COMMISSION OF INQUIRY

INTO CERTAIN ASPECTS OF THE

TRIAL AND CONVICTION OF

JAMES DRISKELL

SYSTEMIC SUBMISSIONS MADE ON BEHALF OF THE ATTORNEY GENERAL OF MANITOBA

Thompson Dorfman Sweatman
Barristers and Solicitors
2200 - 201 Portage Avenue
WINNIPEG, Manitoba R3B 3L3
(E. W. Olson, Q.C./hvk - (204) 934-2534)
(Direct fax: (204) 934-0534)
(E-mail: ewo@tdslaw.com)
(Matter No. 0069741 EWO)
TDSLAW-#623442-v3

SYSTEMIC SUBMISSIONS MADE ON BEHALF OF THE ATTORNEY GENERAL OF MANITOBA

1. These Submissions address paragraph 1(e) of the Order In Council appointing you, Mr. Commissioner, "to make systemic recommendations arising out of the facts of the case" which you consider appropriate.

2. Further, these Submissions are in response to the systemic submissions made on behalf of James Driskell and the Association in Defence of the Wrongfully Convicted received October 27, 2006.

3. As a general statement, the Attorney General of Manitoba does not accept that many of the narrative submissions made on behalf of Mr. Driskell and AIDWYC are appropriate at all, in the course of making systemic recommendations and submissions, do not flow from or arise out of the facts of this case, and, in many cases, relate to recommendations that are beyond the mandate of this Commission of Inquiry. Many are inflammatory in nature, and some appear to be made with no connection to, or not in support of, any formal recommendation made, and accordingly, are not helpful in any event.

4. It is not the intention of these submissions to identify each and every one of the submissions captured by our general comment, but it is necessary to comment on a few of them.

5. At paragraph 5, you are urged to make a recommendation similar to Commissioner O'Connor in the Maher Arar Inquiry relating to an assessment of the claim for compensation. As you are aware, there are separate and outstanding civil proceedings commenced by Mr. Driskell in this Province. There is no mandate for you, Mr. Commissioner, to affect in any way those proceedings, nor to settle or comment on any entitlement to damages or compensation. Indeed, you are directed under paragraph 2 of the Order In Council to perform your duties "without expressing any conclusion or recommendation about the civil...liability of any person or organization...".

6. In paragraph 15 and elsewhere, there are assertions as to the existence of "complacency and a sense of entitlement" in Manitoba Justice, with a pervasive Crown culture through a "13 year pattern of conduct". It is respectfully submitted there is no basis whatsoever for such a statement. The suggestion that "DNA results, large payments to witnesses, witness immunity, and the contents of the Harder Homicide Review were all dismissed as irrelevant". That is not correct. Once the DNA results were known (having been paid for by Manitoba Justice), AIDWYC and Mr. Driskell's counsel were repeatedly urged to commence a

696 process, to the point of suggesting that if they did not, others would. The Hall/Ewatski Report was not in the possession of Manitoba Justice, and accordingly, it could never have been "dismissed as irrelevant"; nor were witness payments or arrangements ever considered irrelevant.

7. As referenced in oral submissions, the evidence of Mr. Whitley was instructive in commenting on the steps taken within Manitoba in recent years to address any potential Crown culture issues in respect of wrongful conviction. That evidence can be found at pages 4696, 4782 to 4784, 4792, 4794 and 4796 of the Inquiry transcripts.

8. In addition, the following exhibits will be of assistance to the Commissioner in assessing, should you wish to do so, the steps taken within Manitoba to address any wrongful conviction issues:

- Exhibit 36A - Disclosure Guidelines
- Exhibit 23 - Direct Indictment Guidelines
- Exhibit 36B - Actions Already Taken in Manitoba
    - (a) Disclosure Protocol between the Crown, Winnipeg Police Service and RCMP
    - (b) Report on the Prevention of Miscarriages of Justice - Federal, Provincial and Territorial Heads of Prosecutions Committee Working Group
    - (c) Forensic Evidence Review Committee Final Report

dated August 19, 2004

(d) Forensic Evidence Review Committee #2 Final Report dated September 13, 2005

(e) "Unlocking Innocence" International Conference Itineraries

(f) Manual - Disclosure-Tracking Module added to Prosecution computer system

(g) Letter from Manitoba Justice to Disclosure Reform Consultation, Department of Justice Canada, dated February 8, 2005

(h) **BLANK** - Firm Directives and Training Sessions for all Crown Attorneys

(i) In-Custody Informer Policy dated November 5, 2001

(j) List of Educational Sessions for Crown Prosecutors and Manitoba High Risk Witness Management Protocol dated May 16, 2005

- Exhibit 27H - Annual Crown / Defence Conferences

  (a) First Annual Crown Defence Conference, September 26 and 27, 2002

  (b) Second Annual Crown Defence Conference, September 11 and 12, 2003

  (c) Third Annual Crown Defence Conference, September 9 and 10, 2004

- Exhibit 45 - Appointment of the Director, Regional Prosecutions and Legal Education

- Exhibit 27G - Lawyers' Weekly Article regarding Attorney General Action Plan on Disclosure

9. Further, Exhibit 27I illustrates the acknowledgement of Mr. Driskell's counsel who made the systemic recommendations and comments to which this responds, in his letter to the then Deputy Minister of Justice for Manitoba on November 25, 2004. At that time, counsel stated "As you know, I have frequently complimented Minister Mackintosh, yourself and Manitoba Justice publicly and privately. I know that you are far ahead of all other Provinces in your desire to address wrongful conviction issues." It is respectfully submitted that not only is Manitoba in the position where it has done everything it can reasonably do to address such issues, but there is no evidence that any inappropriate culture remains within the Department, if indeed it ever existed.

10. At paragraph 18, it is suggested that the repeated use of the Direct Indictment is suggestive of the "same sense of entitlement" in Manitoba Justice. As indicated above, there are, and have been for some years, Direct Indictment guidelines within the Province of Manitoba (Exhibit 23). No one has suggested those guidelines are inappropriate, or contrary to law. No one has suggested that they have not been fully complied with at any time. The fact that Manitoba has had occasion to use some preferred indictments in recent years is of no assistance to you, Mr. Commissioner, in determining the appropriateness of any of those direct indictments, unless you knew the facts and circumstances in each case, and you do not. Indeed, there is no basis upon which to suggest that in Mr. Driskell's

case itself, the circumstances existing in November, 1990 did not, in fact, warrant a preferred indictment. Reviewing the circumstances at that time and comparing them to the dictates of the Guideline in Exhibit 23 indicates an appropriate use of the direct indictment in this case as well. Accordingly, there is absolutely no basis for the comment that any use of the direct indictment in Manitoba is suggestive of anything other than the occasional encountering of those circumstances in which it is, indeed, appropriate for a preferred indictment.

11. In paragraph 19, criticism is made of Mr. Schille suggesting that he had decided Mr. Driskell was "surely guilty" and that for him, the end justified the unacceptable means. This is not fair a comment on Mr. Schille's approach at all. Mr. Schille acknowledged that what he had encountered was suggestive of the fact that Mr. Driskell had not received a fair trial. That was a separate issue as to whether or not there was sufficient evidence upon which a conviction could have been entered. (Refer his evidence at pages 6226 to 6235 of the transcripts).

12. In paragraph 33, the allegation is made that Messrs. Dangerfield, Lawlor and three police officers "were content to deceive the Jury" regarding disclosure of payments made to Zanidean and Gumieny and that "this kind of behaviour is best captured in the phrase noble cause corruption". That phrase references the suggestion that it is permissible to fabricate evidence or commit perjury in order to convict "factually guilty" suspects who would otherwise be acquitted. No

evidence was fabricated here, and no prosecuting attorneys committed perjury. The facts of this case have nothing to do with any such concept.

13. At paragraph 36 and elsewhere, commentary is made on the Ostrowski case as being in parallel in some manner with Mr. Driskell's case. You, Mr. Commissioner, do not have the facts of the Ostrowski case before you, nor is any comment thereon within your mandate under the Order In Council. Any such references are inappropriate.

14. At paragraph 39, criticism is levelled at Mr. Morrison's letter to the Court of Queen's Bench at the time the Stay of Proceedings was entered (contained at page 16 of Tab 5, Exhibit 49A). First there is the suggestion that it ought to have responded to Minister Cotler's remarks in his Release several hours prior to the Stay of Proceedings being entered. No one was asked whether Mr. Morrison even knew of Minister Cotler's remarks, nor was there any evidence before you as to whether there was any consideration given to Minister Cotler's remarks at any time, nor why or in what way any response might appropriately be made. Secondly, the letter is alleged to have been a "self-serving, self-congratulatory letter", and it is stated that the letter represents a "remarkable manipulation of the process by Manitoba Justice". The letter, in fact, was fully compliant with Manitoba's obligation under Section 579 of the *Criminal Code*. It, in fact, stated the reasons for the entry of the stay and was fairly fulsome in so doing. There

was evidence before you that the matter was believed to be a "close call", and indeed, external counsel was consulted prior to making the decision and entering the stay with the written explanation for so doing. None of this is suggestive of any manipulation whatsoever, and such comments are entirely unfounded.

15. At paragraph 40 of the Submissions, two of the panellists heard at this Inquiry, because they held the opinion that a Stay of Proceedings was a satisfactory conclusion to a wrongful conviction case, are criticized as being reflective of "Crown culture at its worst". Surely, one can hold a different opinion from another without having criticisms levelled that your opinion, honestly held, is reflective of "Crown culture at its worst". In our respectful view, it is grossly inappropriate to personally attack individual panellists for the expression of an opinion honestly held with such a characterization.

16. In any event, the panellists view was not that a stay was a satisfactory conclusion, but rather it is an appropriate step for the Crown to take in many circumstances. A stay has to be flexible enough to respond to a variety of situations, most of which do not involve wrongful convictions. Even in those cases it has to be capable of addressing situations along a spectrum ranging from the factually guilty to the factually innocent.

17. At paragraph 44, the statement is made that the "State cannot be trusted to do the right thing in a wrongful conviction case", and refers to "State intransigence" because "it refuses to concede actual innocence". If the suggestion is that the "State" in this case is Manitoba, there is no intransigence on Manitoba's part, but rather a position taken on the basis of the evidence available. Merely because an individual alleges that they are factually innocent, does not warrant the criticism that the State is intransigent if it does not accept or concede that factual statement in the absence of any evidence so indicating.

18. Finally, at paragraph 73, the Commissioner is asked to recommend the creation of an independent Tribunal similar to the U.K. Criminal Cases Review Commission. Manitoba Justice takes the view that such a mandate is not within the narrow and specific provisions of the Terms of Reference. Clearly, this is a very broad and complex issue which, if it was to be considered, would have had to be part of the Inquiry process to permit a full consideration of the matter. It was not.

19. The following responds specifically to the formal recommendations made on behalf of Mr. Driskell and AIDWYC.

RECOMMENDATIONS 1-1, 2 AND 3

20. These recommendations are in respect of the Winnipeg Police Service and the Attorney General of Manitoba makes no comment thereon.

RECOMMENDATION 2-1 - DIRECT INDICTMENTS

21. As indicated above, Exhibit 23 reflects the guidelines in place in Manitoba dated 1996 and 2004 respectively. They are self-explanatory, and in our respectful submission, nothing arises from Mr. Driskell's case that warrants any further recommendations in respect of the utilization of the Direct Indictment.

RECOMMENDATION 2-2 - AN INDEPENDENT REVIEW OF MANITOBA JUSTICE

22. Again as indicated above, to the extent this recommendation is based on the suggested concerns with Crown culture in Manitoba, it is not well-founded. Please refer to the Whitley evidence to which reference is made, plus the various exhibits indicated earlier in these submissions.

RECOMMENDATION 2-3 - A CRIMINAL JUSTICE COMMITTEE

23. There are committees and processes at present that do reflect dialogue on an ongoing basis:

- Disclosure Protocol, Exhibit 36B(a)
- Report on the Prevention of Miscarriage of Justice, Exhibit 36B(b)

and the recommendations for continuing review and a full review within five (5) years

- Exhibit 27H, Annual Crown Defence Conferences
- Exhibit 27G, Announcement of Joint Police-Crown Disclosure Working Group to look at current issues of disclosure between Crown, Winnipeg Police Service and the RCMP
- Exhibit 36B(c) and (d), the Forensic Evidence Review Committee Reports in 2004 and 2005

RECOMMENDATION 2-4 - AUDIT OF GEORGE DANGERFIELD'S HOMICIDE PROSECUTIONS

24. Manitoba, through the Forensic Evidence Review Committee process (Exhibit 36B(c) and (d)), invited all defence counsel to respond and raise any previous case and concerns they might have had with respect thereto, for the purposes of the Committee to review (Exhibits 27E and F). The original frame of reference, homicide cases only, was extended to include sexual assault and robbery cases in the previous 15 years as well. That Committee's membership included RCMP, Winnipeg Police Service, AIDWYC, Department of Justice and a lay participant. Many major prosecution cases over the years have included hair and fibre evidence, and accordingly, a review of many of those cases has already been conducted, to the extent they were raised at all.

25. Reviews are done, on a case-by-case basis when circumstances warrant, and Manitoba's record is reflective of a responsiveness to those circumstances historically. There is no evidence before this Commission that Mr. Dangerfield's

cases require any special review. Indeed the evidence is to the contrary, in that Mr. Dangerfield was unanimously regarded as a person of integrity who provided greater disclosure than others at that time.

26. Given the number of major prosecutions conducted by Mr. Dangerfield historically, and the length of time since he retired from service, it is questionable what value any such review would have at this stage in any event. Any major prosecutions involving allegations of wrongful conviction either have already been reviewed and the subject of inquiries/reports, or are in the process of being reviewed. The fact that Mr. Dangerfield handled most of the major prosecutions for many years in Manitoba prior to his retirement ought to be factored in to any suggestion that, as some of these cases involve Mr. Dangerfield as Prosecuting Attorney, there is anything indicative of concerns with Mr. Dangerfield's work overall in that regard.

RECOMMENDATION 3-1 - POST-CONVICTION DISCLOSURE

27. Although there is very little law developed in this area, the submissions made on behalf of Mr. Driskell refer to the *Trotta* case from the Ontario Court of Appeal. Manitoba follows the law in this regard. It is apparent that counsel for Mr. Driskell disagrees with the Ontario Court of Appeal in that the submissions state "Trotta is not a satisfactory solution for post-conviction disclosure". In our respectful

submission, Manitoba Justice should not develop "a procedure in its Crown Policy Manual" that might differ from the existing law.

28. Materials are "inventoried" in terms of disclosure made to the defence, under the "PRISM" system now in place in Manitoba, which evidence is before this Commission (refer Exhibit 36B(f)). We do not know whether the Winnipeg Police Service inventory materials which they provide to the Crown. Manitoba Justice acknowledges its responsibility to disclose to the defence, and that obligation will remain the responsibility of the Crown Prosecutor who conducted the trial throughout the post-conviction and post-appeal periods.

RECOMMENDATION 3-2 - APPEAL CROWN

29. At present, the practice in Manitoba is in some cases to permit the trial Prosecutor to handle the appeal. This is reflective in many cases of the distinct advantage of having an intimate knowledge of the facts on a complicated appeal and the difficulty in having new counsel brought up to speed in that regard. The practice at present, however, is that if there is any suggestion whatsoever of Crown misconduct, a new Crown is appointed to handle the appeal. It is respectfully submitted this process is sufficiently responsive to any potential concerns in this regard.

30. A blanket policy requiring new counsel, in the absence of any suggestion of Crown misconduct at trial, would be detrimental to the system of justice and the resources available within the Department. In that regard, Manitoba differs from several other Provinces who have an "appeal unit".

RECOMMENDATION 3-3 - ASSIGNMENT OF THE CROWN

31. The recommendation is that whenever a wrongful conviction claim is made, a "fresh" Senior Crown should be assigned to review it. With all due respect, there are insufficient particulars and specificity within the suggested recommendation to be able to respond meaningfully. In part, the response would or could be somewhat different, depending on the level of review suggested. Further, any review process would require a threshold of some sort as there would have to be some basis for the exercise of discretion in triggering a review in the first place, not merely entitling a review in every case where an accused suggests they have been wrongfully convicted.

32. Again, any such suggestion would have to be tempered with some reference to the seriousness of the charges in the first place, as a review of a minor offence would be an unnecessary and unwarranted use of resources itself.

33. In practice in Manitoba, there has been a Senior Crown assigned on a case-by-case basis in the past, when appropriate. It is respectfully submitted that there is

no fixed policy required in this regard and certainly, the broad and unspecific policy suggested would not be workable.

RECOMMENDATION 4-1 and 2 - RECORDING OF ALL DEALINGS WITH UNSAVOURY WITNESSES AND PAYMENTS TO UNSAVOURY WITNESSES

34. This would appear to be a Winnipeg Police Service issue, and accordingly, Manitoba Justice will not respond specifically. It, however, is noted that some definition of "unsavoury" would be required, no matter what further consideration might be given to the recommendation.

35. It is to be noted that Manitoba does have a High Risk Witness Management Protocol dated May 16, 2005 that is relatively comprehensive (refer Exhibit 36B(j)), as well as an In-Custody Informer Policy (Exhibit 36B(i)).

36. Finally, any such recommendation ought not be applied to the customary reimbursement to witnesses for overnight accommodation when required to give evidence if coming from out of the City, or the reimbursement or payment of travel costs whether pursuant to subpoena or otherwise.

RECOMMENDATION 4-3 AND 4-4 - DISCLOSURE INVOLVING UNSAVOURY WITNESSES AND NEGOTIATIONS BETWEEN POLICE FORCES OR CROWN OFFICIALS

37. Manitoba Justice accepts that there shall be full disclosure of all dealings with, payments to, and considerations requested by or provided to, unsavoury

witnesses, subject to the definitional concerns indicated above, and any security concerns or issues arising therefrom.

38. It is, however, further suggested that a degree of formality cannot be imposed to the point where that formal process would materially impede the arrangements being made with witnesses.

39. *Stinchcombe* should cover these concerns in law at present, unless it is intended to redefine *Stinchcombe* which, in Manitoba Justice's view, is not necessary or appropriate through this process.

RECOMMENDATION 4-5 - PSYCHIATRIC AND OTHER RECORDS

40. Again, there are definitional concerns with the term "unsavoury" (for example, would a prostitute with a criminal record, who was a sexual assault complainant, be an "unsavoury" witness?). What appears to be requested through this recommendation is that in effect the Prosecution should join in the O'Connor application.

41. There are also concerns with psychiatric records which are beyond the jurisdiction of the normal investigative processes. Effectively, what is being suggested is that legislated privacy in Manitoba through the *Personal Health Information Act* ("PHIA"), and the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), be avoided through the release process, and if no consent

is given, the witness could not be used. There are some difficulties with such an approach. Further, prison records are in the control of Corrections Canada, and there may well be concerns with respect to the release of such information.

RECOMMENDATION 4-6 - POST-CONVICTION DEALINGS WITH UNSAVOURY WITNESSES

42. In the recommendation suggested, there is no time limitation to the tracking process, and one would be required. Indeed, there should be some factual and temporal linkage before the requirement would be triggered. In Manitoba Justice's view, the common law will develop in this area naturally, with specific rulings in individual cases, without the requirement of any formal direction.

RECOMMENDATION 4-7 - INTENDED FURTHER CONSIDERATION FOR UNSAVOURY WITNESSES

43. Manitoba Justice has no issue with the statement that neither Police nor Crown should conceal intended post-conviction benefits from an unsavoury witness, again subject to definitional concerns. We do not know what is intended through the added phrase "nor purport to do this".

44. We further note that the suggested "review" within Manitoba Justice is now changed to an "investigation". References to the *Ostrowski* case again are inappropriate and beyond the mandate of this Commissioner. Through the

review mechanisms in place, and the Committee's work to date, any cases that are potentially of concern are currently under review, or have been reviewed.

RECOMMENDATION 5-1 - THE MINISTER SHOULD GIVE REASONS

45. It is unclear whether it is suggested this be the Federal Minister of Justice, or the Provincial Minister of Justice, but in either event "all decisions" is far too broad and meaningless. There are further jurisdictional concerns with this Commissioner commenting on any process at the Federal level.

RECOMMENDATION 5-2 - THE ONLY POSSIBLE USE OF THE STAY POWER UNDER SECTION 579

46. It is beyond the mandate of this Commissioner to rewrite the provisions of the *Criminal Code*. Manitoba Justice refers back to the comments made by the various panellists as to the process that might be followed in open court at the time a Stay of Proceeding is entered, or an Acquittal is entered.

RECOMMENDATION 5-3 - FEDERAL AND PROVINCIAL STUDY FOR AN INNOCENCE HEARING MODEL

47. Manitoba Justice believes that it is beyond the mandate of this Commissioner to direct there to be any joint Federal and Provincial study. While the Commissioner may not have the authority to direct a Federal/Provincial study, if considered meritorious, you could recommend that Manitoba make a request to the Federal Government to undertake such a study.

RECOMMENDATION 5-4 - A PILOT PROJECT IN MANITOBA FOR AN INNOCENCE HEARING MODEL

48. The suggested pilot project is not that which was suggested by Mr. MacFarlane in his comments as a panellist before this Committee (refer pages 4974 to 4975). Nor does it address the concerns that Mr. Roach (4981 to 4986) or others expressed.

49. In any event, Manitoba Justice is of the view that any change of this magnitude at best should be referred for further study. If the concept has any merit, that should be determined through such further detailed study, not through a pilot project which would have immediate repercussions for the parties without any certainty that the process would be an appropriate one.

RECOMMENDATION 6-1 - AN INDEPENDENT REVIEW OF THE RCMP FORENSIC LABORATORY SERVICES

50. Manitoba Justice makes no comment thereon.

RECOMMENDATION 6-2 - A NATIONAL AUDIT OF HAIR MICROSCOPY COMPARISON CASES

51. Again Manitoba makes the observation that there may be concerns with this Commissioner's mandate in directing or recommending any national audit of cases.

52. Insofar as Manitoba is concerned, this work has already been done, and the results are in evidence before this Commission.

RECOMMENDATION 6-3 - THE ELIMINATION OF HAIR MICROSCOPY COMPARISONS FROM THE CRIMINAL TRIAL

53. Manitoba Justice refers to the evidence of the panel of experts. The consensus appeared to be that hair microscopy comparisons still had value at the criminal trial.