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

This Review examines the issue as to whether the investigating members of the Winnipeg Police Department (since re-named Winnipeg Police Service), provided full and appropriate disclosure of all relevant information and documents to the Crown Attorneys of the Department of Justice of Manitoba for the prosecution of James Driskell on a charge of first degree murder in June 1991, and for the subsequent appeal in December 1992.

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. It is recognized, however, that information in the possession of the police is deemed to be in the possession of the Crown and the police are expected to disclose to the Crown all relevant information in their possession other than that which is protected by privilege.

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 Winnipeg Police Department gave full disclosure of all relevant information and documents to the Crown so as to allow the Crown to properly fulfill its disclosure obligations.

I request that you review the matter and provide me with your advice on whether appropriate disclosure did take place, having regard to the full Crown file and the contents of a post-conviction internal Winnipeg Police Department analysis dated September 24, 1993 entitled "Perry Dean Harder Homicide Review".

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.

Depending on the results of your review, it may become necessary to review further disclosure issues, but for the time being I ask you to proceed as outlined above.

Dated at Winnipeg, Manitoba this 6 day of January 2004.

Gord Mackintosh
Minister of Justice
Attorney General"

Interpretations and Departmental Directives

A reading of these Terms makes it clear that this Review is not directly concerned with the issue of the guilt or innocence of James Driskell. Nor is it directed at the issue of disclosure to defence counsel, although that issue is directly influenced by findings on the main purpose of this Review, namely did the Winnipeg Police Department give full disclosure of all relevant information and documents to the Crown so as to allow the Crown to properly fulfill its disclosure obligations? In other words, was the Crown fully informed by the police investigators about the case.

Furthermore, the Review shall consider that issue "having regard to the full Crown file and the contents of a post-conviction internal Winnipeg Police Department analysis dated September 24, 1993 entitled "*Perry Dean Harder Homicide Review*" (hereinafter referred to as the 1993 WPD Review). The complete and unedited version of the 1993 WPD Review was provided to me as well as the following:

(a) Pre-trial Disclosure of Evidence Policy dated August 29, 1985, prepared by John P. Guy, Q.C., then the Assistant Deputy Attorney General of Manitoba.

(b) Manitoba Department of Justice, Public Prosecution Policy Directive. Subject: Disclosure, dated October 20, 1990.

(c) Manitoba Department of Justice, Public Prosecution Policy Directive. Subject: Disclosure of Information in Police Files, dated April 16, 1991.

(d) Manitoba Department of Justice, Public Prosecution Policy Directive. Subject: Disclosure, dated January 28, 1992.

(e) Manitoba Attorney General Prosecution Guideline. Subject: Manitoba Policy on Disclosure by the Crown. Guideline No. 36 (undated)

(f) Memorandum from Crown Attorney Russ Ridd. Subject: Disclosure, dated May 7, 2001

(g) Article from Criminal Law Quarterly by Mr. Michael Code, entitled "Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage", published in 1998.

(h) Law Reform Commission of Canada Report #22 entitled "Disclosure by the Prosecution" and dated June, 1984.

(i) The Inquiry Regarding Thomas Sophonow, by Commissioner, The Honourable Peter de C. Corey, dated September 2001.

(j) The oral judgement of Mr. Justice Scurfield, Manitoba Court of Queen's Bench, dated November 28, 2003, R. v. Driskell.

(k) The written judgement of Mr. Justice Scurfield, delivered January 8, 2004, R. v. Driskell.

(l) The Supreme Court of Canada decision in *Stinchcombe v. The Queen*, (1991) 3 S.C.R. 326, delivered November 7, 1991.

The full Crown files

For this Review, all material known to be in the Crown possession was provided. This amounted to some eight cartons of reports, diagrams and files which contained the following information: −

(a) Winnipeg Police Department reports, including: −

- investigators occurrence reports
- numerous supplementary reports
- witness and suspected persons statements
- property descriptions, values, and theft reports concerning same
- criminal records of certain witnesses
- photography and diagrams of scenes and vehicles
- memorandums and correspondence with Crown Attorneys regarding disclosure items
- copies of many hours of telephone interceptions of suspects
- vehicle registration information
- Ident, fingerprint – soil shovel casting comparison
- telephone records as to names

- other investigatory matters

(b) Forensic Reports, including: −

- University of Manitoba entomology reports
- autopsy reports
- Medical Examiner's reports
- soil analysis reports from specialist
- gravesite and body insect analysis
- correspondence from various experts to the Crown
- RCMP Crime Lab reports on fingerprints and hair and fiber analysis
- other forensic information

(c) Ontario Provincial Police reports, including: −

- statements from witnesses in Rushing River Provincial Park area
- hotel and motel clerks
- vehicle removal personnel
- general description reports

(d) Court documents, including: −

1. The indictment and other informations
2. Subpoena returns
3. Pre-Trial Conference and notes
4. Jury lists and questions
5. Crown Brief prepared for trial

6. Crown opening remarks

7. Crown and defence submission at trial's end

8. Case law

9. Complete trial and appeal transcripts

10. Crown and defence appeal Factums

11. Manitoba Court of Appeal decision

(e) Departmental correspondence, including: −

- Crown to Crown memos
- Crown to defence letters
- Disclosure memos and lists
- Handwritten notes for trial
- Reports to senior departmental offices, including briefings for the Minister and Deputy Minister
- Reviews of the case by Crown Attorneys
- A whole file of letters regarding the financial arrangements made for various witness protection cases, including letters of authorization for payments, copies of invoices and bills related to this, as well as settlement arrangements
- A lengthy series of letters, post-conviction, with a private investigator, Janie Duncan, acting for Mr. Driskell
- A lengthy series of letters, continuing to the present, with Mr. James Lockyer, acting for Mr. Driskell

- Correspondence with various authorities in Canada and Birmingham, England leading up to the authorization of DNA analysis
- Lengthy DNA reports and invoices for this
- More recent correspondence between the department and others regarding the pending applications for Mr. Driskell's bail application and the federal review under s. 696 of the Code

(f) Miscellaneous matters, including: −

- Copies of media inquiries
- briefings for media responses
- incidental inquiries

Research and Initial Findings

In assessing this voluminous material, I spent more than a month reading the many files so as to become familiar with the whole matter. Very considerable numbers of files were either photocopies of other files, or were concerned with matters arising years after the conviction and appeal. Nevertheless, I appreciated the fact that the whole file, from pre-charge times to the present, was made available to me to enable as thorough a review as possible.

It soon became evident to me that over the course of twelve years, and the intervening access to the files by various departmental officials, that the extensive nature of the files were not always sequentially organized. This made it necessary to frequently refer back to an earlier

file to confirm dates or establish the completeness of a report. In this regard, I was informed that a perennial problem arising from inadequate staff and resources for maintaining the massive departmental filing system existed, making reliable access to old files more problematic. Of considerable assistance to me was a review compiled by Crown Attorney Dale Schille, dated February 22, 2002.

I am informed that for the preparation of the 1993 WPD Review, that the original police file provided to the Crown in the Driskell case was released to Inspectors R. G. Hall and J. J. Ewatski, now Chief Ewatski, of the Winnipeg Police Department. I found no record of the release of the file, either by way of an acknowledge of receipt by the police or a confirmation of release from departmental officials. This fact may have lead to the concern which was outlined in a Memorandum by Det. Sgt. John Burchill and addressed to Crown Attorney, Dale Schille, dated June 24, 2003 (ten years later) in which he points out that some 100 pages of the "pink copies" of the Police Report which routinely, at that time, were forwarded to the Crown, were still in the possession of the Winnipeg Police Service and therefore missing in the Crown's files. Further comments about these "missing 100 pages" will be made later in this Review.

Having acquired a thorough knowledge of the whole matter, I then commenced a methodical comparison of the contents of the Crown files, with all the matters referred to in the 1993 WPD Review.

Initially I confirmed that for each of the thirty-four civilian Crown witnesses who testified at the trial, there were corresponding police reports and where statements obtained from such civilian witnesses, the statements were also in the Crown files. Next, I checked for police reports for each of the nineteen police officers who testified, and I found all of these reports to be included in the Crown files. There were fifty-five other civilian witnesses referred to in the 1993 WPD Review who were not called as witnesses at the trial but had some involvement either in the investigation of the crime (such as forensic and medical experts), or had been referred to by other witnesses. I found in the Crown files the related reports covering each of these persons and their reports or statements. Then I examined the trial transcripts for the possibility of witnesses' names appearing for whom there were no reports or statements in the Crown files, and found only that Mr. Ian Garber, who had been called by the defence, was not covered by a police report, although his involvement as counsel for Mr. Driskell in the earlier property offence charges in which Driskell was jointly charged with the late Perry Dean Harder, is reported in both the 1993 WPD Review and in the Crown files.

I next examined the various exhibits and documents referred to in the Trial Exhibit Lists and again found all had been referred to by various police and civilian witnesses in the reports in the possession of the Crown. While the 1993 WPD Review does not categorize the exhibits by way of a list, whenever an exhibit is referred to in that Review, there is a corresponding report of that material in the Crown files. There is also a report about the allegations of an inmate then serving a sentence at Stony Mountain Penitentiary, named Marc Eric Roger

Robichaud. He was not a witness but subsequent to the trial and before the appeal, made certain allegations. These are referred to in the 1993 WPD Review and I also found the report covering his allegations and his statement in the Crown files.

Before commenting on certain matters which I did not find in any of the Crown files, (or by way of any other communication), I wish to comment upon the relatively quick progress of the Driskell case, − that is from the date of initial investigation and arrest, to the trial and conviction. Keeping in mind that this was a first degree murder case, that many matters needed to be investigated, numerous witnesses interviewed, extensive forensic preparations for completion, and of course, the ongoing duty to prepare disclosure material for the defence, it is interesting to note that Driskell was arrested on October 22, 1990, and was convicted on June 14, 1991, approximately eight months later, well within the eight to ten month timeframe enunciated in the *R. v. Morin* (1992) 1. S.C.R. 771 judgement. This is an stark contrast to the situation in *R. v. Willingham* as outlined in a recent, as yet unreported, Winnipeg decision by Susan Devine, P. J. delivered February 20, 2004, which resulted in a judicial stay of proceedings due to delay. Instances of delays in cases of many more months are cited in her decision.

I raise this matter because the issue of disclosure in a complex case is always time-consuming. In the Driskell case, the Crown elected, as is its right, to seek and obtain permission to proceed by way of “direct indictment”, thus eliminating the need for a

preliminary hearing. Cogent reasons for this were given and were recognized in granting permission to proceed directly. In addition, the Crown sought and obtained a ruling for an early date for the trial − initially in April, 1991 and then it was agreed to commence June 3, 1991. A pre-trial conference before the presiding judge had occurred, at which agreements and further requests for particulars were made. Some particulars did not reach defence counsel until well into May.

The motion to seek a direct indictment is an "ex parte" motion before a Justice of the Queen's Bench. Defence counsel has no standing in such instances. I am given to understand that while that was the case then, in recent years a policy of informing defence counsel in advance of making such a motion is done, permitting submissions to the department to be made and that defence counsel's concerns are taken into consideration in deciding whether or not to seek a direct indictment. That seems eminently more fair.

With the benefit of hindsight, perhaps in the Driskell case it would have been better to have convened a preliminary hearing to enable both Crown and defence to test issues such as the credibility of the two main Crown witnesses, Reath Zanidean and John Gumieny. New proposed amendments to the Criminal Code providing for "issue-driven" limited preliminary hearings may have helped here. That the personal safety of witnesses and the ongoing expense of the witness protection arrangements for them, motivated the move for an early trial date is understandable, and yet there seemed to me to be almost undue haste to get the

trial over. I hasten to add, however, that nowhere in the files, letters or transcripts from the trial, did I find any objection from the very experienced counsel for the defence, concerning inadequate time to prepare for the trial.

Judicial Commentaries

There are certain aspects of the material which I have mentioned thus far about which a comment should be made. In *R. v. C. (M.H.)* (1991), 63 C.C.C. (3rd) 385, McLachlin J. in her reasons on behalf of the Supreme Court of Canada said,

> *"This Court has previously stated that the Crown is under a duty at common law* (my emphasis) *to disclose to the defence all material evidence whether favourable to the accused or not".*

In other words, even before the *R. v. Stinchcombe*, a Supreme Court of Canada decision delivered on November 7, 1991, about a year before the Driskell appeal, and even before the enactment of the Charter, particularly Sec. 7 and Sec. 11(d), guaranteeing the principle of fundamental justice and the right to making full answer and defence, – there was at common law, the duty to disclose both favourable and unfavourable relevant information to the defence. This duty was Justice Department policy as evidenced in the 1985 policy directive by then Assistant Deputy Attorney General, John Guy, Q.C., and repeated in all of the subsequent departmental directives referred to earlier in this Review.

A number of persons interviewed by the police expressed strong views that Driskell was not the killer. Several named other persons as the culprit. Each of these other suspects were

investigated without obtaining any incriminating evidence such as would warrant arrest and charge. Suspicions about the allegations made by witnesses accusing Driskell are also included in police files, suspicions based mainly on the fact that the witnesses making these allegations had criminal records and had themselves some knowledge of the deceased Harder, some of whom were suspected of having both opportunity and motive to use violence on Harder. These issues are all dealt with in the 1993 WPD Review and, in the Crown files, I found the corresponding statements and reports. The theory that likely more than one person was involved in the crime is documented in both the 1993 WPD Review as well as in the Crown material.

In summary, subject to certain significant exceptions, which will be referred to later, I am of the view that very substantial compliance with all disclosure requirements took place in the Driskell case as between the police and the Crown. Consistent with this assertion is the fact that a reading of the trial transcripts reveals that the defence made no requests at trial for further particulars. While I do not suggest that the defence was completely satisfied with the particulars received, as I have not had access to the privileged files of Mr. Greg Brodsky, Q.C., counsel for Mr. Driskell, nonetheless as the *Stinchcombe* judgement does indicate that there is a duty on counsel for the defence to make timely requests for disclosure, it may not be unreasonable to assume that if no objections to inadequate disclosure is made at the outset of, or during the actual trial, that disclosure to the satisfaction of the defence had occurred. I found no such objections reported in the trial transcripts. Such an assumption would be

inappropriate however where there is evidence or information unknown to the defence, who could then surely not be blamed for not asking for information about a matter he did not know existed.

A consideration of the several departmental policy directives, together with the various judicial *dicta* in *Stinchcombe* and related cases, both before and after the Driskell trial, leads me to the conclusion that Crown Attorneys within the Manitoba Department of Justice had been well informed about their duties relevant to disclosure and particularly as this duty extends to providing the defence with information. A reading of all these directives is, however, less instructive on the duty to ensure that complete disclosure from the investigating authorities or the police has been received. The Crown can only request full information from the police, relevant to each case. It cannot dictate or order the police in the manner of the investigation, although a high degree of cooperation should and does exist between the two. An instructive commentary on the long established common law principle which encourages a certain independence and distance between the investigator (the police) and the prosecutor is found in Mr. Michael Code's paper published in the 1998 Criminal Law Quarterly, where at page 339 he writes: –

> *"One of the principle ways in which Canadian Crown counsel and their English counterparts in D.P.P.'s office have traditionally maintained this independence from the police, unlike their American counterparts, is by not becoming involved in the investigation. The simplest illustration of this approach to independence is the practice of experienced Crown counsel who insist on always being provided with a written brief or summary of the relevant evidence by the police and refrain from interviewing police witnesses. Legal advice is thus provided in*

> *a detached manner on the basis of the written brief and not on the basis of subjective impression, sympathies or interests that might arise from becoming associated with the investigation."*

While this is clearly the practice in Manitoba (as it should be), the result is that the main emphasis contained in the several policy papers or departmental directives listed earlier in this Review, is on the need for full disclosure to the defence, ultimately the most important aspect of the issue of disclosure. These policies and Departmental directives are silent on guidelines as to how to ensure that the Crown has received full disclosure from the police. As indicated, the Crown can only make its requests known to police and trust that full disclosure from the police will be forthcoming. This sometimes may lead to misconceptions and the perception that Crown is negligent in its duty.

Nevertheless, as Justice Straychysn (and others before him) noted in *R. v.Greganti* (2000) O. J. No. 34 (Ont. Sup. Ct.) on the issue of disclosure:

> *"It is clear however that the sins of the police are the sins of the prosecution".*

In the recent *Willingham* case cited earlier, Devine P. J. points to a troubling situation apparently now existing in the following terms:

> *This issue of disclosure as between police and Crown is a troublesome one and warrants further comment. Even on the basis of my personal experience as a judge, the situation that arose in this case is far from unusual. Crown are frequently advising in docket courts that despite repeated requests, they are waiting for certain information to be provided to them by the police…Matters are being adjourned again and again, clogging up our court dockets and contributing to court backlogs…"*

While disclosure of information from the police to the Crown was not delayed in the Driskell case (with the exceptions noted hereafter), the *Willingham* judgement points out what can become a systemic weakness in the whole area of disclosure − both from police to Crown and consequently from Crown to defence.

Therefore unless there is total disclosure of all relevant material by the police, the Crown is not in a position to make appropriate and complete disclosure to the defence. Of course the Crown has the duty and does frequently request supplemental information on this or that aspect of an investigation, and police routinely comply, but generally, the nature and the extent of an investigation is in the control of the police. In the Driskell case there were numerous requests by Mr. Brodsky about various matters, and these resulted in Mr. George Dangerfield, Q.C., Counsel for the Prosecution, or Mr. Gregg Lawlor, Assistant Counsel for the Prosecution at the trial (but not at the appeal) requesting further investigation by the police. This in turn resulted in supplemental police reports, sometimes further statements of witnesses and other material being forwarded to the Crown by the police. As in any complex case, evidence evolves over time and as the investigation proceeds.

I do, however, want to point out the danger of any interference in police investigations by government officials or special interest advocates. This is strongly advocated in various statutes and historically in the common law, as reported in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* in which the Supreme Court of Canada adopts

the *dicta* of Viscount Simonds in a case from Australia, and likewise a judgement of Lord Denning M.R. in *R. v. Metropolitan Police Commissioner, Ex p. Blackburn* in which Lord Denning expresses himself in his usual eloquent and colourful manner as follows: –

> *"I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."*

Therefore, to the extent that any of the more recent inquiries by advocacy groups, defence counsel or members of the media suggest that the Crown should direct or demand police action, is to contravene the principle of independence of the investigatory authority. Nevertheless, in the Driskell case, a number of areas of new investigations were initiated and acted upon with the cooperation of the Crown and police at the request of Ms Janie Duncan, a private investigator acting on behalf of Mr. Driskell, and/or Mr. James Lockyer, also acting for Mr. Driskell in his capacity as a representative of the Association in Defence of the Wrongfully Convicted (AIDWYC), (i.e. most notably, the later DNA testing of certain hair samples).

However, as these more recent developments in the case occurred years after the Driskell trial and appeal, they are matters beyond the Terms of Reference of this Review.

Non-Disclosure Items

Returning then to the focus of this Review, namely the question as to whether or not, in the light of the 1993 WPD Review, the Crown was provided with full and complete particulars about the Driskell investigation so as to enable the Crown to make appropriate disclosure to the defence, my research has revealed that there is no specific report, nor direct or indirect reference in any document or correspondence from the Winnipeg Police Department to the Department of Justice of Manitoba about the following matters, all of which are alluded to in the 1993 WPD Review, namely:

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 WPD 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)

(I will make comments about the matter of anonymity and the Crime Stoppers program, in light of the disclosure principle, later in this Review).

6. On June 20, 1991, some six days after the trial and conviction of Driskell, Mr. Brodsky, 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)

These nine items then are matters referred to in the 1993 WPD Review for which I could not find corresponding reports in the Crown's files. Brief comments about each of them follow.

Regarding items #1, 2, 3, 4 and 5 (the Crime Stoppers matters), these must be considered in context. Crime Stoppers is presently an independent non-profit organization, (in 1990 it was an initiative of the Winnipeg Chamber of Commerce, I believe) whose function it is to encourage persons with relevant knowledge about a crime to make telephone calls or other communications to that office. The information so obtained, remains the confidential property of Crime Stoppers who will only pass it on to the appropriate police officer pursuant to strict guidelines. It is clearly known, and is so advertised in the media, that the caller need not identify him or herself and that anonymity is assured. The courts have long recognized the right of the police to protect informer identity. This principle was strongly endorsed in the unanimous decision of the Supreme Court of Canada in the case of *R. v. Leipert* (1997) 1. S.C.R. 281, in which Chief Justice Lamer, speaking for the Court said:

> "The rule of informer privilege is of such fundamental importance to the workings of criminal justice that it cannot be balanced against other interests relating to the administration of justice. Once the privilege has been established, neither the police nor the court possess discretion to abridge it".

However, as pointed out in this passage, the privilege must first be established as a fact before the principle takes effect. Where, as in this case, both witnesses Gumieny and Zanidean had reported to police authorities and given written statements without any

condition of anonymity, and then made calls to the Crime Stoppers program, it then seems to me to be a case where the informants have *de facto* waived their right to anonymity. Under such circumstances, I believe that the fact of their contacts with Crime Stoppers, the fact of the financial rewards having been paid, and the fact of any police officer having in some way assisted this process, – all these facts, ought in my view under these circumstances to have been disclosed by the police to the Crown. This was not the case in this matter. Understandable as the non-disclosure to the Crown of this information may have been, (because of the belief to protect anonymity of Crime Stoppers informants generally) where the credibility of such crucial witnesses were central to the case, and where even the police investigators were suspicious of this evidence, all information about any benefits received by those witnesses from any authorities relevant to their involvement in the case ought to have been disclosed to the Crown. There may nevertheless be the concern that if in future cases the perception is created that the Crime Stoppers program does not in fact guarantee anonymity for the caller because of disclosure requirements, that issue, which is clearly beyond the Terms of Reference of this Review, will have to be addressed.

Even stronger is the argument that information about moneys or benefits accorded potential Crown witnesses who are under, or negotiating with authorities to be under, any form of witness protection arrangement, should be disclosed. The Crown was fully aware of, and actively engaged in making these arrangements with both Gumieny and Zanidean, so there

cannot be any question about adequate disclosure from the police to the Crown in relation to those arrangements.

Regarding #6 – the anonymous telephone call to Mr. Brodsky. The Crown material indicates that for some time, both before and after the trial, the witness Zanidean was under a form of a witness protection arrangement. There were frequent contacts between him, his lawyer, the police and departmental officials during this fairly extended time, and certainly at the time of the telephone call. From both Crown and police files, it was evident that a degree of dissatisfaction and frustration regarding the details of the witness protection financial arrangements existed. It was not possible for me to ascertain how soon after the call was made, that the police were aware of the fact of the call, the identity of the speaker as Zanidean, and the general substance of his remarks, i.e. the recantation.

If these things became known to the police before the appeal (which occurred some six months after the call) then, despite the fact that defence counsel may have been aware of the same information, it was yet the duty of the police to disclose this to the Crown.

If, on the other hand, this information was not known to the police until the times in preparation of the 1993 WPD Review, even though much later than the appeal, there was an ongoing duty to then disclose the information to the Crown. I could not find any evidence of

this in the Crown material, and to the extent that memory permitted, present and past officials also could not confirm knowledge of this information having been received.

It is fact that at the appeal, defence counsel did not attempt to introduce, as fresh evidence, the fact of this call. It may be that the identity of the caller had at that time not yet been established. Without access to the confidential nature of defence material, it is not possible to assess anything definitive about that. Nevertheless, the duty to disclose new relevant information to the Crown post-trial and even post-appeal, is not excused simply because defence counsel chose not to, or simply did not raise the matter at the appeal.

During my inquiries with police representatives, it was pointed out that during any major case there may be a number of telephone conversations as between investigating police officers and Crown Attorneys. It was suggested that possibly the Crown was told about the call to Mr. Brodsky. As no Crown, present or past, could confirm that to me, and as I found no file or note about that in the Crown's material, I concluded that it had not been disclosed to the Crown.

Of course, as in any trial, witnesses either in direct or cross-examination occasionally add information that the witness never mentioned before, to either the police or the Crown. That may happen in any trial and when it occurs (taking counsel by surprise), it must be dealt with

as the presiding judge may direct. It cannot, however, be argued that there is a lack of disclosure under those circumstances.

Regarding item #7 – the absence of police notes, while it was then the common practice not to disclose these until the preliminary hearing or trial, and usually not until or unless a police officer is testifying in court, *Stinchcombe* clearly entitles the defence to such notes and I believe are now routinely provided upon request by the defence.

Regarding #8 − Zanidean's threat to "go to the media". The whole, rather complex matter of the Swift Current arson investigation is dealt with in length in the 1993 WPD Review. It is not my intention to comment about the matter here, as it involves the issue of Crown/Defence disclosure as much as Police/Crown disclosure, and would logically be more appropriately dealt with in any review of Crown/Defence disclosure. Suffice it to say that as this assertion or threat by Zanidean occurred before the appeal, timely disclosure to the Crown ought to have occurred.

Regarding item #9 – the witness Gumieny telling the police in 1993 about selling his steel-toe welder's boots to Driskell. This occurred well after the appeal and was not revealed by any supplemental police report to the Crown. The *Stinchcombe* case and a Manitoba Department of Justice Public Prosecution Policy Directive Subject: Disclosure dated January 28, 1992, specifically provides "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." As this evidence was not disclosed to the Crown, the Crown could not disclose it to the defence. This is however not a serious omission in that where a conviction has occurred, subsequently received information which merely tends to confirm the correctness of the conviction, (as contrasted to shedding a doubt about it) does not have to routinely be disclosed to the Crown.

One qualifying observation must yet be added in commenting on the non-disclosed items, and that is to point out that despite a diligent reading of the voluminous amount of material in the Crown's possession, the fact that the files were not always well organized and that over the years they had been handled by a number of departmental officials, it may yet be possible that one or other of the non-disclosed items was indeed reported to the Crown. To the extent that memory of these matters permitted, both present and past departmental officials, however, confirmed my findings when asked about them.

Returning to the previously mentioned memorandum from Det. Sgt. Burchill to Crown Attorney Schille regarding the "missing 100 pages" of police reports, I have had the opportunity of meeting with Chief Ewatski of the Winnipeg Police Service, Kim Carswell, Counsel for the Winnipeg Police Service, and Det. Sgt. J. Burchill, writer of the memorandum. I was accorded full access to the missing "pink copies" and systematically reviewed them over several days. My conclusion was that each report contained in those

pages, was also contained, either as a photocopy or in the "white" copy in the Crown material. Therefore, while the pink copies were at that time routinely forwarded to the Crown, they were probably inadvertently not returned to the Crown after Chief Ewatski and Inspector R. G. Hall retrieved the whole Crown file for the purpose of preparing the 1993 WPD Review.

As indicated earlier, I found no evidence acknowledging the fact that in 1993 the Crown file had been released to the police, either by way of a letter or receipt issued by either the Crown or by the Winnipeg Police. Nor was there any acknowledgement of the return of the file to the Crown (minus the missing pink copies mentioned). This adds to the problem of making definitive findings, even though a present perusal would seem to suggest all material was preserved.

Conclusion

Having had the opportunity of reading all the relevant material in the Crown's files, together with the information in the 1993 WPD Review, it became very evident to me, as it did to all parties to the investigation and prosecution, that the case almost exclusively depended upon the credibility of the two Crown witnesses, Reath Zanidean and John Gumieny. While the criminal records and general unsavoury character of both witnesses were made known to the jury, and further that Mr. Justice Peter Morse who presided at the trial, clearly cautioned the

jury following the *dicta* in the *Vetrovec v. The Queen* 67 C.C.C. (2d) 1 judgement, the jury's findings as to the credibility of these key witnesses may have been influenced had they been informed about those non-disclosed items which were known before the trial. As Justice Scurfield said in his oral judgement of November 28, 2003, authorizing the release of Driskell on bail,

> *"the weight attributed to suspect witnesses, is often accrued cumulatively after weighing all of the evidence that impacts on their trustworthiness."*

Clearly the non-disclosed items listed in this Review would be factors which could impact on the trustworthiness of several crucially important witnesses.

Despite this conclusion, it is my view that the Winnipeg Police Department conducted a thorough and objective investigation into the case, including pursuing all leads about persons other than Mr. Driskell as suspects, and keeping open the possibility of further developments or even other arrests in this matter. While this observation may not fall within the ambit of the Terms of Reference for this Review, it is at least peripherally relevant to the question of disclosure in the broadest sense and reflects my sincere conviction about the case.

One must keep in mind that the vastly expanding duties to disclose information was just developing in the years of the Driskell case, with the release of the *Stinchcombe* decision in 1991 and more recently the *Sophonow Inquiry* released in 2001. I understand from discussions with departmental officials that it is not uncommon for new policies or directives

to take several years to be universally understood and complied with. Complicating this procedure are instances where issues of privilege or anonymity became involved. These are areas which require careful consideration on a case-by-case basis. It is with these considerations in mind that I conclude that in the Driskell case, I found no evidence of deliberately withholding evidence, or "tunnel vision" in the manner of the investigation. Nevertheless, certain information in the possession of the police simply was not disclosed to the Crown.

Before concluding this Review, I feel compelled to add that I also found that, by oversight or otherwise, certain facts known to the Crown were not disclosed to the defence. Those issues, however, are beyond the Terms of Reference of this Review.

I acknowledge with thanks, the complete cooperation which I have received from all officials and staff of the Department of Justice of Manitoba.

Respectfully submitted this 31st day of March, 2004.

original signed by

John J. Enns