. And those  
11 that are criminal cases, the vast majority are  
12 prosecutors moving to exclude questionable  
13 scientific evidence proffered by a defence  
14 attorney, where more often than not those  
15 objections by the prosecutor are sustained. But  
16 when objections are raised by the defence  
17 attorney to null the scientific evidence of the  
18 prosecutor, they are overwhelming rejected.

19 So Daubert has not worked, which is another  
20 reason why I think it is important that when you  
21 consider reforms, reforms occur upstream. The  
22 reforms occur in what is considered valid  
23 forensic. The reforms occur when you think  
24 about how notes should be kept. The reforms  
25 occur when you think about what are the proper

1 parameters for a report written by forensic  
2 scientist and what are the proper parameters for  
3 testimony? And you are going to have to  
4 regulate all of that, and have some kind of  
5 external oversight for all of that, or it will  
6 be too little too late.

7 MR. LUCAS: I think I am going to do something I  
8 have always wanted to do. I'm going to appoint  
9 Mr. Neufeld to the Supreme Court of the United  
10 States of America, and Mr. Bromwich also, and  
11 ask them what should the standard be then if  
12 Daubert isn't working?

13 MR. NEUFELD: Mr. Bromwich has a much greater  
14 chance of getting appointed than I do, so maybe  
15 he should answer the question.

16 MR. BROMWICH: I think Peter's point, which I  
17 agree with, is not that there is something  
18 flawed about the standard, is it is not being  
19 properly applied in criminal cases for a variety  
20 of institutional reasons. And I think the lack  
21 of willingness of judges to call into question  
22 some of the ways that things have traditionally  
23 been done in the area of admitting forensic  
24 science, I think that's the issue.

25 MR. TILSTONE: I actually don't agree with some



1 of the things that have been said and implied.  
2 I am in a very small minority, but I don't think  
3 Daubert was a good decision, largely because I  
4 don't think it was a relevant decision. The  
5 court got embroiled in a question of whether  
6 something is scientific or not scientific, and  
7 even scientists can't answer that question with  
8 any, if I may use the word, any degree of  
9 consistency.

10 The issue which should have been addressed  
11 was, is the testing that is being put here for  
12 consideration reliable and producing reliable  
13 results? And there is an entirely different way  
14 you can look at that. If you go to the science  
15 and the literature of quality control and  
16 quality assurance of analytical testing, there  
17 is screeds of it, there is volumes. And it  
18 deals with real issues about reliable testing,  
19 not questions of whether it is this arcane thing  
20 called scientific.

21 And in particular there is an entity called  
22 ILAC, which is a sub group of the global  
23 accreditation community, which has published a  
24 set of guidelines for forensic testing, the ILAC  
25 guide 19 on forensic testing. And the ILAC

1 guide 19 says that forensic science tests should  
2 all be objective tests. And it then goes and  
3 defines what an objective test is, if I may read  
4 it,

5 "It is a test, which having been documented  
6 and validated is under control so that it  
7 can demonstrate that all appropriately  
8 trained staff will obtain the same results  
9 within defined limits. These defined  
10 limits relate to expressions of measurement  
11 uncertainty."

12 And there is a lot in that brief description.

13 It says there has got to be documentation so we  
14 know what the test is that we are talking about.

15 It says it has to be validated, so it is not  
16 something that you can pull off the shelf and  
17 decide, I will use this test today. It has to  
18 be a formal rigorous process that says this test  
19 is fundamentally capable of producing the  
20 results that we want.

21 The definition also says, and this is  
22 important for the crime lab community and its  
23 users, that this is not something that's arcane  
24 and difficult and verging on an individual, a  
25 particular set of skills that no one else can

1 replicate, or an experience that allows them to  
2 be more subjective and less objective. It says  
3 that all appropriately trained staff will obtain  
4 the same results. And then the last part of the  
5 G-19 definition of an objective test is the  
6 defined limits related to expressions of  
7 measurement uncertainty.

8         And there, Mr. Commissioner, I was  
9 interested in your interjection earlier on this  
10 morning, because I think there is a fundamental  
11 misunderstanding in the legal community that  
12 this thing called science is absolutely certain.  
13 And it is not. It is not at all certain. There  
14 is a lot of variability and a lot of uncertainty  
15 in science. And to put it at its very simplest,  
16 if we take probably one of the most common tests  
17 that come out of a laboratory, or out of  
18 forensic science, blood alcohol determination.  
19 If we take the same sample and give it to 100  
20 labs, you will get 100 different answers,  
21 because there is an intrinsic uncertainty in  
22 what we do. But we can measure it, and we can  
23 control it, and we can minimize it, and  
24 therefore we deal with it.

25         Quite frankly, I think that -- and I do

1 agree with Peter -- I think we really need to go  
2 down -- no, we need to go upstream and look at  
3 the fundamental way that laboratories organize  
4 themselves and do their work. And that has to  
5 be based on what, in my view, on what has been  
6 published by ILAC in guide 19.

7 MR. LUCAS: On this point I always remember a  
8 quote from Professor John Thornton. He said he  
9 just wished that the higher courts would make  
10 decisions about forensic that were based on  
11 things that forensic scientists actually do.  
12 And I think that's what has been alluded to  
13 here.

14 DR. MAYER: Again a quick comment. I mean, the  
15 whole business of measurement science is  
16 something that we all touched on. I think at  
17 the heart of it all, this is what we have to  
18 recognize, that whenever possible, it has to  
19 come to measurement size. I know there are some  
20 views around some sciences that today we say do  
21 not lend themselves to that. And I say, well,  
22 that is in fact so much more of a reason to try  
23 and see if we can move into that direction. And  
24 there is variability in any measurement, but as  
25 Bill said, if that variability is properly

1 designed and we know what the scopes are, we can  
2 then make intelligent statements around what are  
3 the outliers.

4       And I don't mean to be critical, but as  
5 soon as somebody says that, you know they are  
6 going to be critical. I don't mean to be  
7 critical of the manual that the RCMP had around  
8 hair examination, but, you know, it was very  
9 thin around the critical issue of what are the  
10 features or what are the biological  
11 variabilities that one ought to include in  
12 making an assessment whether one hair is similar  
13 to another. The document is very silent in  
14 that, and this is where a lot more meat should  
15 have gone then and has to go in today.

16       I find that the Daubert test is terrific  
17 because it does certainly encourage thinking  
18 around the reliability of testing, which is  
19 critical. But I find the culture sometimes is  
20 odd. I find prosecutors and forensic scientists  
21 and defence lawyers, very quickly, when the word  
22 Daubert comes out, they very quickly declare  
23 allegiances, and before you know it, we are  
24 fighting a challenge. And I say that's the  
25 wrong type of culture, wrong type of mentality.

1 If you recognize as an issue, as a forensic  
2 scientist, you need to make everything available  
3 and disclose everything to in fact allow the  
4 trier of fact to make the determination, not  
5 just fight the challenge, I think that's not  
6 what it is all about.

7 MR. DAWE: I just want to follow up on one thing  
8 that Peter said, he mentioned the novel science,  
9 and there is sometimes a perception that the  
10 Daubert standard is something that applies only  
11 to new scientific techniques. And my question  
12 arising out of that is, should we be doing more  
13 to go back and re-examine traditionally accepted  
14 techniques that have been the subject of  
15 evidence, and scrutinize them more closely in  
16 light of the development of the law and our  
17 better understanding of how poorly applied  
18 science can result in miscarriages of justice?

19 MR. LUCAS: This is a big day for me, I have  
20 gotten three yes or no questions, and the answer  
21 I think is yes. We can expand on that if you  
22 like.

23 MR. TILSTON: Yes. But, again, I will put it in  
24 the context of what ILAC defines as an objective  
25 test and, frankly, I do not think that crime

1 labs should be conducting any testing that  
2 doesn't -- and there is more in guideline 19  
3 than I read out to you -- I don't think they  
4 should be conducting any testing that doesn't  
5 fully comply with the requirements of an  
6 objective test as stated in the ILAC document.  
7 DR. DE FOREST: I have an issue there that I'm  
8 not sure is going to be appreciated without more  
9 protracted discussion. But the physical  
10 evidence record at a crime scene is often very  
11 rich, there is a lot of information to be  
12 derived from it. And if we restrict our -- and  
13 I'm talking about a trend that's developed too  
14 with accreditation, that we have gotten focused  
15 on tests and items, and there are other  
16 questions out there, scientific questions that  
17 arise, if they are recognized, that may be, in  
18 terms of its fundamentals, a single occurrence.  
19 In other words, it is something that you could  
20 sit down with other scientists and talk about  
21 it, with people of opposing views and so forth,  
22 and understand that it is an objective  
23 assessment, this indicates this thing happened a  
24 certain way. And probably I am going to be  
25 going off on this too long here -- but it is not

1 covered by a protocol. There is no protocol  
2 for -- I don't want to get into examples, but  
3 there are a number of recent cases that I could  
4 cite where there is very clear evidence that is  
5 either inculpatory or exculpatory, that doesn't  
6 lend itself to a protocol.

7 And a lot of, I think the CYA acronym works  
8 in Canada as well, but I have found many lab  
9 directors who have this CYA attitude about not  
10 wanting to do something outside of the protocol.  
11 The way the ASCLD guidelines are written, the  
12 way I interpret them, there is room there for  
13 getting outside those in particular cases. But  
14 in practice it tends to get blinders on and get  
15 too narrow. I don't know whether I can really  
16 convey something without giving some examples.  
17 But -- am I making sense here or not?

18 DR. MAYER: Well, I fully agree with you in  
19 terms of ASCLD lab and any other accreditation  
20 body that creates a requirement for  
21 documentation of not only methods and  
22 procedures, but all sorts of elements around the  
23 testing and the analytical process. Yes, for  
24 some individuals it becomes a straight jacket  
25 where thinking outside of the box now is limited



1 to what is stated in the guideline or the  
2 criterion. And that's wrong. And that's the  
3 sort of situation that I have seen in my own  
4 shop, where prior to accreditation, everybody  
5 did everything because they needed to and  
6 because it was likely to generate findings. And  
7 they were screaming at me for trying to in fact  
8 create boundaries around methods and deviation  
9 from methods.

10 Now when I talk to some scientists and ask  
11 them about possibly deviating from a method,  
12 well, they are yelling at me for trying to  
13 undermine the whole accreditation process.  
14 Well, that's not the point at all. The point is  
15 that once you do deviate from anything, you have  
16 to ensure that it is properly documented and  
17 validated to the extent possible, and then share  
18 your findings and allow the trier of fact and  
19 any other process to come in and in fact render  
20 a judgment as to what you did. But let's make  
21 it clear that you have deviated and this is  
22 different from the established protocol.

23 We talked about CYA, and last night we were  
24 talking about the PBO test, this is a famous  
25 statistical test that I on occasion use and it

1 stands for pretty bloody obvious. When  
2 something is that obvious, then at some point it  
3 doesn't require a lot of highfalutin science  
4 behind it, but it has to be shown and stated and  
5 captured. But once you move away from a crime  
6 scene, once the investigator develops some sort  
7 of theory about the crime, I mean, when you have  
8 a (inaudible), that meets the PBO test. But  
9 then collecting items and the type of testing  
10 that these items are subjected to then very  
11 quickly has to come within the objective testing  
12 principles. In other words, you have got to  
13 objectify the information to the extent  
14 possible.

15 And I will not hesitate to say today there  
16 are some forensic science disciplines that, in  
17 fact, are not within that -- do not operate  
18 within the scope of that and, in fact, they are  
19 resisting any pressures that would move them  
20 into the area of objective finding information  
21 to the extent possible. Because the lines that  
22 I hear is, well, we have never done it this way  
23 before, it is not possible, you don't know the  
24 science behind it. Well, I'm afraid to say that  
25 thinking has to change and the culture has to

1 change.

2 MR. TILSTON: I almost agree with Joel, but I  
3 think there is nothing in what I have talked  
4 about that stops people doing a one-off to suit  
5 the circumstances that you find. However, what  
6 it does say is, when you do that one-off, unless  
7 you can write it up and describe what you did,  
8 unless you can validate it and ensure that it is  
9 legitimate, and unless you can ensure that it is  
10 not operator dependent, that anyone else would  
11 have gotten the same results from it, and unless  
12 you can define what the intrinsic variability in  
13 the testing is that you have conducted, then you  
14 should not do it.

15 DR. DE FOREST: My point is, I think it is the  
16 way that these standards are administered by  
17 many laboratory directors that's the problem.  
18 Let me give you a example that I thought of in  
19 the meantime here. I got a call from a  
20 prosecutor in Phoenix, I guess it was, and they  
21 had a triple homicide that ultimately they had  
22 the father and the husband, there were two  
23 children and a mother missing, I guess the  
24 bodies were never found.

25 And after a while the investigation settled

1 on this guy. But they had not done a very  
2 thorough investigation of the scene to begin  
3 with, so they got a court order and they went in  
4 six months later. They took up the bedroom  
5 carpeting, among other things, and they found  
6 what looked like a stained area.

7 From their investigation they knew that the  
8 husband had called in a cleaning crew a couple  
9 of days after the people were thought to have  
10 gone missing. And the cleaning crew described,  
11 when they were interviewed, that the carpet was  
12 soaking wet when they got there. So they  
13 thought they saw this stained area, they did  
14 some DNA testing, and they got, you know, pretty  
15 good profiles for the woman, you know, CODUS  
16 profiles. But they realized that they had no  
17 way of knowing whether these were derived from  
18 blood, or from epithelial tissue. The actual  
19 origin of the DNA in terms of sematic origin  
20 could not be known from that test data. So they  
21 wondered what to do about this.

22 And so when I got the call, I said, well,  
23 why don't you do a very careful mapping of where  
24 the DNA samples were taken and see whether you  
25 can also find any human hemoglobin results that

1 come from the same area. Well, that sounds  
2 really interesting, I will have the lab person  
3 call you. The lab guy called and the answer  
4 was, it is not in our protocol, we can't do it.

5 I mean, it should be allowed under the  
6 constraints of the guidelines, but the way it is  
7 practiced, there often is this timidity in terms  
8 of actually carrying out something that deviates  
9 from the ascribed protocol.

10 MR. LUCAS: Just in fairness, I should say,  
11 Mr. Dawe, that the profession of forensic  
12 science recognizes the need to go back and look  
13 at some of these things and, in fact, has done  
14 that. There have been massive studies in the UK  
15 and the U.S. with respect to validity of  
16 fingerprints, for example. We all used to take  
17 at face value that they had to be right, and yet  
18 I can tell you from my experience in an  
19 international proficiency testing program, the  
20 worst examinations that are done are latent  
21 fingerprint examinations. There have been the  
22 beginnings of studies on firearms. There have  
23 been, as already quoted, good studies in the  
24 U.K. about fibre, frequency of occurrence and so  
25 on. Peter was involved with a large study of

1 the validity of bullet lead analysis that lead  
2 to the FBI stopping doing it.

3 So there is that sort of work, there is  
4 recognition of the need for it, there is some of  
5 it being done. But, unfortunately, I have to be  
6 crass to some extent, one of the problems is how  
7 do you fund this? It can be very expensive, and  
8 it is very difficult to go to a granting body  
9 and ask them to fund a study on something that's  
10 been done for 75 years. You don't get a very  
11 sympathetic response to that.

12 DR. DE FOREST: But it needs to be done, there  
13 is a real host of problems that need to be  
14 addressed by research projects and they aren't  
15 being addressed, and I think the money should be  
16 found to do that.

17 MR. DAWE: At this point I would like to again  
18 turn the floor over to my colleagues. Perhaps  
19 we can do it in the same order we did before and  
20 start with Mr. Kennedy.

21 MR. KENNEDY: Good morning again members of the  
22 panel.

23 In relation to, this relates to question  
24 number 4, scientific validity and methodology,  
25 it talks about new developments casting doubt on

1 old techniques. If you have a situation, panel  
2 members, where a scientist, or scientists, or a  
3 lab has been shown to make mistakes, which is  
4 more than an isolated incident, in hair  
5 analysis, and those scientists or that lab is  
6 now doing DNA testing, first, if there is  
7 questions about the competency, training,  
8 experience, or objectivity of that scientist,  
9 scientists, or lab, does that not cause concern  
10 that should lead to the review of the DNA work  
11 done by those individuals or lab? Does anyone  
12 have any comment on that?

13 MR. BROMWICH: I think that the mechanism is  
14 there now. And this was, of course, a much more  
15 "objectifiable" kind of thing than the hair  
16 comparison by microscopy was. But we have,  
17 firstly, testing going on, we have all of these  
18 quality control assurances. And in some sense  
19 the application of the DNA technology to samples  
20 in a forensic laboratory has largely become a  
21 technology, it is actually getting away from  
22 science, it is becoming a routine kind of thing,  
23 that stuff is put into the production line and  
24 results are generated and validated and so  
25 forth. There are questions that arise about

1 some of the situations this arises in, whether  
2 you really know it is really coming from blood  
3 or from something else, since the techniques are  
4 very, very sensitive in picking up trace amounts  
5 of things. But in general, in the terms of the  
6 case context, I don't see that being a frequent  
7 thing where there would be a problem that way.  
8 But it has become a technology rather than a  
9 science.

10 MR. KENNEDY: Sir, there is, would you agree  
11 with me, the issue of subjectivity in the  
12 interpretation of profiles, the issue of a  
13 potential contamination, issues of mixed  
14 profiles that call into question competency,  
15 training and objectivity. If the scientist in  
16 the past has a bad track record, to paraphrase  
17 it, would that not cause concern that that  
18 person has taken these bad habits or lack of  
19 training into these DNA tests?

20 MR. BROMWICH: Yes, it would cause that concern.  
21 And I think what you would need first to look at  
22 is whether the training that the person is  
23 receiving, the peer review that's going on in  
24 the new area, is one that makes you feel more  
25 confident that there has been better training



1 and there is better oversight. If you don't  
2 find those things, and so that the concerns  
3 remain, then I think that it is hard to defend  
4 not looking into some of the work that the  
5 analyst is doing in the new area. So I think it  
6 is really at least a two step inquiry. You have  
7 got to see whether there are institutional  
8 factors that make you feel more comfortable that  
9 whatever the problems may have been in the past  
10 with that examiner and the way he practiced the  
11 prior discipline, that institutional changes in  
12 the way that, for example in your example, the  
13 DNA training has been given, the oversight that  
14 is given, the peer review that is given of a  
15 particular work, if you are satisfied that the  
16 structure is good and there has been no danger  
17 signals about the work of that analyst, then  
18 maybe you don't need to push and look at the  
19 work, the DNA work that the analyst is doing.  
20 But if you don't have those, if you have doubts  
21 about those, yes, I think you have that concern  
22 and there is no way to allay that concern short  
23 of looking at the new cases.

24 DR. DE FOREST: Clearly, I agree. I may have  
25 been misinterpreted there, but it is easier now

1 to monitor that. The objective data, the  
2 documents could be reviewed, and there is a  
3 system in place now to review them with  
4 regularity and so forth. I mean, Doug would be  
5 a good one to talk about accreditation I guess.

6 MR. NEUFELD: Although there is still one  
7 enduring problem, which is even through  
8 accreditation and a lot of the QA/QC programs  
9 that exist now, particularly for DNA testing,  
10 there is still a reliance that human beings will  
11 do what they are expected to do, given the  
12 policies, procedures in the manual.

13 So, for instance, there was no question  
14 that the procedures were in place at the FBI  
15 laboratory that examiners would independently  
16 look at the work of the first examiner to make  
17 sure that the controls were utilized. But when  
18 they found out about, for instance, the  
19 Jacqueline Blake matter, when they did the  
20 investigation and the audit, they realized that  
21 their own controls were not working properly,  
22 because what was happening is that the second  
23 examiner was merely rubber stamping what the  
24 first examiner did, as opposed to truly  
25 independently re-examining data. So they used

1 that audit, if you will, as an opportunity to  
2 fine-tune the QA/QC program so human beings  
3 would do what they are expected to do.

4 MR. LUCAS: I think you have to be a little bit  
5 careful. You referred to mistakes being made.

6 I think we first of all have to determine  
7 whether or not mistakes actually were made in  
8 what was done, and what was done, was it the  
9 state of the art at the time or is it  
10 something -- are we saying that it was a mistake  
11 because, well, it was okay what they did then,  
12 but we now know from something else that that's  
13 not correct. Then that's a different situation.

14 MR. BROMWICH: I am unburdened, my answer was to  
15 a hypothetical, and I'm unburdened with the  
16 facts of this particular instance. So just to  
17 be clear, that was my response.

18 DR. MAYER: I find it is maybe peripheral to the  
19 whole issue, but something that always makes me  
20 cringe, when we refer to forensic scientists,  
21 their skill, their training and their  
22 experience. For the life of me, I don't know  
23 how one quantitates experience, and for the life  
24 of me, I don't know what experience means. Is  
25 it one year of experience 20 times over, or is

1 it truly 20 years worth of experience? And does  
2 that experience also include a code of ethics, a  
3 code of personal ethics, and is there an  
4 organizational code of ethics? And there is an  
5 ongoing effort to ensure that it is not just  
6 experience and to ensure that, in fact, on an  
7 ongoing basis, on a daily basis or what have  
8 you, there are ongoing mechanisms to ensure that  
9 there is proper supervision, there is proper  
10 quality assurance, and whatever else is  
11 available to us.

12 At the end of the day it is a human  
13 process, as I see it. If someone is out there  
14 to subvert the system, it can be done, whether  
15 you are piloting a 747 or running a forensic  
16 science laboratory, it is the same thing.

17 MR. KENNEDY: It leads me into the second issue  
18 then, I will deal with Mr. Lucas' comments at  
19 another point down the road.

20 The second part of this question, does the  
21 issue, if there is the proof or an acceptance  
22 that mistakes have been made in a previous  
23 discipline, and the individual is now doing DNA  
24 testing from hair analysis, does the proof of  
25 mistakes or -- does that cause concern about an

1 institution that knows about the error and  
2 continues to use the scientist in cases where  
3 the scientific evidence is important, in other  
4 words, the failure of the institution to look at  
5 its individuals and/or methods?

6 DR. DE FOREST: I would agree that that's a  
7 failure. We have to look at those things. If  
8 you have got, you know, a scientist that has  
9 shown evidence of that in the past, you want to  
10 be very careful that it is not being repeated in  
11 a new paradigm or whatever.

12 MR. KENNEDY: So how does one force, to use that  
13 term, and I don't know force is the proper term,  
14 I think you know what I'm trying to get at here,  
15 how do you force the institution to look at  
16 these issues?

17 MR. TILSTON: I think you have given us a  
18 restrictive frame of reference, or posed your  
19 question inside of a restrictive frame of  
20 reference. If the institution redeployed  
21 someone from testing activity A to testing  
22 activity B, then the expectation would be that  
23 in that redeployment there was a thorough and  
24 adequate training and evaluation of the  
25 individual before they were decreed appropriate

1 to conduct independent, unsupervised testing in  
2 that area. And if that training and evaluation  
3 of competency had been done correctly and  
4 thoroughly, then I think it could be argued that  
5 the individual has demonstrated that they are  
6 suitable to conduct that new testing,  
7 irrespective of anything that might have  
8 happened in the past.

9 MR. NEUFELD: There is actually a standard of  
10 remediation model for situations such as this.  
11 In clinical laboratories, and I believe also for  
12 forensic laboratories, it goes as follows.

13 Let's say you uncover the mistakes, if they are  
14 mistakes or misconduct, it doesn't really  
15 matter, in one discipline. And that may give  
16 rise to an exhaustive audit of the cases  
17 conducted by that individual in that discipline.  
18 The person moves on to a new discipline and you  
19 hope that through re-training or whatever, you  
20 know, he has improved his conduct and you don't  
21 have that problem anymore. But if you don't  
22 know, because you didn't uncover the initial  
23 problems until after the person moved on, the  
24 standard remedial action in that situation is to  
25 take a random subset of cases. You wouldn't do

1 the kind of exhaustive audit that you did on  
2 hair with DNA, but you would, just to test that  
3 hypothesis, take some small subset of cases,  
4 have them independently looked at by other  
5 people to now ensure that the person did it  
6 properly. That's what you would do. You do  
7 that in clinical labs all of the time, and I  
8 actually know crime laboratories that do that as  
9 well, and that's what you would expect to be  
10 done here.

11 MR. KENNEDY: Actually, let's stop here. I  
12 think Mr. Lockyer will now perhaps move into  
13 more concrete examples that will perhaps put my  
14 hypothetical questions in focus. Thank you  
15 panel members, Mr. Commissioner.

16 MR. LOCKYER: Members of the panel, I want to  
17 ask what may be best described as a very pointed  
18 question that I think has become quite  
19 significant in this inquiry. I want to describe  
20 to you an event that occurred on Tuesday at the  
21 proceedings.

22 As you all know, the hair microscopy  
23 results of Mr. Christianson from 1991 have now  
24 been proven wrong by -- or put it like this, we  
25 now know that the donor of the hairs in the van

1 was not the deceased, as a result of the  
2 mitochondrial testing conducted in 2002 by the  
3 FSS.

4 For reasons that aren't necessary to  
5 explain to you, counsel for Mr. Christianson and  
6 the RCMP laboratories raised an objection during  
7 the course of the questioning of Mr.

8 Christianson, and was then asked to respond on  
9 behalf of both the witness and the laboratories  
10 to the following question: Is the laboratory  
11 and Mr. Christianson, in particular the  
12 laboratory, prepared to concede that the hairs  
13 that Mr. Christianson found to match -- and I  
14 know it is not a good word -- to match the hairs  
15 of the deceased, is the laboratory prepared to  
16 concede that in fact those hairs were not the  
17 deceased's hairs.

18 Counsel for the laboratory thereupon asked  
19 for a moment. He consulted with the head of the  
20 laboratory, who is here now, in other words, the  
21 chief of the RCMP laboratories across the  
22 country, I don't mean for this province, I mean  
23 for the whole country, Mr. Bowen, or Dr. Bowen,  
24 who is here now, returned to the microphone, and  
25 said no. In other words, the laboratory as an



1 institution, and Mr. Christianson as well as it  
2 turned out, were not prepared to concede,  
3 despite the mitochondrial testing, that the  
4 hairs found in the van could not, were not, must  
5 not have been those of Mr. Harder. That's what  
6 happened.

7 I want you to take that, if you would, as a  
8 panel, and analyze it from the perspective,  
9 really three perspectives. The first  
10 perspective is just the simple systemic  
11 perspective, what systemic issues does that  
12 raise about the RCMP laboratories in this  
13 country, at a general level? Second question  
14 is, what issues does it raise about management  
15 of the RCMP laboratory across this country? The  
16 third question it raises is, what issues does it  
17 raise in terms of the line staff, given Mr.  
18 Christianson's position and his evidence,  
19 working within that laboratory in terms of their  
20 training, in terms of their bias, and in terms  
21 of any number of other problems that that  
22 exchange on Tuesday may or may not reveal?

23 It is a pointed question and I apologize  
24 that it is, but it seems to me it is a question  
25 that simply must be addressed.

1 MR. LUCAS: I heard that exchange, I was here,  
2 and I don't know how to respond to your question  
3 because I don't know what the exchange was that  
4 went on between counsel and his client.

5 MR. LOCKYER: Could I ask you to presume,  
6 Mr. Lucas, could I ask you to presume that  
7 Mr. Bowen advised his counsel that the RCMP  
8 laboratory was not prepared to concede that  
9 those hairs did not come from Mr. Harder? So  
10 that we can keep the discussion moving, I think  
11 that's a reasonable assumption.

12 MR. LUCAS: You can ask me to presume that, but  
13 I'm not sure I am prepared to presume that  
14 because I just don't know.

15 MR. LOCKYER: Can we treat it as a hypothesis  
16 perhaps?

17 MR. LUCAS: If you ask a hypothetical  
18 question --

19 MR. LOCKYER: Put it that way, by all means.

20 MR. LUCAS: -- on the same basis, then I would  
21 have considerable concern about all of the  
22 levels within the organization that were  
23 involved in that decision.

24 MR. LOCKYER: And tell me, we don't know -- we  
25 know the decision, if we treat it as a

1 hypothetical, the decision comes from the  
2 director of the lab. The RCMP is in there, the  
3 RCMP lab. If we consider that the RCMP is in  
4 there, would you, Mr. Lucas, from your  
5 experience, have expected that that decision  
6 would have come higher up potentially within the  
7 force itself, rather than from ultimately simply  
8 the lab director himself? Albeit the lab  
9 director is obviously very high up in the  
10 hierarchy, but clearly the RCMP hierarchy goes  
11 beyond the director of the lab.

12 MR. LUCAS: That's certainly a possibility, but  
13 I just don't think I can answer that question.  
14 I don't know enough about the situation.

15 MR. LOCKYER: Fair enough.

16 MR. NEUFELD: Well, I guess you have got to go  
17 back to the beginning. I mean, the beginning  
18 is, and it was alluded to earlier today, do you  
19 really have two equal forensic science  
20 disciplines butting heads here? And I think the  
21 answer that everybody on this panel would agree  
22 to is, no, you don't. There is no question that  
23 the DNA testing conducted by the Forensic  
24 Science Service in England is a far more robust,  
25 more reliable, more validated forensic science

1 than was the hair microscopy done in this case.  
2 It is a simple fact. Before I go further, is  
3 there any debate on that? I don't think so. So  
4 that being the case, and given the fact that I  
5 assume that they had these DNA results from  
6 England for three years now?

7 MR. LOCKYER: Yes, December 2002.

8 MR. NEUFELD: Fine. And there has been no, I  
9 guess, successful effort to rebut those results  
10 scientifically at all?

11 MR. LOCKYER: No effort that I am aware of at  
12 all.

13 MR. NEUFELD: Right.

14 MR. LOCKYER: No consultation, indeed, with any  
15 lab or expert about it.

16 MR. NEUFELD: Well, at a certain point something  
17 is almost irrebuttable, presumed to be reliable  
18 and accurate, and I guess the DNA results in  
19 this case sort of achieve that after a certain  
20 period of time, in the absence of any meaningful  
21 challenge to it.

22 The scary thing is, I guess, when an  
23 institution then takes a position that, despite  
24 being confronted with overwhelming and  
25 irrefutable scientific data which says that

1 these hairs did not belong to the deceased,  
2 nevertheless for whatever reason decides to  
3 maintain that position, is a cause of grave  
4 concern. Because what it means is that instead  
5 of trying to bring people to the table and move  
6 constructively and pro-actively to sort of make  
7 things better, there is a defensiveness that  
8 controls the process. And that's just not good.  
9 It is not good for forensic science, it is not  
10 good for criminal justice, it is not good for  
11 the people of Canada or the people anywhere. So  
12 you don't want that dynamic, it is just not  
13 healthy. And it is dangerous, because what it  
14 does is it can result in erroneous results in  
15 the future being utilized in all kinds of  
16 situations which allow innocent people to be  
17 convicted and allow guilty people to get off,  
18 just because you are defending a result for the  
19 sake of defending a result.

20 It is, in fact, why there is a movement  
21 afoot in a lot of other jurisdictions now to  
22 have outside oversight for different forensic  
23 sciences or forensic science laboratories,  
24 because the feeling is that if other people are  
25 involved who are truly independent, who don't

1 have the same stake in the outcome, there is a  
2 greater opportunity to make sure that that kind  
3 of culture doesn't take hold.

4 And, frankly, that seems what you are  
5 really addressing here is kind of an  
6 institutional culture where you dig your heels  
7 in and you circle the wagons, as opposed to  
8 saying, you know what, we were wrong and we  
9 should move forward from that and make things  
10 better.

11 There is another annoying issue though  
12 which has to be entertained. In Doug Lucas'  
13 report he talks about three possible situations.  
14 He says the most likely is that the DNA is  
15 correct. Okay. And I think we have even gone  
16 beyond the most likely, I think it achieves an  
17 even higher level of acceptability in this case  
18 at this point.

19 So you have two other possibilities. One  
20 possibility is that just by coincidence the  
21 hairs of three different people, the hairs of  
22 three different people are visually,  
23 microscopically, indistinguishable from the  
24 hairs of the deceased. And I think the people,  
25 particularly somebody like Dr. De Forest who has

1 great experience in hair microscopy, well, yes,  
2 it is possible that one can make a mistake, or  
3 say that two hairs could be indistinguishable  
4 when in fact they come from different people. I  
5 know, at least anecdotally, of not a single  
6 instance in my career, and maybe you do, where  
7 someone has made that same mistake with three  
8 different people in the same case. In other  
9 words, what is the likelihood that somebody just  
10 by chance would take hairs that, in fact, belong  
11 to four different people, to three strangers and  
12 the deceased, and conclude that instead they all  
13 come from the same person? I have never seen  
14 that before. Maybe you have.

15 MR. DAWE: If I may interject here. One of the  
16 curious features of Mr. Gaudette's study is that  
17 one of the hairs that various comparisons have  
18 been unable to distinguish is the hair from a  
19 single person that he can't distinguish from  
20 three other people.

21 DR. DE FOREST: It happens. If the hairs are  
22 nondescript, if there aren't a lot of  
23 characteristics there, then one has to be very,  
24 very, careful about any conclusions drawn. And  
25 you can have these conclusions. I mean, even

1 Barry Gaudette, who is probably the mold on  
2 which the whole approach in this case was based,  
3 you know, published data that showed the very  
4 thing that you are talking about, that if you  
5 look at these you would have certain hairs that  
6 were very similar. And any scientist seeing  
7 that should recognize that you don't treat that  
8 the same as you would as one where there are  
9 features that one can rely on to discriminate  
10 these.

11 MR. NEUFELD: But if Gaudette saw that once in  
12 his study where he looked at all of those hairs,  
13 this is not once in a study, this is seeing it  
14 allegedly with respect to four different people  
15 in one crime scene, in one case. And what one  
16 has to entertain, okay, is of course the  
17 possibility that this person simply is making  
18 these kinds of mistakes with that degree of  
19 frequency, okay, which perhaps would reflect on  
20 his competency. But the other possibility that  
21 one has to entertain is that it is not merely  
22 negligence, but it rises to the level of  
23 misconduct. Because in all operations, whether  
24 we are lawyers, doctors, or forensic scientists,  
25 some wrong answers are the result of negligence



1 and some wrong answers are the result of  
2 misconduct.

3 We are now required in the States to  
4 entertain and conduct audits for both situations  
5 and get to the root cause of what happened. And  
6 I would submit that what you have to do here is  
7 you would also have to get to the root cause of  
8 the wrong answers here. And that hasn't been  
9 done yet.

10 One of the things you would want to do,  
11 unfortunately we no longer have the hairs, that  
12 would be the easiest way to do it, if you had  
13 the hairs you could have another team of experts  
14 examine the hairs and see whether or not they  
15 are so similar that one could make that mistake,  
16 or whether they were not. But even in the  
17 absence of the hairs, what we would do is we  
18 would undertake an inquiry of his training, of  
19 his proficiency testing, and of other work he  
20 did in other cases. Because, frankly, if it  
21 turns out that he is extraordinarily competent  
22 and his proficiency is beyond reproach, then it  
23 may actually provide some evidence that we have  
24 misconduct as opposed to negligence. You just  
25 don't know. But you can undertake that inquiry,

1 and you can come up with some kind of meaningful  
2 answer.

3 MR. BROMWICH: Let me give you a very quick  
4 answer to your question, if I can. I think  
5 nothing is more important to a forensic lab than  
6 the credibility that it has in generating  
7 forensic results, and then testifying about  
8 those results. So if an acknowledgment of an  
9 error seems to be called for by the facts of a  
10 particular case, and it is not forthcoming, then  
11 I think an explanation has to be provided as to  
12 why the acknowledgment is not being made.

13 So without knowing anything more than you  
14 posed in your hypothetical, if the admission  
15 that seems to be driven by the facts is not  
16 being made, then I think the individual whose  
17 case it is, and the public at large, is entitled  
18 to an explanation as to why that acknowledgment  
19 is not being made.

20 MR. LOCKYER: Dr. Lucas, can I -- I sort of  
21 alluded to this but I just want to flesh it out  
22 a little better. Can we assume that the  
23 decision that resulted in counsel's response,  
24 Mr. Gates' response on Tuesday, was as a result  
25 of a decision made by higher levels of

1 management within the RCMP, and was not a  
2 decision that stopped at the level of Dr. Bowen,  
3 the DNA scientist I might say, who is now the  
4 director of the lab. If that were the case,  
5 would your concerns be greater in the  
6 circumstances?

7 MR. LUCAS: I have always heard that you  
8 shouldn't respond to hypothetical questions, but  
9 I never listened, so I will respond to it. Yes,  
10 clearly you would have greater concern.

11 MR. LOCKYER: If you could elaborate, I mean, we  
12 are talking -- I suppose what we are really  
13 talking about is the idea of a RCMP lab and  
14 should we take the RCMP out of it?

15 MR. LUCAS: I think we are going to come to that  
16 in the next session, and it might be better to  
17 leave it until we get into that question.

18 MR. TILSTON: Can I, Mr. Lockyer, address your  
19 question? I'm sitting, trying to see if I can  
20 see the correlation, stripping away the  
21 slightly, or the somewhat sensitive contextual  
22 framework in which you posed it. If you asked  
23 me that question as a former crime lab director,  
24 then the answer I would give would go something  
25 like this. On the basis of the DNA results, I

1 without hesitation would agree that the  
2 conclusions presented by my member of staff in  
3 1990 were incorrect. But I would not  
4 necessarily agree to, with the same frankness,  
5 that that indicated that mistakes had been made  
6 in the work that was conducted in 1990.

7 MR. LOCKYER: In other words, the hair  
8 microscopy could have indeed seen two hairs that  
9 matched?

10 MR. TILSTON: Yes, the work that was done in  
11 1990 could have been absolutely sound. But that  
12 doesn't mean that looking at it in 2006, with  
13 the benefit of better technology, the conclusion  
14 was correct.

15 MR. LOCKYER: But I think what you say as the  
16 imaginary director of the crime lab, I  
17 understand. In the scenario that we have,  
18 that's not what the real director of the crime  
19 lab has said. So that really forces us into the  
20 next level of this. Where does that take us?

21 MR. TILSTON: No, I don't know that, and I may  
22 have misunderstood you. But I heard you,  
23 perhaps mistakenly, say in the way that you  
24 posed the question that you were looking, you  
25 had an expectation that today's director of the

1 lab was going to concede that mistakes had been  
2 made with the testing in 1990?

3 MR. LOCKYER: Well, in effect by refusing to  
4 concede the mitochondrial results accuracy, in  
5 effect, there is a refusal to concede that the  
6 hair microscopist necessarily got it wrong.  
7 Once you concede -- got it wrong in terms of  
8 saying, got it wrong in terms of the inference  
9 that was left that these all came from the same  
10 person, namely the deceased. It is difficult to  
11 word this sometimes. But by maintaining the  
12 position he is maintaining, he is not conceding  
13 that the hair microscopist's comparisons in fact  
14 didn't accurately reveal that those hairs were  
15 Perry Dean Harder's.

16 MR. TILSTON: That's a long way of saying that  
17 the microscopist made a mistake, and I couldn't  
18 answer that.

19 MR. NEUFELD: Actually, it begs the question,  
20 and you don't have to go that way. But the  
21 simple question was, the gentleman would not  
22 concede that the DNA was accurate, forget  
23 whether --

24 THE COMMISSIONER: We don't know exactly if that  
25 is what he was saying. I really think we have

1 gone as far, or perhaps further than we should  
2 on this, and I would like you to move to another  
3 topic.

4 MR. LOCKYER: Well, Mr. Commissioner, that was  
5 the topic I wanted to ask questions about.

6 That's --

7 THE COMMISSIONER: Okay. Thank you.

8 MR. LOCKYER: Thank you.

9 MR. DAWE: Before we move on to the last issue,  
10 I should of course call on Mr. Gates to make any  
11 comments, pose any questions in this area.

12 MR. GATES: No, thank you.

13 MR. DAWE: Of course, I don't mean to exclude  
14 any of my other colleagues. If anyone has any  
15 interest to pose any questions, feel free to  
16 jump in.

17 If we move now to the last issue -- and we  
18 are running a little short on time, so I will do  
19 this as quickly as possible -- and that's this  
20 issue of independence. And just by way of  
21 context, as you all know, the microscopic hair  
22 analysis in this case happens to have been done  
23 by a laboratory affiliated with the police  
24 force, the RCMP lab. I don't think it would be  
25 fair to ask you to comment specifically on the

1 RCMP, but based on your own experiences with  
2 other laboratories that are and are not  
3 affiliated with police forces, I will pose this  
4 question to you in general; does in your view  
5 the fact that a forensic lab is directly  
6 connected with a police force or a prosecutorial  
7 service raise, in your opinion, a concern of  
8 bias, conscious or unconscious, or about the  
9 appearance of bias, and if so, how do these  
10 concerns manifest themselves and what should be  
11 done about it?

12 MR. LUCAS: Perhaps I could start, because I can  
13 just discuss or mention some of the things I  
14 said in my report. I dealt with this issue to  
15 some extent. And from my own experience, I know  
16 there is some very fine laboratories within  
17 police forces. I know there is some very fine  
18 laboratories that are in other agencies, and  
19 there is a whole range of them and I have listed  
20 them in my report. I know from my own  
21 experience that there have been problems in some  
22 laboratories that are parts of police forces. I  
23 know from my own experience that there have been  
24 problems in some laboratories that are not part  
25 of police forces. And that's perhaps a long way

1 of getting around to saying, I don't think it  
2 makes a lot of difference in the reality of the  
3 situation.

4 I do agree, however, that there is a  
5 problem of perception. And I think Mr. Justice  
6 Kaufman dealt with that in his report, and I  
7 certainly would agree with what he said.

8 MR. BROMWICH: I agree with Doug. In practice I  
9 think you will find that you have some good labs  
10 affiliated with law enforcement agencies, some  
11 bad labs affiliated with law enforcement  
12 agencies, and the same is true of labs not  
13 affiliated with law enforcement agencies, both  
14 good and bad. I think what is important to  
15 understand is that the mere institutional  
16 position of the lab, whether it is part of a law  
17 enforcement agency or not, is not really what  
18 creates the bias. It is the relationships that  
19 get developed, the clients that the lab serves,  
20 that's the source of the potential bias. Even  
21 if you strip out a crime lab from a law  
22 enforcement agency and set it up separately,  
23 independently, or affiliated with some other  
24 agency, they are going to still have to deal,  
25 forensic scientists, on a day-in-day-out basis,



1 with the same law enforcement personnel who have  
2 the same interests and motivations for making  
3 the cases as ever.

4 So I think that, although I'm sensitive to  
5 the perception and appearance issue that Doug  
6 Lucas has mentioned, I think it is a little bit  
7 illusory to suggest that an institutional  
8 change, or organizational change in the position  
9 of the crime lab is going to make a significant  
10 difference in terms of the issues of bias that  
11 we may be concerned about. So in a sense I  
12 think it is focusing on the wrong issue.

13 DR. DE FOREST: I would agree wholeheartedly  
14 with that, and with what Doug said there. I  
15 think the major limitation or problem arising  
16 from police administration of laboratories is a  
17 funding issue, that they aren't given adequate  
18 funding. As a result of that, they aren't a  
19 priority thing in the general scheme of things  
20 in terms of police administration. But I think  
21 there is no -- as long as they have good  
22 scientific leadership in the laboratory, I don't  
23 think there is a problem how it is structured  
24 administratively.

25 MR. NEUFELD: I would agree with what Mike just

1 said, and I would add one thing, which is no  
2 matter what you do with the laboratory, whether  
3 it is part of law enforcement or outside of law  
4 enforcement, I think what is critical though is  
5 that you create some kind of independent  
6 oversight body. And the reason is that people  
7 sometimes have this notion, well, we don't need  
8 it because we are accredited. And anybody who  
9 knows anything about the accreditation will tell  
10 you, it doesn't matter what the institutional  
11 setting is. Accreditation basically are the  
12 lowest common denominator standards. It is what  
13 we require as a floor, it is not what we want as  
14 a ceiling. And what external oversight provides  
15 you with is, instead of thinking about the  
16 lowest common denominator standards, minimum  
17 standards, it can give you what is called best  
18 practices, something to aspire to, something to  
19 hope to achieve. And by having an independent  
20 oversight entity, where you have civilians  
21 involved who don't have the same even perception  
22 of a conflict that you might have with law  
23 enforcement, they can be prosecutors, they can  
24 be some defence attorneys. Frankly, what it  
25 should also include are people from other

1 scientific disciplines, not necessarily forensic  
2 science, but people who run the pathology  
3 departments at a leading medical centre here in  
4 Winnipeg, for instance, or in the other  
5 provinces as well.

6 And you get their input, and you will  
7 quickly see that kind of culture that we were  
8 concerned with dissipating, and it will be  
9 replaced by a culture which is much more  
10 science, about science and less about being part  
11 of a team that's seeking a conviction. And you  
12 will also get people striving towards best  
13 practices. So it becomes a win-win for public  
14 safety if you move that way.

15 MR. TILSTON: Just a couple of things, I'm so  
16 delighted, I have spent all morning agreeing  
17 with Peter, which is scary. And at last he has  
18 given me something I disagree with.

19 I think the totally unsubstantiated  
20 assertion that the accreditation represents  
21 floor standards is just not warranted and quite  
22 wrong, and I'm disappointed in you, Peter.

23 The second comment that I want to make is  
24 that the only, I would go so far as to say the  
25 only major forensic science lab that I'm aware

1 of, and it no longer exists, that has had no  
2 case problems and has always been held in very  
3 high regard is the Metropolitan Police Forensic  
4 Science Lab in London. I think there are  
5 characteristics to the way that the Met lab  
6 operated that are really important in it  
7 achieving that standing.

8 First of all, the laboratory has always  
9 been managed by, well, pretty well always been  
10 managed by someone who was chosen because of his  
11 or her scientific credentials and leadership.

12 Secondly, the head of the laboratory  
13 reported either -- I'm not quite sure, it is  
14 long time ago -- either directly to the  
15 Commissioner or to a Deputy to the Commissioner  
16 in the Metropolitan Police Force. And I think  
17 it is that combination of the scientific, and I  
18 emphasize scientific standards and leadership in  
19 the director, which was reinforced by the  
20 recruitment practices of the Met Lab for that  
21 position, together with where the lab director  
22 was positioned, if you will, in the food chain  
23 of responsibility and accountability in the Met  
24 Lab, that produced such a consistent high  
25 standard of operations.

1 MR. LUCAS: I think Bill and Peter have touched  
2 on really what is the key issue, and that is  
3 that the laboratory has very strong scientific  
4 leadership. There is an extension of that  
5 however, and that is that the agency allows them  
6 to lead. And I have seen problems where that  
7 has not been the case. Where I have seen  
8 problems in laboratories in police departments  
9 is where they were not allowed, the scientific  
10 leadership either didn't exist or they were not  
11 strong enough to exert their authority.

12 Mr. Bromwich saw that in the FBI laboratory  
13 review that he did. The FBI laboratory had  
14 started with good strong scientific leadership,  
15 but along the way they had gotten away from it,  
16 and it just became another rotation through for  
17 people who were moving up the organization. And  
18 one of the recommendations that he made, and  
19 they adopted, was that they go back to having  
20 strong scientific leadership.

21 What I've been able to see over my career  
22 with, and connections with the RCMP laboratory  
23 system, is they have always had that strong  
24 scientific leadership.

25 MR. NEUFELD: One last thing just to respond to

1 Bill's remark about the accreditation. I'm  
2 involved -- I sit on a Forensic Science  
3 Commission which regulates forensic science  
4 services by all of the state and local crime  
5 labs in New York State and have done so for  
6 approximately a decade. And I can tell you that  
7 it is the consensus there that accreditation is  
8 not about best practices. Because obviously you  
9 can't get everybody on board to engage in best  
10 practices. But what I can tell you is that by  
11 having some kind of external independent  
12 oversight, what you do is you create a mechanism  
13 that whenever it is necessary to have an audit,  
14 it will happen. Because we see here, for  
15 instance, or we have heard other stories,  
16 hypothetically, where things are uncovered, and  
17 I don't care what the cause is, whether it is  
18 simply negligence or misconduct, it really  
19 doesn't matter, but there is an unwillingness to  
20 be introspective, there is an unwillingness to  
21 be self-critical, there is an unwillingness to  
22 do the kind of re-examination of casework that's  
23 required by scientific methodology, and there is  
24 also an absence of a duty to report. So with  
25 some kind of independent oversight, that whole

1 notion of reporting duties and audits when  
2 appropriate becomes a rather matter of fact  
3 operation, and it only inures to the benefit of  
4 the integrity of the scientific result and to  
5 the morale of the organization ultimately.

6 MR. LUCAS: I am glad that Peter mentioned the  
7 organization in New York, because it is a very  
8 important organization. And I think it is fair  
9 to say, Peter, that most, if not all, of the  
10 laboratories in New York are part of police  
11 agencies, are they not?

12 MR. NEUFELD: Yes. We also handle medical  
13 examiners, which are not.

14 MR. LUCAS: There are some medical examiners.

15 MR. NEUFELD: Actually, it is interesting that  
16 you raise that point, because the problem with  
17 medical examiners really echoes what Michael  
18 just said before, which is that even though the  
19 medical examiners' offices are independent,  
20 because they have a very, very close  
21 relationship with law enforcement and  
22 prosecutors, they function almost the same way  
23 as if they were part of the law enforcement  
24 agency.

25 MR. LUCAS: I wanted to follow up with the New

1 York situation because I think it relates to  
2 something I said earlier. There was, I think it  
3 is fair to say, considerable reluctance on the  
4 part of at least some of those laboratories to  
5 seek accreditation. They were mandated into it  
6 by this organization. The reluctance did not  
7 exist for the most part in the laboratories, the  
8 reluctance existed higher up in the agencies.  
9 And in the absence, and I know this from  
10 personal experience, in the absence of it being  
11 mandated, there were some organizations that  
12 were not prepared to ever seek accreditation.

13 THE COMMISSIONER: Mr. Neufeld, can you tell me  
14 in one minute or less what you mean by  
15 oversight?

16 MR. NEUFELD: Sure. Actually, you know what, I  
17 would almost defer to Mr. Bromwich on this  
18 point, partly because he was talking about what  
19 happened in Houston, but before he ever went to  
20 Houston, he was the inspector general for the  
21 U.S. Department of Justice, and so has probably  
22 more experience, certainly more experience than  
23 I have, and probably more than anybody else in  
24 this room on the independent auditing function.  
25 And I think that's one of the things that I'm



1 getting at.

2 MR. BROMWICH: I don't think there is any magic  
3 way to organize the oversight function. It can  
4 be either a standing body like the kind of  
5 commission that Peter is talking about, it can  
6 be an institution like the inspector general  
7 that exists in all federal agencies in the  
8 United States Government, or you can have an  
9 outside entity that comes in and part of their  
10 charter and job is to come in and do independent  
11 audits or independent investigations to get at  
12 the roots of problems. I think that the best  
13 systems are either where you have an internal  
14 watch dog that is on the scene and poised to do  
15 work in investigating and auditing problems as  
16 they arise, or a standing commission of the kind  
17 that Peter has discussed.

18 I worry that when you are talking about  
19 forensic commissions, though, their energies are  
20 spread so relatively thin that they can't be  
21 sort of on the scene and investigating specific  
22 problems as they arise as well as an oversight  
23 entity whose job it is to look at issues as they  
24 arise.

25 MR. NEUFELD: What we would do, just to give you

1 an example, is we have this state commission,  
2 which has oversight, not just for what kinds of  
3 standards will be required in different  
4 laboratories, but also what kinds of quality  
5 assurance programs need to be in place, and  
6 quality controls, which may go beyond what the  
7 accreditation process requires. But we will do  
8 more than that. We will require them to report  
9 any instances of negligence occurring in the  
10 laboratory, or instances of misconduct, and then  
11 what we will do is, we will not do the audit  
12 ourselves. Because as Michael pointed out, we  
13 would be spread too thin, also we lack the  
14 expertise. But what we did do is we have now  
15 given that audit responsibility to another  
16 independent entity that will come in and do what  
17 is called a root cause analysis, try to figure  
18 out what went wrong and what can be done to  
19 prevent it from happening in the future.

20 So it is the combination of having the  
21 commission in place that is looking generally at  
22 how we can really maintain the high integrity of  
23 forensic science, always improve it, and on the  
24 other hand being aware that there will be times  
25 when problems arise and there has to be an

1 auditing mechanism in place to deal with those  
2 contingencies.

3 THE COMMISSIONER: Thank you.

4 MR. DAWE: Perhaps now I invite my colleagues to  
5 ask any follow-up questions they might have in  
6 this area. Mr. Kennedy? Mr. Lockyer?

7 MR. LOCKYER: I just thought, in answer to the  
8 Commissioner's question, perhaps, Dr. Lucas, you  
9 could describe the advisory committee in the  
10 Centre of Forensic Science, because that may be  
11 of some assistance.

12 MR. LUCAS: You can do it better than I can,  
13 probably. But Mr. Justice Kaufman, in his  
14 report, recommended that there should be an  
15 advisory committee, and the Ministry of the  
16 Solicitor General, as it was then, established  
17 one, which is composed of, includes  
18 representatives of the defence bar,  
19 representatives of the Crown, a retired judge,  
20 representatives of clients, police, fire  
21 marshal, police and fire marshal, coroners  
22 office, representatives of other laboratories in  
23 the Government of Ontario, representatives of  
24 other forensic laboratories, and one has-been  
25 lab director.

1 THE COMMISSIONER: Dr. Mayer, at the risk of  
2 offending one has-been, does this advisory body  
3 work, and is it effective?

4 MR. LUCAS: Yes, I think it has. Mr. Lockyer  
5 may want to add to it too, but we have reviewed,  
6 for example, just one example -- the  
7 Commissioner recommended that there be formal  
8 written policies developed, and these were  
9 developed within the Centre of Forensic  
10 Sciences, but they were all reviewed and  
11 commented on by the advisory committee. And I  
12 think that had a very positive impact on it. We  
13 have looked at particular cases where there have  
14 been, or may have been problems suggested, and  
15 made recommendations on that. So, yes, I think  
16 it is working.

17 It is always difficult with groups such as  
18 that in that we only meet I think twice a year,  
19 so that things sometimes are stale by the time  
20 we get to look at them. And one of the  
21 disadvantages, unfortunately, but I don't know  
22 how you get around it, is dealing with people  
23 who are busy, is just getting them to be able to  
24 attend meetings. But with those caveats, my  
25 impression is that it does work, and I know from

1 talking with the management of the laboratory  
2 there, it is very helpful to them.

3 THE COMMISSIONER: Now I will ask Dr. Mayer,  
4 what is your view?

5 DR. MAYER: Well, I will very much echo the  
6 comments made by Doug Lucas. It has been  
7 positive because it makes our enterprise step  
8 forward and explain to someone else what has  
9 happened and what we are doing about this. It  
10 also allows us to get important feedback.

11 As Doug said, the issues sometimes are  
12 stale, and it is a matter of fine tuning.  
13 Whatever we can do to make the workings of an  
14 advisory body better, I'm sure we will embark  
15 on. And I would suggest that an advisory body  
16 or review of some sort is not unique to forensic  
17 sciences, it is not unique to commissions or  
18 other government labs, it is a sort of standard  
19 practice in the academic environment, it is  
20 standard practice in large and small  
21 corporations. That's what it is all about. You  
22 have to be able to be an open book to what you  
23 are doing. You have to be able to ensure that  
24 the ethics and the procedures are in place, and  
25 share it with the world. And if there is a

1 different opinion out there, let's at least hear  
2 about it. It doesn't mean that you are always  
3 going to act on it, but you are going to bring  
4 it out.

5 MR. LUCAS: I would like to add one other thing,  
6 thinking as I go along here. It is important to  
7 recognize, and we have recognized that it is an  
8 advisory body. Because of my experience in  
9 government, and I'm sure that anybody else who  
10 has ever worked in government knows that Deputy  
11 Ministers are very reluctant to give up their  
12 authority to anybody, they are prepared to seek  
13 advice from people. So it is not really an  
14 oversight group, as Peter has described, but it  
15 is strictly an advisory group.

16 MR. NEUFELD: One reason why you might want more  
17 than simply an advisory body is because it has  
18 to be, it is not just oversight, but one of the  
19 linch pins of oversight is accountability. And  
20 I don't know if your advisory board, for  
21 instance, has the authority to say you need to  
22 do an audit about X. In New York it has that  
23 authority. In Texas it would have that  
24 authority.

25 MR. LUCAS: We could recommend it, but we

1 couldn't order it.

2 DR. MAYER: For some cynics, advice of course is  
3 defined as opinions sought on positions already  
4 taken, and I don't think that that's the mold  
5 that we are working with. But Doug is  
6 absolutely right, the advisory committee is  
7 there to give us an added perspective. And we  
8 very much welcome that. Why wouldn't we? Let's  
9 work with it.

10 MR. DAWE: Does anyone else have any questions,  
11 Mr. Gates or anybody else?

12 MR. GATES: I just have one question, Mr. Lucas.  
13 As I understand it, sir, you were commissioned  
14 by the Commissioner to undertake a review of an  
15 aspect of the Commissioner's mandate given to  
16 him by the Government of Manitoba with respect  
17 to the matter that's before us. Can you tell us  
18 very briefly, sir, whether or not in executing  
19 the mandate that Mr. Justice LeSage gave to you,  
20 you were engaged with the management and/or the  
21 working levels of the RCMP crime lab?

22 MR. LUCAS: Yes, I was, very much so.

23 MR. GATES: And can you tell us, sir, what the  
24 level of cooperation or lack of cooperation you  
25 received in the course of that exercise?

1 MR. LUCAS: The cooperation I received from  
2 everybody that I dealt with was complete.  
3 Everything I asked for, I received, every  
4 question that I asked was answered.

5 MR. GATES: Did you have any concerns about not  
6 being provided with information that you were  
7 looking for?

8 MR. LUCAS: There wasn't anything that I asked  
9 for that I wasn't provided with. There may  
10 have, I can't say whether there was anything  
11 that I didn't ask for because I didn't even  
12 think of it, that it wasn't there. But I  
13 received everything that I asked for.

14 MR. GATES: Thank you very much, Mr. Lucas.  
15 Thank you, Mr. Commissioner.

16 THE COMMISSIONER: Thank you, Mr. Gates. Unless  
17 you have one short one?

18 MR. LOCKYER: Me?

19 THE COMMISSIONER: I thought you were looking  
20 longingly.

21 MR. LOCKYER: No.

22 MR. DAWE: In that case, I would just like to  
23 thank everybody for taking their time and effort  
24 to come here. And it has been extremely  
25 educational for all of us.



1 THE COMMISSIONER: I particularly thank each and  
2 every one of you, some of whom have come great  
3 distances, even though your luggage may not have  
4 come with you. But you are looking resplendent  
5 at the moment and I want to comment on that.

6 DR. DE FOREST: One comment there, I did  
7 discover that when your luggage is lost, a good  
8 substitute for hair gel is the hand lotion in  
9 the hotel.

10 THE COMMISSIONER: That's a scientific opinion.

11 I want to thank each of you. I have spent  
12 a good bit of my life in and around the justice  
13 system, and a modest bit of that in the criminal  
14 portion of the justice system. And I thought I  
15 had some passing knowledge of the system, of the  
16 structure, but after today, I realize how little  
17 knowledge I did have and how little knowledge I  
18 do have in the whole area. The presentation has  
19 been elucidating, it has been helpful, and it  
20 is -- I have just found it interesting and, dare  
21 I say, enjoyable. Thank you all so much for  
22 making the effort and taking the time to come  
23 and assist us in this inquiry.

24 MR. LUCAS: Thank you, Mr. Commissioner.

25 THE CLERK: We will adjourn until 2:00 o'clock.

1 (Proceedings recessed at 12:45 p.m.

2 and reconvened at 2:00 p.m.)

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

5 THE COMMISSIONER: Good afternoon, Mr. Lawlor.

6 BY MR. CODE:

7 Q Mr. Lawlor, I'm almost finished, we have  
8 reached -- as you can see, I have been going  
9 through the story chronologically -- and reached  
10 the point where Mr. Zanidean is called as your  
11 penultimate witness in the trial. Again, just  
12 to recap where we left off last night, your best  
13 recollection today is that you were unsure or  
14 unclear at the moment of his testimony whether  
15 the negotiations between Kovnats and Miller had  
16 come to a successful conclusion or not?

17 A I didn't know what stage they were at.

18 Q Now, I would like you to turn to Zanidean's  
19 cross-examination by Mr. Brodsky, which you will  
20 find at tab 52 of your book of documents, right  
21 at the end of volume 2. And for those who have  
22 got a marked up copy of it in the first book of  
23 exhibits where we dealt with it, it is also in  
24 the Kovnats' book, which is exhibit 15B at tab  
25 38. So either tab 52 of exhibit 30B, or tab 38

1 of exhibit 15B is where you find these key  
2 passages in the transcript.

3 And I want to just put three aspects of  
4 Zanidean's testimony to you, Mr. Lawlor. First  
5 of all if you look at page 42, in the middle of  
6 page 42 Mr. Brodsky raises the Swift Current  
7 arson. Do you see that?

8 A Yes.

9 Q And Zanidean acknowledges that he is responsible  
10 for it. And then at line 19, Mr. Brodsky asks,

11 "And you are not charged?"

12 And his response is,

13 "Not yet."

14 And then when Mr. Brodsky asks line 21,

15 "Does it depend on how you do in court  
16 today?"

17 And Zanidean says,

18 "No."

19 And this is the part that I want to ask you  
20 about. His answer then, he goes on to say what  
21 his understanding is, he says,

22 "What they told me...",

23 presumably the police,

24 "...was they give the Swift Current RCMP  
25 the information I give them, and that was

1           it."

2           Which is generally consistent with what you had  
3           said at tab 44 at the pre-trial. And then at  
4           line 25 he says,

5                     "Then I talked to my lawyer."

6           And Mr. Brodsky picks up that over the page.

7                     "Q     You talked to your lawyer.

8                     A     Right."

9           And then the final question in this line that I  
10          want to put to you is, Brodsky then says,

11                    "About making a deal to avoid being charged  
12                    in Swift Current?"

13          And Zanidean replies,

14                    "No, that's not what I said."

15          Do you recall hearing that testimony in court  
16          and being present when Zanidean gave that  
17          evidence?

18          A     I was in court. Today I don't recall it.

19          Q     I appreciate that, but you don't deny that you  
20          were in court?

21          A     No, no.

22          Q     And indeed you were taking notes, we have your  
23          notes of the cross-examination, which you have  
24          seen, have you not?

25          A     Yes.

1 Q And you knew that Zanidean had been inquiring  
2 about the status of the Swift Current charge?  
3 We saw that at the tab 17 note of yours?

4 A Yes.

5 Q And you had been briefed generally about  
6 Zanidean's concern on this matter?

7 A Yes.

8 Q And you also knew, as we know from the preferred  
9 indictment memo of yours at tab 7, that he had a  
10 lawyer, that he had retained counsel,  
11 Mr. Kovnats, and that Kovnats was advancing  
12 various demands on his behalf; is that correct?

13 A Yes.

14 Q And you knew that that matter was being handled  
15 by Mr. Miller?

16 A Yes.

17 Q And I want to ask you whether you had any  
18 concerns as to whether Zanidean was being  
19 truthful here as to the reason why he retained  
20 counsel and the instructions he gave that  
21 counsel?

22 A No, this answer doesn't cause me any concern in  
23 the context of what I knew at that time.

24 Q You had no understanding or belief that  
25 Zanidean, through his counsel, was seeking

1 assistance on that Swift Current charge?

2 A I think all I knew was that he had retained a  
3 lawyer to work on the witness protection aspect  
4 of the case.

5 Q And you had no understanding or appreciation  
6 that the immunity on the Swift Current charge  
7 was perceived by various people as being tied up  
8 with witness protection?

9 A At that point in time, I had no idea that the  
10 immunity was being discussed.

11 Q But what you did appreciate is that, whatever  
12 the truth was about this matter, it was Miller  
13 who knew the true facts?

14 A I don't know what Miller knew at that point in  
15 time. I knew Zanidean was under investigation  
16 for an arson in Saskatchewan.

17 Q And you knew that Miller was negotiating with  
18 Kovnats?

19 A With respect to the witness protection business.

20 Q And you told us that when you received the tab  
21 17 memo -- remember the tab 17 note where he  
22 asked you about the status of the charges --  
23 that you passed it on to Miller; is that  
24 correct?

25 A I did.

1 Q And you told us the reason you passed it on to  
2 Miller is that he knew more about this than you  
3 did?

4 A Yes.

5 Q He was the one who you assumed would be dealing  
6 with this?

7 A I didn't link the Saskatchewan charges with the  
8 witness protection dealings that were going on.

9 Q Regardless of whether you linked the two, when  
10 you got that note, you passed it on to Miller  
11 because you assumed that he was the one who  
12 would be dealing with that, he was the one that  
13 would know?

14 A Dealing with Zanidean.

15 Q So my question to you is, once this matter got  
16 raised -- and you will agree with me, Brodsky  
17 comes back to this theme over and over again  
18 throughout his cross-examination concerning  
19 Zanidean's motivation, does he not?

20 A Yes.

21 Q And whether his motivation is tied up with some  
22 kind of a deal on the Swift Current charge?

23 A That's what Brodsky is headed at.

24 Q He put it to him repeatedly. Why would you not  
25 simply ask your colleague, Mr. Miller, when you

1           went back at the end of the day after court,  
2           what are the true facts on this, Bruce? I don't  
3           know anything about this, would you tell me what  
4           the true facts are?

5       A     I don't know why I didn't.

6       Q     Turning the page of the cross-examination, page  
7           44, Mr. Brodsky starts asking him about his  
8           house and arrangements made in relation to the  
9           house, in the middle of the page; do you see  
10          that?

11      A     I do.

12      Q            "You had to move out of your  
13                    house?"

14            Line 13,

15                    "A    Right."

16            You were aware of that, were you not?

17      A     Yes.

18      Q            "Q     You're being paid for that?

19                    A     Paid for moving out of my house? No.

20                    Q     What are you being paid for?

21                    A     I'm not being paid for nothing. All  
22                            as they are doing is paying my  
23                            accommodation where I'm staying right now."

24            Then Mr. Brodsky returns to the same theme, over  
25            the page, if you could flip forward to page 45,



1 he comes back to the house at line 16 on page 45  
2 where he says, he asks him about his mortgage  
3 payments. And the answer is,

4 "My mortgage payments are in arrears right  
5 now since then, and I'm on the verge of  
6 losing my house; and you can check that  
7 out.

8 Q What arrangements have you made for  
9 that?

10 A I've made no arrangements for that."  
11 Now, is it fair to say that you knew Zanidean  
12 had been moved out of his house and into a safe  
13 house in December of 1990?

14 A Yes, one of those memos you directed me to  
15 yesterday has a notation "moving expenses."

16 Q It is back at tab 10 where you are copied on a  
17 memo that expressly refers to moving expenses;  
18 is that what you are referring to?

19 A Yes.

20 Q So his suggestion that he wasn't paid in moving  
21 out of his house, you must have known that that  
22 was not true?

23 A I can't say I did. I don't know if I paid any  
24 attention to this memo of November 26 at tab 10.  
25 I may have been handed it and simply put it on

1 the file.

2 Q As a matter of common sense, Mr. Lawlor, in a  
3 witness protection arrangement, where you are  
4 taking a witness into witness protection, moving  
5 him into a safe house, out of his own house that  
6 he owns, is it likely that you would look after  
7 his moving expenses?

8 A Yes.

9 Q In terms of the house itself and the need to  
10 sell the house and to deal with his mortgage  
11 payments, you knew that that was an issue as a  
12 result of reading the memo at tab 9, or you must  
13 have known as a result of reading the police  
14 report at tab 9, where Sergeant Anderson had  
15 highlighted the importance of getting Zanidean  
16 out of his house and getting his house sold; is  
17 that correct? Do you remember Sergeant  
18 Anderson's earlier report to you at tab 9?

19 A I'm just looking at it.

20 Q In the very first paragraph he raises the  
21 problem of the house, because the accused and  
22 his associates know the house, and refers to the  
23 need to sell the house at a number of points in  
24 the report?

25 A Yes, there is reference to a real estate agent

1 listing the house.

2 Q As a matter of common sense, once you moved him  
3 into the safe house in December, you must have  
4 known that some arrangements needed to be made  
5 in relation to his own house, which he had  
6 vacated, as part of the short term witness  
7 protection plans; is that fair?

8 A Now it is fair. At that point in time, I don't  
9 even know if that was on my mind.

10 Q Again as --

11 A In retrospect, sure, it makes sense.

12 Q All right. And again, whatever the arrangements  
13 were with the house, you would have understood  
14 that this was something Miller was looking after  
15 with Kovnats?

16 A What specifically Miller and Kovnats were  
17 discussing, I can't say.

18 Q Well, again, I'm not asking the specifics, you  
19 knew the general parameters of it were the  
20 witness protection arrangements?

21 A Yes.

22 Q So you have agreed that making some arrangement  
23 for the house as a matter of common sense would  
24 have been part of that, Miller would have been  
25 the guy dealing with it?

1 A Yes.

2 Q And once again, did you make any effort to ask  
3 Mr. Miller, Brodsky has raised this matter in  
4 court, it is now under oath in front of the  
5 jury, what are the facts about the house? Were  
6 there any arrangements made? Did you make those  
7 inquiries with Mr. Miller?

8 A No, I didn't. I didn't know whether or not--  
9 well, of course I didn't know whether or not  
10 arrangements had been made, whether or not  
11 arrangements had been made. No, I made no  
12 inquiries of Miller and I don't know why.

13 Q Do you agree with me that it is unacceptable for  
14 Crown Counsel to deliberately keep themselves in  
15 ignorance on a relevant matter that's come out  
16 in evidence?

17 A Yes.

18 Q The last aspect of the testimony of Mr. Zanidean  
19 that I want to cover with you is the whole  
20 question of his living expenses, relocation  
21 expenses. If you look at the bottom of page 44,  
22 go back to where we were at the bottom of page  
23 44, line 21, Mr. Brodsky raises the question of  
24 living expenses.

25 "Somebody's paying your living expenses?"

1 Do you see that at line 21?

2 A Yes.

3 Q And he asserts that they are paying his room and  
4 board, his room and meals, do you see that?

5 A Yes.

6 Q And then again Mr. Brodsky comes back to it at  
7 the next page, page 45 in the middle of the page  
8 he asks how long they will continue to pay for  
9 his room and board. And Zanidean's answer at  
10 line 11 on page 45 is,

11 "Until the end of today, unless I'm needed  
12 tomorrow."

13 Do you recall him giving that evidence?

14 A I don't recall it but I see it in front of me.

15 Q The implication is that he is going to be cut  
16 off as soon as he finishes his testimony; is  
17 that fair?

18 A The room and board.

19 Q And Mr. Brodsky returns to it again on the next  
20 page, page 46, in the middle of the page, line  
21 14.

22 "I engaged a lawyer to take care of the  
23 witness protection program."

24 And Brodsky says,

25 "Wasn't that payment of money?"

1 And he says,

2 "No. What that is is relocation and new  
3 identity, if needed."

4 And Brodsky says,

5 "And start-up costs?"

6 And his answer is,

7 "They never mentioned start-up costs."

8 And my question in relation to this area of his  
9 testimony is, again, as a matter of common  
10 sense, you must have understood that witness  
11 protection arrangements, whatever they were,  
12 would involve some long-term plan to relocate  
13 him; is that fair?

14 A Yes. Common sense tells me it wouldn't end the  
15 moment he left the witness stand.

16 Q And indeed the police report at tab 9, Sergeant  
17 Anderson's report clearly set out a long-term  
18 plan for post-trial relocation, did it not?

19 A Yes.

20 Q And when you received the tab 17 message from  
21 the police about Zanidean's demands, and with an  
22 ultimatum attached to it, he wanted to be  
23 relocated to B.C.?

24 A He wanted relocation, yes.

25 Q And again, did you honestly believe that there

1           would be no mention of start-up costs in any of  
2           that?

3       A     Well, what is start-up costs? I mean --

4       Q     Well, presumably it is a term that actually  
5           Mr. Kovnats uses, if you want to -- he uses  
6           it --

7       A     I assume that's --

8       Q     -- to get started in your new location,  
9           presumably. If you look at Mr. Kovnats' letter  
10          at tab 11, he asks the Crown to provide him  
11          sufficient monies to live on until he starts his  
12          new job and his new identity. Living expenses  
13          to get him started in the new location is what  
14          Mr. Kovnats is negotiating for?

15      A     Sure.

16      Q     And Zanidean here says they never mentioned  
17          start-up costs. Did that strike you as unlikely  
18          to be true?

19      A     Well, I don't know if the police discussed  
20          start-up costs with him.

21      Q     And again, the person who would have the  
22          information on this would be Mr. Miller?

23      A     Yes, he was negotiating with Kovnats.

24      Q     And you made no effort to ask Mr. Miller, to go  
25          back to your office and say this matter has been

1 raised in sworn testimony in front of the jury,  
2 what are the true facts on this, we need to make  
3 sure that the jury is not misled?

4 A No, I never asked Miller about it.

5 Q You remember that these kinds of details about  
6 start-up costs, and whether there was  
7 relocation, and the immunity, these kinds of  
8 details associated with the witness protection  
9 package had been requested by Mr. Brodsky back  
10 in his very first letter, the February 8th  
11 letter back at tab 28 that we reviewed yesterday  
12 afternoon?

13 A Yes.

14 Q And you will remember that Mr. Dangerfield's  
15 response at tab 29 was to refuse to provide  
16 those details because they would give the  
17 witness away. You recall that?

18 A I do, yes.

19 Q And now we have a situation here where these  
20 matters are the subject of sworn testimony, and  
21 there is no objection from Mr. Dangerfield that  
22 any of this is giving Zanidean away. Is that  
23 correct?

24 A Yes.

25 Q Surely, at this point you had a duty to revisit



1           that disclosure decision that you had made back  
2           at tab 29 in February, now that presumably you  
3           had come to the view that these were relevant  
4           and proper questions, and to make that  
5           disclosure?

6   A   Looking back today, you are right.

7   Q   And that never occurred to you while you were  
8           sitting there and listening to his testimony?

9   A   No, it didn't.

10   Q   All right. You can put that transcript away,  
11           Mr. Lawlor. I want to return to the chronology.  
12           There are a number of other developments that  
13           occur very shortly after Zanidean completes his  
14           evidence on June 11th, and I want to just  
15           quickly ask you a few questions about four of  
16           the key post-trial developments. And the  
17           documents relating to these are all in your  
18           exhibit book, exhibit 30.

19           First of all, eight days after his  
20           testimony is completed on June 19th, there is a  
21           meeting held between Mr. Miller, Corporal Orr,  
22           Mr. Kovnats and Zanidean. And you will find the  
23           only record that we have of that meeting is at  
24           tab 55, if you could turn to tab 55. And this  
25           is Corporal Orr's note of the June 19th meeting.

1           And you see he and Miller discuss the idea of a  
2           relocation fee. He puts the word "relocation"  
3           in the middle of the page, to help him relocate,  
4           set up a new life?

5           A     Yes.

6           Q     And at the meeting itself, that proposal gets  
7           broached to Zanidean. And Zanidean appears to  
8           find it attractive but he hasn't yet signed on  
9           or agreed to it. You see that in Corporal Orr's  
10          note.

11                     "The idea of a relocation is attractive to  
12                     Zanidean, but he was promised the sun and  
13                     the moon by the Winnipeg Police in the  
14                     first instance and is sticking with that  
15                     misconception. I would imagine that will  
16                     be the way they will go and that the  
17                     witness protection is out of the picture,  
18                     but we will see."

19          A     Yes, I see that.

20          Q     Were you briefed about that development eight  
21           days after Zanidean completed his testimony?

22          A     No, I wasn't.

23          Q     Was it a discloseable fact, in your view, that  
24           very shortly after his testimony these  
25           discussions about a relocation fee were

1 mentioned, were under negotiation?

2 A In looking at his testimony, yes.

3 Q It is somewhat contrary to his sworn evidence  
4 that start-up costs had not even been mentioned,  
5 is it not?

6 A Yes. Unless this is the first time it came up  
7 in Zanidean's presence, I don't know that.

8 Q Well, I can assure you it is not, but that's  
9 other evidence before the inquiry that we don't  
10 need to review with you.

11 The second event that I want to cover with  
12 you is the next day, June 20th, and this is at  
13 the very next tab, tab 56. Zanidean is still  
14 under the protection of the Winnipeg Police in a  
15 motel, and he has a very vigorous disagreement  
16 with them, to put it mildly. If you look at the  
17 bottom of that police report, you see the  
18 reference to the 20th of June?

19 A I do.

20 Q There is a bullet point there, and Sergeant Paul  
21 and Zanidean get into an argument about his  
22 package that's being negotiated, and Zanidean  
23 states that his testimony had all been lies. Do  
24 you see that?

25 A Yes.

1 Q And he storms out of the room and places a phone  
2 call, which ultimately is traced to Mr.  
3 Brodsky's phone number. Do you see that over  
4 the page? In any event, take it from me that  
5 the phone records show that the phone call is to  
6 Mr. Brodsky.

7 A Yes.

8 Q But leaving aside the phone call to Mr. Brodsky,  
9 the Winnipeg Police conclude that they are going  
10 to terminate the witness protection  
11 arrangements, and the next day Zanidean is out  
12 on the street. At the bottom of that first  
13 page, you will see the reference to the 21st of  
14 June.

15 A Yes.

16 Q He would have to look after his own  
17 accommodations. Were you briefed on these  
18 June 20th developments?

19 A No, I wasn't.

20 Q And is Zanidean's assertion that his testimony  
21 had all been lies, nine days after having given  
22 that testimony, was that a discloseable fact, in  
23 your view?

24 A Well, did he say that? He threatened to go to  
25 the press to tell them that his testimony had

1 all been lies.

2 Q Yes, he is presumably engaged in some  
3 brinkmanship with Sergeant Paul, and he is  
4 dissatisfied with the package, and what Sergeant  
5 Paul records him as saying is a threat to go to  
6 the press and say that his testimony had all  
7 been lies. Was that a discloseable fact, in  
8 your view?

9 A Yes.

10 Q The third development is the next day,  
11 June 21st, you see this at the next tab, tab 57,  
12 Mr. Miller sends Kovnats a letter, which appears  
13 on its face to memorialize a final agreement  
14 that Mr. Miller describes as having been worked  
15 out with the police. Do you see that, the third  
16 paragraph?

17 A Yes.

18 Q And the figure \$20,000 is stated as the maximum  
19 payment to cover Zanidean's relocation. You see  
20 that?

21 A I do.

22 Q Were you briefed on these developments?

23 A No, I wasn't.

24 Q And you will recall that Mr. Kovnats had been  
25 asking for \$30,000, and it appears that they

1           have now sawed off at \$20,000. Would that have  
2           been a discloseable fact, in your view?

3   A       Yes.

4   Q       And finally, the fourth and last development in  
5           this period is the Swift Current matter raises  
6           its head once again in July, a few weeks later.  
7           And if you -- this memo is in tab 20 of your  
8           first book of documents. Sergeant Anderson  
9           writes a lengthy memo in the fall of 1991. And  
10          if you look at page 3 of that memo, so tab 20,  
11          page 3, you see at the top of the page 3 that  
12          Zanidean is told that he is not going to be  
13          charged on the Swift Current arson, and then in  
14          the second paragraph, do you see the paragraph?

15   A       I do.

16   Q                "Negotiations relating to Zanidean's  
17                    long-term protection continued at this time  
18                    and involved Orr, Vandergraaf, Zanidean and  
19                    Kovnats and Miller. Zanidean's immunity  
20                    became a component of the protection  
21                    agreement reached by Miller and Kovnats."

22           Were you briefed on those developments  
23           approximately a month after Zanidean's  
24           testimony?

25   A       No, I wasn't.

1 Q And again, were those developments a  
2 discloseable fact, in your view, that the  
3 immunity agreement had now been finalized?

4 A Yes.

5 Q The last matter that I want to cover with you,  
6 Mr. Lawlor, is developments in the post-appeal  
7 period. So we are now, if you could move  
8 forward chronologically a couple of years, and  
9 the appeal has been dismissed by the Court of  
10 Appeal. And in the summer of 1993, August 23,  
11 1993, inspectors Hall and Ewatski are carrying  
12 out a review of the case on behalf of the Chief  
13 of Police. Do you remember the review that  
14 those two senior officers conducted?

15 A I remember hearing about it.

16 Q And towards the end of their review, they come  
17 to see yourself and Dangerfield, and they have a  
18 joint meeting with the two of you as the  
19 prosecutors on the case. Do you remember that?

20 A I don't remember the meeting but I have seen  
21 Hall's memo.

22 Q If you turn to tab 72 of the --

23 A Yes, I have it.

24 Q -- the third volume is Inspector Hall's log  
25 book, which contains probably the best record of

1 the meeting, certainly the most legible one.  
2 And I don't want to go through all of this with  
3 you in any great detail, but there is one  
4 passage that I particularly wanted to question  
5 you about. At the bottom of the first page  
6 where you discuss the immunity issue and  
7 Zanidean. Do you see the last two lines at the  
8 bottom of page 810, tab 72?

9 'In relation to any deal made with Reath  
10 Zanidean..."

11 A Yes, I have it.

12 Q "...they both emphatically state no deals  
13 were made or proposed. That they had in  
14 fact personally told Zanidean that they  
15 could offer no assistance with his Swift  
16 Current charges and made no attempt to  
17 assist him. They are also adamant that the  
18 police made no deals with Zanidean."

19 Do you recall saying words to that effect to  
20 Inspectors Hall and Ewatski?

21 A No, I don't. And I don't think that I would  
22 have been the person that said that. I don't  
23 know why he is using the word "they."

24 Q "They had in fact personally told  
25 Zanidean..."



1 A I never spoke to Zanidean.

2 Q You never met with Zanidean outside of court?

3 A Not that I recall. I'm sure I didn't.

4 Q Did Mr. Dangerfield meet with him out of court,  
5 to your knowledge?

6 A I don't know.

7 Q Do you have any --

8 A I expect he may have in preparation for his  
9 testimony, but beyond that, I have no idea.

10 Q Did you ever personally tell Zanidean, or in  
11 Mr. Dangerfield's presence did the two of you  
12 ever tell him personally that you could offer no  
13 assistance with the Swift Current charges?

14 A No, I never told Zanidean that. I made no such  
15 statements to him.

16 Q This isn't just a matter that you don't recall,  
17 you are positive?

18 A I'm quite confident that I have never spoken to  
19 Zanidean.

20 Q So Hall has just got that wrong when he puts  
21 that in --

22 A When he puts "they," yes.

23 Q -- third person plural? Your best understanding  
24 of this is that it must have been  
25 Mr. Dangerfield personally who spoke to him?

1 A If anybody did.

2 Q Are you suggesting that he has completely got  
3 this wrong, that neither of you spoke to  
4 Zanidean?

5 A No. I don't know whether or not Mr. Dangerfield  
6 did. I know I didn't.

7 Q You see, the pre-trial memo at tab 44 that we  
8 spent some time on yesterday afternoon, Mr.  
9 Brodsky's memo about the pre-trial, suggests  
10 that you and Dangerfield had some knowledge  
11 about this Swift Current matter and whether or  
12 not Zanidean had any favours extended to him in  
13 relation to that?

14 A Yes, that would have been information that we  
15 would have received from the Winnipeg Police.

16 Q And now this note is saying not only were you  
17 knowledgeable about it, but you were involved in  
18 actually discussing the matter with Zanidean?

19 A I didn't discuss it with Zanidean.

20 Q And did Dangerfield ever brief you on  
21 discussions he had had with Zanidean?

22 A No.

23 Q The other post appeal matter I wanted to ask you  
24 about, Mr. Lawlor, is at the next tab, tab 73,  
25 one of Ms. Duncan's letters to the Ministry?

1 A Yes.

2 Q You see that letter at tab 73?

3 A Yes, I have it.

4 Q And in the indented part of her letter she asks  
5 Mr. Miller, it is a letter to Mr. Miller,  
6 January 2, 1995,

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

10 And that's the part of the letter that I want to  
11 focus on here. If you turn the -- staying at  
12 the same tab, turn to the next document, you see  
13 Ms. Duncan's letter is January 2, and it is  
14 received by the Ministry on January 6th,  
15 according to the date stamp. And then six days  
16 later, on January 12th, we have a memo to Rob  
17 Finlayson, who at this point has become the  
18 Acting Director from Les Kee, the acting ADM?

19 A Yes.

20 Q And Mr. Finlayson's appointment as the Acting  
21 Director in around this point in time is due to  
22 Mr. Miller being appointed to the bench; is that  
23 correct?

24 A Yes.

25 Q You see Mr. Kee's memo,

1 "Please ensure this matter is dealt with as  
2 soon as possible. Provide Stu with a copy  
3 of your response to Janie Duncan."

4 Do you see that?

5 A I do.

6 Q And Finlayson has written a note back to Kee,  
7 you see the note in the bottom right?

8 A Yes.

9 Q "Les, please find attached draft. While  
10 same is..."

11 I'm not sure what that word is, I think it is  
12 some kind of synonym for brief,

13 "...I believe it should go out as drafted  
14 by Bruce in light of the letter written by  
15 Ms. Duncan."

16 It appears that Finlayson has obtained a draft  
17 from Miller and is recommending it go out. Is  
18 that the way you read that note?

19 A Yes.

20 Q And if you turn the page again, we have what  
21 appears to be the draft, because you see the  
22 handwritten note in the top right-hand corner,  
23 it says "per B. Miller, January 6, 1995"?

24 A Yes.

25 Q And the first two paragraphs have got a

1 handwritten bracket around them, and the second  
2 paragraph says,

3 "However, we would direct you to the  
4 transcript of the evidence of Mr. Zanidean  
5 which will contain the answers to your  
6 questions."

7 And then there is a note below it saying,

8 "Check with Shermie, did they lead evidence  
9 on witness protection deals? Everything  
10 done through witness protection was lead in  
11 evidence?"

12 Who is Shermie, first of all?

13 A That was a nickname that I had.

14 Q And who particularly used that nickname for you?

15 A I got it from Miller.

16 Q So it appears Miller has drafted a response to  
17 Duncan's letter, but he is saying to check the  
18 facts with you. Is that a fair reading of it?

19 A Yes, it is.

20 Q And in particular what he is asking Finlayson,  
21 presumably, who is stepping in for him to check  
22 with you is,

23 "Did they lead evidence on witness  
24 protection deals? Everything done through  
25 witness protection was lead in evidence?"

1 He is asking you to confirm whether the details  
2 or the substance of the negotiations about  
3 witness protection were lead in evidence. Is  
4 that a fair reading of it?

5 A Yes, that's what he is asking.

6 Q And my question for you is, how could you lead  
7 evidence of the witness protection deals if  
8 Mr. Miller had kept you in the dark about them?

9 A I can't answer that.

10 Q In order for you, according to the way you have  
11 described the setup, Miller is negotiating these  
12 deals, you and Dangerfield are prosecuting, for  
13 you to lead it in evidence, he would have to  
14 brief you on it, wouldn't he? It is common  
15 sense?

16 A Yes.

17 Q And based on that note, he appears to believe  
18 that you had the capacity at least to lead it in  
19 evidence, does he not?

20 A You can read it that way, yes.

21 Q And your response to him, you see the  
22 handwritten note?

23 A That's my handwriting.

24 Q Who is Gail?

25 A She was Bruce's assistant.

1 Q And so this is a note to Bruce's assistant from  
2 you stating,

3 "All of the transcripts are missing, but I  
4 am sure this is accurate."

5 A Yes.

6 Q Is that what you told Mr. Miller?

7 A Yes.

8 Q And what you are saying that you are sure is  
9 accurate is that everything done through witness  
10 protection was lead in evidence?

11 A Yes.

12 Q We know from the transcript that none of the  
13 witness protection arrangements were lead in  
14 evidence; is that correct?

15 A Yes.

16 Q How could you possibly have made that response,  
17 Mr. Lawlor?

18 A Well, this was three and a half years later, I  
19 made reference to the transcripts are missing, I  
20 obviously wanted the transcript to check it and  
21 they weren't available. So I must have assumed  
22 it had been lead, because normally that type of  
23 information would be lead.

24 Q The normal practice --

25 A Yes. So I was making an assumption.

1 Q The normal practice that we have heard in the  
2 Manitoba Crown system at this time was if you  
3 had made arrangements through negotiations with  
4 a key witness, the Crown brought it out in  
5 chief?

6 A Well, you would let the jury know that -- you  
7 would lead evidence that he was under some sort  
8 of witness protection arrangements.

9 Q Why wasn't that done in this case, if that's  
10 normal practice?

11 A I don't know if it was "normal practice." I  
12 can't recall. I expect there were very, very  
13 few cases in those days, and even today,  
14 probably more so today, but very few cases in  
15 which there were witness protection  
16 arrangements. So to say it is normal practice,  
17 I mean, it was an unusual situation.

18 Q I used the term normal practice in this kind of  
19 a case.

20 A If it existed, sure.

21 Q And you were the one who raised it, you said you  
22 made an assumption that it had been done because  
23 that's the way it was done?

24 A That's the way it would have been done, or  
25 should have been done.



1 Q And again --

2 A And I didn't have the benefit of the transcript,  
3 unfortunately. And my answer would have been --  
4 would not have been inaccurate if I had had the  
5 benefit of the transcripts.

6 Q So again, my question is, if this is the way in  
7 which it would have been done or should have  
8 been done in this kind of a case at that time --

9 A And I assumed.

10 Q -- why was it not done in this case?

11 A I have no idea.

12 Q The last two tabs that I want you to quickly  
13 look at, tab 74 and 75, Mr. Finlayson continues  
14 to receive these letters from Janie Duncan over  
15 the next few months while he is in the acting  
16 director position, same general subject. And  
17 again you see the, if you are at tab 74, he  
18 appears to again confer with you about the  
19 matter. Do you see a memo, Gregg Lawlor from  
20 Rob Finlayson saying,

21 "Gregg advises that all transcripts filed  
22 at trial."

23 This is about the body packs that you are  
24 dealing with now?

25 A Yes, I have that memo.

1 Q You see that memo at tab 74?

2 A Yes.

3 Q Dated July 18th?

4 A Yes.

5 Q And then the last letter of that tab, still at  
6 tab 74, the last page, July 19th letter where  
7 Mr. Finlayson again repeats the assertion that  
8 Zanidean's testimony contains the answer to your  
9 inquiries. Do you see that?

10 A Yes.

11 Q Letter B of Mr. Finlayson's letter?

12 A Yes, I have it.

13 Q And finally tab 75, a month later there is  
14 another memo he writes to Les Kee, the acting  
15 ADM. Do you see that?

16 A Yes.

17 Q And in the last paragraph of that memo,  
18 "Despite her assertions I'm advised that  
19 any and all agreements between Zanidean and  
20 the Crown were put on the record of  
21 proceedings in Mr. Driskell's trial and  
22 that no one in our office made any other  
23 deals with Zanidean."

24 So he is continuing, the historical memory  
25 of the department is that these, according to

1           these documents that we have been reviewing, is  
2           that any deals with Zanidean were put on the  
3           record. Is that correct?

4   A       Yes.

5   Q       And Mr. Finlayson, in his statement to the  
6           Commission, his interview with us, which is at  
7           tab 5 of the book, asserts that he was relying  
8           on you as the historical memory of the case in  
9           this regard. And my question to you is, why did  
10          you not go back and make sure that you were  
11          providing accurate information to the senior  
12          officials in the department?

13   A       The transcripts were missing. That's the only  
14          source of information that I would have had. I  
15          did not know what type of negotiations were  
16          going on between Mr. Miller and Mr. Kovnats.

17   Q       No, no, the assertion is that it was all put on  
18          the record, Mr. Lawlor, that it was all brought  
19          out in evidence in accordance with what you told  
20          us is the normal practice that should have been  
21          followed. Why did you not check to make sure  
22          that you were providing accurate historical  
23          information to the new senior officials who were  
24          now running the department?

25   A       Because the only place I could check would have

1           been the transcript, and the transcripts are  
2           missing.

3       Q     The transcripts were missing and you didn't have  
4           access to them; is that correct?

5       A     I asked somebody to get me the trial transcripts  
6           when I got the first query from Miller, and  
7           there is a note here that the transcripts are  
8           missing.

9       Q     And they were never found?

10      A     That I don't know.  Whoever I asked to find them  
11           for me couldn't and they told me that they were  
12           missing, and I relied on that.

13      MR. CODE:  Thank you, Mr. Lawlor.  Those are all  
14           of my questions.

15      MR. LIBMAN:  Good afternoon, Mr. Lawlor.

16      THE WITNESS:  Good afternoon.

17      MR. LIBMAN:  Mr. Commissioner, if that could be  
18           marked as the next exhibit.

19      THE COMMISSIONER:  Exhibit 44.

20                   (EXHIBIT 44:  Book of documents for Mr.

21                   Libman's cross-examination of Mr. Lawlor)

22      BY MR. LIBMAN:

23      Q     Mr. Lawlor, I want to ask you a few questions to  
24           start to deal with the testimony that we heard a  
25           little bit this morning and yesterday afternoon.

1           You conducted the direct examination of Tod  
2           Christianson?

3       A     I think I did, yes.

4       Q     You can take it from me that you did, sir. Did  
5           you meet with Mr. Christianson prior to him  
6           testifying?

7       A     I don't remember whether I did or not.

8       Q     Do you have --

9       A     I would have had his report.

10      Q     You would have had his report. Do you have a  
11           background in science, sir?

12      A     No.

13      Q     Can you tell us how many cases where you would  
14           have called hair microscopic evidence?

15      A     No, I can't.

16      Q     Did you have a general understanding of that  
17           type of evidence or did you rely on Mr.  
18           Christianson?

19      A     I relied on the experts, the lab people. I  
20           didn't do any independent reading or study, if  
21           that is what you mean.

22      Q     Or did you take any course in that type of  
23           science?

24      A     No.

25      Q     Another thing that came up yesterday in

1 Mr. Code's examination is when he asked you  
2 about a material witness warrant for  
3 Mr. Zanidean?

4 A Yes.

5 Q Mr. Zanidean leaving the province in May of '91?

6 A Yes.

7 Q And I thought I heard you say, we never learned  
8 about these events. And when you were saying  
9 "we," I thought you meant you and  
10 Mr. Dangerfield. We have heard evidence and we  
11 know for a fact that Mr. Dangerfield was at the  
12 Public Safety Building when Mr. Zanidean was  
13 brought back, he got into an altercation with  
14 Mr. Kovnats. Does this surprise you?

15 A No, I have since heard about it.

16 Q Did you hear about it before the trial?

17 A No.

18 Q So it is your position that Mr. Dangerfield  
19 didn't relate to you the events of the Sunday  
20 before the trial started, eight days before the  
21 trial starts?

22 A I can't remember him telling me anything about  
23 that, no.

24 Q That would probably be something that would  
25 stick in your memory because it was such an

1 unusual event; correct?

2 A I would think so.

3 Q We have heard evidence that it was the topic of  
4 gossip among the bar here. Mr. Kovnats  
5 testified that colleagues were calling him, we  
6 have memos that have been disclosed from Mr.  
7 Brodsky's file that Mr. Garber found out about  
8 it through the rumour mill. You didn't hear  
9 anything about this?

10 A If there was a rumour, I probably did.

11 Q So you had some knowledge of that?

12 A Probably.

13 Q Now, I understand that you were a busy Crown  
14 Attorney in 1990/91. You would agree with me  
15 that when you have to prioritize your cases, a  
16 direct indictment first degree murder case would  
17 be top priority in your practice; correct?

18 A Yes.

19 Q Now I would like to ask you about your knowledge  
20 of the evidence, because I'm sure you have been  
21 in your lawyer's office and you know that the  
22 material is about seven feet high now of our  
23 disclosure. Have you read the Perry Dean Harder  
24 homicide review?

25 A No, I haven't.

1 Q Have you had the opportunity to read it? Do you  
2 have a copy? Did you just choose not to?

3 A I don't know. If there was a copy in one of  
4 these books --

5 Q It wouldn't be in your book, though, but it was  
6 something that was released, there was a lot of  
7 attention, as you know, when it was released,  
8 there was a lot of media coverage. I am just  
9 curious, is it not something that you would want  
10 to get your hands on --

11 A No, I have never read it.

12 Q In the disclosure that we have gotten for this  
13 inquiry, have you had the opportunity to read  
14 Mr. Brodsky's file? That would be material,  
15 obviously, you wouldn't have access to, but has  
16 since been disclosed to your lawyer.

17 A The only material from Brodsky's file that I  
18 have read was the material contained in exhibit  
19 30.

20 Q So you have had no curiosity to see what was in  
21 Mr. Brodsky's file?

22 A No.

23 Q Have you had an opportunity to look at the  
24 Winnipeg Police Service file? For instance, we  
25 have got Deputy Chief Klippenstein's file that



1 contains memos. Have you said to yourself, I  
2 want to see what is in that file?

3 A No.

4 Q No curiosity? Any opportunity or curiosity to  
5 read the RCMP files?

6 A No.

7 Q The source witness protection files, the Swift  
8 Current files?

9 A No.

10 Q Mr. Lawlor, I can tell you it is in tab 3,  
11 exhibit 28A, you don't have to go to it, Mr.  
12 Lawlor, you don't have to go to it, it is page  
13 81 of the Perry Dean Harder homicide review.

14 A Okay.

15 Q And the authors of that report wrote, and this  
16 would have been written in the fall of '93, and  
17 they wrote:

18 "Mr. Miller is satisfied that he and the  
19 prosecuting attorneys had been fully  
20 advised of all aspects of what Zanidean had  
21 told police investigators during the course  
22 of the investigation, including his  
23 involvement in the arson."

24 Would you agree with that statement, sir?

25 A Agree with?

1 Q Mr. Chief Ewatski, Inspector Ewatski as he then  
2 was, and Inspector Hall wrote, and I will read  
3 it to you again.  
4 "Mr. Miller is satisfied that he and the  
5 prosecuting attorneys...",  
6 that would be you and Dangerfield,  
7 "...have been fully advised of all aspects  
8 of what Zanidean had told police  
9 investigators during the course of their  
10 investigation, including his involvement in  
11 the arson."  
12 A No, I don't agree with that.  
13 Q Not at all, sir?  
14 A No, not since what I have learned in the last  
15 two years. I obviously did not -- I had a small  
16 picture, not the big picture.  
17 Q Seeing how you say that, sir, and I believe you  
18 now know that there was notebook entries, there  
19 was two notebook entries, one in which -- two  
20 notebooks, I think one in Anderson's book, one  
21 in Paul's book, where Zanidean made an admission  
22 to the arson in Swift Current and even said that  
23 this could affect his credibility?  
24 A Yes, I saw those for the first time in July of  
25 this year.

1 Q Can you tell me, sir, whose fault it is that  
2 that material didn't get in the hands of Mr.  
3 Brodsky so he could use it for  
4 cross-examination?

5 A I don't want to lay blame. If we were weren't  
6 provided it by the police, then obviously we  
7 couldn't pass it on to Mr. Brodsky.

8 Q I understand that. For the purpose of this  
9 question, sir, I will accept that. But whose  
10 responsibility, whose fault is it? Mr. Brodsky  
11 was asking for this material. Very skilled  
12 counsel, you will agree with me?

13 A Yes. And we forwarded those requests to the  
14 police and we said, do we have everything? And  
15 we were told, yes, we do.

16 Q And --

17 A And so responded to Brodsky, you have  
18 everything.

19 Q Can you tell us who you would say would be  
20 responsible then, in the police service, for not  
21 giving you that information?

22 A I'm not going to point fingers at the police  
23 service, I don't know who would have been  
24 responsible there.

25 Q We also now know, and you were taken to this

1           yesterday, that the trial had already started  
2           and Mr. Zanidean was changing his statements.  
3           Whose responsibility is that, that that  
4           information did not get into the hands of Mr.  
5           Brodsky?

6   A       What statements?

7   Q       He was changing his statement. I believe  
8           Mr. Code took it to you, there was an incident  
9           with Sergeant Paul. Do you recall him,  
10          Mr. Code, taking you to that yesterday?

11   A       What incident?

12   Q       Mr. Paul, Mr. Kovnats, Zanidean's lawyer and  
13          Mr. Zanidean met in a restaurant, and  
14          Mr. Zanidean was making notes on his statement?

15   A       Yes, I remember that.

16   Q       And you agreed that was discloseable, should  
17          have been disclosed?

18   A       Yes.

19   Q       Can you tell us whose responsibility is it that  
20          that information then get into the hands of Mr.  
21          Brodsky?

22          MR. CODE: I'm having difficulty with the way  
23          these questions are being formed.

24          THE WITNESS: I am too.

25          MR. CODE: In order to know who is responsible,

1           you have got to make a lot of assumptions.

2           BY MR. LIBMAN:

3           Q     Did you know that this occurred?

4           A     No, I didn't.

5           Q     And you should have known?

6           A     I don't know.

7           Q     You expected the investigating officer to say,  
8           Mr. Lawlor, this is what occurred the other day?

9           A     I don't know what I expected of them.

10          Q     I want to ask you about Mr. Dangerfield. We  
11          heard a lot about him. Would you agree that he  
12          was a very skilled attorney, very good lawyer?

13          A     Yes.

14          Q     Excellent Crown Attorney?

15          A     Yes.

16          Q     Would you agree that he was a type A  
17          personality?

18          A     What is type A?

19          Q     Controlling, was in control, anal retentive,  
20          liked to know what was going on?

21          MR. PROBER: Well, I object to that question,  
22          there is no evidence before the court that Mr.  
23          Lawlor is an expert psychologist.

24          MR. LIBMAN: I didn't mean it as in a negative  
25          way, Mr. Commissioner, it is just that as a

1 skilled lawyer, he was someone who was not  
2 derelict in his duties, he put a lot of  
3 preparation --

4 MR. PROBER: Perhaps we could get a ruling on  
5 the objection.

6 MR. LIBMAN: I will change the question then.

7 THE COMMISSIONER: Your objection is sustained.

8 Mr. Libman --

9 MR. LIBMAN: I will slow down.

10 BY MR. LIBMAN:

11 Q Mr. Lawlor, was it your opinion that  
12 Mr. Dangerfield was prepared counsel?

13 A Yes.

14 Q You had no concerns about working with him on  
15 this type of case?

16 A No, I didn't.

17 Q Okay. In his dealings in the office, did you  
18 see Mr. Dangerfield as someone who worked well  
19 with others?

20 A Yes.

21 Q Was he senior to you in service to the  
22 government?

23 A Yes, he was.

24 Q Was he senior to you at the bar?

25 A Yes.

1 Q He had more trial experience than you?

2 A Yes.

3 Q And you considered yourself his junior during

4 this case; is that correct?

5 A Yes.

6 Q And you will agree with me that, notwithstanding

7 you are Mr. Dangerfield's junior, your ethical

8 obligations as a Crown Attorney and officer of

9 the court still applied; correct?

10 A Oh, yes.

11 Q Now, you obtained your designation of general

12 counsel in 1988 or 1989; correct?

13 A Around that time.

14 Q And you are still general counsel; correct?

15 A Yes.

16 Q And you would agree with me that general counsel

17 is someone who has a lot of experience doing

18 different kinds of work in the Justice

19 Department?

20 A Yes.

21 Q And you would agree with me that one of your

22 duties as general counsel is to advise the

23 Minister of Justice, the Deputy Minister or the

24 ADM, or the director of public prosecutions on

25 matters?

1 A Yes.

2 Q And you would agree with me one of your duties  
3 as general counsel would be to advise the police  
4 on complex negotiations?

5 A Yes.

6 Q And would you agree with me that one of your  
7 duties is to act as a mentor, offer advice to  
8 other Crown Attorneys who would seek it?

9 A Yes.

10 Q And I take it you still do that in the  
11 department today?

12 A I do.

13 Q The reporting relationship between general  
14 counsel, you and Mr. Dangerfield, and Mr. Miller  
15 when he was director of public prosecutions, was  
16 that memorialized in a Crown handbook or policy  
17 manual?

18 A Memorialized?

19 Q Was there a rule of who you would report to, a  
20 directive?

21 A It is in the policy manual, it sort of purports  
22 to set up a "hierarchy of reporting scheme," but  
23 that's in writing only, there is nothing formal.

24 Q So the practice of the office deviated from the  
25 manual?



1 A Yes.

2 Q And that would also occur between, the reporting  
3 relationship, between general counsel and the  
4 ADM; correct?

5 A Yes.

6 Q Okay. For the record, I'm going to make some  
7 reference to some memos, Mr. Lawlor, they are in  
8 volume 3 of Mr. Code's book.

9 First of all, let's take to you  
10 Mr. Finlayson's statement. That's at tab 5.

11 THE COMMISSIONER: That's in volume 1, I think.

12 MR. LIBMAN: Yes, page 2.

13 BY MR. LIBMAN:

14 Q Part B, the Winnipeg Crown office, second  
15 paragraph:

16 "Dangerfield was senior general counsel.  
17 When the first departmental reorganization  
18 took place in the late 1980's, Dangerfield  
19 didn't want to go into management and  
20 wanted to continue prosecuting big cases.  
21 He wanted a title and a direct reporting  
22 relationship with Whitley. Finlayson  
23 senses that Dangerfield did not have a  
24 great deal of respect for Miller and did  
25 not want to report to him. Since

1 Dangerfield was still doing mainly court  
2 work, he remained in the Crown bargaining  
3 unit, even though the collective agreement  
4 did not provide for a senior general  
5 counsel position. Dangerfield's only  
6 managerial responsibility was to supervise  
7 the other three general counsel,  
8 Montgomery, Saul and Lawlor. In  
9 Finlayson's view, the non directive  
10 language that Miller uses in his 1992 and  
11 1993 memos to Dangerfield about the  
12 Saskatchewan disclosure is consistent with  
13 Dangerfield's reporting relationship. This  
14 is the way Dangerfield wanted it. He  
15 wanted to take direction from Whitley and  
16 not from Miller."

17 Would you agree with Mr. Finlayson's analysis,  
18 and I am referring you to the last part that I  
19 just read, that Mr. Dangerfield wanted to report  
20 to Mr, Whitley and not to Miller? Was that your  
21 sense in the office?

22 A I didn't get that sense.

23 Q Okay. If you could turn to volume 3 of the  
24 materials, tab 63, and that is the July 7, 1992  
25 memo. Have you seen this memo before, Mr.

1 Lawlor?

2 A Yes, I had, when I was going through this book.

3 Q And this is the memo where Mr. Miller brings to  
4 Mr. Dangerfield's attention Mr. Quinney's  
5 letters; correct?

6 A Yes.

7 Q You see from the memo, Mr. Miller initially  
8 approached you about this case; correct?

9 A Yes.

10 Q And again, did you find that unusual that there  
11 is a situation in the case and Mr. Miller is  
12 coming to you, Mr. Lawlor, as junior counsel on  
13 the case, and not Mr. Dangerfield?

14 A No, because I was in charge of appeals at that  
15 time, he probably would have wanted to check  
16 with me who was doing the appeal. And I would  
17 have referred him to Dangerfield.

18 Q Would you agree with me, though, when you look  
19 at the second paragraph of the memo -- third  
20 paragraph of the memo,

21 "I trust that you will make whatever use of  
22 it is appropriate in the circumstances."

23 You will agree with me that language shows a  
24 deference that Mr. Miller is extending to  
25 Mr. Dangerfield, it is not a direction?

1 A It can be read that way.

2 Q Tab 64, there is a handwritten memo from --

3 A Sid Lerner.

4 Q Go past that to the March 11th memo. Miller is  
5 again writing to Dangerfield, March of '93?

6 A Yes.

7 Q And again, I ask you to draw your attention to  
8 the second paragraph.

9 A Um-hum.

10 Q "Was the information disclosed to counsel  
11 for Mr. Driskell? If not, should we do so  
12 at this time?"

13 You will agree with me, again, deferential  
14 treatment from Mr. Miller to Mr. Dangerfield?

15 A It can be read that way, sure.

16 Q Tab 67, have you seen this memo before, sir?

17 A I did when I received these volumes a couple of  
18 weeks ago, yes.

19 Q This is a memo that Mr. Miller writes to Mr,  
20 Whitley telling him that the disclosure to Mr.  
21 Brodsky has not been provided?

22 A Um-hum.

23 Q Third paragraph,

24 "As you can see from the materials  
25 attached, Mr. Dangerfield clearly agrees

1           that the material should be sent to Mr.  
2           Brodsky with an accompanying explanation.  
3           At my request, George has compiled a draft  
4           letter serving that purpose."

5           Again, would you agree that you read that there  
6           is deference to Mr. Dangerfield, as he is  
7           writing the draft letter, not Mr. Miller?

8   A    I wouldn't say deference.

9   Q    You wouldn't agree with that?

10  A    No. To me, I read this as Dangerfield has been  
11       asked to draft a letter.

12  Q    Okay. Do you see there he says that  
13       "Mr. Dangerfield clearly agrees," Mr. Miller is  
14       seeking out his opinion on this?

15  A    Seeking out whose opinion?

16  Q    Miller seeking out Dangerfield's opinion about  
17       the material?

18  A    That's not how I read that sentence.

19  Q    Do you agree that Mr. Miller had a lot of  
20       respect for Mr. Dangerfield?

21  A    Yes.

22  Q    Mr. Dangerfield is senior to Mr. Miller at the  
23       bar?

24  A    He was.

25  Q    Senior to him in government service?

1 A He was.

2 Q Had more trial experience?

3 A Yes.

4 Q We have heard from other witnesses that  
5 Mr. Dangerfield was a very strong personality in  
6 the office?

7 A Yes.

8 Q You would agree with that? Not someone to be  
9 fooled with, we have heard from some of the  
10 police officers, and in the context of that is  
11 he would be very unhappy if he wasn't given all  
12 of the information?

13 A Sure.

14 Q You agree with that? We have also heard that  
15 Mr. Miller was a very patient person, someone  
16 who tried to be a conciliator in the office.  
17 Would you agree with that?

18 A That's kind of a general statement, you know.

19 Q Would you agree with it at all?

20 A In some senses, yes.

21 Q Would you view Mr. Miller, as a manager, as  
22 someone who didn't pull rank, he would have  
23 deference to Mr. Dangerfield's seniority?

24 A Yes.

25 Q Would you agree with me that Mr. Miller would

1 not take action, have a hands-on approach on a  
2 Dangerfield prosecution?

3 A Probably not, yes.

4 Q You would agree with that?

5 A He would leave it in George's capable hands,  
6 yes.

7 Q Would you agree with me then, sir, the ultimate  
8 decision whether to disclose the Quinney letters  
9 lay with George Dangerfield?

10 A It seems to be, that is how I read these memos.

11 Q Miller is leaving it up to Dangerfield?

12 A Yes.

13 Q Thank you. During the course of the -- when the  
14 matter is on remand, the matter is eventually  
15 set for trial, your duties in working with  
16 Mr. Dangerfield would be to respond to Brodsky's  
17 disclosure request?

18 A First of all Garber's and then Brodsky's, yes.

19 Q And your duties would be to direct further  
20 police investigation?

21 A Yes, I did that. I have noticed in these books,  
22 some memos, or faxes, or whatever, to the police  
23 asking to follow up on a request from Brodsky.

24 Q Do you recall how you became involved in the  
25 Harder homicide case?

1 A I don't recall how, but I have a suspicion about  
2 that. I was an agent for wiretap applications  
3 in those days. I think one of the first  
4 involvements our office had with the police in  
5 this was to obtain the authorizations. And I  
6 must have been the agent that they approached to  
7 assist them in the applications for the  
8 authorizations. And I believe that's how I must  
9 have got involved in the case in the first  
10 place. Because my duties at that time were  
11 appeals full time. I hadn't done a trial for  
12 some time, and I don't think that I have been  
13 involved in a trial since. So when I think  
14 about it, that's got to be the only way, the  
15 reason I would have been involved in the first  
16 place.

17 Q Did you write a memo to file memorializing how  
18 you came to learn about Zanidean's concerns  
19 about the Swift Current arson?

20 A No.

21 Q Did you prepare a memo to file detailing your  
22 various meetings with Greg Brodsky and/or Ian  
23 Garber?

24 A No, I didn't.

25 Q Yesterday, when you were questioned by Mr. Code,



1           you used the words "you had so much paper," when  
2           talking about a disclosure request. Do you  
3           recall answering a question like that?

4   A       Paper, no, I don't know.

5   Q       Do you recall that?

6   A       No.

7   Q       Do you recall when you looked at the -- when you  
8           were shown the memos, the May memos of the  
9           pre-trials, Mr. Brodsky's memos, you used the  
10          expression "that's Brodsky putting words in my  
11          mouth"?

12   A       One particular phrase and one memo, I used that  
13          phrase, yes. Because that's Brodsky's recall,  
14          recollection of what was said in the pre-trial.  
15          And the way Brodsky's memo was worded, I had  
16          some difficulty with it, and that's why I said  
17          it looks like he is putting words in my mouth.

18   Q       Do you have any concerns or problems with  
19          Mr. Brodsky's character and honour as a defence  
20          lawyer, sir?

21   A       No, I don't.

22   Q       Did you ever prepare a memo putting down your  
23          meetings with Mr. Dangerfield, the content of  
24          your meetings, what occurred, what direction you  
25          were given, what you told him?

- 1 A No, I didn't. As I recall, we never had  
2 meetings as such. We would get letters  
3 requesting disclosure, and we would meet on  
4 those, and divide up, divide them up, if you  
5 will, decide who was going to be responsible for  
6 each.
- 7 Q And did you ever go back to your office and  
8 dictate a memo to file saying, I met with  
9 Dangerfield, he gave me this instruction?
- 10 A I have never used a dictaphone.
- 11 Q Did you ever handwrite a letter?
- 12 A The only handwriting is the notations on  
13 Brodsky's letters.
- 14 Q You did have access to support staff who could  
15 type for you if need be?
- 16 A Yes.
- 17 Q So I guess you answered my next question, I will  
18 just state it for the record, you never prepared  
19 a memo to file outlining your meetings with  
20 Mr. Miller?
- 21 A I can't recall having any meetings with  
22 Mr. Miller.
- 23 Q All right. But you might have, you can't recall  
24 if you did?
- 25 A No, I can't.

1 Q Did you ever prepare a memo to file, and I'm  
2 just stating this for the record, outlining your  
3 meetings with Anderson, Paul, and/or  
4 Vandergraaf?

5 A No, because I don't think I had a heck of a lot  
6 of meetings with them either.

7 Q You had telephone conversations with them?

8 A Yes, I would have had the odd telephone  
9 conversation, passing on requests for  
10 disclosure. At that time it was -- Bruce Miller  
11 was the one that Anderson and Paul were meeting  
12 with on a regular basis.

13 Q Did you ever put to paper "spoke to Anderson or  
14 Paul," I will use that for example, "gave them  
15 this instruction, they informed me of this"?

16 A No, all you have is a copy, specifically I can  
17 recall a copy of the fax that I sent to  
18 Vandergraaf. That would have been my paper  
19 record.

20 Q You have conduct of -- you had responsibility  
21 for examining some of the witnesses in  
22 Mr. Driskell's trial; correct?

23 A Yes.

24 Q Did you ever put pen to paper and write down  
25 notes of your dealings in prepping, for

1 preparation of those witnesses for testimony?

2 A No.

3 Q Okay.

4 A Because my prep time with witnesses doesn't  
5 encompass a lot of time. In most cases I will  
6 give them a copy of their statement they gave to  
7 the police. I will ask them to read it. I will  
8 ask them if it is correct. I will ask if there  
9 is any errors. I will ask if there is anything  
10 missing. And then we go into the courtroom  
11 and --

12 Q But you do put questions to them?

13 A Just to make sure the statement is accurate and  
14 it is not missing anything.

15 Q And they respond to your questions, correct?

16 A Yes.

17 Q So do you ever put pen to paper to record their  
18 responses?

19 A If there was something that was incorrect, I  
20 would make a note on the copy of their witness  
21 statement that I was going to be using in  
22 examining them in court. If there was something  
23 missing, I would make a note of that just to  
24 remind myself in court to direct my attention to  
25 those areas.

1 Q Did you ever prepare a memo, again, put pen to  
2 paper detailing your discussions with a Corporal  
3 Atras of D division RCMP?

4 A I don't recall any dealings with him.

5 Q Again, the answer is no?

6 A No.

7 Q I can tell you that we have information that he  
8 dealt with you post trial.

9 A Okay. No, I never made any note of it.

10 Q Did you keep time records? Those of us in  
11 government service, we used to call them  
12 one-writes?

13 A No.

14 Q You didn't have to keep them --

15 A No.

16 Q -- any one-writes or time records?

17 A No.

18 Q So there is absolutely no paper file, other than  
19 the two memos that Mr. Code put in his book,  
20 outlining your involvement in Mr. Driskell's  
21 case, the preparation leading up to trial?

22 A No paper, no.

23 Q I'm going to suggest to you, sir, that this lack  
24 of notes and memos in file, your failure to  
25 record things in writing, ignoring proper

1 protocol, which I suggest it is proper Crown  
2 procedure to put things in writing, is  
3 reflective of a culture at work here, sir, that  
4 you were quite sure you wouldn't have to account  
5 or answer for anything that occurred leading up  
6 to Mr. Driskell's trial. Do you agree with  
7 that?

8 A No, that's not the case.

9 Q Mr. Lawlor, since Mr. Driskell's trial in 1991,  
10 have you at any time left the employment of  
11 Manitoba Justice?

12 A No.

13 Q Okay.

14 MR. OLSON: I am sorry, I missed the question.  
15 The staccato approach, it is difficult to take  
16 notes, and it must be difficult for the court  
17 reporter, and it is certainly difficult for the  
18 witness. Perhaps if Mr. Libman could slow down  
19 and articulate things, we would all be on the  
20 same page.

21 MR. LIBMAN: I asked if he had continuous--

22 MR. OLSON: Just a minute, Mr. Libman, please.

23 BY MR. LIBMAN:

24 Q Have you had -- I just want to make sure, I just  
25 want to be clear for the record, have you left

1 at any brief period of time with Manitoba  
2 Justice, or since 1991, you have always  
3 maintained your employment there?

4 A Which question? One is yes and one is no.

5 Q Have you always maintained your employment?

6 A I have always maintained my employment, yes.

7 Q Sir, we have heard at this inquiry that in 1997,  
8 Mr. Finlayson, who you know as Mr. Miller's  
9 successor as the director of public  
10 prosecutions, the title may have changed, he was  
11 asked to prepare a briefing memo to the  
12 Minister. Did he approach you and ask you to  
13 assist him in preparing that briefing note?

14 A I don't remember.

15 Q Okay. We don't have a paper trail of it, we  
16 have no memo as such?

17 A And I have no recollection.

18 Q Would you remember something like that if he  
19 would have asked you?

20 A Not necessarily, no.

21 Q We know in 2000 that AIDWYC became involved, the  
22 Association in Defence of the Wrongly Convicted?

23 A Yes.

24 Q They became involved in this case?

25 A Yes.

1 Q Manitoba Justice began to deal with AIDWYC,  
2 involved in this case?

3 A Yes.

4 Q Did anyone approach you then and ask you for  
5 your involvement to help them in dealing with  
6 AIDWYC?

7 A No.

8 Q We now know, sir, in 2000 Mr. Schille became  
9 involved in Mr. Driskell's case. Did  
10 Mr. Schille approach you at any time to seek  
11 help?

12 A No.

13 Q Guidance?

14 A No.

15 Q Or clarification of any issues?

16 A No. As I understood, and I stand to be  
17 corrected, his job was to go through the file to  
18 see what we had paperwise.

19 Q And so you answered my question, he never  
20 approached you and asked for help?

21 A No, he didn't.

22 Q You know who Mr. Schille is?

23 A I do.

24 Q And you work in the same physical plant as Mr.  
25 Schille?



1 A Yes.

2 Q Same floor?

3 A No.

4 Q Floor above, floor below?

5 A Several floors.

6 Q But there is no impediment for you and

7 Mr. Schille to speak to each other; correct?

8 A No.

9 Q When did you first become aware of Mr. Quinney's

10 letters to Mr. Miller, sir?

11 A When I read about them in the press about two

12 years ago.

13 Q Would it be fair to say that would be late

14 November, 2003?

15 A Yes, about then.

16 Q When did you first become aware, sir, that there

17 was an immunity agreement with Mr. Zanidean?

18 A Around the same time.

19 Q Reading it in the paper during the application

20 for release?

21 A Yeah.

22 THE COMMISSIONER: Mr. Libman, you just have to

23 remember not to speak over the other person.

24 MR. LIBMAN: Yes.

25

1 BY MR. LIBMAN:

2 Q After you heard about, read about these material  
3 facts in the case, did you approach Mr. Schille,  
4 or Mr. Finlayson, or Mr. MacFarlane, and ask to  
5 get involved and speak to them about the case?

6 A No, I didn't.

7 Q At that time, sir, you were aware that  
8 Mr. Miller was a judge; correct?

9 A Yes.

10 Q And that Mr. Dangerfield had already retired?

11 A Yes.

12 Q And Mr. Whitley had left the department and was  
13 working with the Federal Department of Justice?

14 A Yes.

15 Q I suggest to you, sir, as the last employee of  
16 Manitoba Justice who was involved in the  
17 prosecution of Mr. Driskell, that you had a  
18 responsibility to advise Mr. Finlayson or  
19 Mr. MacFarlane and outline the things that you  
20 knew?

21 A I received memos from management in our  
22 department asking me certain questions and I  
23 responded to them.

24 Q Okay. Can you tell us what memos you followed  
25 up on? I cannot recall any. You can tell us

1 the content --

2 A Are they not in these documents?

3 Q I haven't seen them. The only memo that I have  
4 seen, sir, is one where you outline to  
5 Mr. Finlayson -- it is actually in my materials,  
6 I will take you to it. Tab 3?

7 THE COMMISSIONER: Tab 3 of exhibit 44.

8 THE WITNESS: Yes, okay.

9 BY MR. LIBMAN:

10 Q Is that the only memo that we are talking about?

11 A No, there is a later memo from Don Slough asking  
12 me to comment on the ledgers and the memos  
13 dealing with the payments.

14 Q Those are the two memos, I am aware of those,  
15 sir.

16 A Those were the only two that I recall as well.

17 Q Did you -- the ledgers and the payments, that  
18 was the only direct information that you were  
19 asked?

20 A As I recall, yes.

21 Q Were you asked to outline your involvement with  
22 the Winnipeg Police Service?

23 A No, I wasn't.

24 Q Were you asked to tell the department what  
25 happened between you and Mr. Miller, or

1 Mr. Dangerfield, any details of the prosecution,  
2 things that we are trying to find out now?

3 A Well, you will have to be more specific.

4 Things --

5 Q Did they say to you, Mr. Lawlor, there is these  
6 Richard Quinney letters -- they asked if you  
7 knew about them. Did they say, were you  
8 involved in the witness protection agreement?  
9 Were you involved in dealing for negotiation?

10 THE COMMISSIONER: Just a moment.

11 MR. OLSON: First of all, I think it would be  
12 helpful if Mr. Libman slowed down. And second  
13 of all, if he could put some time parameters to  
14 this?

15 MR. LIBMAN: 2004.

16 THE COMMISSIONER: Mr. Libman, the objection was  
17 made.

18 BY MR. LIBMAN:

19 Q Mr. Lawlor, after you heard about the memos,  
20 2003, November, you realized there was a problem  
21 with the case, Mr. Driskell had been granted  
22 bail; correct?

23 A Um-hum.

24 Q Did anyone in the Department of Justice approach  
25 you and ask you if you were involved in the

1 witness protection negotiations?

2 A Not in that sense, I was asked to -- you just  
3 directed me to tab 3 in your materials, and that  
4 would be my response to requests in that regard.

5 Q Okay. Were you asked to provide a memo  
6 outlining your dealings with Mr. Miller?

7 A No.

8 Q Okay.

9 A I can't recall having any dealings with  
10 Mr. Miller.

11 Q Mr. Lawlor, this inquiry has heard that in three  
12 instances the jury was misled by Mr. Zanidean,  
13 and you were taken through them this afternoon?

14 A Yes.

15 Q The first one is that Zanidean testified that he  
16 did not hire a lawyer to make a deal to avoid  
17 being charged in Swift Current?

18 A Um-hum.

19 Q And we know that's not true?

20 A I now know that's not true.

21 Q This inquiry, we know that Zanidean testified  
22 that he was about to lose his house?

23 A Yes.

24 Q We now know that's not true?

25 A Yes, now I do.

1 Q Zanidean testified that the support, room and  
2 board, would end after his testimony. We now  
3 know that's not true; correct?

4 A I now know it is not true.

5 Q My question to you is this, Mr. Lawlor; this is  
6 not the first time you were Crown Counsel in a  
7 murder case where a jury was misled; isn't that  
8 correct?

9 A It may not be.

10 Q If I could take you to tab 5 of my materials?

11 A Yes.

12 THE COMMISSIONER: Mr. Libman, it is about break  
13 time. If you were going to be more than four or  
14 five minutes, I think we will take our break and  
15 you can continue after.

16 MR. LIBMAN: Understood.

17 THE COMMISSIONER: All right.

18 THE CLERK: All rise. This Commission of  
19 Inquiry is adjourned for a 15 minutes recess.

20 (Proceedings adjourned at 3:20 p.m. and  
21 reconvened at 3:36 p.m.)

22 THE CLERK: All rise. This Commission of  
23 Inquiry is now in session.

24 THE COMMISSIONER: Mr. Olson.

25 MR. OLSON: It may be helpful, Commissioner, to

1 put -- before Mr. Libman poses the question --  
2 to rise to say I believe I know where Mr. Libman  
3 is going to try to adduce some similar fact  
4 evidence in respect to the Sophonow Inquiry, and  
5 I don't think that's an area that would be  
6 fruitful to you, Mr. Commissioner, in assessing  
7 the conduct of the Crown, in particular,  
8 Mr. Lawlor in this case.

9 MR. PROBER: If I may, Mr. Libman, I support  
10 Mr. Olson's objection to the reference to the  
11 Sophonow Inquiry, and I do so because there is  
12 some mention in one of the documents of  
13 Mr. Dangerfield. It is in document 5. And  
14 while I note that this book has been marked as  
15 an exhibit, if you, Mr. Commissioner, agree with  
16 our objection, then we will simply obviously  
17 trust that it won't be considered by you in your  
18 deliberations. Thank you.

19 MR. LOCKYER: I'm addressing this issue,  
20 Mr. Commissioner, having addressed it during the  
21 cross-examination of Mr. Dangerfield as well.  
22 It is, I think it is -- with respect, it seems  
23 to be re-litigating an issue that's already been  
24 litigated. Mr. Dangerfield was questioned by  
25 me on some of the events during the Sophonow

1 case and at the Sophonow Inquiry, and the same  
2 inquiry in the context of both that area and  
3 other areas reviewed Mr. Lawlor's conduct. And  
4 indeed, Mr. Lawlor has already acknowledged that  
5 this isn't the first time he has had this  
6 problem, that was his last answer before the  
7 break.

8 MR. OLSON: Just a minute. That was not his  
9 answer. His answer was it wasn't the first time  
10 he had been involved in a case where the jury  
11 was misled.

12 MR. LOCKYER: Well, if that's Mr. Olson's  
13 position, it is a little cute. I mean, you just  
14 have to read the inquiry report to see that  
15 Mr. Lawlor's name, when the chapter dealing with  
16 non-disclosure comes up, Commissioner Cory makes  
17 some really quite adverse findings.

18 MR. OLSON: I am sorry, I was commenting on what  
19 Mr. Lockyer has said the evidence of Mr. Lawlor  
20 is, and that wasn't --

21 THE COMMISSIONER: I agree with Mr. Olson. It  
22 sounded, Mr. Lockyer, as if you were saying that  
23 what Mr. Olson said was pretty cute, and  
24 Mr. Olson was simply repeating the answer. And  
25 quite frankly, I didn't think that Mr. Lawlor



1 was being cute. But anyways, carry on.

2 MR. LOCKYER: No, actually the cute was with  
3 reference to what Mr. Olson, not Mr. Lawlor,  
4 what Mr. Olson had said, not what Mr. Lawlor had  
5 said.

6 THE COMMISSIONER: Well, you were mistaken.

7 MR. LOCKYER: I got lost, the train of thought.

8 In the case of Mr. Dangerfield, of course  
9 he was cross-examined or questioned with respect  
10 to other cases as well. And in my submission,  
11 this is an important area for you,  
12 Mr. Commissioner, to review to be able to assess  
13 many of Mr. Lawlor's positions that he has  
14 taken, particularly during Mr. Code's  
15 examination of him, and during Mr. Libman's  
16 questioning of him as well. And in my  
17 submission, you should permit the questioning.

18 It is interesting to note in passing,  
19 although I don't place a lot of reliance on  
20 this, that as it happens some of the events at  
21 the Sophonow Inquiry have been used to support  
22 witnesses who have testified here. I recall,  
23 for example, Mr. Wolson raised it just the other  
24 day with Chief Ewatski, when he was questioning  
25 him and using Sophonow as a buttress for, and

1 quite legitimately I should add, for Chief  
2 Ewatski's, not so much credibility, but  
3 character, in terms of the way he had acted in  
4 that case, in contrast to the allegations as to  
5 way he has acted in this case. So really, in a  
6 sense, that might be a sauce for the goose,  
7 sauce for the gander argument as well. But in  
8 my submission, this argument has really already  
9 been argued with respect to Mr. Dangerfield, and  
10 there is no reason why, in my submission, the  
11 ruling should be different for Mr. Lawlor.

12 THE COMMISSIONER: Mr. Prober, you had some  
13 response?

14 MR. PROBER: Yes. Because my friend,  
15 Mr. Lockyer, has misstated the issue that was  
16 dealt with when Mr. Dangerfield was testifying.  
17 The general issue was the same, namely similar  
18 fact evidence, Mr. Commissioner. But you  
19 rejected the broad line of questioning and  
20 disallowed it, and said that you didn't see the  
21 benefit of allowing similar fact evidence,  
22 except, as I recall, if there was a particular  
23 narrow issue. And we haven't heard about any  
24 narrow issue.

25 Mr. Wolson referred to Chief Ewatski's

1           conduct prior to the Sophonow Inquiry in a  
2           complimentary way. If we thought that  
3           Mr. Libman was going to be complimentary, we  
4           wouldn't be on our feet. But it is similar fact  
5           evidence that should not be allowed, in my  
6           respectful submission.

7           THE COMMISSIONER: One of my difficulties is  
8           that my memory doesn't permit me to recall  
9           exactly what my ruling was on Dangerfield, but I  
10          do recall I allowed some limited questioning,  
11          yes, and I guess that was it, on a specific  
12          issue.

13          MR. CODE: If I could try to assist here, if my  
14          colleagues have finished their submissions, I  
15          have quickly read tab 5 to try and get a sense  
16          of where Mr. --

17          THE COMMISSIONER: Mr. Code, if I may just  
18          interject, I have to tell everyone that I have  
19          read the Sophonow Inquiry, I read the Sophonow  
20          Inquiry before I was appointed to be the  
21          Commissioner on this matter, and I read it after  
22          I was appointed Commissioner on this matter.  
23          Whether I should have or not, I did. But, I  
24          mean, the first time was just part of general  
25          reading, the second time was because I had been

1 appointed. And maybe I shouldn't have.

2 MR. CODE: I'm sure that's helpful in terms of  
3 full disclosure, Mr. Commissioner. I'm sure you  
4 haven't been corrupted by what you read. I  
5 can't say that I have read it, other than  
6 piecemeal on occasion. But I think there is a  
7 point of principle here, and the objections need  
8 to be responded to. And my recollection of the  
9 ruling when this issue came up in relation to  
10 Mr. Dangerfield is generally consistent with the  
11 way that Mr. Prober has put it. That the issue  
12 that came up in relation to Mr. Dangerfield was  
13 that he asserted that his invariable practice in  
14 cases in which some kind of an arrangement or  
15 negotiations or deals had been conducted with  
16 protected witnesses, or disreputable witnesses,  
17 is that he brought it out in chief. He was the  
18 one, he would make a point of taking the sting  
19 out of the evidence by disclosing it himself to  
20 the jury in examination-in-chief and dealing  
21 with it himself. And that was very important to  
22 his certainty, that had he known the  
23 arrangements that were being worked out with  
24 Zanidean, he would have brought it out. And it  
25 was to challenge that very specific assertion of

1 an invariable practice that I submitted  
2 Mr. Lockyer was entitled to go into the  
3 Ostrowski case, which seemed to challenge that  
4 narrow specific assertion.

5 On my reading of tab 5, and I stand to have  
6 this clarified by Mr. Lockyer, it looks to me  
7 like this is simply a broad attack on character  
8 and does not relate to any narrow specific  
9 issue. Now, of course, you are entitled to  
10 cross-examine a witness on character, but if  
11 that's the issue to which it goes, it is simply  
12 general character as a Crown prosecutor and the  
13 ethical standards of a Crown prosecutor in that  
14 general sense, Mr. Lockyer should articulate  
15 that, that that's the issue to which it goes.  
16 We don't have the situation that we had with  
17 Mr. Dangerfield, it seems to me, unless I'm  
18 misunderstanding what my colleagues seek to do  
19 with this evidence.

20 MR. LOCKYER: I'm trying to recall exactly how I  
21 questioned Mr. Dangerfield on the Sophonow  
22 report.

23 THE COMMISSIONER: I thought it was on Ostrowski  
24 and --

25 MR. LOCKYER: It was both.

1 THE COMMISSIONER: -- I thought there was  
2 another case.

3 MR. LOCKYER: I'm looking at Sophonow now, page  
4 75. I have a very distinct memory of  
5 questioning Mr. Dangerfield about the failure to  
6 disclose information regarding a witness called  
7 Thomas Cheng, and reading out to Mr. Dangerfield  
8 how he had agreed that he should have disclosed  
9 the material to the defence and hadn't, and that  
10 he claimed not to have kept it from Mr. Brodsky  
11 deliberately. I'm looking at the piece now.

12 And I also remember, as I recall, referring him  
13 to a witness, Adrian McQuade, that there was  
14 some non-disclosure with respect to as well.

15 So, I mean, the purpose, to take what  
16 Mr. Code was asking, the purpose of the  
17 cross-examination that Mr. Libman proposes to do  
18 with respect to Mr. Lawlor is quite similar to,  
19 it is really the same as with respect to  
20 Mr. Dangerfield. It is to suggest that here we  
21 are, the second time around, where Mr. Lawlor  
22 has failed to disclose relevant material in an  
23 extremely serious prosecution.

24 And I do recall your ruling as well was  
25 that there was a limit to this in terms of time

1 and content. And I think I kept within the time  
2 and content, because I did as much as I had  
3 actually intended to do. And I think the same  
4 would be true here. In Mr. Libman's case, the  
5 time may be quicker, a lot quicker than me  
6 because, just because he talks a bit faster than  
7 me. We are not talking a massive amount of  
8 cross-examination in this case either. Now,  
9 that doesn't make something admissible, but  
10 consistent as I recall with your ruling with  
11 respect to Mr. Dangerfield, we -- or Mr. Libman  
12 has no intention of spending a lot of time on  
13 this, but just pointing out the similarities  
14 between what occurred with this witness at  
15 Sophonow to what has occurred with this witness  
16 allegedly at this inquiry as well, or  
17 Mr. Driskell's trial as well.

18 MR. CODE: I have your ruling. Mr. Dawe has  
19 pulled it up. I will read the important part.  
20 You said,

21 "Well, I think the issue is a difficult  
22 one. I want to do my best to try and keep  
23 the inquiry on the focus that the  
24 Order-In-Council mandates us to do. I am  
25 very leery about getting into deeds or

1 misdeeds of other similar cases. I think I  
2 may have made a reference to that earlier,  
3 in my general view and approach to similar  
4 fact evidence. However, it seems to me  
5 that if the witness, Mr. Dangerfield, has  
6 testified about a particular practice in  
7 his testimony here at this inquiry, then he  
8 could be, then it would not be  
9 inappropriate to have him cross-examined  
10 about whether that practice was followed in  
11 another case. And that, it seems to me,  
12 would be an issue of credibility."

13 So I don't think we are squarely within the  
14 Dangerfield ruling here. It simply requires a  
15 fresh ruling on a fresh point, on this witness,  
16 whether he can be cross-examined about his  
17 disclosure practice in another case.

18 MR. LOCKYER: I suppose Mr. Lawlor's position  
19 here is that he has a disclosure practice, and  
20 the submission on this inquiry is that he didn't  
21 follow it with respect to the Driskell trial,  
22 any more than he followed it with respect to the  
23 Sophonow trial. And it was the same as  
24 Mr. Dangerfield, it was the same argument.

25 THE COMMISSIONER: All right.



1 MR. OLSON: Mr. Commissioner, I don't want to  
2 prolong this, but the issue here is Mr. Lawlor  
3 says he didn't have the information, and the  
4 argument will ultimately be made that he ought  
5 to have and, therefore, it is by omission that  
6 he somehow allowed the jury to be misled. The  
7 issue that my learned friend wants to try and  
8 get into in the Sophonow case is a specific  
9 dealing with a specific witness who has told  
10 Mr. Lawlor something. Very different issues.

11 MR. LOCKYER: That surely highlights the issue,  
12 because our position, I anticipate, is that  
13 Mr. Lawlor shouldn't necessarily be believed in  
14 that regard, and a way of approaching whether he  
15 should be believed and his credibility to try  
16 and satisfy you, Mr. Commissioner, that he has  
17 done it before, and here he is doing it again.  
18 It makes the point very well the way my friend  
19 has phrased it.

20 THE COMMISSIONER: Thank you very much. The  
21 objections are sustained. I think it is  
22 different than the Dangerfield, because one is a  
23 practice and the other is, as Mr. Olson pointed  
24 out, is that he didn't have the information.  
25 However, as I said before, I have read the

1           Sophonow report. So, therefore, you may not ask  
2           the question.

3           MR. LIBMAN: May not?

4           THE COMMISSIONER: May not. But I do not intend  
5           to remove it from the exhibit book, it is a  
6           document of public record, in any event.

7           MR. LIBMAN: Thank you, I will move on.

8           BY MR. LIBMAN:

9           Q    Mr. Lawlor, this inquiry has heard that in April  
10           of 1991, Sergeant Anderson secured a deal with  
11           the Swift Current RCMP, where the RCMP would  
12           exercise their charging discretion and not  
13           charge Zanidean for arson. Are you familiar  
14           with that testimony?

15          A    No, I'm not.

16          Q    You can accept from me, sir, that we have heard  
17           that from Sergeant Anderson.

18          A    All right.

19          Q    We have also heard that Sergeant Anderson tells  
20           us that Miller, Mr. Miller instructed him,  
21           Sergeant Paul, not to tell Zanidean before he  
22           testified that he was safe from prosecution in  
23           Swift Current.

24          A    Okay.

25          Q    Have you heard that before?

1 A No, I haven't.

2 Q You can accept that from me, sir. Sergeant  
3 Vandergraaf --

4 A Sorry, I did hear that somewhere before, I can't  
5 recall where. I haven't read Anderson's  
6 evidence.

7 Q It might have been the papers, but you accept  
8 what I'm saying to you?

9 A Yes.

10 Q Vandergraaf concurs with Paul and Anderson, and  
11 he goes further and says he had a meeting with  
12 Mr. Dangerfield. He was delivering some  
13 documents, some papers, he ran into  
14 Mr. Dangerfield in the library and filled him in  
15 on this. Okay.

16 Sergeant Paul went further, because he says  
17 after the trial started Miller told him and  
18 Anderson and this is prior to Zanidean  
19 testifying but after the trial started, that  
20 Miller secured formal immunity for Zanidean, he  
21 inferred formal immunity, Justice Department to  
22 Justice Department. But, again, here the key  
23 issue here is, do not tell Zanidean.

24 Now, you know that Mr. Zanidean was seeking  
25 immunity through his counsel; correct?

1 A Yes.

2 Q And Brodsky is questioning his motivations to  
3 testify; correct?

4 A Yes.

5 Q Attacking his overall credibility to speak. Can  
6 you comment, sir, if this situation is  
7 acceptable?

8 A What situation?

9 THE COMMISSIONER: What was -- we are sort of  
10 lead to believe that this was, I wouldn't say a  
11 practice, but that this was the appropriate way  
12 of dealing with the situation was don't tell the  
13 person, at least don't formally tell the person  
14 that they have been given immunity, and I will  
15 use that term in a loose sense, because that  
16 would compromise their credibility, so don't  
17 tell them until after they have testified. Am I  
18 correct, Mr. Libman, that's what you are saying?

19 MR. LIBMAN: Yes.

20 THE COMMISSIONER: What do you think of that  
21 practice, if it was a practice, and is it a  
22 valid thing to do?

23 THE WITNESS: I have never ran into that  
24 situation. It is difficult for me. I would  
25 think that before you put a witness on the

1 stand, the air is cleared, you don't keep things  
2 hanging over his head.

3 BY MR. LIBMAN:

4 Q Do you see any impropriety with the type of  
5 situation where the witness would be asked, for  
6 instance, do you have immunity from charges  
7 outside of the jurisdiction, he can honestly say  
8 no, but other people know that that's not  
9 truthful and the jury is mislead?

10 A Do I see what?

11 Q Is that improper?

12 A I don't know if improper is the word. It  
13 wouldn't be the way I would handle it but --

14 Q Would you agree with me that the result of doing  
15 that would be to leave the jury with a false  
16 impression?

17 A That he didn't have immunity?

18 Q No, he is telling the jury, I'm not getting  
19 anything for this?

20 A At that point in time, that's what he thought  
21 the situation was.

22 Q But other people know that he was getting  
23 something?

24 A Yes.

25 Q Do you see how the jury was left with a false

1 impression?

2 A Not out of Zanidean's mouth, because from my  
3 understanding, that's what he thought the  
4 situation was.

5 Q But officers of the court are setting up a  
6 charade, a situation where he is allowed to say  
7 that, and you don't see a problem with that? We  
8 will move on. I just ask you, you don't see a  
9 problem with that?

10 A How does it affect the witness's credibility  
11 when he doesn't know?

12 Q It misleads the jury about what a potential  
13 benefit could be to him.

14 A But how does that affect his credibility?

15 Q Because he is seeking this immunity.

16 A Yes. And if he doesn't know he has got it, how  
17 does that affect him as a witness?

18 Q His evidence, I suggest, may be stronger because  
19 he wants something more. It is being dangled  
20 over his head --

21 A It may be. I don't know what was in Zanidean's  
22 mind.

23 Q So you don't really see a problem with it I  
24 guess?

25 A I am not saying I don't see a problem, I don't

1 see -- from what I have read and seen, I don't  
2 see how it can be perceived to have caused a  
3 problem in this case.

4 Q Sir, this inquiry has heard -- first of all, do  
5 you accept, to wrap up, that Mr. Brodsky was  
6 mislead with respect to his disclosure request?

7 A Yes.

8 Q Do you accept that pre-appeal relevant  
9 information did not get to Mr. Brodsky that  
10 should have?

11 A Yes, I have since learned of the Saskatchewan  
12 correspondence.

13 Q Do you -- are you aware that in November of '91,  
14 Mr. Zanidean received \$20,000?

15 A No, I wasn't until I saw it in these.

16 Q Now you know that?

17 A Now I know that.

18 Q And that's a discloseable issue; correct?

19 A Yes.

20 Q Especially with an appeal pending?

21 A Especially an appeal pending.

22 Q And post appeal, we know the situation where  
23 Mr. Driskell's investigator, Ms. Duncan,  
24 received incorrect information; correct?

25 A Which information?

1 Q The fact that all of Mr. Zanidean's dealings  
2 were on the record. We were taken through that  
3 this afternoon?

4 A My recollection of what I was shown, she was  
5 referred to the transcripts, and they would  
6 answer her questions.

7 Q But they didn't, you don't agree -- you told  
8 Mr. Code that you saw your answer was wrong, do  
9 you remember that line of questioning?

10 A Yes, because I didn't have the benefit of the  
11 transcripts. And she was told to secure the  
12 transcripts and they would answer her questions  
13 for her.

14 Q But do you agree that the transcripts would not  
15 answer her questions?

16 A Well, she wanted to know whether or not, if I  
17 recall what the questions were, she wanted to  
18 know whether or not the witness protection  
19 information was brought before the jury. She  
20 was told that would be in the transcript. If it  
21 wasn't in the transcript -- and I suppose now  
22 that it wasn't, although I still haven't seen  
23 the transcript -- then she would know, that  
24 would answer her question that it wasn't lead  
25 before the jury.



1 Q No, the question, sir, if you could turn to tab  
2 73, page -- it is at the bottom right-hand  
3 corner, page 2158.  
4 THE COMMISSIONER: Fourth page in.  
5 BY MR. LIBMAN:  
6 Q And we know that is Mr. Miller's writing,  
7 "Check with Shermie, did they lead evidence  
8 on witness protection deals? Everything  
9 done through witness protection was lead in  
10 evidence?"  
11 A Yes.  
12 Q And you will agree with me now, sir, that the  
13 witness protection deals were not lead in  
14 evidence; correct?  
15 A Yes.  
16 Q So you agree with me that that answer is wrong,  
17 correct? I'm not asking for your motivation,  
18 just that it is the wrong answer.  
19 A It is an inter-office memo, is it not? It is  
20 not the answer. Where is the answer? Where is  
21 the letter written to Duncan? Where is she  
22 mislead? Is that letter in this book?  
23 Q Keep going.  
24 A "I would direct you to the transcript  
25 which will contain the answer to your

1 question."

2 Q But do you accept that it wouldn't because the  
3 witness protection deals weren't put in  
4 evidence? You didn't know about them, according  
5 to your evidence.

6 A The question was,

7 "What were the particulars of the deals  
8 made in return for Ray's testimony against  
9 my client?"

10 Now that, sorry -- which will contain answers to  
11 your questions. Where is that question that it  
12 purports to answer?

13 Q If I can take you to Mr. Finlayson's statement.

14 A No, I want to see Duncan's letter. You are  
15 telling me her question was not answered. Where  
16 is her question?

17 MR. CODE: That same tab, the very first page.

18 BY MR. LIBMAN:

19 Q January 2, 1995, I will read it into the record,  
20 third paragraph.

21 "However, you have evaded my question that  
22 I have asked in my letter, and that is, A,  
23 what were the particulars of the deals that  
24 were made in return for Ray Zanidean's  
25 testimony against my client, Jim Driskell?"

1           You then agree that Mr. Miller drafted a  
2           response and asked that you confirm that the  
3           witness protection deals were put on the record,  
4           lead in evidence.

5   A       That is not in relation to that question, the  
6           way I read these documents, it is a different  
7           question.

8   Q       So you don't see that as a connection?

9   A       No.

10   Q       Your wrong answer to Mr. Miller and  
11           Mr. Finlayson was incorrect when he asked --

12   A       Miller is asking me whether or not the  
13           particulars were lead in evidence. This is the  
14           answer to that question,

15                 "The transcripts will contain the answer to  
16                 your question."

17           The question she asked is, what were the  
18           particulars, not whether or not they were lead  
19           in evidence?

20   Q       Were they were lead in evidence, that is what he  
21           is asking?

22   A       That's not what this question is.

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

1 Q And Mr. Miller's question to you was, was the  
2 witness protection, the particulars, the witness  
3 protection deals lead in evidence?

4 A That's two -- sorry, I don't see any relation  
5 between those two.

6 Q You see no relation to those two?

7 A No.

8 Q Could I have a moment, Mr. Commissioner?

9 Could I take you to page 13 of tab 5,  
10 Mr. Finlayson's statement?

11 THE COMMISSIONER: Suffice it to say,  
12 Mr. Lawlor, that it may surprise you, but I do  
13 see a relationship. The question is, what were  
14 the deals. Now maybe I'm misreading it, but  
15 what were the particulars of any deals made, and  
16 then Miller has the draft and he says, check  
17 with you, Shermie, Lawlor, did they lead  
18 evidence on witness protection deals?

19 Everything done through the witness protection  
20 was lead in evidence?

21 THE WITNESS: To me that's two different  
22 questions. One, what are the particulars of the  
23 "deals" is a different question as what was lead  
24 in front of the jury.

25 MR. LIBMAN: I'm going to move on,

1 Mr. Commissioner. I think your answer is quite  
2 clear, Mr. Lawlor.

3 BY MR. LIBMAN:

4 Q Mr. Lawlor, we heard in this inquiry that  
5 Mr. Whitley, who is the Assistant Deputy  
6 Minister for Manitoba Justice at the time, was  
7 of the opinion that Mr. Driskell's  
8 constitutional right to a fair trial was  
9 violated. We heard yesterday from Chief Ewatski  
10 that Mr. Driskell's right to a fair trial was  
11 violated. Do you share that opinion, sir?

12 A I do.

13 Q And do you have anything that you wish to say to  
14 Mr. Driskell, sir?

15 A I don't know what I can say to Mr. Driskell.  
16 Now, today, and as of I suppose two years ago  
17 when I started reading things in the media, in  
18 the paper, I realized that things that should  
19 have been disclosed were not disclosed.  
20 Mr. Driskell did not have a fair trial. I  
21 regret I was part of it, but I had no knowledge  
22 of these things at that time. I apologize to  
23 Mr. Driskell that I was a part of it, but I  
24 don't feel that I was responsible for the  
25 non-disclosure, because I knew nothing about it.

1 MR. LIBMAN: Thank you, Mr. Lawlor, those are my  
2 questions.

3 THE COMMISSIONER: Mr. Kennedy.

4 BY MR. KENNEDY:

5 Q Good afternoon, Mr. Lawlor. My name is Jerome  
6 Kennedy, I am counsel for the Association for  
7 Defence of the Wrongly Convicted. I have a  
8 number of questions for you, sir.

9 It is my understanding, Mr. Lawlor, that  
10 you have been a prosecutor since 1974?

11 A '75.

12 Q And you became general counsel in the late  
13 '80's, approximately 1988?

14 A Approximately, yes.

15 Q So I would assume, sir, that you are, in terms  
16 of length of time at the bar, an experienced  
17 senior Crown in Manitoba Justice right now?

18 A Yes.

19 Q During your tenure as a Crown, Mr. Lawlor, has  
20 there ever been any policy in place in the Crown  
21 policy manual, or whatever you would call it,  
22 relating to the preparation of memos, notes or  
23 letters on significant events?

24 A I don't think there is.

25 Q Do you agree with me, sir -- is there any policy

1 in place at present?

2 A I have never had a case, but I know there is  
3 some type of a policy now dealing with sensitive  
4 cases, that they have to be documented, things  
5 that are happening with it.

6 Q Sorry, Mr. Lawlor?

7 A Sorry.

8 Q Do you agree with me, sir, that a policy as such  
9 nature might have, if in place today -- if in  
10 place at the time, might have avoided some of  
11 the problems that occurred in Driskell?

12 A I can't answer that question. I don't know.

13 Q It would have been a way, Mr. Lawlor, for the  
14 trial Crowns to update your superiors; correct?

15 A Yes.

16 Q Nothing like that was done at the time?

17 A No, it wasn't.

18 Q You would agree, would you, that it would be a  
19 good policy to implement, at least in terms of a  
20 major case basis?

21 A So the managers know what the prosecutors are  
22 doing.

23 Q Sir, leading also on that point, or a similar  
24 point, during your tenure as a Crown, or today  
25 even, has there ever been a requirement or

1 practice of what I will refer to, for lack of a  
2 better term, as a post-conviction briefing where  
3 the trial Crowns and managers or senior  
4 directing Crowns would get together and discuss  
5 the case.

6 A No, there is no policy in that regard.

7 Q In other words, in a situation like we had here  
8 there has been, part of the difficulty has been  
9 the lack of memos, notes and letters; correct?

10 A And communication, yes.

11 Q That if the communication channels could be  
12 improved, then a similar situation might be  
13 avoided; correct?

14 A Yes. From what I have seen, the communication  
15 between Miller and Dangerfield and Whitley on  
16 the Saskatchewan revelations was very informal.  
17 So you are right, if there was a formal policy,  
18 it certainly would assist.

19 Q The terminology that I'm using, sir, is not  
20 meant to be carved in stone, but a type of  
21 post-conviction briefing where the trial Crown  
22 or Crowns would sit down with the director, or  
23 directors, and discuss the case to make sure  
24 there are no outstanding issues, or issues that  
25 could have affected a fair trial, as best as you



1 can see at that time, that would be a good idea,  
2 would it?

3 A In a general sense, I suppose.

4 Q But combined with notetaking, and letter  
5 writing, and memo writing, and post-trial  
6 autopsy, it would certainly alleviate some of  
7 the concerns that have arisen in this case. Is  
8 that correct?

9 A Yes, things would be documented.

10 Q Sir, during your time with the Crown, and I  
11 would -- this is what, 32 years now?

12 A Just over 30 --

13 Q 31 years, Mr. Lawlor?

14 A Yes.

15 Q Has there ever been a policy, and when I say a  
16 policy, either in writing or in practice,  
17 although I would assume in writing would be  
18 better, in relation to accountability of Crown  
19 prosecutors where errors of a significant nature  
20 have been made which affect the fairness of the  
21 trial?

22 A Not that I'm aware.

23 Q And by accountability, Mr. Lawlor, what I'm  
24 referring to is a situation where a director may  
25 call -- may have a meeting with a prosecutor and

1 review an issue that has come to the attention  
2 of the director or another senior Crown. Are  
3 you aware of such --

4 A I'm not aware of any formal policy, no. But I'm  
5 sure that if a serious error, or an error of  
6 significance occurred in a case, that the Crown  
7 Attorney who was responsible for that would be  
8 asked to speak to management about it.

9 Q Unfortunately, sir, we don't want to have to go  
10 to inquiries to discover those, do we?

11 A No.

12 Q Now, Mr. Olson passed out some materials the  
13 other day, there was reference to a man by the  
14 name of Brian Kaplan having some role?

15 A Yes, he is the Director of Regional Prosecutions  
16 and Education.

17 Q And does the Regional Prosecutions and  
18 Education, does that deal with the kind of  
19 issues that I'm talking about in terms of  
20 accountability, ethics, fair play?

21 A Not really, no.

22 Q Are you ever aware, sir, of a situation that I'm  
23 talking about where a prosecutor -- I'm not  
24 saying, Mr. Lawlor, that this should occur --  
25 but are you aware of any situation where a

1           prosecutor, as a result of an action in a trial  
2           or conduct of a trial has resulted in reprimand,  
3           suspension, or anything like that?

4   A    I can't think of anything specific, no.

5   Q    My fourth point, sir, is there any policy in  
6           place in relation to what I will refer to as an  
7           internal review, or an ongoing internal review  
8           of files, to borrow a term that I think we heard  
9           earlier today, to ensure quality control?

10  A    No, there isn't.

11  Q    My last point, sir, we know from the materials  
12           that Mr. Olson has filed that in Manitoba there  
13           have been a number of initiatives taken. I'm  
14           not sure of the exact year, Mr. Lawlor, but  
15           around at least 2002, 2003, where there have  
16           been meetings of Crowns and defence and  
17           discussions of wrongful convictions. You are  
18           aware of these seminars, workshops, or meetings,  
19           are you?

20  A    Yes.

21  Q    Have you ever, sir, as a senior Crown, been  
22           involved in presenting at these kinds of  
23           seminars, in terms of your experience and the  
24           pitfalls that can occur in the trial process?

25  A    No, I haven't. I wrote a paper several years

1           ago which I made available to all Crowns and  
2           Justice Departments in other provinces. I  
3           updated it a few years ago. I called it loosely  
4           "Conduct of the Crown, Abuse of Process."

5           THE COMMISSIONER: I'm having trouble hearing  
6           you?

7           THE WITNESS: I wrote a paper I entitled,  
8           "Conduct of the Crown, Abuse of Process and  
9           Other Topics," in which I went through various  
10          aspects on that, and I made it available to all  
11          Crown attorneys.

12          BY MR. KENNEDY:

13         Q     And when did you write that, Mr. Lawlor?

14         A     The mid '90's.

15         Q     So that would have been subsequent to the  
16          Driskell trial?

17         A     Yes, and it had nothing to do with the Driskell  
18          trial.

19         Q     No, certainly not but --

20         A     It was just something that I became interested  
21          in.

22         Q     And did you refer in that paper, sir, to the  
23          role of the Crown when issues arose, as to the  
24          questions arose, as to fairness of a trial?

25         A     Yes.

1 Q And did you outline what you felt the role of  
2 the Crown was when something like that occurred?

3 A When something like what occurred?

4 Q For example, became aware there was  
5 non-disclosure at trial, or there were issues  
6 affecting the fairness of the trial, or  
7 questions were being raised?

8 A That arose post-trial?

9 Q Yes?

10 A No, I don't think I covered that area at all.

11 Q You would have dealt with the trial process, did  
12 you?

13 A Pre-trial and trial, yes.

14 MR. KENNEDY: Thank you very much, Mr. Lawlor.  
15 Thank you, Mr. Commissioner.

16 THE COMMISSIONER: Thank you, Mr. Kennedy.

17 MR. ABRA: If nobody is going, I will go, Mr.  
18 Commissioner.

19 THE COMMISSIONER: I thought there were no  
20 questions.

21 MR. ABRA: You were probably hoping.

22 THE COMMISSIONER: No, not at all.

23 BY MR. ABRA:

24 Q Gregg, I'm acting for Bruce Miller's estate, as  
25 I believe you are aware.

1 A Yes.

2 Q Just a few areas that I would like to canvass  
3 with you. Firstly, can you go to tab 19, in the  
4 book of, in the first volume of the book of  
5 documents?

6 A I have it.

7 Q This is a document that Mr. Code showed you  
8 yesterday, and it was the application by  
9 Mr. Zanidean for witness protection. Did I  
10 understand you to say that you had never seen  
11 that document before?

12 A I had never seen it until I received these  
13 exhibits, copies of these exhibits a few weeks  
14 ago.

15 Q Okay. Now, nextly I would like you to go to tab  
16 20, please?

17 A Yes.

18 Q And this, as you've been told, is a memorandum  
19 that was prepared by Sergeant Tom Anderson for  
20 Inspector Johns of the Winnipeg Police Service.  
21 And you will see it is addressed to him, it is  
22 dated October 8, 1991?

23 A Yes.

24 Q And I would like to take you to paragraph 2.  
25 Now, Sergeant Anderson was one of the primary

1           investigators of the Driskell murder, was he  
2           not?

3       A     He was.

4       Q     And he worked with Sergeant Paul?

5       A     Yes.

6       Q     And Staff Sergeant Vandergraaf was, we have  
7           learned, in charge of the investigation in  
8           essence?

9       A     Yes.

10      Q     You were aware of that?

11      A     Yes.

12      Q     They are the three police officers that you  
13           dealt with the most?

14      A     I think I dealt more with Vandergraaf than  
15           anybody else.

16      Q     Okay. But you did receive information on  
17           occasion from Anderson and Paul?

18      A     Yes.

19      Q     And whenever you had any questions of Winnipeg  
20           Police Service, you would direct them either to  
21           Vandergraaf, Anderson or Paul, as far as this  
22           case was concerned?

23      A     Yes.

24      Q     And as you told Mr. Code yesterday, not in so  
25           many words, but you certainly implied to him

1           that you were relying on the Winnipeg Police to  
2           provide the information, and you were relying  
3           upon them to provide accurate information?

4   A       That's correct.

5   Q       And you were relying upon them to provide  
6           truthful information to you?

7   A       That's correct.

8   Q       Now, you said that at one point you became aware  
9           of the situation of the Swift Current fire and  
10          the fact that Mr. Zanidean may have participated  
11          in the setting of it?

12  A       Yes. I don't know exactly when and I don't know  
13          exactly what I knew, but I knew he was under  
14          investigation for a fire in Saskatchewan.

15  Q       Were you ever told by Anderson, Paul, or  
16          Vandergraaf, that Anderson had been carrying on  
17          negotiations with the RCMP in Swift Current  
18          about Driskell not being charged with that  
19          offence?

20  A       Driskell not being charged?

21  Q       Yes?

22  A       No.

23  Q       Sorry, Zanidean, I apologize.

24  A       No, I wasn't aware of that either.

25  Q       You were never told that?



1 A No.

2 Q Anderson never told you?

3 A No.

4 Q Paul never told?

5 A No.

6 Q Vandergraaf never told you?

7 A No.

8 Q Now, if you go to page 2 of tab 20, in this  
9 memorandum Anderson lays out for Inspector Johns  
10 the negotiations that he had with Constable Orr  
11 of the RCMP in Swift Current?

12 A Um-hum.

13 Q Between -- during March and April of 1991. Now,  
14 that's three or four months before the trial?

15 A Yes.

16 Q You would agree with me that clearly Anderson  
17 has an agreement with Burton that Zanidean, or  
18 they are discussing Zanidean not being charged  
19 with that offence in Swift Current?

20 A Yes, I see that.

21 Q In essence, they are talking about immunity for  
22 Zanidean?

23 A Yes.

24 Q Were you ever told that by any of Vandergraaf,  
25 Anderson or Paul?

1 A No, I wasn't.

2 Q Do you agree with me that you should have been  
3 told?

4 A Yes, I should have.

5 Q Yes. And it should have been disclosed to  
6 Mr. Brodsky?

7 A It should have been disclosed to Brodsky, yes.

8 Q Now, I would like to take you to tab 28 of  
9 volume 2, please?

10 Now, the second page, and you identified  
11 this for Mr. Code yesterday, is the letter that  
12 Mr. Brodsky sent dated February 7th of 1991  
13 asking for all sorts of disclosure?

14 A Yes.

15 Q And although you were on your way to Cancun, you  
16 obviously sat down and analyzed these requests  
17 prior to your heading to Cancun?

18 A Well, I don't know if analyzed would be the  
19 right word, but I made notes.

20 Q You made the notes, okay. Now, specifically  
21 number 6,

22 "We would like to have the detail of  
23 witness protection programs Mr. Dangerfield  
24 mentioned in court that have been offered  
25 to various witnesses."

1           You wrote "no"?

2   A       Yes.

3   Q       And the reason for that was that you and  
4           Dangerfield had what, made a decision that you  
5           weren't going to disclose any details in that  
6           regard?

7   A       I remember George saying at one point in time  
8           words to the effect that to disclose details may  
9           put the witnesses in danger.

10   Q       Okay.

11   A       Or jeopardize their safety, whatever.

12   Q       And it was for that reason a decision was made  
13           not to give any information to Mr. Brodsky?

14   A       Yes.

15   Q       Now, this particular letter was never shown to  
16           Bruce Miller, was it, as far as you are aware?

17   A       I didn't show it to him.

18   Q       Okay. Now, the police -- or you were also asked  
19           in number 16, Mr. Brodsky says that he has eight  
20           or nine statements from Zanidean.

21           "Are there any that we do not have? I  
22           would like a record of all of his contacts  
23           with the police, whether by way of formal  
24           statement or written notification in a  
25           police officer's notebook."

1           And you have written beside it, "has all  
2           statements"?

3       A     Yes.

4       Q     Now, would you have written that as a result of  
5           speaking to someone with the police?

6       A     Yes.

7       Q     And it would have been either Vandergraaf,  
8           Anderson, or Paul?

9       A     Most likely.

10      Q     And they told you that you as the Crown Attorney  
11           had everything, and Brodsky, if you turned  
12           everything over to Brodsky, then he had  
13           everything?

14      A     I wouldn't have written that note unless that's  
15           the information that I got.

16      Q     And it came from either Vandergraaf, Anderson,  
17           or Paul?

18      A     Most likely, but I can't say for sure.

19      Q     Well, it wouldn't have been anybody else, would  
20           it?

21      A     It doesn't seem so.

22      Q     No. And you were not told at any time that  
23           Zanidean, some six months before, in October,  
24           had told and admitted to Paul and Anderson that  
25           he had set the fire in Swift Current?

1 A No, we were never given that information.

2 Q You were never told that?

3 A No.

4 Q You should have been?

5 A Yes, we should have been.

6 Q Now, we are aware of the fact, and I won't show

7 it to you, but there was a supplementary

8 prepared by Anderson and Paul of their meetings

9 with Zanidean in October of '90, and they went

10 through at some length in their supplementary

11 all of the information that Zanidean had given

12 to them in a couple of meetings with him, about

13 his involvement with Mr. Driskell and so on.

14 But nowhere in that supplementary do they

15 mention the fact that Zanidean had confessed to

16 the Swift Current fire in their meeting with

17 them?

18 A Okay.

19 Q You were relying on the supplementary as being

20 an accurate recital of their version of the

21 events of that meeting?

22 A I would, yes.

23 Q You would have expected that to be in the

24 supplementary, in the police report?

25 A As I have said before, I expected that anything

1           that was in the police officer's notes would be  
2           put into the typed report.

3       Q     And anything that they were told by Zanidean  
4           that was the least bit relevant, you expected to  
5           be in the police report?

6       A     Yes.

7       Q     And if indeed -- well, we know that Zanidean  
8           confessed to them about the fire. You would  
9           have expected that to be in the police report?

10      A     I would have expected everything, the complete  
11           conversation they had with Zanidean to be in the  
12           police report.

13      Q     You expected full disclosure from the police?

14      A     Yes.

15      Q     And you didn't get it, did you?

16      A     Today, I see that we didn't.

17      Q     No. And Mr. Dangerfield at tab 29 was the one  
18           that replied to Mr. Brodsky. And you see on  
19           page 4, paragraph 16, obviously he was never  
20           aware of the fact either, was he?

21      A     No.

22      Q     That Zanidean had confessed to setting the Swift  
23           Current fire?

24      A     Doesn't appear so, no.

25      Q     Now, Mr. Brodsky then wrote to you again, Gregg,

1 under tab 33?

2 A Okay.

3 Q And specifically I draw your attention to  
4 paragraph 5, where Mr. Brodsky is asking for  
5 significant information about witnesses and  
6 consideration that they may have received --

7 A Um-hum.

8 Q -- and so on. And number 9, Mr. Brodsky asks  
9 specifically,

10 "What do the Winnipeg Police Service have  
11 on the fire in Swift Current, Saskatchewan,  
12 the fire at 1859 Pacific and the fire at  
13 Ashif Kara's shop."

14 Do you see that?

15 A Yes, I do. Those questions are passed on to  
16 Vandergraaf.

17 Q Yes, and that's under tab 34?

18 A Yes.

19 Q And you sent not only the memo, excuse me, the  
20 facsimile cover sheet that's shown at tab 34,  
21 but according to the fax sheet, you sent five  
22 pages. So you would have sent Vandergraaf the  
23 whole letter?

24 A Yes.

25 Q You specifically asked for information on

1 paragraphs 5, 9 and 16, along with various  
2 others?

3 A Yes.

4 Q Now, you go now to tab 37, and if you go to the  
5 letter which is again at tab 34, or 33, excuse  
6 me, number 5 -- well, excuse me, just a minute,  
7 if you go to number 9 about the Swift Current  
8 fire?

9 A Yes.

10 Q And you wrote to Brodsky,  
11 "Re paragraph 9, Winnipeg Police have  
12 nothing on these incidents."

13 A Yes.

14 Q Were you aware of the fact -- well, you are now  
15 aware of the fact from Anderson's memorandum of  
16 October '91, that we went over a few moments  
17 ago, that he was negotiating with the RCMP in  
18 Swift Current?

19 A Yes.

20 Q So obviously he had knowledge about that?

21 A Yes.

22 Q You weren't told that?

23 A According to my memo, or letter of April 29th, I  
24 wasn't.

25 Q Were you aware of the fact that the Winnipeg



1 Police Service in fact had a copy of the full  
2 RCMP investigation report of that fire in Swift  
3 Current?

4 A No, I wasn't.

5 Q You were never told that?

6 A No.

7 Q Now, when you wrote then "re paragraph 9,  
8 Winnipeg Police have nothing on these  
9 incidents," were you told that by Vandergraaf?

10 A I must have received that information from the  
11 police, because I directed, as you pointed out,  
12 that question to them.

13 Q You directed it to Vandergraaf?

14 A Yes, for him or --

15 Q And I suggest to you that it must have been one  
16 of the three that replied, Vandergraaf, Anderson  
17 or Paul?

18 A It probably was one of the three.

19 Q And they told you that they had nothing, and no  
20 knowledge of Zanidean's -- maybe not no  
21 knowledge, but that they had nothing about  
22 Zanidean's involvement in the Swift Current  
23 fire?

24 A They have nothing on the incidents.

25 Q The information that they gave to you, I

1 suggest, was false?

2 A It appears it was.

3 Q That letter of Mr. Brodsky's, by the way, of  
4 April -- tab 33, Gregg -- you never gave a copy  
5 of it to Bruce Miller?

6 A No.

7 Q Any time up to the trial, did Vandergraaf,  
8 Anderson, or Paul, or any other member of the  
9 Winnipeg Police Service, ever correct the false  
10 information that they had previously given you,  
11 about the information they had about Zanidean's  
12 participation in the fire in Swift Current?

13 A I was never given any different information. I  
14 didn't know it was false, so I can't --

15 Q All right. Up to the date of trial?

16 A I wasn't given anything more.

17 Q In fact, I gather from your evidence, either to  
18 Mr. Code or Mr. Libman, that you never became  
19 aware of the fact that you were given this false  
20 information until just a couple of years ago?

21 A When I saw in the media about the Saskatchewan  
22 Justice correspondence and the immunity stuff,  
23 yeah.

24 Q Okay. You were never told by Anderson, Paul, or  
25 Vandergraaf, or anybody else in the Winnipeg

1 Police, anything different?

2 A No.

3 Q Other than what they had told you, that they had  
4 nothing on Zanidean's participation in that  
5 fire?

6 A That's what they must have told me because that  
7 is how I answered it relative to his inquiry.

8 Q Now, I would like to take you to tab 41, please.  
9 This again is it a supplementary of a police  
10 report that Mr. Code showed to you yesterday?

11 THE COMMISSIONER: Tab 41.

12 BY MR. ABRA:

13 Q Tab 41. I would like you to look at the last  
14 paragraph on the page.

15 A Yes.

16 Q Now, you will see the reference to question  
17 number -- and this is prepared by Sergeant  
18 Anderson and Paul?

19 A As a result of the fax, yes.

20 Q And the question number 6 in Mr. Brodsky's  
21 original letter related to, in fact, became --  
22 number 5 in that letter became number 6. Okay?

23 A Um-hum.

24 Q And it is the criminal records of all witnesses  
25 and what favorable considerations there were and

1 so on.

2 A Okay.

3 Q And if you look at the paragraph beside the  
4 reference to question number 6, Gregg, you will  
5 see that Anderson and Paul are referencing what  
6 was Brodsky's question number 5, that being the  
7 criminal records of witnesses and any reason  
8 that they would have to assist the Crown, in  
9 essence, okay?

10 A Um-hum.

11 Q Now, you will see there, with respect to the  
12 second part of this question,

13 "We are not aware of a single criminal  
14 charge outstanding against a single  
15 subpoenaed witness at the time of the  
16 deceased's disappearance. Furthermore,  
17 protection is the only favourable  
18 consideration given to any witness. We are  
19 not aware of any stayed charges or any  
20 other deals made with any witness in  
21 exchange for testimony."

22 Do you see that?

23 A I do.

24 Q Knowing, as he did, as Anderson was negotiating  
25 with the RCMP in Swift Current, do you not think

1           that what he put in this supplementary, with  
2           Pauls' concurrence, was false?

3       A     I don't want to comment on that.  You know, it  
4           may be a matter of interpretation.  I don't want  
5           to say that he has written false --

6       Q     I suggest to you, Mr. Lawlor, that you know  
7           perfectly well that Anderson is misleading you  
8           in the response that he gave?

9       A     It can be taken that way, yes.

10      Q     Well, I suggest to you that you know perfectly  
11           well, he is not giving you full disclosure, he  
12           is not giving you any disclosure.

13      A     But this paragraph is also very carefully  
14           worded.

15      Q     It is, isn't it?

16      A     All right.  That's why I can't say that he has  
17           given me false information, because it is  
18           carefully worded.

19      Q     It is certainly not fair, full and frank  
20           disclosure, is it?

21      A     No.

22      Q     And that's what you expected from the police,  
23           isn't it?

24      A     Yes.

25      Q     And that's what you had to give Mr. Brodsky?

1 A Yes.

2 Q And what this refers to is not full, fair or  
3 frank disclosure, to use Mr. Code's words, is  
4 it?

5 A No, it isn't.

6 Q In fact, it might even have been helpful, I  
7 suggest, if they had said to you in that  
8 supplementary, if you require any further  
9 information, speak to Bruce Miller?

10 A It might have.

11 Q Yes. Now, tab 43, Mr. Lawlor, questions, these  
12 are what Mr. Brodsky prepared for the pre-trial  
13 with Mr. Justice Morse, I believe. Were copies  
14 given to you and George prior to the pre-trial,  
15 do you recall?

16 A No.

17 Q So then it was adjourned for you to get the  
18 information?

19 A I think that's how it went, if I remember  
20 yesterday's line of questioning correctly.

21 Q All right. And then if you go to Mr. Brodsky's  
22 memo at tab 44 -- by the way, the questions at  
23 tab 43, these were never given to Bruce Miller?

24 A Not that I know of. There would be no reason  
25 to. Brodsky was dealing with Dangerfield and

1           myself as far as disclosure went and pre-trials  
2           went. Bruce wouldn't have any involvement from  
3           that.

4   Q       But were you aware of the fact that he was  
5           dealing with the issue of witness protection?

6   A       I was.

7   Q       And you were aware that he was having some  
8           involvement with Anderson and Paul in that  
9           regard?

10  A       Yes.

11  Q       You were also having involvement with Anderson  
12           and Paul because they were primary investigators  
13           in the case?

14  A       On that, yes, on that side of it, yes.

15  Q       And you had to rely on them to give information  
16           to you in response to many of Brodsky's  
17           questions?

18  A       I did.

19  Q       And if you go to tab 44, according to  
20           Mr. Brodsky, he was told at the pre-trial by you  
21           and Dangerfield, as you know, that the Crown  
22           "...was not prepared to involve itself in  
23           the Swift Current fire, that's another  
24           police force. The RCMP were advised,  
25           according to Dangerfield (by Lawlor) in

1            Dangerfield's presence in the office of  
2            Justice Morse that Zanidean probably set  
3            this fire. The RCMP chose to do nothing  
4            about it."

5            That information had to have been given to you  
6            by Vandergraaf, Anderson, or Paul?

7            A     Yes.

8            Q     And this now is just about two weeks before  
9            trial?

10          A     It is, or less than that.

11          Q     So you are still being -- still not being told  
12          anything about the arrangement that Anderson has  
13          made with the RCMP in Swift Current that  
14          Zanidean would not be charged with the Swift  
15          Current arson?

16          A     No.

17          Q     No. You were first mislead in that in April,  
18          and you are still being mislead in May; correct?

19          A     Not given the full picture, no.

20          Q     Well, you are not being given any picture at  
21          all, are you?

22          A     Not much.

23          Q     Now, it is according to Vandergraaf's own  
24          evidence that he sat through the whole trial.  
25          Do you recall that?



1 A I don't recall him being there, no.

2 Q You don't?

3 A No.

4 Q Okay. Assuming for a moment that he was there,  
5 and when Zanidean was cross-examined, as he was  
6 on the issues that Mr. Code asked you about, I  
7 won't go over them, but it related of course to  
8 Swift Current and immunity and so on, do you  
9 have any recollection at all of Vandergraaf ever  
10 drawing to your attention that maybe the  
11 evidence that Zanidean was giving was false?

12 A Not to my attention.

13 Q He never mentioned anything in that regard?

14 A Not to me.

15 Q And I suggest, notwithstanding that 15 years  
16 have passed, you would have remember it if you  
17 had been told that, i.e., that a Crown witness  
18 is lying?

19 A I expect I would, yes.

20 Q You would remember?

21 A I can't say for sure, but I would think I would.

22 Q Now, Mr. Libman asked you, or told you about  
23 evidence that Anderson, Paul, and Vandergraaf  
24 had given to this Commission. And what they  
25 have said is that Bruce Miller told them that

1           Zanidean was not to be told about the fact that  
2           he had immunity on the Swift Current fire until  
3           after he had given his evidence.

4   A    Okay.

5   Q    The essence of what they are alleging Mr. Miller  
6           told them resulted in Mr. Zanidean testifying  
7           falsely, but he didn't know it was false,  
8           because when he was cross-examined on the issue  
9           of immunity, he said that he didn't have  
10          immunity.

11   A    Right.

12   Q    Which to his information was correct, but to the  
13          knowledge of Vandergraaf, Anderson, and Paul was  
14          false?

15   A    At least Anderson and Paul.

16   Q    At least Anderson and Paul, and Vandergraaf has  
17          admitted to us that he was aware of the  
18          arrangement as well with the Swift Current RCMP.  
19          So the essence of what they are testifying to is  
20          that Bruce Miller effectively counseled  
21          obstruction of justice by permitting a witness  
22          to testify to something that was false, that  
23          they knew was false but the witness didn't.

24   A    Well, is that counselling to obstruct justice?

25   Q    Well, whether it is or isn't, I suggest to you

1 it is not right.

2 A Probably not.

3 Q It is not, it is not ethical, surely you agree  
4 with that?

5 A Yes.

6 Q I suggest to you that the Bruce Miller that you  
7 knew and I knew would never give advice of that  
8 nature?

9 A I agree.

10 Q He was honest, he was ethical and he was  
11 forthright?

12 A Yes.

13 Q You liked him?

14 A Yes.

15 Q That's fine. Thank you very much.

16 (OFF THE RECORD DISCUSSION)

17 MR. ABRA: I am sorry, Mr. Libman has just  
18 pointed out that I made the same mistake as I  
19 did previously, I mistakenly referred to  
20 Zanidean as Driskell. The court reporter has  
21 signaled that she has caught it. She knows that  
22 I make lots of mistakes.

23 THE COMMISSIONER: I see we have a minute and 50  
24 seconds. Perhaps, Mr. Wolson, you could --

25 MR. WOLSON: I could start, but I think I will

1           wait until tomorrow morning when you are fresh,  
2           Mr. Commissioner.

3           MR. CODE: I would like to help Mr. Wolson out  
4           by suggesting that we use the minute and 30  
5           seconds to just briefly address scheduling.

6           I had a very fruitful meeting with all of  
7           my colleagues after court yesterday, and went  
8           back to the office and had a discussion with you  
9           about our discussion, and then drafted a memo  
10          which Mr. Giasson and I reviewed this morning.  
11          And I've typed it up and circulated it to my  
12          colleagues after the lunch recess. And it sets  
13          out a proposal to deal with the scheduling of  
14          final submissions. And I wonder if my friends  
15          have had a chance to look at it. We weren't  
16          able to put it all together last night, and so I  
17          have tried, I thought it would be helpful to put  
18          it in writing so that we all had a written  
19          record of exactly what we are proposing.

20          And if my friends could indicate whether  
21          what is set out in that memo is acceptable?

22          The one thing that we have left unsettled,  
23          because I think it was understood it would be  
24          more appropriate to let them try to work it out  
25          amongst themselves, was the order in which

1           counsel would make their submissions, aside from  
2           Mr. Lockyer and Mr. Kennedy and myself. So  
3           Mr. Giasson prepared this chart at page 3 that  
4           let's counsel fill in the blanks. But we've set  
5           out precise time slots for everybody, because I  
6           know some of my colleagues, especially  
7           Mr. Tapper, I know has an ongoing trial, and  
8           Mr. Prober has got to get away, and Mr. Wolson  
9           has got to get back. So I thought if everybody  
10          had a time slot that they could put themselves  
11          into, it might help a bit with their calendars.

12                 So perhaps I could ask whether this is  
13          satisfactory, whether we have got an agreement,  
14          or if there is additions?

15          MR. OLSON: Mr. Commissioner, this is very  
16          helpful, I think that accurately reflects the  
17          discussions. I just had one comment which I  
18          passed on to Mr. Code. If one turns to the back  
19          page, the final submission schedule, on systemic  
20          issues, October 27, the representations on  
21          behalf of Mr. Driskell and AIDWYC, and on  
22          November 10, the responses, and that's fine,  
23          except as indicated in the narrative that  
24          precedes it, Commission Counsel will not be  
25          making submissions on the proposed systemic

1            recommendations. I observed to Mr. Code what  
2            happens or what will be the process if there are  
3            no recommendations coming forward, or if there  
4            is a lack of some recommendations coming forward  
5            that you yourself might wish to make. If you  
6            don't have any proposals before you to make  
7            recommendations, can you self-initiate them?  
8            And that's the observation that I have. That  
9            may occur, I don't know at this stage. And this  
10           schedule and this process wouldn't afford you  
11           that opportunity, at least without giving us an  
12           opportunity to respond.

13           THE COMMISSIONER: I have to tell you, I haven't  
14           thought that far ahead. But I can tell you, if  
15           it came to that, or if I was going to make some  
16           recommendations that didn't flow from  
17           Mr. Lockyer and Mr. Kennedy, then I would of  
18           necessity be obliged to pass them by you and  
19           Federal Justice and Winnipeg Police, and would  
20           do so.

21           MR. OLSON: That suffices.

22           MR. LOCKYER: Can I address that? It is not a  
23           bad point. I never thought of it.

24           THE COMMISSIONER: I think it is a good one  
25           actually.

1 MR. LOCKYER: I mean, I can only speak from  
2 experience, but certainly in the Morin Inquiry,  
3 Justice Kaufman came out with a large number of  
4 recommendations that had not been put forward by  
5 any of the parties. Commission Counsel, in that  
6 case, made no submissions at the conclusion of  
7 the evidence in any regard, only counsel did.  
8 And certainly some counsel put forward  
9 recommendations, but Justice Kaufman made a lot  
10 of recommendations that weren't specifically  
11 suggested by anyone, and obviously amended some  
12 suggestions that were made, and rejected others  
13 and adopted some, but certainly had a lot of his  
14 own.

15 If you just look at the ones on the Centre  
16 of Forensic Science, for example, because I was  
17 looking at them in preparation for today's  
18 panel, I would reckon that probably 20 of them  
19 were not actually put forward by any counsel.  
20 And a classic example, as I recall, for example,  
21 just taking today's evidence, was the advisory  
22 committee, he recommended the advisory committee  
23 which was then formed. It probably came up in  
24 the evidence, I can't remember, but certainly I  
25 don't recall any counsel putting it forward as a

1 proposition. And I would feel that, obviously  
2 it is up to you, Mr. Commissioner, but I would  
3 feel, I would think you might find it a little  
4 straight jacketing if you have to come back --  
5 THE COMMISSIONER: I would.

6 MR. LOCKYER: -- every time you want to make  
7 another recommendation. Now, if you wanted to  
8 make a truly fundamental recommendation that  
9 hadn't been asked for by anyone, just to take an  
10 example in context, let's suppose no one were to  
11 recommend that the RCMP lab would be pulled out  
12 of the RCMP but you decided that you thought it  
13 should be, that's a pretty fundamental  
14 recommendation, to say the least, and one might  
15 think you should call at least on Mr. Gates to  
16 give you submissions on it. If on the other  
17 hand you were going to recommend, just to use  
18 the same example, and I only use it because it  
19 is fresh in our minds from this morning --

20 THE COMMISSIONER: Or keeping records or  
21 something like --

22 MR. LOCKYER: Or that perhaps you thought some  
23 kind of committee should be set up to examine  
24 that issue, in other words, there is no final  
25 decision on a fundamental issue -- I'm not



1       trying to make a point in that context, but it  
2       is just because it is fresh in my brain --  
3       that's a little less, far less fundamental.  
4       But, I mean, I will certainly be making a  
5       situation, for example, to take the Monday  
6       session with respect to the setting up of some  
7       kind of an innocence idea, whether it is in  
8       Manitoba or universal, whatever it may be.

9               And you may feel -- let's suppose we were  
10       to recommend, or ask that you recommend a  
11       national policy in that regard, and you felt  
12       that you should only do it as a test pilot  
13       project in Manitoba, does that mean that you  
14       have to call back counsel to discuss that issue?  
15       I would hope not.

16              The fact is, these issues have been aired  
17       in the evidence, they are going to be further  
18       aired in the recommendations. And I'm quite  
19       sure that you are not going to make  
20       recommendations that are not in some way  
21       connected with the process that we have been  
22       engaged in.

23              And we can use our imaginations as to what  
24       you will be thinking about, and we have our own  
25       imaginations as to what we think would be there,

1 and I would hope that that would suffice. I  
2 just think it would be hopelessly unwieldy, and  
3 I would worry that it would mean recommendations  
4 that you feel would be appropriate, albeit  
5 not -- sort of recommendations to almost attach  
6 to other recommendations.

7 If you look at Justice Kaufman's, there is  
8 sort of a flow to the forensic recommendations,  
9 for example, in fact to all of them, but  
10 particularly the forensic ones, they sort of  
11 follow one after the other. We might lose a lot  
12 of benefits of your ideas if we have an unwieldy  
13 process.

14 So I said rather more than I meant to, but  
15 I hadn't thought of it until Mr. Olson raised  
16 it.

17 THE COMMISSIONER: There is a lot of meat there  
18 for me to consider. But I clearly couldn't come  
19 up with some significant recommendation that is  
20 going to have a significant cost effect, or  
21 personnel effect, which I guess is probably cost  
22 anyways, on Manitoba Justice or Winnipeg Police  
23 or RCMP, without at least giving them an  
24 opportunity to comment on it. But, again, as  
25 you say, I guess not every detail would I need

1 to have comments on. So I guess I will just  
2 have to give some thought to it.

3 MR. CODE: What might be a possible solution  
4 would be to find a compromise between the two  
5 positions -- and I'm sympathetic both to what  
6 Mr. Olson said and to what Mr. Lockyer has said.  
7 A useful compromise might be, once we have the  
8 October 27th submissions of Mr. Lockyer and Mr.  
9 Kennedy, if Mr. Dawe and I think that they have  
10 missed something quite fundamental that we are  
11 certainly going to raise with you when you are  
12 writing the report, that we could circulate some  
13 kind of notice to the other sides so that they  
14 would know that there are additional issues they  
15 need to address. But I agree with Mr. Lockyer,  
16 that certainly on minor implementation kinds of  
17 recommendations, one would not want to introduce  
18 a new procedure that every little recommendation  
19 has got to be vetted in advance with the  
20 parties. But I think we can work out some kind  
21 of a compromise along those lines.

22 THE COMMISSIONER: We will work on that. And  
23 you know, I guess the main thing is, I will  
24 certainly try to ensure that the parties that  
25 are going to be significantly affected by any

1 recommendation, I mean, not that the  
2 recommendation binds anybody, but where it would  
3 have the potential of doing that, that it is  
4 only fair that they have an opportunity to  
5 comment on it. But, again, if it is simply  
6 detail or a flow from a fundamental  
7 recommendation, then I wouldn't think that I  
8 need to advise.

9 MR. CODE: Can I just briefly, and I apologize  
10 to Madam reporter for going over our usual time  
11 here. One other brief scheduling matter for  
12 tomorrow that I just want to make sure that all  
13 my colleagues are aware that what we plan to do  
14 tomorrow, aside from finishing Mr. Lawlor's  
15 evidence, is we will file the Lerner and Schille  
16 statements, the two interviews that we completed  
17 over the adjournment period, which are now  
18 finalized, we will file them as exhibits.

19 Because I believe, as Commission Counsel, I'm  
20 obliged to file them, since I'm not recommending  
21 that either of them be called as witnesses. And  
22 then at that point, any additional submissions  
23 that Mr. Olson and Mr. Lockyer have on the rule  
24 27 motion that is still pending could be made to  
25 you orally, so that you would then be in a

1 position to make your ruling on the Schille  
2 matter. And that would then help us to know  
3 whether there is any evidence next week.

4 THE COMMISSIONER: I will make my ruling  
5 tomorrow after I hear -- I may have to adjourn  
6 for a short while, but I will make my ruling  
7 tomorrow after I hear further submissions on the  
8 Schille matter. And which reminds me, Mr. Code,  
9 I don't think I have a copy of the Lerner  
10 statement.

11 MR. CODE: I will make sure you get it.

12 THE COMMISSIONER: I have read Schille's, but I  
13 don't think that I have Lerner's.

14 Thank you all, and tomorrow morning at  
15 9:30.

16 THE CLERK: All rise. This Commission of  
17 Inquiry is adjourned until tomorrow, 9:30 a.m.

18 (Adjourned at 4:55 p.m.)  
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and correct transcript of our Stenotype notes as  
taken by us at the time and place hereinbefore  
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