A Review of Crown to Defence Disclosure Compliance
in the
James Driskell Murder Trial and Appeal
July 2004

This Review examines the issue as to whether or not Crown officials of the Department of Justice of Manitoba provided full and appropriate disclosure of all relevant information to the defence in the prosecution of Mr. James Driskell for first degree murder at the trial in June, 1991, and for the subsequent appeal in December, 1992. It follows directly after my findings in my earlier Review entitled "**A Review of Police to Crown Disclosure Compliance in the James Driskell Trial and Appeal**" dated March 31, 2004 (hereinafter referred to as the "earlier Review").

Authorization

At the outset, it is appropriate to cite the *Terms of Reference* by which this Review was initiated. It is as follows:

"*Terms of Reference*

To: John J. Enns

Decisions of the Supreme Court of Canada have confirmed a broad obligation on the part of the Crown to disclose information to an accused relating to the charge he or she is facing. The obligation to disclose is subject to only three exceptions. The Crown has no duty to disclose information that is not relevant, that is not in its possession or that is privileged.

In the case of James Driskell, convicted in 1991 of the murder of Perry Dean Harder, questions have recently been raised concerning whether and to what extent the Crown gave full disclosure of all relevant information and documents to the Defence.

I request that you review the matter and provide me with your advice on whether appropriate disclosure did take place, having regard to the Crown and Defence

files, together with any other information you feel is necessary or that may be helpful in the circumstances.

In the discharge of your responsibilities you may have full access to all staff employed by or documents held within Manitoba Justice. I would appreciate your advice on these matters as soon as reasonably practicable.

Dated at Winnipeg, Manitoba this 11 day of March 2004.

Gord Mackintosh
Minister of Justice
Attorney General"

Interpretation

These Terms, as were the Terms for the earlier Review, are clearly broad and require as thorough an examination of the issues of disclosure as possible. As stated in the earlier Review, and I believe it to be important to again point out, that neither the earlier nor this Review is **directly** concerned with the issue of the guilt or innocence of James Driskell. **Indirectly** it is vitally concerned with those questions as it is clear that if there was not appropriate and full disclosure either from the police to the Crown and then from the Crown to the defence, the likelihood that a new jury, or appellant court, in considering all the facts, and especially having to weigh the questions of credibility of crucial Crown witnesses, may come to different conclusions than those which the jury reached at Driskell's trial in 1991 or the decision of the Manitoba Court of Appeal, had the non-disclosed information been revealed at the appeal stage in 1992. It is not, however, my task to express an opinion on the matter, as that question must await a decision as to whether or not the Application pursuant

to Sec. 696 of the Criminal Code of Canada, to the federal Minister of Justice results in a direction to refer the case back to the courts, or for a new trial. That Application is presently pending.

The phrase in the Terms "*having regard to the Crown and Defence files*" must be considered within the limited authority of this reviewer. Not having the powers of a Commissioner to subpoena witnesses or mandate responses from anyone, I interpreted the phrase as meaning that I should seek, as far as possible, voluntary responses from counsel, both Crown and defence, and rely as well on the material available to me in the voluminous Crown files. For that purpose, inquiries were made to various counsel and certain information was received.

The full Crown files

In researching the issues, I again perused the material in the Crown's files. They are listed at page 4 to 7 in my earlier Review and need not be repeated here. The departmental directives listed on pages 3 and 4, as well as the case law authorities referred to throughout the earlier Review and those listed on page 3 of the earlier paper entitled "**Review of Prosecution Policy on Disclosure – Issued May, 2001**" which was added to the earlier Review and also dated March 31, 2004, – all this material assisted me in the research into the important issues involved.

My research leads me to conclude that there are two types of information which were not disclosed to the defence. The first type consists of information which the police had, but had not passed on to the Crown, who therefore could not disclose it to the defence. The second type consists of information which the Crown possessed, but did not disclose to the defence. Both are equally important, because, from the point of view of the defence, it is of no consequence as to whether the police or the Crown failed to disclose, as the results are that in both cases the defence does not receive full and appropriate disclosure of all relevant information, as per *Stinchcombe*, and the various departmental policy directives.

The non-disclosed information follows:

Information not disclosed to the Defence by the Crown because the Police had not disclosed the information to the Crown.

The following list repeats the findings of my earlier Review, but for the sake of easy reference, are repeated here (the explanatory notes and commentaries about each of them which appear in the earlier Review are however, not repeated here): –

1. The fact that on October 9th, 1990, the Crown witness John Gumieny contacted the Crime Stoppers office, filing a claim for a reward for giving information about the Harder homicide, for which he received a $400.00 reward on November 6, 1990. (p. 66 – 1993 Winnipeg Police Department Review)

2. The fact that on the same day, October 9th, 1990, the Crown witness Reath Zanidean contacted the Crime Stoppers office, also claiming a reward for giving information about the Harder homicide, for which he received a reward, the amount of which is not disclosed. (pp. 164/165 – 1993 WPD Review)

3. The fact that both Gumieny and Zanidean may have contacted Crime Stoppers before, but certainly after they had already spoken to police investigators about the Harder homicide. (p. 164 – 1993 WPD Review)

4. The fact that Sgt. Harry Williams of the Winnipeg Police Department was called by Zanidean to help expedite Zanidean's claim for a reward from Crime Stoppers. (p. 67 – 1993 WPD Review)

5. The fact that prior to the time of the 1993 WPD Review, there was uncertainty about the practice of police actually recommending or in some manner encouraging persons who had already been interviewed by police, to attempt to obtain rewards for such information from the Crime Stoppers program. (p. 165 – 1993 WPD Review)

6. On June 20, 1991, some six days after the trial and conviction of Driskell, Mr. Brodsky, Q.C., Defence Counsel, received an anonymous telephone call from a man who alleged that an important witness at the Driskell trial had given false evidence. The call was tape-recorded and from its' contents, it was readily evident that the caller had considerable knowledge about the facts of the case. Whether or not Mr. Brodsky was able to recognize at that time the voice of the caller as being the witness Zanidean whose voice he had had the opportunity to hear during his day-long testimony on the witness stand a few days earlier, I have not been able to confirm, but at a later date, and certainly at the time of the preparation of the 1993 WPD Review, both Mr. Brodsky and the police were aware of the identity of the caller as the witness Zanidean. There is no reference in the Crown material that the fact of the telephone call was disclosed by the police to the Crown then or at a later date. (p. 84 – 1993 WPD Review and taped transcript)

7. Not every police officer's notes in his or her own notebooks, or copies of same, are contained in the Crown files. At trial, various officers refer to their notes and both Crown and defence then have access to these notes, but in the Crown files, they are mainly absent.

8. After the trial but before the appeal, in the course of the investigation into the Swift Current arson, Sgt. T. Anderson of the Winnipeg Police Service is reported to have told RCMP officials in Swift Current that the witness Zanidean had threatened to "go to the media" and basically recant his testimony given at the Driskell trial in the event that he was charged in the arson case. This assertion by Zanidean was not contained in any supplemental or other report in the Crown material. (p. 78 – 1993 WPD Review).

9. The witness John Gumieny told the writers of the 1993 WPD Review during that process, that Driskell had purchased a pair of steel-toe, cleated welder's boots from

> him for the express purpose of "kicking the shit out of Perry". This was not in his initial statement to the police, not in any supplemental report forwarded to the Crown, and had not been referred to in examination or cross-examination at trial. (p. 67 – 1993 WPD Review)

All of the matters listed as not having been disclosed, arose directly out of a reading of the 1993 WPD Review. It had been the decision of the Winnipeg Police Service in 1994 that that Review was to be considered an "internal document", not to be released to the public, and not even to the Manitoba Department of Justice. Justice Oliphant, A.C.J., Court of Queen's Bench of Manitoba, in his oral judgement dated November 24, 2003, in considering an application for an order to seal the report filed in support of Mr. Driskell's bail application, disagreed strongly with the view that its contents ought not to be made public; –

> "*The contents of the report, which I have read, are relevant, not only in terms of the application for judicial interim release, but also, in my view, in possibly assisting the applicant in demonstrating that his conviction for first degree murder in the death of Mr. Harder may well be the result of a miscarriage of justice. More questions are raised than answered in the report*".

Even though the 1993 WPD Review was completed more than a year after Driskell's appeal, had the decision not been made to treat it as a confidential internal document, all of these matters would have been known then. This would not have absolved the police from disclosing to the Crown such matters as known to them before the trial or before the appeal, it would nevertheless have ensured much earlier awareness of those matters than by virtue of Justice Oliphant's Order of November 24, 2003.

Information in the Crown's possession but not disclosed to the defence.

The defence was provided with only the following information regarding details of any protection offered to Crown witnesses: –

> "*we cannot provide details of the protection offered witnesses for fear of giving them away but can assure you that the protection amounts to provision of monies to help support them while they are protected and a constant surveillance over them*" (letter dated February 8, 1991 from Mr. George Dangerfield, Q.C. General Counsel, for the Prosecution, to Mr. Greg Brodsky, Q.C. Defence Counsel)

1. Not disclosed were the facts that this "provision of monies to help support", in the case of the witness Reath Zanidean, included the following:

   a. For several months before and after the trial, assistance with mortgage payments on his home.

   b. Assistance in the sale of his house in Winnipeg.

   c. Monthly rent payments at two different locations to which he had been moved.

   d. Moving expenses, telephone calls, motel accommodation, etc.

   e. Substantial retainer fees to Zanidean's lawyer while under protection.

   f. A lump sum settlement of $20,000.00 negotiated in December 1991, a year before his appeal.

   g. That in total this support over a period of about a year amounted to in excess of $70,000.00.

All of these amounts are in addition to an undisclosed amount received by Zanidean from the Crime Stoppers program.

2. While the Crown files contain extensive records of bills, invoices and other charges paid by Manitoba Justice officials to, or on behalf of, the witness Zanidean, there is only indirect and limited information about moneys paid to another important Crown witness, namely John Gumieny. That file appears to be missing. From what information that is documented about payments to Gumieny, the following facts were not disclosed to the defence:

   a. Moving expenses to another city.

   b. Monthly rental payments.

   c. Moving expenses to a second city.

   d. Some other undisclosed amounts.

These payments were in addition to the sum of $400.00 Gumieny had received from Crime Stoppers.

In a detailed response from Dangerfield, in a letter from Mr. Jay Prober, his counsel, he indicates that Brodsky

> "*was aware that 2 witnesses were protected and who they were*" and
>
> that "*there is always a danger in providing too much information*

concerning the circumstances of the protection afforded witnesses of disclosing their location and placing them at risk".

Prober also adds that Dangerfield

"*knows nothing about the $20,000.00 paid to Mr. Zanidean*"

and that Dangerfield provided Brodsky "*with the same trial brief setting out the information, the arguments and points of law that were provided to the trial judge*".

Helpful as this response is, it remains the fact that Brodsky, and subsequently the jury at trial, were only vaguely aware about the general extent of the financial assistance both Zanidean and Gumieny received. Obviously their new addresses and names, if any, and any other information which could lead to their discovery ought not to have been disclosed, – but to allow the information to be left at the trial that the financial support was minimal, was inappropriate. The trial brief did not contain any information about these arrangements.

In his response, Mr. Bruce Miller, Q.C., then Director Winnipeg Prosecutions, indicates that he had no direct dealings with Brodsky in the course of the Driskell trial and appeal, as Dangerfield had total responsibility for the case. He was aware of the witness protection financial assistance arrangements for Zanidean, but not those for

Gumieny. Miller adds that the whole issue of how much information should be disclosed regarding witness protection arrangements "*calls for a subjective opinion which may differ significantly amongst different people. I therefore do not wish to comment on the matter.*" It is important, of course, that in exercising this "subjective opinion" that the decision to disclose or not is based on adequate information about the details of the witness protection arrangements.

3. After Driskell's conviction, but nearly a year before the appeal, in a letter dated January 16, 1992, Mr. C. Richard Quinney, Q.C., Saskatchewan Justice, and directed to Miller, Quinney alerts Miller to the fact that the Crown witness Zanidean in the Driskell case likely committed perjury when testifying that his involvement in the burning down of his sister's house in Swift Current in July 1990 was an act of revenge, (not for a reward nor to assist his sister in making a claim for insurance on the house). Quinney specifically refers to the *dicta* of the recently released *Stinchcombe* Supreme Court of Canada case which mandates ongoing disclosure of material information, even after conviction. Attached to that letter is a copy of Driskell's own statement in which he outlines in considerable detail how, at Zanidean's request, he and Zanidean traveled to Swift Current together in July 1990 for the express purpose of burning down Zanidean's sister's house for the purpose of assisting her to collect insurance. This was done, and Driskell was eventually paid $900.00 by Zanidean, according to Driskell's statement, for his assistance. This

statement was given with Brodsky's consent and on the condition of immunity from prosecution for the arson for Driskell.

The Crown files do not reveal that any disclosure to Brodsky was given shortly following that letter, and then a second letter from Quinney, dated March 9, 1992 again directed to Miller, appears on the file. Quinney confirms the views he expressed in his letter of January 16th, and again urges disclosure to the defence. Attached to this letter is a report by the Swift Current RCMP in which the correctness of Driskell's allegation about the arson, as contrasted to Zanidean's testimony at Driskell's trial, is outlined. Quinney also indicates in this letter the following:

> *"With respect to the arson in this province, it seems clear that Mr. Zanidean is of the view that he was granted immunity from prosecution no matter exactly how this came about. To prosecute him at this point would in my view result in a likely successful abuse of process argument by his defence."*

Miller now has the two letters from Quinney, together with the statement of Driskell and an eight-page RCMP report on the Swift Current arson. According to the Crown files no disclosure to Brodsky is made reasonably soon after the second letter, and in fact nearly four months elapse, after which Miller, in a memorandum dated July 7, 1992 and directed to Dangerfield writes the following:

> *"I understand from my discussions with Mr. Lawlor that you will be assuming conduct of the Driskell case in the Court of Appeal. I am advised that it will be scheduled to be heard perhaps in December of 1992.*

In any event, I wish to bring to your attention material which was forwarded to me some time ago by the Department of Justice of Saskatchewan.

I apologize for the delay in bringing this material to your attention, however, I trust that you will make whatever use of it is appropriate in the circumstances.

Thank you for your continuing cooperation and assistance."

A thorough search of the Crown files does not reveal that any disclosure about this information as having been forwarded to Brodsky before or at the appeal in December, 1992. A perusal of Brodsky's Appeal Factum and Argument makes it clear that he had not received the information as no submission about it is included.

It is not until another memorandum from Miller to Dangerfield dated March 11, 1993, three months after Driskell's unsuccessful appeal, that any further action takes place. Miller writes the following:

"You will recall some time ago prior to the Court of Appeal hearing into the above-noted matter, my providing you with documentation which had been submitted to us by our colleagues from Saskatchewan. That information related to an investigation which had been conducted by R.C.M.P. in Saskatchewan in respect of alleged activities of Mr. Driskell and Mr. Zanidean.

Was that information disclosed to counsel for Mr. Driskell? If not, should we do so at this time?

If my memory serves me correctly, Mr. Greg Brodsky, Q.C. was counsel for Mr. Driskell both at the trial and in the Court of Appeal.

I will leave the issue in your hands for whatever action you deem appropriate. I would be pleased to discuss the matter further with you should you so desire.

Thank you for your consideration."

At the bottom of this memorandum, a handwritten note, presumably from Dangerfield, appears as follows:

"*Bruce*
I don't recall of the material.

Perhaps you could refresh my memory by showing it to me. I hesitate to agree to send it to counsel without first looking at it.

Geo."

Again this memorandum does not trigger a timely disclosure letter to Brodsky but, about a month later, Miller writes to Mr. Stu Whitley, Q.C., then the Assistant Deputy Minister, in a memorandum dated April 13, 1993, as follows:

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

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

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

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

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

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

Thank you for your consideration."

Following that memorandum to Whitley, and as a result of articles appearing in both the Winnipeg Free Press and the Winnipeg Sun, Miller writes to Corporal Tom Orr, RCMP "D" Division, in a letter dated April 15, 1993, concerning certain comments attributed to Staff Sergeant Ferguson of the Swift Current RCMP detachment in which Ferguson is alleged to have said that a decision not to prosecute Zanidean for the Swift Current arson was made following an agreement between the Saskatchewan and Manitoba Departments of Justice. The next day, April 16, 1993, Miller also writes to Quinney about the same matter, and requests confirmation that the decision not to prosecute Zanidean was **not** as a result of an agreement between the Departments, but independently made by the Saskatchewan authorities, and that the

decision was **not** an immunity decision, but based on the argument that as a result of conflicting reports filed by RCMP and Winnipeg Police Department, that a prosecution would fail on the grounds of the defence of "abuse of process". Quinney responds by letter dated April 28, 1993, in which he completely concurs with this version of the facts. Staff Sergeant Ferguson also files a supplemental report in which he expresses his regret at having unintentionally given the impression to media and to a private investigator, that his understanding was that an immunity deal had been made. He agrees that he had no basis for even indirectly suggesting this was the case.

These last mentioned letters and memoranda are the last record of any references to the Swift Current arson in the Crown files until years later. The "draft letters" intended for Brodsky and Janie Duncan referred to in Miller's memorandum to Whitley dated April 13, 1993, could not be located in the Crown files, nor could copies of final letters, (if they were prepared and sent) nor the "attached material" referred to in that memo having on it some indication that Dangerfield "*clearly agrees that the material should be sent to Brodsky with an explanation*". Nor could I locate any responses to this memorandum from either Whitley or Dangerfield. A thorough search of all the Crown material has failed to reveal any further related documentation.

It is troubling, furthermore, to note that only days after Miller's memorandum to him on March 11, 1993, Dangerfield prepared a memorandum dated March 16, 1993 for Mr. Ron Perozzo, then Acting Deputy Attorney General, which he entitled "**Briefing Note James Patrick Driskell**" in which at page 4, he asserts "*In short, the trial was fairly conducted with the defending counsel having been provided with full particulars of the evidence to be called against Driskell. Nothing was kept from him.*" This briefing note was transmitted, according to an attached facsimile covering page, on March 16, 1993 from Miller to Perozzo. Can one assume that Miller also read and concurred with Dangerfield's assertions even though only days before he was inquiring from Dangerfield whether or not he had disclosed the Swift Current information?

From the last memorandum having direct reference to the Swift Current correspondence which I found in files, namely the one dated April 13, 1993 from Miller to Whitley, it is clearly evident that Miller, Dangerfield, and assuming Whitley received that memorandum, Whitley also, were all aware then that the information had not been disclosed. As indicated earlier, there are no copies of the draft letters, or copies of the actual letters, (if they were indeed prepared) nor the attached materials with Dangerfield's comments, referred to in Miller's memorandum of that date. What has happened to these various important documents? I have not been able to

explain their absence despite diligent inquiries, and through searching all the material in the Crown files.

In response to my inquiries about the Swift Current correspondence, Dangerfield, through his counsel, indicates that he cannot recall having received Miller's memorandum dated July 7, 1992, and points to his handwritten note at the bottom of Miller's March 11, 1993 memorandum in which he states "*I don't recall of this material...*" as a further indication that he had not received or seen the July 7th memorandum. He furthermore points out that in the body of the July 7th memorandum, there is no direct indication as to the subject matter of that memorandum, however, each of Miller's memoranda have in the heading (not quoted in these Reviews) the identifying note "*re: R. v. Driskell*" and the memorandum itself does refer to "conduct of the Driskell case in the Court of Appeal." Further on in Prober's response, he explains that Dangerfield

> "*says now, as he said at the time of the Driskell matter (according to the memo dated April 13, 1993), that the information provided by the Saskatchewan Department of Justice concerning Zanidean's possible perjury during the Driskell trial should have been disclosed to Mr. Brodsky. According to the April 13, 1993 memo from S. J. Whitley to Bruce Miller 'Mr. Dangerfield clearly agrees that material should be sent to Mr. Brodsky'. This is based on the*

materials attached to the April 13th memo which appear to be no longer available for your consideration. This is most unfortunate".

The Crown files **do** contain the original letter from Quinney, the original statement of Driskell about his and Zanidean's involvement in the Swift Current arson, as well as a copy of the Swift Current RCMP Report about the arson. In Miller's various memoranda, I believe it can correctly be assumed that **those** documents are "the materials" he is referring to. Only in the April 13, 1993 memo does Miller add the words "*As you can see from materials attached, Mr. Dangerfield clearly agrees that the material should be sent to Mr. Brodsky...*" indicating that by that time, Dangerfield had actually seen the Swift Current correspondence and had either attached his own note to it, or had written a note directly on the material agreeing that the information should be sent. That note, or that copy of the material on which he wrote his views (if that was the case), cannot be located.

In Miller's response, he explains that although his position was that of "Director, Winnipeg Prosecutions" he was "*not Mr. Dangerfield's superior and because of his* (Dangerfield's) *seniority at the Bar and in the Department, it would have been inappropriate for me to direct Mr. Dangerfield as to what information should be disclosed about the Driskell case*"... "*As I believe you are already aware, as General Counsel, Mr. Dangerfield did not report to me. He reported directly to Assistant*

Deputy Minister, Stuart Whitley, Q.C.". For that reason, he explains, his memoranda to Dangerfield are not phrased as directives to be complied with, but simply as sharing information.

In Quinney's initial letter dated January 16, 1992, he refers, at the beginning of his letter, to his advising Miller in a telephone conversation the day before about the Swift Current information. If Miller had no direct involvement in the Driskell trial and appeal, the question arises as to why Miller did not advise Quinney at that early time to correspond directly with Dangerfield. As in the area of information about witness protection arrangements, an apparent lack of communication as between Crown officials arose here.

As to the important April 13, 1993 memorandum to Whitley, Miller explains

> *"It is my recollection that Mr. Dangerfield had drafted a handwritten letter addressed to Mr. Brodsky related to disclosure of the Zanidean information. I believe that I attached that letter to the memo that I sent to Mr. Whitley dated April 13, 1993. I understand from you that Mr. Dangerfield's handwritten draft letter is not now available.*
>
> *I am aware that it is Mr. Whitley's position that he does not recall ever receiving my April 13 memo. Part of his rationale is that there is no date stamp of receipt of the memo. I do not believe that interdepartmental memos between Crown Attorneys were date stamped at that time. But I am not sure whether my recollection is correct."*

In a detailed response from Whitley, he indicates that despite inquiries made to certain past and present departmental officials, and even after a reading of at least some of the material in the Crown files, that nevertheless "*none of this jogged my memory*" about the Swift Current information, and he goes on to say that had he indeed seen the April 13, 1993 memo from Miller, "*It seems unlikely that I would forget something as startling as this now appears to be*". He goes on to list a number of factors or possibilities about what might have happened, but basically concludes that he has no memory of the whole issue. It remains unclear as to what happened following the April 13th Miller to Whitley memo.

It is clear from all of this that Brodsky was not informed either before the appeal or in the years immediately following, of this serious allegation about Zanidean. This finding is confirmed in a letter, **a decade later**, dated November 18, 2003 from Crown Attorney Dale Schille and addressed to Driskell's present counsel, Mr. James Lockyer, in which he acknowledges that the Swift Current correspondence was never disclosed, and by which letter this is finally provided by enclosing copies of the Swift Current correspondence.

In the year 2000, Schille had reviewed the Crown files and was understandably of the view that as the last memorandum about the subject indicated that Dangerfield had prepared a draft letter with explanation, he therefore assumed that disclosure of this

information had occurred shortly after the April 13, 1993 memorandum. It was not until he was preparing for the Driskell bail application in November, 2003, on receiving the defence material that he realized that as the contents of the Swift Current correspondence were not alluded to in the defence material, that it had in fact not been transmitted to the defence. I drew these conclusions from a reading of Schille's undated **James Patrick Driskell** review (compiled in 2000) as well as from the contents of his letter to Lockyer dated November 18, 2003, and from a consultation with him.

It is this issue that is of very grave concern to me. That this information, first received in January, 1992, was not disclosed until November, 2003, is totally unacceptable. Senior departmental officials were aware of the nature of the information; were aware of the fact that the information impugned the credibility of the most important Crown witness in the case in that it strongly indicated that he committed perjury while testifying before the jury; were aware of this before Driskell's unsuccessful appeal at which the defence, if it had known about that, could have attempted to raise the issue; and even after the appeal, (as the duty to disclose clearly continues after all appeals are concluded), did not at that late date (April, 1993), transmit the information, – all these factors raise very serious questions which this reviewer cannot answer.

4. In a related matter, the question as to why Zanidean did not face a perjury charge, and why that decision was not disclosed to the defence, must also be considered. For the reason Quinney outlined in his letter to Miller of January 16, 1992, the Saskatchewan authorities felt they could not prosecute Zanidean for the arson in Swift Current. But that decision did not mean Zanidean could not be prosecuted for perjury for false evidence given at the Driskell trial in Winnipeg. A review of the evidence in support of this charge – that is: –

- Zanidean's sworn testimony disclosed in the trial transcript;
- the detailed statement of Driskell;
- the evidence of a number of telephone calls from Zanidean's home in Winnipeg to the home of his sister, then living in Edmonton, calls occurring shortly before and shortly after the arson occurred;
- certain tape-recorded comments Zanidean and Driskell make concerning Zanidean's sister and others who might connect them with the arson and payment;
- and the contents of the Swift Current RCMP report.

All this information seems to indicate that Zanidean committed perjury. For reasons not clear to me, a decision nevertheless was made and communicated in a letter dated February 1, 1994, from L. H. Klippenstein, then Deputy Police Chief, Winnipeg Police Department, to Miller stating: –

> "*The review of Reath Zanidean's testimony in the James Driskell murder trial has now been completed.*

> *Sergeant J. B. Bell has concluded that there is no basis for a perjury charge and both Chief J. B. D. Henry and I accept his conclusion and concur with his recommendation that the file be closed."*
>
> (copies of this letter were sent to Dangerfield, Ewatski and Hall)

Sgt. Bell's conclusion "*that there is no basis for a perjury* charge" against Zanidean, without providing any explanation as to why the incriminating evidence available at that time was not sufficiently cogent to merit a charge of perjury against Zanidean, remains troubling to me. While this decision, whether appropriate or not, was made well over a year after Driskell's appeal, as stated earlier I found no evidence of the disclosure of this decision, that is, not to prosecute Zanidean, having been given to the defence.

Conclusion

It is with deep regret that I have come to the conclusion, based on both my findings of non-disclosed items in the earlier Review and those referred to in this Review, that both the trial and the appeal of the James Patrick Driskell case was seriously flawed. While some of the items which I have found not to have been disclosed to the defence, were in themselves not very significant, others were quite important. And while some of the non-disclosed matters were perhaps considered at that time not necessary to be disclosed, while others may simply have been inadvertently overlooked; the consequences of all these non-disclosed matters, when considered cumulatively, are indeed troubling. At the trial, the jury was asked by the

Crown to accept the evidence of all the Crown witnesses, the most important of which were Zanidean and Gumieny. The non-disclosed items all bear upon those two witnesses, particularly Zanidean. As many courts have said, and it is merely common sense, that the issue of credibility is determined by a consideration of a multitude of factors. Even in cases where all relevant information about the background, intelligence, his or her independence or not, demeanor in the witness box, alertness, criminal record, if any, etc. of a witness is known, the decision to accept a witness as being credible or not, may be problematic. Therefore where the jury is not fully aware of all relevant information about a witness then it is reasonable to surmise that any finding of credibility of the witness would have been significantly influenced, if instead, all the information had been provided to the jury. It is this concern which underlies the ultimate importance of complete and proper disclosure in the broadest sense. Unfortunately, in my view, that did not occur in the Driskell case.

Having come to this conclusion, the question arises: Why did neither the trial judge nor the three appeal court justices find that the trial was conducted improperly? Were there no indications or suspicious responses by any of the witnesses, or by any submissions by either counsel, which should have alerted the judges to the fact that something was incorrect, or some information was missing?

The explanation is relatively simple. Both at the trial and at the appeal, the presiding judge or justices can merely consider the facts presented to the court. It was impossible for them to

have known facts which either the police or Crown possessed but had not disclosed to the defence and which were not lead in evidence at the trial. The appellate court relies exclusively on the transcripts of the trial and submission by counsel. Therefore, what was not disclosed, could not be considered by either the trial judge or the appellate justices. In the circumstances it was not surprising that in its short oral reason for decision Scott, C.J. M. speaking for the Manitoba Court of Appeal, in a brief oral judgement, stated: –

> "*In a model charge, the trial judge covered the relevant issues in an evenhanded and lucid manner. There is absolutely no merit to any of the plethora of complaints about the charge, nor with respect to the evidentiary matters raised on appeal.*"

If my conclusions are correct, as I believe them to be, then the case demonstrates how the possibility of a miscarriage of justice can occur despite the fact that very experienced and highly competent jurists presided at a trial and appeal. It is only when Crown and defence have the opportunity to examine and cross-examine **all** relevant evidence in an informed manner, where the defence is aware of any matters which may affect the credibility of a witness, whether directly related to the case at trial or not, that the true merits of our adversarial criminal justice system, arguably the finest and fairest in the world, are upheld.

The wisdom of certain common law prerogative writs and "habeas corpus" rights, and the codified rights under Sec. 696 of the Criminal Code, becomes most evident in cases of miscarriage of justice when all otherwise normal and seemingly proper trial and appeal procedures have been exhausted.

I realize that these latter remarks are not directly relevant to any of the Terms of Reference under which these Reviews were mandated, however, as the absolute importance of full and complete disclosure became more and more evident to me during my lengthy research into the case, I felt compelled to express these views here.

Other Reviews or Investigations

During the course of the preparation of this Review, an amendment to the initial Terms of Reference for this Review, in the form of an additional task, was initiated by the Minister on April 7, 2004. It is as follows: –

> *"Amendment to Terms of Reference*
>
> *To: John J. Enns*
>
> *By Terms of Reference dated the 6th day of January 2004, I asked you to consider whether appropriate disclosure to the Crown had been provided by the Winnipeg Police Department in the case of James Driskell; and by further Terms of Reference dated the 11th day of March 2004, I asked you to consider whether the Crown, in turn, had provided appropriate disclosure to the defence in the same case.*
>
> *I wish also to receive your advice on the following further question: On your view of the facts in the case, are there any further reviews or investigations by the Law Society of Manitoba, a law enforcement agency or any other independent third party organization that are warranted?*
>
> *Dated at Winnipeg, Manitoba this 7th day of April 2004.*
>
> *Gord Mackintosh*
> *Minister of Justice*
> *Attorney General"*

A consideration of these Terms makes it clear that the conduct of the investigating police officers as well as the conduct of any lawyer involved in the trial and appeal, is to be examined to determine whether there was improper, unethical or other misconduct such as would warrant a referral to independent third party discipline authorities, or indeed, if any criminal act may have been committed. The Terms clearly do not require an actual finding of improper, unethical or criminal conduct, but merely whether there are circumstances which would merit a referral to the appropriate authority to examine, leaving it to that body to make whatever findings it may.

This task will be dealt with in two sections. The first will consider the conduct of the investigating police officers, and the second will consider the conduct of Crown and defence lawyers appearing at the trial and the appeal.

The Conduct of the Police

The police investigation into the Perry Dean Harder murder was a difficult and complex one. The fact of the murder itself was not known until more than three months after it had occurred, – when Harder's mainly decomposed body was found. In addition to the gravesite forensic and autopsy inquiries, the numerous witnesses to be interrogated were asked to recall events which had happened as much as a year earlier, and several witnesses were witnesses of suspicious character whose credibility police investigators themselves were doubtful about. It is not the duty of this Reviewer to assess the strategy and effectiveness of

the investigation, but rather to determine whether the police acted in some abusive, unethical or other improper manner while carrying out the investigation.

To this end I made a request to Mr. George Wright, Commissioner, The Manitoba Law Enforcement Review Agency (LERA), to determine whether in the five year period from 1989 to 1993 any of the civilian witnesses called at the trial, or civilians interrogated by the police but not called as witnesses, had filed a complaint with LERA. In a response dated April 13, 2004, Mr. Wright informed me as follows: –

> "*A search was made as per your attached list and I found there were no match or complaints filed with these individuals.*"

Mr. Wright also provided me with the latest Annual Report (2002) of LERA and explained the scope and authority which the Agency has. It clearly has authority to receive and deal with complaints, of a wide variety of kinds, about any "*conduct or action of a municipal police officer in Manitoba.*"

It will be remembered that Ashif Kara, Shakif Kara, Ron Driskell, Doreen Berens, Clifford Scott Warren and Cheryl Maygard had all made accusations of wrongful treatment of one kind or another about the treatment they had endured in their dealings with the police. It is unfortunate that none filed complaints with LERA, which might well have been able to shed more light on their complaints in the intervening years. In several cases, these persons had had independent legal advice as well. This information from LERA confirms statements

made in the 1993 WPD Review in which the various accusations of mistreatment are outlined, but always ending with the comment that the person had not filed a complaint with LERA nor with the Winnipeg Police Department. There may be many reasons for not complaining, and in making these remarks, I do not mean to criticize any person for not having filed a complaint. It is merely the fact that no independent hearing about any of these matters has occurred which may have assisted my research.

In passing, I wish to thank Mr. Wright and his staff for the prompt and careful assistance given to me. The operation of an agency such as LERA is, in my view, a very important function in our society in dealing, as it does, with the many aspects of reviewing the conduct of law enforcement officers.

The authors of the 1993 WPD Review acknowledge some concerns which I believe should be examined.

1. The fact that Sergeant Wayne Harrison had, over a period of several months, received four telephone calls from Harder, after his arrest and being charged jointly with Driskell in certain stolen property offences. In some of these calls, he expressed fear for his safety from possible actions by Driskell; and that Harrison made no reports or notes of these calls until after Harder's body was discovered and identified much later. As it was apparently generally believed that Harder had left Winnipeg to avoid facing his trial in June 1990 and the expected gaol sentence, Harrison made no notes or reports of these calls until Harder's murder was revealed.

   This information was disclosed to Crown and defence and was the subject of thorough examination and cross-examination at trial. Regrettable as it was that Harrison did not make contemporaneous notes about these calls, it is a matter which internal police authorities can deal with.

2. There was the serious misunderstanding which arose as between members of the Winnipeg Police Department and members of the Swift Current RCMP Detachment in their dealings with the witness Zanidean regarding the arson investigation. As a direct result of that misunderstanding, the Saskatchewan authorities decided a prosecution against Zanidean had been so compromised as to make prosecution improper. That situation was addressed in the 1993 WPD Review and I believe that directives are now in place to prevent a similar occurrence from happening in the future. The real gravity of the matter was the fact that this matter was not accurately disclosed either by the police to the Crown, nor by the Crown to the defence. That will be addressed later in this Review.

3. The apparent practice by unnamed police officers of in some way encouraging or assisting informers to obtain Crime Stoppers rewards after they had already reported, not anonymously, to police investigators earlier about the same crime. Police authorities indicate that directives preventing this have been put in place in 1993 to prevent this from happing. Again, the problem for the Driskell case is that disclosure to the Crown and therefore to the defence, was incomplete because of this apparent practice at that time.

4. Questions are raised by the authors of the 1993 WPD Review about the circumstances and the manner in which statements from the witnesses Ashif Kara and Shakif Kara, in particular, and possibly others, were obtained by Detectives R. Morin and D. Shipman. Very serious accusations of abuse, verbal and physical, of threats and intimidation are made. Despite these allegations, and despite having engaged their own lawyer, no complaint to LERA was made, and it was left that the lawyer, Mr. S. D. Sarbit, would bring the matter to the attention of Dangerfield on the first day of the trial. The brothers both made it clear when being interviewed in 1993 that they do not want to lodge any complaint about this treatment and would not cooperate with any investigators about the matter.

At page 170 of the 1993 WPD Review the authors comment on police interview techniques and report writing.

> "***INTERVIEW TECHNIQUES AND REPORT WRITING***
>
> *During the course of reviewing the Perry Dean Harder homicide investigation we were impressed by the work of the investigators in dealing with some of the witnesses. Communicating effectively with people is difficult at the best of times and when you have to deal with people who are uncooperative, of low intelligence and/or have extensive criminal records the task becomes extremely difficult.*

Although the investigators were able to obtain valuable evidence from the witnesses in this investigation, it appears the methods used by some of them may cause concern if this investigation is reviewed in a public forum. The committee did not uncover any abuses of authority, intimidation or impropriety.

We understand not all interviews are conducted as a free flowing exchange of information between investigator and witness. There are times when investigators have to cut through the webs of lies and untruths and this has to be done in a far from friendly fashion. Investigators are expected to vigorously and aggressively question people if results are to be forthcoming. Police departments and the courts do not have difficulty with this as long as the investigator's actions do not amount to abuse or intimidation. The result of aggressive interviewing can take the form of allegations of abuse and/or the recanting of statements at a later date. This was the situation during this investigation and subsequent court case.

In an effort to combat these type of allegations certain precautions should be employed. Investigators must fully document the course of events surrounding all interviews including those which were difficult. If a witness had to be questioned in an aggressive manner and his cooperation was less than favourable it should be clearly reported. It is unrealistic to believe that every witness in this investigation was eager to supply investigators with the truth right from the start but most of the accounts of these interviews make the reader believe that this was the case.

There is growing acceptance among investigators to utilize electronic recording, either audio or video taping, to accurately record interviews with witnesses. Progressive thinkers agree this serves as an accurate record of what was said during an interview.

Obviously logistics do no always allow for this but a case can be made for this procedure when investigators have to spend valuable time in defending their version of events when a witness disputes the facts that are being attributed to him.

In any case, strong consideration should be given to the electronic recording of witness statements when a possibility of conflict may arise at a later date (i.e. in a court of law)."

As indicated earlier, several persons interrogated by investigators made allegations of various kinds of abuse. The reference in the second paragraph of the above quotation – "*it appears the methods used by some of them may cause concern if this investigation is reviewed in a public forum...*", this indicates an awareness of the possibility of improper interrogation, and at the same time attempts to address ways and means of correcting any improper interrogation procedure. As none of the persons making these allegations wishes to lodge complaints with LERA, or any other authority, that must conclude the issue at this time. However, with full disclosure provided, there would be opportunity to examine these issues in the event of a new trial.

These are the concerns I found raised by the authors of the 1993 WPD Review. In my earlier Review I listed nine items which I found had not been disclosed by the police to the Crown, as listed earlier in this Review.

Items #1 to #5 were all in relation to information about money rewards paid by Crime Stoppers to the witnesses Zanidean and Gumieny. I commented upon these, dealing with the issue of anonymity and determined that it was the view of the investigators that it was proper not to disclose this information. As it is normally the case that persons giving tips to Crime Stoppers remain unnamed, I accept this as the reason why no disclosure of these money rewards was made. It was only in the particular circumstances of this case, which, in my view, made disclosure necessary. In view of the assertion at page 165 of the 1993 WPD

Review that "*several policy and procedural issues were addressed regarding the Crime Stoppers program and the Winnipeg Police Informant Policy.*" I believe that that issue has been addressed adequately.

The next item listed (#6) relates to the anonymous telephone call to Brodsky a few days after the trial. According to the police the identity of the caller was not known to the police until the time of the preparation of the 1993 WPD Review. Once the identity and the nature of the contents of that call was known, there was a duty to disclose this to the Crown. The fact that the police believed that Brodsky knew this information then, didn't excuse their failure to advise the Crown, although it does to a certain extent explain this. I am unable to determine whether the failure to report this to the Crown was deliberate or merely an oversight. While Mr. Brodsky indicates he suspected the caller was Zanidean, he had no proof. The police indicate that while records of the telephone calls made from the place where Zanidean lived revealed that a telephone call was made from that number to Brodsky, it was not until the police had access to the tape recording of that telephone call (provided by Brodsky later), that they were able to confirm Zanidean as the actual caller and then only learned the content of his conversation with Brodsky.

Turning to the next matter referred to in the earlier Review (#7), – the matter of police officers' notes not all being in the Crown's files, this is a less serious omission and I make no comment about this.

The matter of the threat by Zanidean to "go to the media" if he was charged with the Swift Current arson (#8) is important. This threat was made and known to the police before Driskell's appeal and clearly should have been communicated to the Crown. In discussions with senior police about this, it was argued that there were frequent telephone calls between investigating officers and Crown officials, and that the possibility existed that the Crown was verbally informed about this. As I could not confirm from any Crown source, or from the Crown files that this had occurred, and as there is no reference to this in either the Crown or defence appeal factums, I believe it simply was not disclosed. This matter also relates to the other important issue, namely the disclosure of the Swift Current correspondence, and will be further commented on later on.

The last matter was disclosed only at the 1993 WPD Review and relates to the witness Gumieny's recollection of selling a pair of steel-toed boots to Driskell (#9). While this too ought to have been disclosed to the Crown, the duty is not so strong considering the fact that it only tends to strengthen rather than cast doubt about the correctness of the conviction.

Having reviewed all of these matters, the question then remaining is that raised in the Amendment to Terms of Reference cited above, namely "*are there any further reviews or investigations by...a law enforcement agency or any other independent third party organization that are warranted?*"

I have already commented upon certain new directives which the Winnipeg Police Service has instituted since the 1993 WPD Review. I have also reviewed a number of Winnipeg Police Service documents described as either Routine or General Orders relating to the issue of disclosure and other matters. It was indicated that due to the lapse of thirteen or more intervening years and the manner of preparing these directives then (i.e. not on a computer memory bank) that other documents may yet to be located in the Service's ongoing research into this matter, but as I do not wish to protract the completion of this Review unduly, I feel confident in making my findings with the material I have. From these documents, I am satisfied that the police administrators were generally aware of the duty to disclose all relevant information to the Crown. Former Chief of Police J. B. D. Henry specifically refers to the requirement of the *Stinchcombe* decision in a directive dated March 12, 1993. A number of more recent directives indicate an ongoing process of instructions to ensure complete information is being forwarded for bail applications, pre-trial and trial dealings with Crown prosecutors.

It is therefore my view that as to police conduct in their investigation of the Harder murder, no further "*reviews or investigations by...a law enforcement agency or any other independent third party organization*" are warranted. What is important, in my view, is that existing policies and guidelines, and instructions as outlined in the Winnipeg Police Service's "Routine" or "General Orders", and consistent with the *Stinchcombe* guidelines, be the subject of thorough training sessions and rigorous supervision. **Rank and file police officers**

must be made fully aware of the rules of disclosure, and supervisors must monitor timely compliance with these principles constantly.

The Conduct of the Lawyers

As the scope of the Amendment to Terms of Reference dated April 7, 2004, are quite broad in nature in requesting an opinion on the question "*...are there any further reviews or investigations by the Law Society of Manitoba, a law enforcement agency or any other independent third party organization which are warranted?*". I have therefore taken the view that all the lawyers who had any direct or indirect involvement in either the prosecution or defence in the initial stolen property offences in which Harder and Driskell were jointly charged, or in the prosecution and defence in the subsequent first degree murder trial and appeal against Driskell, should be included in this review. They are the following: –

- Mr. Ray Wyant, former Senior Crown Attorney, in charge of the prosecution of Harder and Driskell in the stolen property offences.

- Ms Naomi Levine, former Crown Attorney whose involvement was to attend court before Provincial Court Judge Arnold Connor, on the date set for the trial or preliminary hearing against Harder and Driskell on the stolen property offence charges, namely June 21, 1990. When Harder fails to appear, Levine requests and obtains a warrant for the arrest of the absent Harder, and she also seeks an adjournment of the hearing against Driskell, which Judge Connor refused to grant, and as a result, the charges against Driskell are discharged or dismissed.

- Mr. Tim Killeen, defence counsel for the late Mr. Harder. Killeen had no knowledge as to why Harder failed to appear and therefore did not oppose Levine's request for a warrant for Harder's arrest.

- Mr. Ian Garber, defence counsel for Driskell on the stolen property offence charges and initially on the murder charge. He appeared with Driskell on the scheduled hearing date for the stolen property offence charges before Judge Connor and when Levine requested an adjournment, as Harder had failed to appear, Garber opposed this request, and as indicated earlier, Judge Connor refused the request for an adjournment, and therefore, (as the Crown witnesses had been told not to appear because the Crown had anticipated a guilty plea from Harder), therefore in the absence of any evidence, the property offence charges against Driskell were discharged or dismissed.

  (There were other Crown Attorneys and possibly other defence counsel who may have appeared on remand dates, or had peripheral involvement in the prosecution and defence of the property offence charges leading up to June 26, 1990, but I see no reason to consider their involvement in this review).

- Mr. George Dangerfield, Q.C., General Counsel, in charge of the prosecution in the first degree murder trial as well as the appeal in the Driskell case.

- Mr. Gregg Lawlor, Crown Attorney, who acted as the assistant to Dangerfield at the first degree murder trial, but not at the appeal stage.

- Mr. Bruce Miller, Q.C., former Director, Winnipeg Prosecutions, who, by his position, had general supervisory responsibilities for City of Winnipeg prosecutions at that time.

- Mr. Stu Whitley, Q.C., former Assistant Deputy Minister of Justice, who likewise, by the fact of his position, had supervisory responsibility within the Manitoba Department of Justice at that time.

- Mr. Greg Brodsky, Q.C., Defence Counsel for Driskell at both the first degree murder trial and the appeal.

While the involvement of Crown and Defence Counsel in the earlier property offence charges against Harder and Driskell jointly, may not fall within the ambit of either the Terms of Reference or the Amendment to the Terms of Reference cited earlier, as it was the

Crown's theory that the motive for the murder was Driskell's belief that Harder had informed against him about the stolen property offences, I therefore took the view that the conduct of counsel involved in the earlier proceedings should also be considered here.

In considering the conduct of the various lawyers involved in the proceedings, I considered a number of sources, including a Manitoba Department of Justice Public Prosecutions "Policy Directive – Subject: Disclosure" dated January 28, 1992 (issued therefore only 12 days after the initial letter from Quinney about the Swift Current allegations); Chapters #9 and #10 of the Manitoba Law Society's "Code of Professional Conduct" entitled "The Lawyer as Advocate" and "The Lawyer in Public Office"; the *Stinchcombe* case, the "*Martin Report*", a number of articles referred to in these authorities, as well as certain sections of the Criminal Code of Canada.

With those principles and guidelines in mind, I considered firstly all counsel involved in the stolen property offence charges, namely Wyant, Levine, Killeen and Garber. The fact that the Crown did not call Wyant as a witness, is purely in the prerogative of the Crown, and in no way implies wrongdoing by him. The fact that Levine seemed unprepared as a witness and had to stand down from the witness box in order to give her an opportunity to review the Crown file on the property offence charges, may have several explanations, but do not suggest misconduct of any kind.

Apparently there had been some handwritten notes on the original stolen property offence files that, some time after Harder's death, were "purged" by someone. As I could not determine what the nature or content of these notes were, I am unable to comment on this. Generally speaking, I found many handwritten comments in the Crown files, suggesting to me that there was no overall effort made to erase embarrassing or confidential opinions or information.

Summing up, then, with respect to each of these lawyers, I found nothing to suggest any improper or unethical conduct. Each of these counsels carried out his or her function completely appropriately and in accordance with the principles governing Crown and defence professional ethics.

Turning to the prosecution and defence counsel in the first degree murder trial and appeal respecting Driskell, I firstly considered the conduct of Brodsky, defence counsel. In my view he was thorough and vigorous in representing Driskell's interest. Both at the trial and at the appeal, he astutely and aggressively put forward the allegations of the defence. The fact that the jury and subsequently the appeal justices did not concur in his arguments for an acquittal, in no way reflected upon his legitimate and proper defence tactics. Therefore I found nothing to suggest any improper or unethical conduct by Brodsky.

In considering the conduct of Crown officials, I will deal with their conduct at the **trial** firstly, and then secondly, their conduct before, at, and after the ensuing **appeal**.

Dangerfield, assisted by Lawlor, prosecuted the case at trial. In addition to the previously listed items of information which the police had failed to disclose to the Crown, (only those items which were known to the police before the trial) the main area of information known to the Crown before trial and not disclosed to the Defence, was the extent of the moneys and benefits paid to the witnesses Zanidean (and his counsel), and to Gumieny (but not including the $20,000.00 lump sum settlement for Zanidean which was not arranged until after the trial. Dangerfield indicates that he had no knowledge of the $20,000.00 settlement). The Crown had not yet received the information about Zanidean's alleged involvement in the Swift Current arson for insurance purposes, rather than a grudge against his sister. Dangerfield had disclosed to Brodsky that Crown witnesses were getting "*monies to help support them*" but no further details. Brodsky was aware of the fact that the witnesses Zanidean and Gumieny were under witness protection arrangements, the extent of this arrangement was not known to him. While Whitley and Miller were generally aware of the existence of witness protection arrangements, and Miller actually actively negotiated these, the primary responsibility of disclosing particulars to the defence for the trial lay with Dangerfield and his assistant Lawlor.

I am mindful of both Miller's and Dangerfield's comments about the need to be circumspect when making disclosure of witness protection arrangements, and take these remarks into account when considering the conduct of the Crown at the trial. In keeping with this care, Dangerfield properly did not raise in direct examination of the witnesses Zanidean and Gumieny any questions about their witness protection arrangement. In *Regina vs. Pollock*, June 23, 2004 Mr. Justice Rosenberg, J.A. of the Court of Appeal for Ontario, strongly criticizes Crown counsel for leading evidence of a witness protection program. Only if, in cross-examination a witness's motive is challenged as having been influenced by witness protection assistance, may the Crown in re-direct raise the issue. In the Driskell case Brodsky cross-examined vigorously on Zanidean's motive which only then lead to limited witness protection information being disclosed.

In conclusion, after a careful review of the many and complex procedures initiated in preparation for the **trial**, I have come to the view that, despite the failure to disclose certain information as mentioned, that the conduct of all Crown officials, directly or indirectly involved in the Driskell trial was not such as to warrant "*any further reviews or investigations...*"

As indicated earlier, it is the conduct of Crown officials leading up to Driskell's **appeal**, and in the immediately ensuing years, which are of very serious concern to me. While other post-conviction pre-appeal developments occurred, relevant to my considerations here, the one

issue which, in my view, is the most serious of all post-conviction developments, is namely the information Quinney passed on to Miller in his letters of January 16th and March 9th, 1992 both of which, together with their attached materials had to do with the information about Zanidean's alleged perjured evidence at the Driskell trial. While Miller did not have personal carriage of the prosecution, he was surely aware of the fact that Quinney's allegations seriously impugned the credibility of an important witness in the Driskell case, as he, Miller, was very much involved in negotiating the witness protection arrangements, including authorization of numerous payments, to Zanidean and his counsel, Mr. D. Kovnats.

That despite the two letters from Quinney, including a detailed statement by Driskell and an eight-page Swift Current RCMP Report on the arson, Miller delayed any action until his July 7th, 1992 memorandum to Dangerfield is very regrettable, and, I believe, negligent.

It should be noted that a Departmental Policy Directive, dated January 28, 1992, on the Subject: Disclosure, expressly calls for, among other things, the following:

> *"The guiding principle with respect to Crown disclosure should be full, fair, and frank disclosure of the nature and circumstances of the Crown's case, restricted only by a demonstrable need to protect the integrity of the prosecution against abuse or misuse of information. The fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction, but the property of the public to ensure that justice is done. (Stinchcombe v. The Queen)*
>
> *ix) Evidence which may assist the defence which the Crown is not intending to call as part of its case should be disclosed to the defence on a timely basis. This would include such matters as*

> *the identity of witnesses who fail to make an eye witness identification or other witnesses whose evidence is generally favourable to the accused.*
>
> *There is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution, without the need for a further request for disclosure. Evidence does not become irrelevant simply on the basis that the Crown Attorney does not believe it is credible. Credibility is for the trial judge to determine after hearing the evidence."*

This Policy Directive, it will be noted, was issued merely days after the initial letter from Quinney.

The July 7, 1992 memorandum to Dangerfield would presumably have, as attached material, the letters from Quinney, Driskell's statement and the Swift Current RCMP Report – a fairly substantial package of papers and therefore hardly something easily overlooked or misplaced. Nevertheless, Dangerfield asserts that he cannot recall having received it. There is no acknowledgement of the material in the file and when he does receive the next memorandum from Miller, dated March 11, 1993 (therefore after the appeal) his handwritten note on it that he doesn't recall the matter, seems to confirm this. From this it becomes obvious that Brodsky was not informed about the information in time for the appeal in December, 1992, being about a year and a half after Driskell's conviction in June, 1991. The seriousness of the delay in disclosing the information becomes more and more evident.

Apparently Dangerfield **does** become aware of the Swift Current information after receiving the March 11, 1993 memorandum from Miller, because in Miller's April 13, 1993

memorandum to Whitley, reference is made to conversations with Dangerfield, that he now agrees the information should be sent and has, at Miller's request, prepared draft letters of explanation about this to Brodsky as well as private investigator, Janie Duncan. There is no explanation from Dangerfield or in the files about the absence of copies of the draft letters (or final letters if they were prepared) nor of the material on or with which Dangerfield's notes attached. Again the file has no acknowledgement of its receipt by either Whitley or Dangerfield.

In relation to this April 13, 1993 memorandum from Miller to Whitley, in his response, as indicated earlier, Whitley indicates he has no recall of having received or seen it. With that "dead end", the Swift Current correspondence lies dormant for more than a decade, while Driskell is serving his life sentence without parole for 25 years!

Shortly after the unsuccessful appeal, more questions and allegations arise, either from private investigator Janie Duncan, Dan Lett, of the Winnipeg Free Press, Heidi Graham of The Sun, Peter Warren on the CJOB radio talk show, and others. As indicated in the earlier Review, this prompted former Police Chief Henry to initiate the 1993 WPD Review, and in the Crown files there is frequent reference to media inquiries and the need for appropriate responses. Was this attention by the media the reason for Miller's memorandum to Dangerfield dated March 11, 1993, in which he inquires as to whether or not the Swift Current correspondence had been disclosed? I was not able to determine that, but my reason

for raising the whole matter of media and private investigator's involvement is to point out that the Driskell case had become a high profile concern within the Department of Justice by the spring of 1993. Dangerfield had prepared a "Briefing Note" for the Deputy Minister dated March 16, 1993; and as well there were internal memoranda and FAX messages between officials which made it evident to me that at various levels of Departmental responsibilities, the case was being talked about.

With this in mind, I find it somewhat difficult to believe that neither Dangerfield nor Whitley, even thirteen years later, have no recollection of memorandums they should have received. I fully realize that each had many and varied duties and responsibilities, and yet, the nature of the circumstances would, in my view, have impressed themselves upon their memories. Miller's memoranda mention earlier conversations on more than one occasion, and the very act of Dangerfield writing an explanatory letter with additional particulars to Brodsky, would seem again to be an infrequent happening, given the seriousness of the disclosed material and the publicity then surrounding the case.

There is the further development that followed when Miller receives Sgt. Bell's opinion that there was insufficient evidence to charge Zanidean with perjury – as shown in Acting Police Chief Klippenstein's letter to Miller dated February 1, 1994 (copied to Dangerfield and others). Did neither Miller, Whitley or Dangerfield recall, or be reminded of the arrangement to send the letter of explanation with the material? Or the need to disclose that decision?

The incompleteness of the Crown file concerning this makes it literally impossible for me to pin-point the problem, but what remains is that by actions, or more precisely by inaction amounting to gross negligence bordering on the criminal offence of obstruction of justice, important disclosure did not take place. As it is not possible to determine specifically whose responsibility it was to ensure the disclosure of this information, as the Crown file is incomplete and the responses received inconclusive, I can only conclude that senior Crown officials, either collectively or individually failed seriously in their duty to disclose. In the absence of any evidence that this act of non-disclosure was done willfully, I believe it would be pointless to recommend possible criminal investigations, although if more information should become available, that possibility may yet have to be considered. It will be remembered that my Review was not initiated with powers to subpoena witnesses.

As to any referrals to the Law Society of Manitoba for conduct unbecoming a barrister or solicitor, I am likewise constrained by an absence of particular information, pointing to any one counsel. Again, should more particular information become evident at a later date that option may yet have to be considered.

Some concluding remarks

As this series of Reviews was the first which I have ever been asked to undertake, I had hoped at the outset that my research would not only confirm certain things, but also find the solutions to any problems my Reviews may reveal. Whenever inquiries are authorized by

public officials, one hopes for concrete answers and practical solutions. **The solutions indirectly recommended throughout these Reviews are not new ones, but simply a plea to all involved in law enforcement, to conscientiously and diligently follow existing principles and guidelines.** It is my hope that these Reviews will, in some small way, encourage that.

Respectfully submitted this 28 day of July, 2004.

John J. Enns