Commission of Inquiry

Into the Wrongful

Conviction of David Milgaard

before

THE HONOURABLE MR. JUSTICE

EDWARD P. MacCALLUM

* *

Transcript of Proceedings

and

Testimony before the Commission

sitting at the

Radisson Hotel at

Saskatoon, Saskatchewan

* *

On Thursday, June 9th, 2005

Volume 51

Inquiry Proceedings

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Appearances:

Mr. Hersh Wolch, Q.C., **for** Mr. David Milgaard

Mr. James Lockyer, Esq., **for** Ms. Joyce Milgaard

Ms. Catherine Knox, **for** Mr. T.D.R. (Bobs) Caldwell

Mr. Garrett Wilson, Q.C., **for** Mr. Serge Kujawa

Mr. Rick Elson, Esq., **for** the Saskatoon Police Service

Mr. Aaron Fox, Q.C., **for** Mr. Eddie Karst

Mr. Bruce Gibson and Ms. Rochelle Wempe, **for** the RCMP

Mr. Brian A. Beresh, Esq., **for** Mr. Larry Fisher

Mr. David Frayer, Q.C. and Ms. Jennifer Cox, **for** Minister

of Justice (Canada), The Hon.

Irwin Cotler

Mr. Alexander Pringle, Q.C., **for** Justice Calvin Tallis

(Retired)

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1   ***Transcript of Proceedings***

2   *(Reconvened at 9:00 a.m.)*

3   COMMISSIONER MacCALLUM: Morning.

4   ALL COUNSEL: Morning.

09:05 5   MR. ELSON: Mr. Commissioner, I'm not

6   scheduled to go first, Mr. Fox is, but there is a

7   matter I would wish to raise.

8   As a result of the CBC National

9   News last evening, I had spoken earlier with

09:05 10   Mr. Hodson when a question had been asked of me

11   by a member of the local media with respect to

12   the propriety of broadcasting or publishing any

13   interviews of any of the parties with respect to

14   a witness' testimony while that witness was still

09:05 15   on the stand, it was my understanding from

16   Mr. Hodson -- and I stand to be corrected -- that

17   at the very least there was to be no publication

18   and no broadcast of an interview of one of the

19   parties, and preferably no interview given at all

09:06 20   with respect to a witness' testimony, while that

21   witness was on the stand and before that witness'

22   testimony had concluded.

23   I notice that neither

24   Mr. Lockyer nor Mrs. Milgaard are here this

09:06 25   morning, but there was an interview, and it

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1   appeared to me from the interview I saw on CBC

2   National News last evening that it was an

3   interview of Mrs. Milgaard while former Chief

4   Penkala was on the stand.

09:06 5   I'm not asking for a specific

6   remedy in this respect, in fairness to

7   Mrs. Milgaard it was a very brief interview, she

8   made a comment with respect to a reaction that

9   she had on one particular part of the testimony.

09:06 10   Having said that, it may be

11   appropriate to remind all parties of the

12   propriety of consenting to media interviews with

13   respect of a witness' testimony before that

14   witness' evidence is concluded.

09:07 15   And, again, I'm probably rising

16   at the wrong time because, in fairness, neither

17   Mr. Lockyer nor Mrs. Milgaard are here, but it is

18   nonetheless a point that perhaps not only the

19   parties should be reminded of, but also the

09:07 20   members of the media reminded of.

21   COMMISSIONER MacCALLUM: Mr. Hodson?

22   MR. HODSON: Yes. I believe that the

23   ruling made earlier, Mr. Commissioner, was a

24   direction to the parties and counsel not to

09:07 25   discuss the evidence of any witness until that

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1   witness' evidence was concluded. I believe that

2   was the ruling made. As opposed to a direction

3   to the media, I believe it was to the parties and

4   counsel, is my recollection.

09:07 5   MR. WOLCH: Mr. Commissioner, I apologize,

6   I didn't see the news item at all and I don't

7   know what was stated on it so it's a bit

8   difficult to respond for Mrs. Milgaard.

9   I don't recall if the ban or

09:07 10   suggestion, or whatever it might be, but

11   obviously something to be followed, applies to

12   counsel or applies to individuals, or whether it

13   can apply to individuals in terms of their

14   reaction to evidence. But certainly counsel,

09:08 15   obviously, must follow it. I don't know if it

16   can be applied to people beyond counsel.

17   In any event, there also is a

18   fine line between commenting on the evidence and

19   making comments on the broader sense, and not

09:08 20   having seen what Mrs. Milgaard said I don't know,

21   and I'm not even sure if My Friend is saying

22   Mr. Lockyer said anything or not, I don't know.

23   I do know that I was approached

24   yesterday to comment on the evidence and I

09:08 25   declined because of your ruling. The, some media

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1   were particularly interested in our reaction to

2   the apology, etcetera, and I indicated 'I can't

3   comment until this is over', and that's the way

4   it stood. But perhaps there should be some

09:09   5   clarification if, Mr. Commissioner, you feel you

6   have the jurisdiction to apply that to

7   individuals as opposed to just counsel. And,

8   keeping that in mind, I really don't know if

9   there was a comment on the evidence or not, I

09:09   10   don't know. My Friend does not specifically say

11   other than to say it was a brief comment about

12   her reaction and her feelings, and I don't know

13   if she can be precluded from saying what her

14   feelings are on an issue, so I know I'm not being

09:09   15   overly helpful, I just don't know.

16   COMMISSIONER MacCALLUM: Okay. Thanks.

17   Somebody has handed me up a piece of paper; what

18   is this, Mr. Hodson?

19   MR. HODSON: Yes, we can actually call up

09:09   20   the ruling on the screen, it's page 1264, volume

21   9 from the January 26th transcript, it will just

22   be a second for that to load.

23   COMMISSIONER MacCALLUM: Okay. What's this

24   that I have been handed here? Can that be seen

09:11   25   by everybody? Okay. And when was this; does

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1   anybody know?

2   MR. HODSON: This was January the 26th.

3   COMMISSIONER MacCALLUM: Okay.   And at

4   another time, Mr. Hodson, my memory is that I

09:11   5   asked the public at large, particularly the

6   media, to be cautious about jumping to

7   conclusions on the basis of a witness that we're

8   hearing at any particular time because that

9   wouldn't be the entire story --

09:12 10   MR. HODSON: And I --

11   COMMISSIONER MacCALLUM: -- and they should

12   exercise some restraint.   But I don't think I'm

13   in any position to order them not to report this

14   or report that, they can -- this is a public

09:12 15   inquiry.

16   MR. HODSON: That's right.   And I think,

17   the interview that Mr. Elson is referring to

18   Mrs. Milgaard was giving her reaction, I believe,

19   to Mr. Penkala's evidence regarding the

09:12 20   apology --

21   COMMISSIONER MacCALLUM: Yes.

22   MR. HODSON: -- and it was a very brief

23   interview.

24   And I'm wondering, I'm not sure

09:12 25   what the wishes of the parties are, but maybe we

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1   could just remind and reinforce to all parties

2   and to counsel the directive that no party or

3   counsel should be commenting on evidence of a

4   witness until the evidence is concluded.

09:12 5   Certainly, when a witness is done, I don't think

6   there's any restrictions; is that -- I think --

7   COMMISSIONER MacCALLUM: Well I suppose, on

8   the basis of what you can see before you, there

9   is no restrictions at this moment, it's simply an

09:13 10   expression of my wish based upon certain

11   practicalities. If counsel respect it I would be

12   very happy, and if their clients refrain from

13   talking to anybody, particularly the media, about

14   the evidence of a witness while it's ongoing, I

09:13 15   would be even happier. But, if they choose not

16   to, I suppose they run the risk of impeding the

17   effectiveness of the Inquiry.

18   Morning, Mr. Fox.

19   **_JOSEPH PENKALA, continued_**:

20   **BY MR. FOX:**

21 Q   Thank you. Thank you, a glass of water, if I get

22   too many of them up here I'll spill one for sure.

23   Mr. Penkala, my name is Aaron

24   Fox, I'm the lawyer for Eddie Karst in these

09:14 25   proceedings. I'm going to cover some ground with

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1   you, and particularly involving the investigation

2   in 1969, and what took place in 1970 and '71.

3   First of all just a couple of

4   general questions. I'm assuming as a former

09:14   5   police officer, and you were a police officer with

6   many years of experience, so looking back on your

7   own career, and obviously watching very closely

8   the work that others did because in your various

9   supervisory capacities, including eventually

09:14   10   chief, fair to say that sometimes mistakes are

11   made?

12   A   Yes.

13   Q   And fair to say that sometimes things are

14   overlooked or we don't get things exactly right?

09:15   15   A   Yes.

16   Q   And I can tell you -- and no disrespect meant, Mr.

17   Commissioner -- judges tell me all the time that I

18   didn't get things right, and occasionally when I

19   get them to agree with me usually the Court of

09:15   20   Appeal tells us that we're both wrong, but that

21   happens, and I'm assuming that just goes with the

22   job; fair to say?

23   A   Yes, the job, and the complexity of the job.

24   Q   Right. The suggestion, though, that was put to

09:15   25   you by Mr. Lockyer over the last couple of days

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1   sort of went quite a bit beyond suggesting to you

2   that you just made a mistake or overlooked

3   something or didn't interpret something correctly.

4   As I read his comments or listened to his

09:15 5   comments -- and I think they were pretty direct --

6   he suggested an outright coverup by the members of

7   the Saskatoon Police Service and he suggested,

8   basically, that you knew David Milgaard was

9   innocent and framed him; he suggested that you

09:16 10   knew Larry Fisher was guilty, you let him go; and

11   you did that knowing that an innocent man was

12   going to sit in jail and that a guilty man went

13   out there and committed a number of more serious

14   offences which he wouldn't have otherwise

09:16 15   committed. That was what was put to you. Now I

16   understand you don't have counsel here, Mr.

17   Penkala?

18 A   I do not.

19 Q   And you agree you and I have never spoken about

09:16 20   this matter before?

21 A   That's correct.

22 Q   I just want to ask you, I'm just going to give you

23   an opportunity, can you just tell me how you

24   respond or react to the statement that was put to

09:16 25   you that you, as a member of the Saskatoon Police

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1   Service, intentionally hid the fact that David

2   Milgaard was innocent and hid the fact that Larry

3   Fisher was guilty; can you tell me how you respond

4   or how you feel about that?

09:16 5   A   I think I made that response before, but I can

6   tell you right now that there was not a crumb of

7   truth in that, in that suggestion by Mr. Lockyer.

8   I was -- I'm offended to have that suggestion

9   brought forward, and my experience with officers

09:17 10   that I worked with, I really never knew a police

11   officer that would stoop to that type of a

12   process.

13   Q   I'm going to ask you specifically about Eddie

14   Karst, who was a detective in 1969 and 1970 and

09:17 15   into '71; were you aware of, then or now, of any

16   conduct on the part of then-former Detective Karst

17   which suggested to you that he was hiding or

18   covering up either David Milgaard's lack of

19   involvement in the death of Gail Miller or Larry

09:17 20   Fisher's involvement in it?

21   A   No.

22   Q   And knowing Detective Karst, having worked with

23   him and supervised him, can you tell me what, and

24   this is just an opinion of yours, but in your

09:15 25   opinion what is the likelihood that he might be

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1   involved in something like that?

2   A   I've known Mr. Karst for probably 50 years and

3   I've never experienced anything in the category

4   that's being suggested.

09:16 5   Q   Now I'm going to talk about this, the case

6   specifically now. Mr. Lockyer reviewed with you

7   and argued that you should have concluded that Mr.

8   Fisher murdered Gail Miller, that should have been

9   the conclusion you came to, and as I listened to

09:16 10   your evidence, I noted a couple of occasions when

11   you tried to bring up the subject or the point

12   that you still had this evidence against David

13   Milgaard that you had to consider and deal with.

14   I want to go through that evidence with you a bit

09:16 15   or at least what your knowledge was as to why

16   David Milgaard was a suspect, notwithstanding all

17   we know about Larry Fisher, why in 1969, 1970 did

18   you consider David Milgaard a suspect in the death

19   of Gail Miller. Okay?

09:16 20 A   Okay.

21   Q   Now, if I go to January 31st, 1969, I think you've

22   already acknowledged that there were similarities

23   between the death of Gail Miller and the two rapes

24   and indecent assault that occurred prior to that

09:17 25   time, that's correct, that we've already talked

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1   about that?

2   A   Yeah.

3   Q   But am I also correct that in pursuing that there

4   were many, many, many suspects that were

09:17 5   investigated in relation to the death of Gail

6   Miller?

7   A   Yes.

8   Q   I think then early in these proceedings, earlier

9   in this phase of the proceedings, and we don't

09:17 10   need to bring it up, but it's document 326548,

11   which was a compilation study that was put

12   together by Commission Counsel that indicated that

13   a total of 208 possible suspects were investigated

14   as possibly being responsible for the death of

09:17 15   Gail Miller. Does that sound about right to you?

16 A   I'm not sure what reference, what this is

17   reference to.

18 Q   This is reference to various individuals who you

19   received information on in 1969 that may have been

09:18 20   somehow involved in the death of Gail Miller, so

21   you would investigate them to see are they

22   responsible or can we clear them as not being

23   responsible.

24 A   And I'm assuming that you are talking about the

09:18 25   list of sex offenders that we --

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1   **Q**   Actually, I'm talking about in document 326548, it

2   includes everybody from Les Spence, who was an

3   acquaintance of Gail Miller, to friends of Gail

4   Miller, to other people who somebody came up to

09:18 5   and said hey, this person was driving around with

6   ladies' underwear under the seat of his car, all

7   of these people were investigated?

8   *A*   Yes, and I wouldn't know that of my personal

9   knowledge, but yes.

09:18 10   **Q**   And you would be aware, however, though, that many

11   people were investigated as possible suspects?

12   *A*   In a general sense, yes.

13   **Q**   Okay. And I think that particular document

14   referred to also indicates that 38 individuals

09:19 15   were checked out after March 2nd, 1969, which was

16   the date that Albert "Shorty" Cadrain came in and

17   identified David Milgaard, and I take it you don't

18   have any personal, direct knowledge of that, but

19   you wouldn't dispute that number?

09:19 20   *A*   No, I wouldn't.

21   **Q**   Now, Mr. Lockyer made the statement to you, and it

22   was repeated a number of times, that -- and I'm

23   referring to document, maybe we can just bring

24   that up if we could, 250609, this is the RCMP

09:19 25   summary report which I think is dated May 21st,

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1   1969. This is the document of course, Mr.

2   Penkala, that refers to that May 16th, 1969

3   meeting that I've highlighted there in paragraph

4   3, okay, so that's the time frame I want to talk

09:20   5   about just for a second. The suggestion was put

6   to you that the investigation was going nowhere in

7   finding a suspect, that's what the suggestion was.

8   Would I be correct that sort of quite to the

9   contrary, as at May 16th, 1969 you had information

09:20   10   that did point to a suspect in the death of Gail

11   Miller and that suspect would be David Milgaard?

12   A   Yes, that would be correct, yes.

13   Q   I'm not suggesting at that point in time you had

14   made any decision that you thought he should be

09:20   15   charged or he was the one who did it or whatever,

16   but there's no question by that point in time you

17   had already received some very direct information

18   from Albert "Shorty" Cadrain suggesting David

19   Milgaard was involved in the death of Gail Miller;

09:20   20   would that be correct?

21   A   That's my understanding, yes.

22   Q   And I want to -- and if we look at Mr. Cadrain's

23   statement, and we don't need to review it, but

24   would I be correct that at least in general terms

09:21   25   Mr. Cadrain, in his statement, he came in to see

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1   the police on March 2nd, 1969, put David Milgaard

2   in the area of the murder; that would be correct?

3   A   That's my understanding. As you are obviously

4   aware, I wasn't directly involved, but the general

09:21 5   understanding is that that was the situation.

6   Q   Described seeing blood on the clothes of Mr.

7   Milgaard?

8   A   I recall that, yes.

9   Q   Described Mr. Milgaard changing his clothes?

09:21 10   A   Yes.

11   Q   Described, referred to various statements and

12   conduct of Mr. Milgaard which, at least as Shorty

13   Cadrain indicated to him, that he may have been

14   involved in killing Gail Miller?

09:21 15   A   Yes.

16   Q   And indicated that he and the others were afraid

17   of Mr. Milgaard?

18   A   Yes.

19   Q   And, frankly, expressed his opinion that he

09:21 20   thought David Milgaard was involved in the murder

21   of Gail Miller, that was the general information

22   that you received about March 2nd, 1969 from

23   Mr. Cadrain?

24   A   That's my recollection.

09:22 25   Q   Now, just in general terms, having received that

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1		information, I mean, this fellow walks in, you
2		didn't arrest him, he comes in out of the blue and
3		volunteers this for you, what do you do with that?
4		You've got this information, he's made this
09:22 5		statement, it points towards David Milgaard. Just
6		generally, as a police officer, as a police
7		service, what are you going to do with that
8		information?
9	A	You take it seriously and investigate it further.
09:22 10	Q	And in investigating it further, are you making a
11		determination already at that point, yes, it's
12		true, or no, it's not true?
13	A	No. That's why you would investigate it further,
14		to establish whether there's truth in it, and as a
09:22 15		rule these things usually identify themselves in
16		the interests of whether the statements are true
17		or not true.
18	Q	So he comes in with a story, you are going to see
19		whether or not there's any evidence that either
09:23 20		supports that story or eliminates that story?
21	A	Yes.
22	Q	Either says, indicates there may be something
23		truthful to what he's saying or maybe he's just
24		feeding us a load of garbage and we can scratch
09:23 25		this one off the list too; fair to say?

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1   A   Yes, very fair, yes.

2   Q   I want to talk to you just in general terms. When

3   you -- we've heard the word incriminating used an

4   awful lot, incriminating evidence and so on.

09:23 5   Would it be fair to say, Mr. Penkala, that

6   incriminating evidence sometimes can be the most

7   innocent of things, it might look like it's not

8   incriminating or supports an allegation, but it

9   may in fact do that?

09:23 10   A   Oh, yes.

11   Q   Unfortunately I've had too many clients who I've

12   advised not to give a statement and who have said

13   no, I didn't give a statement, I just told them

14   that I was there and I told them I had a knife in

09:24 15   my hand, but I didn't tell them I stabbed them.

16   That kind of statement, saying I was there, I did

17   have a knife but I didn't stab the person might

18   sound kind of innocent, but it may very well be

19   viewed as incriminating evidence?

09:24 20   A   Yes, I follow, yes.

21   Q   And maybe not the type of statement that a Crown

22   might be able to use or would decide to use in a

23   case, but it's something that the police would

24   look at, the information that came with that in

09:24 25   deciding whether you should investigate further;

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1   fair to say?

2   A   Oh, very fair, yes.

3   Q   So when we look at, for example, what Albert

4   Cadrain said, one of the next things you would do

09:24 5   is go, want to speak to his two travelling

6   companions, Nichol John and Ron Wilson, and that's

7   what was done?

8   A   Yes.

9   Q   And you are trying to find out from them is there

09:24 10   some basis, is there some substance to what he

11   says; correct?

12   A   Yes.

13   Q   Now, and I know you are not familiar with those

14   statements at this point in time, but generally at

09:25 15   that time you would have had some idea what was on

16   the file in terms of reports and statements, you

17   certainly had a better knowledge back in 1969 than

18   you do now?

19   A   That's true.

09:25 20   Q   And when we look at those statements, and I don't

21   think we have to review them, but the initial

22   statements obviously indicated that Nichol John

23   and Ron Wilson said that David Milgaard hadn't

24   left them, hadn't been out of their sight and that

09:25 25   would suggest that they, you know, that he didn't

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1   kill Gail Miller; correct?

2   A   That would be an assumption that would be made,

3   yes.

4   Q   Right. But those statements also confirmed what

09:25 5   Albert Cadrain had said, which is that they were

6   in Saskatoon early in the morning when the murder

7   occurred, indicated that they were in the area

8   where the murder occurred and indicated that he

9   did change his clothes that morning; correct?

09:25 10   A   Yes, that's my understanding.

11   Q   So when you've got that information, fair to say

12   not, it's not kind of telling you for sure David

13   Milgaard is our man, but it's not sort of telling

14   you for sure he's not our man; correct?

09:26 15   A   That's the way I perceived that information, yes.

16   Q   And the logical thing to do is then continue with

17   your investigation and see where it takes you?

18   A   Yes.

19   Q   Now, when you are carrying out your investigation,

09:26 20   I'm assuming, Mr. Penkala, you are looking for

21   evidence or information that would directly relate

22   to the alleged offence?

23   A   Yes.

24   Q   But I assume you are also looking to see anything

09:26 25   else that might indicate could this individual

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1   have committed the offence or is it not likely

2   that he would have committed the offence?

3   A   That's kind of a normal process of investigation.

4   Q   Police officers are trying to get a feel for what

09:26 5   they are dealing with, they are trying to use

6   their instincts; correct?

7   A   Yes, oh, yes.

8   Q   You also are assessing are the people telling the

9   truth when they make certain statements to you?

09:27 10   A   Yes. That's always a challenge, yes.

11   Q   Also trying to decide whether or not they are even

12   -- telling the truth is a credible issue, but a

13   reliability issue would be were they on drugs or

14   something like that that maybe they really don't

09:27 15   know what went on, you are assessing that all the

16   time fair to say?

17   A   Oh, very much so.

18   Q   And you are trying to make a read as to whether I

19   should pursue this further or do I really think

09:27 20   they are telling the truth, that goes on all the

21   time?

22   A   Yes.

23   Q   It wouldn't be surprising, surprise you, Mr.

24   Penkala, to know that probably every lawyer in

09:27 25   this room has been doing that every minute that

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1   you've been up on the witness stand, we do it all

2   the time, we're assessing what witnesses are

3   saying in trying to make some decision, is it

4   reliable, is it credible or should we just move

09:27 5   on, that goes on all the time, it wouldn't

6   surprise you to hear that?

7   A   I understand.

8   Q   So I'm looking at some of the evidence that was

9   gathered then as a result of Albert Cadrain's

09:28 10   statement and I want to -- if you could just bring

11   up document 106640. This is the statement -- or

12   sorry, that was done by Lieutenant Short. Now, at

13   the bottom of this statement starting at about,

14   right about there, Detective Short in his

09:29 15   statement says:

16   "Also female Nichol John was located at

17   a hippie house in Regina and she was

18   after considerable persuasion brought to

19   the Regina gaol and interviewed by Karst

09:29 20   and myself was placed in a room with

21   Cadrain and allowed to discuss this

22   matter and it was learned from her after

23   this discussion that through

24   interrogation that she was of the

09:29 25   opinion that Cadrain was --"

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1   If you can go to the next page,

2   "-- was telling the truth and that

3   everything he said was exactly what

4   happened on this trip."

09:29   5   So Lieutenant Short is reporting back Nichol John

6   was interviewed, she did say that he wasn't gone,

7   but I believe Albert "Shorty" Cadrain when he

8   says, when he's telling his story. Just

9   something else you've got to take a look at,

09:29 10   maybe Cadrain is truthful, maybe what he is

11   saying is true, just another factor you would

12   have to consider; fair to say?

13   A   Absolutely.

14   Q   It also goes on and says:

09:30 15   "She was of the opinion that Milgaard

16   was of a dangerous character and that he

17   had forced her to have intercourse etc.

18   several times and she was afraid of

19   him."

09:30 20   Now, as an investigator investigating the Gail

21   Miller file, being told that David Milgaard is

22   possibly involved in this and then finding out

23   from his travelling companion that she says,

24   whether it's correct or not, but she's saying

09:30 25   that he forced her to have intercourse and

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1   considered him as a dangerous character, that

2   would be something you would look at to say maybe

3   we're on the right track?

4   *A*   Oh, I think an investigator would observe the red

09:30 5   flag coming up, yes.

6   Q   Sure. And we've heard Nichol John testify to that

7   and she's described it and in later years she

8   referred to as being rape, but whatever, whether

9   it's correct or not, as an investigator receiving

09:30 10   that information, it would be pretty hard to

11   ignore that as at least suggesting maybe I should

12   be continuing to follow up this fellow as a

13   suspect; fair to say?

14   *A*   I think there would be an obligation.

09:31 15   Q   And then Sharon Williams was interviewed and this

16   was the former girlfriend of David Milgaard and

17   she was interviewed March 22nd, '69, I think her

18   statement is found at document 006500. This

19   statement looks like it was obtained March --

09:31 20   sorry, March 20th, '69, I think it's about 12

21   pages long, I believe it's Detective Malanowich

22   who obtained this statement, and if you go to

23   document 009245 if we could and I believe this is

24   Detective Malanowich's statement. If we go to the

09:32 25   next page, I think his name is on there. Yeah,

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1   Sergeant John Malanowich. And I understand he was

2   in morality at that time?

3   A   That's my understanding, yes.

4   Q   Okay. I'm not going to go through this statement

09:32 5   or his report in detail, but it states that after

6   speaking with Sharon Williams, she gave a

7   statement again referring to forced sexual

8   activity, it refers to an occasion when David

9   Milgaard said he had a gun, reports about an

09:32 10   occasion when he was poking her and pointing a

11   knife at her, talks about extensive drug use,

12   travelling throughout Canada, confirmed what

13   Albert Cadrain said about being in Edmonton, so

14   all of this information is received March 22nd,

09:32 15   '69 both in her statement and in the report of

16   Sergeant Malanowich. Again, evidence that you

17   would look at or information you would look at

18   suggesting maybe David Milgaard should be a prime

19   suspect in this thing, maybe what Shorty Cadrain

09:33 20   is saying can be true?

21   A   Yes. That's kind of convincing in support of what

22   is already known.

23   Q   When you -- going back in 1969, Mr. Wolch referred

24   to Wilson and Nichol John and David Milgaard as

09:33 25   being kids and certainly age wise they were kids,

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1   they weren't very old, we know that?

2   A   Yes.

3   Q   They were 16, 17 years of age?

4   A   Yes.

09:33 5   Q   But would it be fair to say that as a police

6   officer you are also looking to see, okay, what's

7   the background, what's their experience in life,

8   what's their experience in the criminal world in

9   assessing whether or not David Milgaard might be

09:33 10   involved in something like this. Would that be

11   fair to say?

12   A   Yes.

13   Q   So we look at Ron Wilson and we see that by 1969

14   he had already done a stint in jail, been involved

09:34 15   with the law, was involved in the use and sale of

16   drugs, maybe he's only 17 years old, but it's kind

17   of like he's been around the block a little bit so

18   to speak. Fair to say?

19   A   Yes.

09:34 20   Q   When you look at David Milgaard, you found out

21   from talking to Nichol John, you found out from

22   talking to Sharon Williams and others he's been

23   involved with the law, he's been selling drugs

24   throughout the country, he's been pretty sexually

09:34 25   active in what has been described by two people as

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1   in a forceful way. Again, pretty young person,

2   but again sort of been around the block a bit?

3   A   Yes.

4   Q   And all that does, it doesn't tell you that David

09:34 5   Milgaard killed Gail Miller, but you would have to

6   agree it certainly would point you in that

7   direction, point you to say that maybe we should

8   keep on following this up?

9   A   Yes.

09:34 10 Q   Now, I don't know if you are aware of this, but

11   the statements were obtained, the statement was

12   obtained from Mr. Cadrain, Shorty Cadrain, and I

13   understand he was questioned fairly extensively

14   after that about his statement and basically

09:35 15   didn't back down, he stuck with what he said. Are

16   you aware of that?

17   A   In a general sense, yes.

18   Q   And I think if we can look at again Lieutenant

19   Short's report, 106640, if you could highlight

09:35 20   just that area there:

21   "On March 5/69 Albert Cadrain was again

22   brought in by my request and another

23   statement taken from him at which time

24   he verified and stuck with his story and

09:35 25   he was interviewed at that time by

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1   several members of this department and

2   one Insp. Riddell of the RCMP and also

3   S/Sgt. Edmundson --"

4   Who I think was with the RCMP.

09:36   5   "I might mention here that on Sunday,

6   March 2/69 after getting in touch with

7   Supt. Wood and Chief of Police James

8   Kettles that it was decided that Det.

9   Karst would go to Winnipeg ..."

09:36   10   And that's when they talked about interviewing

11   David Milgaard. So it looks like Shorty Cadrain

12   is brought in March 5th, 1969, a number of

13   officers, including a couple of officers from the

14   RCMP, spoke to him and he's still sticking to his

09:36   15   story?

16   A   That's what it says, yes.

17   Q   So again it doesn't tell you necessarily that what

18   he's saying is truthful, but he's not backing down

19   from it. You've still got a story, you've still

09:36   20   got evidence or testimony -- sorry, it isn't

21   evidence or testimony, but you've got a statement

22   from him that points towards David Milgaard that

23   he hasn't retracted, you've still got to deal with

24   as a police service; is that fair to say?

09:36   25   A   Yes. Obligated to.

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1   Q   Obligated to. And in that regard -- well, I'll

2   leave that for a second. Now, we want to go back

3   to Ron Wilson and Nichol John because they've gave

4   you statements and the concern with their

09:37 5   statements has been expressed a couple of ways,

6   one, maybe they are lying, in other words, what

7   they said is not correct, but the second concern

8   is maybe they are just not telling you the full

9   story; correct?

09:37 10   A   Yes.

11   Q   And that wouldn't be surprising, that somebody

12   might be a witness to an offence that was

13   committed by a friend or maybe somehow involved

14   peripherally even, might not give you the full

09:37 15   story?

16   A   My experience has been that that's usually the

17   way.

18   Q   And it would be pretty sloppy police practice not

19   to follow up on that and see if you could at least

09:37 20   make some ascertation (sic) in your own mind as to

21   whether I've got the whole story or not; correct?

22   A   Yes.

23   Q   Would I be correct as well that in looking and

24   trying to make that assessment, obviously you are

09:38 25   trying to get some read off the individuals who

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1   are giving you the statements, but you are also

2   looking at the statements themselves to see, well,

3   how do they compare, are there inconsistencies, is

4   somebody saying one thing, somebody saying

09:38 5   something else, what's the explanation for that;

6   would that be correct?

7   A   That would be a proper approach, yes.

8   Q   And I wondered about that, because when I looked

9   at -- and I don't know if you recall this or not,

09:40 10   David Milgaard gave a statement on March 3rd,

11   1969; you are familiar with that or at least know

12   that he did that?

13   A   Umm, I'm not positively sure that I -- March the

14   3rd did you say?

09:41 15   Q   Let me put this it way; you are aware that David

16   Milgaard gave one statement fairly quickly after

17   Albert Cadrain came in and then gave a second

18   statement later on; the exact dates, I'm assuming

19   you are not aware of that?

09:41 20   A   No, I'm not.

21   Q   Okay. In his first statement, and it's document

22   006586 and it's at page 3 -- and I don't need to

23   bring it up but it's been referred to a number of

24   times -- David Milgaard states that when he was

09:41 25   looking around for Shorty Cadrain's, that he spoke

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1		to an older lady for directions, spoke to a lady
2		on the street seeking directions. Ron Wilson,
3		Nichol John, in their first statements make no
4		reference to speaking to a lady, old, young, or at
5		all, for directions; do you recall that or do you
6		remember anything about that?
7	A	Umm, not specifically.
8	Q	Okay. As an investigator, though, would that sort
9		of perk your interest; why is David Milgaard
10		mentioning that he spoke to an old lady, quick to
11		point out that she is old, yet Ron Wilson and
12		Nichol John just aren't making any reference to
13		just speaking to a lady at all? Might that be
14		something that you just want to know why is that,
15		why -- maybe it's a completely innocent
16		explanation, maybe they just forgot about it, or
17		maybe they want to cover up the fact that they
18		spoke -- that David Milgaard spoke to a lady that
19		morning?
20	A	I think a good detective would want to follow that
21		up.
22	Q	All that happens is your antennae go up and maybe
23		we want to find out why this is?
24	A	Exactly.
25	Q	And Mr. -- it was suggested that, well, there is a

09:41 (line 5)
09:42 (line 10)
09:42 (line 15)
09:42 (line 20)
09:42 (line 25)

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1   -- you are presupposing that these people are

2   lying, that Nichol John and Ron Wilson are lying.

3   Did you automatically -- would it be an automatic

4   conclusion that these people are lying?

09:42   5   A   I would suggest, I would suggest that when you are

6   dealing in this type of a situation it's not so

7   much whether they are lying, it's trying to

8   establish, through efforts, whether it's the

9   truth, if you know what I mean. I mean people say

09:43 10   things and they may be true, they may not be true,

11   I think an investigator looks at those things with

12   some doubt in all cases until it's more or less

13   established, 'eh, that is true because other

14   things support it'. I think that's kind of a

09:43 15   general approach that an investigator would take.

16   Q   So what you are doing is not saying Nichol John is

17   lying or she's telling the truth, you are just

18   saying 'I think I want to find out as best I can

19   is she lying or is she telling the truth, or does

09:43 20   she have further information that she can give

21   us'?

22   A   Yes.

23   Q   Fair to say?

24   A   Yes.

09:43 25   Q   And if I look, can you bring up document 106661,

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1   this is Detective Karst's report of April 18th,

2   1969. Detective Karst, in this paragraph here,

3   states:

4   "With the assistance of Ken Walters,

5   Cst. ...",

6   Ken Walters:

7   "... with the Regina City Police, we

8   located the NicholJohn girl at 817

9   Victoria Ave. and transported her to the

09:44 10   City Police Station and was interviewed

11   at length. Further investigation of the

12   girl when she was interviewed gave one

13   the feeling that she was telling the

14   truth and she emphatically stated she

09:44 15   could not recall any time while they

16   were in the City of Saskatoon during the

17   morning of the murder at which the

18   Wilson or Milgaard had left the vehicle

19   in which they were driving long enough

09:44 20   to commit this offence. She denied that

21   Milgaard had left their vehicle at any

22   time to go to the bathroom or go for a

23   cup of coffee which she could recall.

24   This girl did however state that she

09:45 25   felt Milgaard was capable of an offence

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1   of this nature and admitted having

2   sexual relations with him at different

3   times and that he was more of the animal

4   nature than you would expect of a

09:45   5   human."

6   So Detective Karst is sort of showing the pros

7   and the cons of what Nichol John is saying, she's

8   saying something which would seem to exonerate

9   David Milgaard of this offence, he didn't leave

09:45   10   the car; correct?

11   A   Yes.

12   Q   He is noting that in his report; is that fair to

13   say?

14   A   Yes.

09:45   15   Q   At the same time he is saying 'Nichol John also

16   gave us some information that suggests he is

17   capable of an offence like that'; correct?

18   A   Yes.

19   Q   All you are doing as an investigator is gathering

09:45   20   that information and hoping somebody will be able

21   to digest it at some point in time in deciding

22   whether a charge should be laid or not; fair to

23   say?

24   A   Yes.

09:46   25   Q   And he certainly confirms that when you go to the

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1   next page of the report, that would be 662, if I

2   could:

3   "Although there are many unanswered

4   questions with regards to Milgaard's

09:46 5   activities on that particular morning,

6   if one is to believe the girl,

7   NicholJohn, and it appears that she is

8   very convincing with her story, then

9   there is no way in which Milgaard can be

09:46 10   connected with this crime."

11   Again, that's Detective Karst pointing out

12   there's unanswered questions, he's got some

13   issues here with what's being said; on the other

14   hand noting she is true and she seems convincing

09:46 15   at this point, then he wasn't involved. All he

16   is pointing out is sort of both sides of the

17   issue; fair to say?

18   A   I agree.

19   Q   And he goes on here near the bottom of the,

09:46 20   towards the end of the page:

21   "With regards to the above information

22   it now appears that further questioning

23   of Cadrain is warranted with regards to

24   the blood as both youths Milgaard and

09:47 25   Wilson along with the girl, NicholJohn

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1   deny that Milgaard had any blood on his

2   clothing, while Cadrain emphatically

3   states that he observed this blood."

4   That sort of lays out pretty clearly the issue

09:47 5   that was facing the police service at that point

6   in time; Albert Cadrain saying there's blood,

7   David Milgaard looks like the suspect, Nichol

8   John/Wilson give some information which suggests

9   he is capable of the offence but say they didn't

09:47 10   see blood, what's going on here; fair to say?

11   A   Yes.

12   Q   And, again, you would expect a good investigator

13   to do that, point out those two different

14   conflicting positions?

09:47 15   A   Yes.

16   Q   And then goes on further to say concerns he has

17   about whether or not Cadrain had heard about the

18   offence previously, and I think if you turn to the

19   next page as well, concerns about whether or not

09:48 20   he had been smoking marijuana the night before;

21   correct?

22   A   Yes.

23   Q   So, I'm not sure we'll ask Mr. Karst when he

24   testifies what his opinion was at that point in

09:48 25   time, but certainly in his reports he is -- he

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1		seems to be putting down both sides of the issue
2		so to speak fair to say?
3	A	That's the way I see it, yes.
4	Q	And that's what you would expect a good
5		investigator to do?
6	A	Yes.
7	Q	Can we just turn to the document that's been
8		referred to as the summary, this is document
9		006799, please. If we could go to the last page
10		of that document, if you could highlight that,
11		take my marking out of it. Thanks, thank you.
12		"- Nichol John, Wilson and Cadrain be
13		brought to Saskatoon ...",
14		this is the suggestions:
15		"... where with all present true story
16		can be obtained ...",
17		and I think it's supposed to be:
18		"... even if hypnosis or polygraph are
19		necessary."
20		Umm, sort of looks like you are suggesting
21		exactly what Mr. Karst was talking about; let's
22		find out what the true story is?
23	A	Yes, and that's, that's a very reasonable approach
24		to, to the situation as I understand it was up to
25		that point.

Timestamps in left margin: 09:48 (line 5), 09:48 (line 10), 09:49 (line 15), 09:49 (line 20), 09:49 (line 25)

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1   Q   Can we bring up document 250609, please, and if we

2   look at paragraph 4. This is, again, what was

3   referred to as the turning point by various

4   counsel who have questioned you:

09:50 5   "After a great deal of discussion it was

6   agreed that David Milgaard could be

7   considered as the prime suspect in this

8   case and that further efforts should be

9   made to eliminate or implicate him in

09:50 10   this offence."

11   Is that your understanding of what came out of

12   that meeting on May 16th, 1969?

13   A   Yes.

14   Q   'Eliminate' means determine that he wasn't

09:50 15   responsible?

16   A   Yes.

17   Q   'Implicate' means finding evidence, if there's

18   evidence there, that suggests that he was?

19   A   Yes.

09:50 20   Q   Seems to be you are sort of doing the very same

21   thing that's referred to in the summary that's

22   referred to in Detective Karst's report, you are

23   going to look at the issue and decide is there

24   evidence there that either eliminates him or

09:51 25   implicates him; correct?

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1   A   My understanding of that situation, that was

2   precisely the purpose of the meeting.

3   Q   There was reference made to the description of Mr.

4   Milgaard as the prime suspect; as at March 16 --

09:51 5   May 16th, 1969, was there any other suspect in

6   relation to the death of Gail Miller?

7   A   I --

8   Q   Had anyone else pointed directly to any other

9   suspect as being responsible for the --

09:51 10 A   I'm not aware that that came up. I have no

11   recollection of any other suspects coming up. I

12   would suggest that there were no other suspects

13   other than, you know, what I refer to as the, the

14   Milgaard group.

09:51 15 Q   When --

16   A   Pardon me.

17   Q   When you are investigating a criminal offence and

18   you are looking -- I mean some cases I assume are

19   pretty easy to deal with, I find a fellow laying

09:52 20   on the ground with a knife in his heart and the

21   accused is laying on top of him drunk holding the

22   knife in his hand, pretty easy to identify who

23   your suspect is in a case like that?

24   A   Yes.

09:52 25 Q   Fair to say?

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1   A   Of course, yes.

2   Q   This one doesn't fall into that category, we're --

3   you were more limited, at least nobody, the

4   suspect wasn't found immediately and so on, you

09:52 5   are trying to piece the story together; correct?

6   A   Right.

7   Q   Would I be correct that in any investigation like

8   that, where I'm now looking at a suspect who

9   hasn't given me a statement admitting he committed

09:52 10   the offence or whatever, I at some point in time

11   have to complete the work of either implicating

12   him or eliminating him, that's the road I have to

13   go down at some point in time with that suspect;

14   fair to say?

09:52 15   A   Yes, that's, that's the, that's the practice of

16   investigating.

17   Q   That isn't unique to this case or the Paul Morin

18   case, or any other case like it, that's basically

19   police work; once I have identified a suspect that

09:53 20   seems to be connected or possibly connected to the

21   offence, I have got to go down that road to try

22   and implicate him or eliminate him, one or the

23   other?

24   A   Absolutely.

09:53 25   Q   Now I understand, Mr. Penkala, on the taking of

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1   the second set of statements, the second more

2   detailed statements from Nichol John and Ron

3   Wilson, you weren't directly involved in that?

4   A   No I was not.

09:53 5   Q   Umm, but you are aware that they, in fact,

6   acknowledged -- first of all, in those statements

7   they provided considerably more information about

8   what had taken place on the morning of January

9   31st, 1969?

09:53 10   A   Yes.

11   Q   Correct?

12   A   Yes.

13   Q   And I'm not sure if you are aware of this or not,

14   having followed the proceedings after 1970 up to

09:54 15   the present time, that although we've heard lots

16   about recantations and so on, at the end of the

17   day Mr. Wilson still acknowledges that there was a

18   lot of information that he did not give the police

19   in his first statement which was relevant; would

09:54 20   that be correct?

21   A   Umm, again, I'm not, --

22   Q   Sure.

23   A   -- of my own personal knowledge, really aware of

24   that.

09:54 25   Q   Sure. So information like 'yeah, we did break

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1   into an elevator in Aylesbury, yeah we did have a

2   knife in the car, yeah we did get stuck, yeah we

3   did in fact separate for a period of time, yeah we

4   did plan to roll somebody that morning to possibly

09:54 5   steal a purse', all of that information, none of

6   that was in the first statement, it was in the

7   second statement, it's been acknowledged as being

8   truthful, at least as much as we can accept

9   something like that from Mr. Wilson, so would it

09:54 10   be fair to say the gut instinct, if I can describe

11   it that way, that Wilson and John maybe weren't

12   giving you all of the information the first time

13   around proved to be correct?

14   A   I would have come to that conclusion, yes.

09:55 15   Q   So I want to go, now, to May 25th-26th, 1969. You

16   have now -- you, and by 'you' I mean the Saskatoon

17   Police Service -- have now received all of this

18   information; you have got Albert Cadrain's story,

19   he is sticking with it; you have got what Nichol

09:55 20   John and Sharon Williams have told you about him;

21   you have got the evidence of Wilson and John in

22   terms of what they saw and heard, all of those

23   sorts of things; at that point in time who makes

24   the decision that there's going to be a charge

09:55 25   laid against David Milgaard?

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1   A   Umm, the normal process would be the coordinator

2   would indicate what support there is for the

3   findings, and then my experience and my

4   understanding is that you would approach the Crown

09:56 5   prosecutor and review those aspects of evidence

6   that you have to legally establish that they are

7   valid, and then proceed with -- with the

8   appropriate charge.

9   Q   Sure. You might have reasons to believe David

09:56 10   Milgaard committed this offence which might not

11   constitute evidence that a Crown prosecutor could

12   use in a Court of law?

13   A   Right.

14   Q   Comments, for example we see in the summary

09:56 15   document -- and that would be, again, document

16   006799 at page 4 of that document -- right there:

17   "Father of Milgaard made statement to

18   effect that he was not surprised and had

19   suspected something like this might

09:57 20   happen."

21   That might not be evidence that the Crown could

22   use but, again, it's something that the police

23   might have that helped suggest or might point

24   them, suggesting they are going down the right

09:57 25   track in pursuing Mr. Milgaard as a suspect; fair

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1   to say?

2   A   Yes.

3   Q   But at the point in time that the Crown gets it

4   now the Crown is going to do some review, what

09:57 5   have I got by way of admissible evidence, is there

6   a basis to proceed with a charge?

7   A   That's my understanding, yes.

8   Q   To your knowledge, certainly in that time period,

9   would the police ever lay a murder charge without

09:57 10   consulting first with the Crown?

11   A   I don't think so.

12   Q   The matter then proceeds to trial and Lapchuk and

13   Melnyk also testify at trial, and I take it other

14   than hearing, perhaps, about their evidence you

09:58 15   weren't involved in that?

16   A   That's correct.

17   Q   Okay. But certainly, at the end of the day, you

18   have got basically five friends or acquaintances

19   of Mr. Milgaard giving evidence that directly

09:58 20   implicates him in the death of Gail Miller; Mr.

21   Cadrain, Mr. Wilson, Ms. John, Mr. Lapchuk,

22   Mr. Melnyk, correct?

23   A   Yes.

24   Q   The suggestion is made 'well what, what about

09:58 25   Larry Fisher', and let's say Larry Fisher showed

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1		up the day of the trial or the day after the trial
2		and said 'I, I raped Ms. (V1)-, I raped
3		Ms. (V2)-----, I assaulted (V5)-- (V5)---'; what
4		if he showed up and said that -- 'but I didn't do
09:59 5		anything to Gail Miller', the position he still
6		takes and the position he testified to in the
7		Supreme Court of Canada. If he showed up and said
8		that would you be in any position to say 'okay,
9		David Milgaard, you are gone, you are not involved
09:59 10		in this'?
11	A	No. The same process that we have been talking
12		about this morning would then apply to the
13		supposed confession of, as you are suggesting,
14		Larry Fisher. You would have to go through that,
09:59 15		an investigator would have to go through that same
16		process to verify whether he is accurate in what
17		he is suggesting, you would obviously, with the --
18		if the time frame was that close you would
19		obviously look at both crimes. You know, that
10:00 20		would put an entirely different approach to the
21		investigation of the Miller murder if it had
22		occurred in that fashion.
23	Q	The fact of the matter remained, though, that you
24		still had five people directly implicating David
10:00 25		Milgaard; correct?

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1   A   Yes.

2   Q   And whether Larry Fisher raped (V1)--- (V1)- or

3   whether he raped Ms. (V2)-----, the fact is you

4   still had those five witnesses pointing to David

10:00 5   Milgaard?

6   A   Yes.

7   Q   I want to talk just a little bit about Larry

8   Fisher a bit. There was a -- the letter, and we

9   don't need to bring it up -- well, let's bring it

10:00 10   up. This is 058476, a February 5, 1969 letter.

11   This is the letter that you wrote to the RCMP, and

12   there's attached to it two pages where you

13   summarize the Gail Miller offence and then refer

14   to two other rapes that occurred in Saskatoon.

10:01 15   A   Yes.

16   Q   And I'm assuming what you are doing is asking them

17   to see if they have got any information about

18   other perpetrators, other people that might have

19   committed the offences, that might match up to

10:01 20   what we've got for the Gail Miller offence?

21   A   That's why Crime Index existed.

22   Q   And they may have, you hoped that they would come

23   back and say 'well here, we've got a fellow over

24   here who sort of sounds like him' or 'he has

10:01 25   committed an offence like that', and then you

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1		would follow it up?
2	A	That's the way that works, yes.
3	Q	Fair to say you didn't receive any response to
4		this letter, they didn't supply you with any
10:01 5		possible suspects?
6	A	I'm not aware of any.
7	Q	Okay. The theory that's discussed is that the
8		person who killed Gail Miller would have also
9		committed the, at that time, the offences
10:02 10		involving (V1)-, (V2)----- and (V3)------, that's
11		the theory, and correct when I say it was just
12		that, a theory?
13	A	Yes, it's been proposed in my -- in the
14		examination of me, yes.
10:02 15	Q	And it would be correct that there certainly were
16		similarities between those other three offences?
17	A	Yes.
18	Q	But there also were some differences, they weren't
19		identical?
10:02 20	A	Umm, yes, I think that's fair, yes.
21	Q	For example in the Gail Miller case it appears she
22		was robbed, her purse was taken, her money was
23		gone?
24	A	Yes.
10:02 25	Q	Correct? I don't think that occurred in those,

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1		those first three, (V2)-----, (V1)-, or
2		(V3)------?
3	A	I'm not, I'm not --
4	Q	I think --
10:02 5	A	-- specifically --
6	Q	We've heard that already. And I suppose one of
7		the other most significant differences is that in
8		the Miller case there was an actual stabbing, in
9		fact not just one stabbing, a very vicious
10:03 10		stabbing that took place that involved a number of
11		slash wounds and then a number of stab wounds that
12		ultimately led to the death of this individual?
13	A	Yes.
14	Q	That was one dramatic difference between this file
10:03 15		and those other three; would that be correct?
16	A	Yes.
17	Q	And then I suppose the ultimate difference, in
18		terms of these files, was that in the case of
19		(V1)-, (V2)-----, (V3)------, I'm not aware -- and
10:03 20		I'm assuming you are not aware -- that anyone was
21		specifically implicated in those three offences;
22		in other words nobody said 'there's your suspect
23		for those offences', correct?
24	A	That's my understanding, that --
10:03 25	Q	Big difference in the Gail Miller case, you

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1   eventually had someone who was specifically

2   implicated in that offence; correct?

3   *A*   Yes.

4   **Q**   I want to just talk about the (V4)--- file for a

10:03   5   minute. Umm, this is the lady who was sexually

6   assaulted or indecently assaulted, I think as it

7   was described at that time, as she was walking

8   down the street the morning that Gail Miller was

9   murdered. Now the evidence we've heard is that

10:04 10   Gail Miller left her home at about 6:40-6:45 a.m.

11   and sometime after that, we assume before she got

12   to her bus stop, was sexually assaulted, raped,

13   murdered, that murder involved removing some

14   clothes, putting some clothes back on, and then

10:04 15   the stabbing death of her?

16   *A*   Yes.

17   **Q**   So sometime 6:45 a.m., after that, that occurred.

18   The (V4)--- assault occurred at 7:07 a.m. some

19   distance away. I think if you look at the, the

10:04 20   investigation report that was done -- and you

21   don't need to bring it up -- investigation report

22   that was done, I believe it was by the RCMP, it's

23   document 0213167 (sic), at page 223 of that

24   document -- you don't need to bring it up -- but

10:05 25   the distance to walk from where the Gail Miller

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1   assault took place to where the (V4)--- assault

2   took place was described as an eight-minute walk.

3   COMMISSIONER MacCALLUM: Just give me the

4   number again, please, would you?

10:05   5   MR. FOX: I believe it's at document

6   0213167 (sic), and I believe it's at page 223 of

7   that document, 223 is the page number of the

8   document, not the ID number.

9   BY MR. FOX:

10:05   10   Q   All right. Looking at that, first of all in terms

11   of the logistics of it, what do you think the

12   possibility is that someone, after 6:45 a.m.,

13   would have encountered Gail Miller, dragged her

14   into an alley, removed her clothes, sexually

10:05   15   assaulted her, raped her, put her -- had her coat

16   back on, slashed her, stabbed her, left, and by

17   7:07 was an eight-minute walk away touching

18   someone that they are just approaching face to

19   face on the street; logistically does that seem

10:06   20   very possible to you as a police investigator?

21   A   Not really, but still possible I guess.

22   Q   Still possible, doesn't sound very possible, but

23   possible I guess?

24   A   Yes.

10:06   25   Q   And if you put in there that the perpetrator who

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1   committed the offence in Gail Miller had a car and

2   also drove the car back to an address some

3   distance away and then was walking back after

4   dropping off the car it even seems less likely

10:06   5   that it could have occurred in that time period;

6   you would agree?

7 A   Yes, I think that's, that's appropriate, yup.

8 Q   Looking at the (V4)--- assault, she described

9   someone who approached her on the street face to

10:06 10   face and she gave a very detailed description of

11   that individual, quote, "face to face", basically

12   he touched her, grabbed at her, ran his hands on

13   her body, and she screamed and he ran away. That,

14   fair bit different from what we saw in the sexual

10:07 15   assaults or rapes of (V1)-, (V2)-----, even Gail

16   Miller, if we assume it's the same?

17 A   I -- and I recognize that it is different.

18 Q   Just a completely almost different category of

19   offence; one is somebody walking down the street

10:07 20   face to face approaching someone and touching

21   them, screaming, and running away, the others

22   involve someone being grabbed, pulled into an

23   alley, identity hidden throughout, and a very

24   protracted sexual assault taking place; fair to

10:07 25   say?

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1   A   Yes.

2   Q   I'll leave it for someone else to figure out

3   whether that's similar or not.

4   If I can go to 1969, to your

10:07 5   knowledge was Larry Fisher at any time in 1969

6   identified as a suspect in any offence, in any

7   sexual offence or any offence at all; were you

8   aware of him being identified as a suspect in

9   anything?

10:08 10   A   Larry Fisher was not known to the Saskatoon Police

11   Department throughout '69.

12   Q   As I understand Larry Fisher, in 1969, had no

13   criminal record?

14   A   Umm, certainly not with us, not --

10:08 15   Q   None that you have been able to ascertain?

16   A   That's right. Well, we didn't have a name, so we,

17   we couldn't even --

18   Q   Yeah?

19   A   -- we couldn't even check the central indices of

10:08 20   the nation in regards to that.

21   Q   But certainly, looking back now, we don't see that

22   Larry Fisher was on some place with a previous

23   record for sexual assault, or anything of that

24   nature, being investigated for anything like that,

10:08 25   he is just not on the radar screen at all in

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 1          1969; --

 2     A    That's --

 3     Q    -- correct?

 4     A    That's right.

 5     Q    You were aware that the Winnipeg Police

 6          apprehended him in Winnipeg in 1970, he was

 7          actually caught raping someone there?

 8     A    Yes, I'm aware of that, yes.

 9     Q    Now I want to, I'm not sure if you are familiar

10          with these documents, but I'm going to show them

11          to you and ask you if you are and then I'm going

12          to ask you some questions about it.  Could we have

13          document 093349.  This is the statement that Larry

14          Fisher gave on September 19th, 1970 in Winnipeg.

15          I'm not sure if it's -- have you seen that

16          document?  This is a statement where he is

17          apprehended and immediately gives a statement

18          acknowledging that he had sexually assaulted a

19          lady or raped a lady in Winnipeg.

20     A    I don't, I don't recall seeing this statement

21          before.

22     Q    Okay.  Show document 093357.  This is the

23          information that was laid against -- I'll just

24          kind of highlight it, and if we can walk from the

25          top down to the bottom, yeah, that's good -- the
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1   information is laid against Larry Earl Fisher --

2   if we can just continue scrolling up -- he was

3   charged September 19th with a sexual assault, it

4   appears as though he appeared February 12th, '71,

10:10   5   waived his right to a preliminary hearing, and

6   went straight to trial; that's how you would read

7   that?

8   A   Yes.

9   Q   His counsel at that time was an L. Greenberg, so

10:10 10   he had a lawyer representing him appears to be the

11   case, L. Greenberg counsel for the defence?

12   A   That's what it says, yes.

13   Q   And then he is sentenced May 20th, '71 to 6 1/2

14   years consecutive on each of the two counts, that

10:11 15   would be a total of 13 years; that appears to be

16   what went -- took place?

17   A   Yes.

18   Q   So the charge was laid, the information was sworn

19   September 19th, '70, not finally disposed of until

10:11 20   May 20th, '71, and that's when he gets his 13-year

21   sentence.

22   A   That's what it says, yes.

23   Q   Okay. Now I want to go back. Can we have up

24   document 261186. Now this is a statement given by

10:11 25   Mr. Fisher October 21st, 1970, looks like it's

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1   taken by two officers from actually I think it's

2   the Fort Garry police department, and he goes on

3   saying:

4   "Q   Do you wish to give a statement?

10:12 5   A   Yes. I want to clear up three more

6   things. The first one was in

7   Saskatoon sometime around ...",

8   thanks, keep on scrolling there:

9   "I want to clear up three more things.

10:12 10   The first one was in Saskatoon sometime

11   around this spring. I was downtown, I

12   seen this girl get on a bus so I got on

13   to. She got off and I got off to. I

14   followed her. I grabbed her from the

10:12 15   front, dragged her into the back of a

16   yard. I took off her clothes and raped

17   her. This was in the Pleasant Hill

18   District around Avenue U. It was

19   around, west of St. Paul's Hospital, I

10:12 20   think. I think the girl was wearing a

21   dark coat and slacks.

22   The second one was also in

23   Saskatoon, near the University. I don't

24   know what I was doing in that District.

10:13 25   I saw the girl, I followed her, dragged

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1   her into a back alley. I tried to rape

2   her but a car came along and I took off.

3   This happened this summer, about six or

4   seven months ago. The girl was wearing

10:13 5   slacks and carried some books."

6   And refers to a third one in Winnipeg. So he has

7   given a statement October 21st, 1970 already to

8   the Winnipeg Police admitting to two rapes in

9   Saskatoon, or at least one rape and one attempted

10:13 10   rape?

11   A   Yes.

12   Q   That would be correct?

13   A   Yes.

14   Q   The statements that were then obtained by

10:13 15   Detective Karst and Inspector -- is it Inspector

16   Nordstrom --

17   A   Yes.

18   Q   -- Inspector Nordstrom, they are October 22nd,

19   1970. The one is 012642, that's the first one,

10:13 20   that deals with (V5)-- (V5)---. I'm not going to

21   go through this, but this is where he describes in

22   pretty brief detail his rape of (V5)-- (V5)---,

23   and it's acknowledged that it was in February in

24   1970. He said he thought, I think he refers

10:14 25   somewhere he thought it was later, but -- or

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1   sorry, the second one he refers to later than

2   that, February 1970. Would I be correct that by

3   the time, obviously by the time Detective Karst

4   and Mr. Nordstrom or chief -- or Inspector

10:14   5   Nordstrom went to Winnipeg they weren't going,

6   frankly, to interrogate to get some something new

7   because Fisher had already given the statement to

8   Winnipeg the day before?

9   A   It would appear that way, yes.

10:12 10   Q   And I'm sure you are not sure of what did

11   transpire, but pretty logical that once Winnipeg

12   got the information October 21st, they would have

13   phoned Saskatoon and said hey, we've got a fellow

14   here that says he committed a couple of rapes in

10:12 15   Saskatoon, do you want to talk to him and get a

16   statement from him, that's pretty logical?

17   A   That would be a standard process.

18   Q   And Detective Karst going there with Inspector

19   Nordstrom on October 22nd, it's kind of a done

10:12 20   deal already by that time, this isn't new or

21   revealing, they are basically going to get a

22   statement just conforming what he has already told

23   the Winnipeg police; fair to say?

24   A   Yes.

10:12 25   Q   Inspector Nordstrom, as I understand it, he was

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 1              the head of morality?

 2      A       He was, yes.

 3      Q       And so logical that he would go along?

 4      A       Yes.

10:12   5  Q    And the (V5)--- and -- the second statement that

 6              was given is 012639 and I don't think we have

 7              to -- well, let's bring it up just for the record.

 8              That's again the October 22nd statement and that

 9              relates to Ms. (V3)------ and he describes it and

10:13  10       again gives a little bit of detail, not much about

11              it and says where it took place and so on.

12              Basically these two matters, (V3)------ and

13              (V5)---, those investigations would fall under the

14              morality section?

10:13  15  A    Yes.

16      Q       And logical, therefore, that Inspector Nordstrom

17              would have been there?

18      A       Yes.

19      Q       And I take it the follow-up, if there's even going

10:13  20       to be any follow-up because you've now, this is

21              more or less a done deal, he has pled guilty, that

22              would fall to the morality section; in other

23              words, what are we going to do with these

24              statements, are there going to be some charges

10:14  25       laid, that sort of thing?
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1   A   Yes.

2   Q   You mention that, not surprising, Detective Karst

3   would have gone along because he was a good

4   investigator and was often sent or occasionally

10:14 5   sent to get statements and that because he did a

6   good job?

7   A   Yes.

8   Q   But once those statements were obtained, this

9   would be a morality issue and they are going to

10:14 10   decide where they go?

11   A   That would be the normal practice.

12   Q   Detective Karst was not in morality?

13   A   No.

14   Q   The sentencing takes place on May 21st -- May

10:14 15   20th, 1970 we saw from the information, he gets a

16   total of 13 years. Would the -- would the police

17   service, Saskatoon Police Service have a role in

18   arranging the court appearance for Larry Fisher in

19   Saskatchewan or wherever, would you have a role in

10:15 20   that? Who would make the final call on how that's

21   going to be dealt with?

22   A   Well, I would suggest that if it's established

23   that a crime within the Saskatoon jurisdiction had

24   occurred and they had support for the crime, it

10:15 25   would be the Saskatoon Police Department's

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1   obligation to prepare the charges and set them.

2   Q   Now, you prepare the charges. Who's going to deal

3   with those charges?

4   A   Normally it would initiate with the division that

10:15 5   is charged with the responsibility. In this case

6   it was the morality division, they would have the

7   investigation to that point and they would then

8   follow it up with --

9   Q   Who would deal with the charges in court?

10:16 10   A   It would be -- charges would be sought on the

11   basis, assuming that they are supportable, and

12   then some officer in the court would swear to the

13   information and then once the information and the

14   accused is before the court, the process then

10:16 15   becomes that of the court.

16   Q   And who discusses with the accused or his defence

17   counsel what your sentence is going to be, that

18   sort of thing?

19   A   It would be the Crown.

10:16 20   Q   The prosecutor would deal with that?

21   A   Yes.

22   Q   In this particular case we saw that Mr. Fisher

23   eventually pled guilty, notwithstanding he had

24   given his statements already in October of 1970 to

10:16 25   the Winnipeg charges, he didn't plead guilty until

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1   May 20th, 1971 and at that time got 13 years. He

2   then came back to Saskatchewan, pled guilty to

3   four charges here and got concurrent time. Would

4   the Saskatoon Police Service have been involved in

10:17 5   negotiating whatever agreement there was in terms

6   of where he's going to plead guilty, what sort of

7   sentence he's going to get, anything of that

8   nature?

9   A   My understanding of that process is that either

10:17 10   the accused or his defence counsel would initiate

11   that process and that that process would have to

12   be, if it was going to be heard or dealt with in a

13   jurisdiction other than the jurisdiction where the

14   crime occurred, the Attorney General would have to

10:17 15   provide his consent or waive the process.

16   Q   We saw on the information in the Winnipeg charges

17   that Mr. Fisher was represented by a Lawrence, or

18   L, I think it's Lawrence Greenberg, and I think

19   we'll hear that he similarly represented Mr.

10:18 20   Fisher on the charges in Saskatchewan. Do you

21   know, to your knowledge, if the Saskatoon Police

22   Service would have had any direct dealings with

23   Mr. Greenberg?

24   A   I don't have any information on that.

10:18 25   Q   And would you expect that they would or would you

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1   expect that that would be dealt with by the Crown

2   prosecutor's office or the Department of Justice?

3   A   I was never really involved in that other than a

4   very general sense, but I would suggest that a

10:18 5   possible way would be the defence lawyer would

6   contact the Attorney General and then maybe get

7   direction from the Attorney General and then it

8   would kind of come back through the Saskatoon

9   Police Department. As I understand, it did

10:18 10   because there's some correspondence where they

11   were asked for the summary of those offences that

12   were going to be dealt with.

13   Q   So in other words, you were asked for some

14   information which you provided?

10:19 15   A   Yes.

16   Q   In terms of negotiating what his sentence should

17   be, that sort of thing, any indication that the

18   Saskatoon Police Service was involved in that?

19   A   No, and usually the police are never involved in

10:19 20   that aspect.

21   Q   Now, the suggestion was made that Mr. Fisher

22   didn't receive any time for the offences he

23   committed in Saskatchewan and I want to ask you

24   about that. Is it fair to say that circumstances

10:19 25   arise where you would have an accused who is

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1   arrested on one or two or maybe more than two

2   offences, is going to clearly be found guilty,

3   decides to plead guilty and decides that he's

4   going to basically clear everything up at the same

10:19 5   time?

6   A Yes.

7   Q That could happen in some very minor offences,

8   like, for example -- I shouldn't describe break

9   and enter as minor offences, but you might have

10:20 10   someone who's caught on two or three break and

11   enters, they are prepared to admit to six others

12   and want to get them cleared up all at the same

13   time?

14 A That's usually -- my experience has been that

10:20 15   that's usually how these things occur.

16 Q And part of the reason for that is that the

17   individual doesn't want to do time on the first

18   two break and enters, get released, then gets

19   charged on the next six and then maybe have to go

10:20 20   back to jail again?

21 A I think that's an element that must cross the mind

22   of the accused.

23 Q And generally if I've got to go to jail, maybe I

24   might as well get everything cleared up so that

10:20 25   when I get out I can start fresh, so to speak?

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1   A   Yes.

2   Q   We see that happen with more serious offences as

3   well, armed robberies for example?

4   A   Yes.

10:20 5   Q   Someone might have got caught holding up a

6   7-Eleven and admits to two or three others because

7   they want to get them all cleared up. Fair to

8   say?

9   A   My experience has indicated that's the way it

10:21 10   usually happens.

11   Q   You would see that and you would have seen that

12   certainly with sexual assault offences, and I'm

13   thinking, for example, certainly in the last 20

14   years we've seen a number of individuals charged

10:21 15   with sexual assaults, residential school

16   situations, situations like that, positions of

17   trust, offences laid, charges laid there?

18   A   In a general sense, yes, I have.

19   Q   Sure. And it's not uncommon in those

10:21 20   circumstances to see a series of guilty pleas

21   entered and basically one large sentence imposed?

22   A   Yes.

23   Q   And I take it you are not able to comment what

24   role the Saskatchewan offences had on the 13 year

10:21 25   sentence that he received in Winnipeg?

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1   *A*   No.

2   *Q*   But in your experience as a police officer, it

3   wouldn't be unusual that the 13 year sentence was

4   imposed with some consideration that he's also

10:22 5   going to be giving guilty pleas on some charges in

6   Saskatchewan as well, that they are going to clean

7   everything up, that certainly is a possibility?

8   *A*   Yes.

9   *Q*   And all the more so when we know that when he

10:22 10   entered his guilty plea in Manitoba and received

11   his sentence on May 20th, 1971, he had already

12   given statements admitting to at least two of the

13   offences in Saskatchewan?

14   *A*   It would appear that that's what happened.

10:22 15   *Q*   Okay. The sentencing that took place of Mr.

16   Fisher in Saskatchewan on December 21st, 1971, I

17   take it you have no particular knowledge of that?

18   *A*   No.

19   *Q*   In terms of why that date was picked or whether it

10:22 20   had anything to do with Mr. Fisher or his counsel

21   wanting that date or that time, you have no

22   knowledge of that?

23   *A*   No knowledge.

24   *Q*   Were you aware of anything that prevented the

10:23 25   public from having access to what took place in

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1		the sentencing of Mr. Fisher in 1971?
2	A	No.
3	Q	Would I be correct that basically criminal record
4		is public information?
10:23 5	A	Yes.
6	Q	If the CBC or anybody else wanted to see if Larry
7		Fisher had a criminal record or had been convicted
8		of criminal offences, it's available to the
9		public?
10:23 10	A	I should correct that, I think a conviction is
11		public.
12	Q	Yes. A conviction is public record?
13	A	Yeah.
14	Q	Now, there was some questions asked about advising
10:23 15		complainants or advising people who have been the
16		victim of offences as to the outcome of charges?
17	A	Yes.
18	Q	Now, I just want to talk in this particular case,
19		dealing with the (V2)-----, (V1)-, (V5)---,
10:24 20		(V3)------ offences, those all would have fallen
21		under the morality section?
22	A	Yes.
23	Q	And in terms of -- by that I mean the
24		investigators assigned to those files would have
10:24 25		been all morality officers?

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1   A   I would assume that that was the case.

2   Q   And would have been overseen by, in this case by

3   Inspector Nordstrom?

4   A   Yes.

10:24   5   Q   And in terms of somebody going and advising those

6   four that charges had been disposed of dealing, or

7   their charges had been disposed of, would you

8   normally expect that that would fall to morality?

9   A   Yes.

10:24   10   Q   Now, we heard from --

11   A   Or somebody on behalf of morality.

12   Q   They would be the ones giving the directions or

13   overseeing it I should say.

14   A   Yes.

10:24   15   Q   We've heard from Ms. (V5)---, (V5)-- (V5)---

16   testified that she was advised of an arrest and

17   that the individual was arrested and was

18   responsible for some other rapes as well, we've

19   heard that testimony, and I think it's in the RCMP

10:25   20   report of her which is document 254911, and again

21   I take it you have no knowledge as to how that

22   came about or sort of why she was told that and

23   maybe the others weren't?

24   A   No, and I would have never -- I wouldn't have been

10:25   25   in a position at that time to really be involved

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1   in that process.

2   Q   Sure.   Could we have up document 105246, and this

3   is a report of Gus Weir who I understand was a

4   morality officer?

10:25 5   A   I believe that's right.

6   Q   And this is a report, February 5th, '71, and so

7   this would have been after Mr. Fisher had given

8   his statement, still hadn't -- the charge hadn't

9   been disposed of, but given his statement.

10:26 10   "The situation concerning this

11   occurrence and the alleged mental

12   condition of the accused was explained

13   to this girl and her parents. At the

14   present time these people appear to be

10:26 15   completely satisfied with the actions

16   taken re this occurrence. This therefor

17   is a concluded report."

18   If I can just scroll up a bit I think. Sorry.

19   Yeah, no, that's it. So it appears as though at

10:26 20   that time Officer Weir, Morality Officer Weir

21   certainly is advising Ms. (V5)--- that there is

22   an accused talking something about the mental

23   condition, and I'm not going to ask you questions

24   about that because there are some other documents

10:27 25   that refer to that I think, but talking about the

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1   mental conditions, certainly advising her about

2   the accused and it appears as though she

3   considers the matter concluded. I'm sure you

4   weren't aware that this took place in February,

10:27 5   '71?

6   A   No, I'm not.

7   Q   But fair to say it appears as though Morality

8   Officer Weir is getting back to the victim and

9   advising her at least of the status of the

10:27 10   situation?

11 A   That's what it suggests to me.

12 Q   And in terms of why that doesn't appear to have

13   happened with the others, you are not sure of

14   that?

10:27 15 A   No, I don't know.

16 Q   Now I want to ask you a few questions about the

17   suggestion that the information about the rapes

18   and sexual assaults took place was somehow hidden

19   from Mr. Milgaard or his defence counsel in 1969

10:28 20   and early 1970 when he went to trial. First of

21   all, was there any attempt on your part, you

22   personally, to try and hide that information from

23   either Mr. Milgaard or his defence counsel or

24   anyone on behalf of Mr. Milgaard?

10:28 25 A   No.

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1	Q	Are you aware of any effort by any members of the
2		Saskatoon Police Service, and specifically
3		Detective Karst or anyone else, to try and hide
4		that information from Mr. Milgaard?
10:28 5	A	I'm not aware of anything of that nature.
6	Q	Now, Mr. Fisher has been referred to as a serial
7		rapist and are you -- I don't know if you can
8		comment on this in terms of how well it was known
9		in 1968 into 1969 and early 1970 that someone had
10:29 10		committed or was alleged to have committed a
11		number of sexual offences. Do you know how
12		wide-spread that information might have been?
13	A	It's kind of hard to assess that at this stage of
14		the game because of the time frame. I'm sure --
10:29 15		I'm sure that the presence of those types of
16		crimes would have been a concern to the community
17		and of course to the police service.
18	Q	Okay. We've referred to document 050611 and if we
19		can just bring that up if you could, and that's
10:29 20		just the publication that took place on page 3 of
21		the *StarPhoenix* December 14, '68 issuing a warning
22		about two instances of alleged rape and an assault
23		that were brought to the police's attention,
24		Riverdale area and one at the university, telling
10:30 25		people to be on the look-out, be careful, and I

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1   don't know if you said whether you had any

2   specific recollection of that being put out or

3   not?

4   *A*   No, I didn't. I think this is the first time I've

10:30 5   seen this.

6   *Q*   Okay. But it has been established that was put

7   out there, so certainly there's some public notice

8   gone out, be on the look-out?

9   *A*   And I'm not surprised at that.

10:30 10   *Q*   Okay. I'm going to ask if we can have document

11   050612, this is a copy of a publication of a

12   February 3rd, 1969 edition of the *StarPhoenix* and

13   it starts out, if I can highlight that paragraph:

14   "A $2,000 reward was authorized today by

10:30 15   the Board of Police Commissioners for

16   information leading to the apprehension

17   of the slayer of Gail Miller."

18   And gives the address there. If we can go on, if

19   I can just look at this area here, highlight that

10:31 20   if I could, thanks:

21   "One of the possibilities being

22   investigated by the police is that the

23   attacker was a rapist who was active in

24   the city last fall.

10:31 25   She had been dead about an hour

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1   before her body was found by a child

2   Friday morning about 8:30.

3   Police have issued a plea to

4   all citizens to contribute any

10:31   5   information which might aid in the

6   investigation."

7   I'm not sure, do you recall this publication?

8   *A*   I don't recall it. I do recall that there was a

9   reward posted, I recall that, but I don't

10:31   10   specifically recall this, and it doesn't suggest

11   that I didn't see it at the time, I just don't

12   remember.

13   *Q*   Sure, I appreciate that. But certainly it seems

14   to be sending out the message to the public that

10:31   15   this murder might be related to the attacker who

16   was a rapist active in the offences in the fall?

17   *A*   Yes.

18   *Q*   If we can put up document 050613, this is a

19   similar story that appeared in the Regina

10:32   20   *Leader-Post* February 4th, '69, first paragraph

21   there -- sorry, yeah.

22   "Police are investigating the

23   possibility that the person who slashed

24   a 20-year-old nurses' aide to death

10:32   25   Friday may be the same person who

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1   attacked three women here last fall."

2   This is story originating out of Saskatoon.

3   "Last fall police said that they

4   believed one man was responsible for two

10:32 5   rapes and one attempted rape of women on

6   city streets."

7   Again, this a *Leader-Post* article, but would it

8   be fair to say that this seems to be saying to

9   the public, you know, we think it could be the

10:32 10   same person, might be, might not be, but we're

11   concerned it might be the same person; correct?

12 A   That's what I would assume, yes.

13 Q   And then if we could put up document 050614, this

14   is a February 6, '69 article, "Purse yields no

10:33 15   fingerprints," and I think you already referred to

16   that, checked the purse for fingerprints, didn't

17   find anything, and then we've got a statement by

18   Superintendent Wood:

19   "Supt. Wood said women who have recently

10:33 20   been indecently assaulted and had not

21   pressed charges or reported the

22   incidents were now coming forward to the

23   police."

24   Again, it seems to be referring, okay, we've got

10:33 25   other matters, people are coming forward, that

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1   sort of thing. It's interesting, the (V9)----

2   report, although the incident occurred January

3   15th, '69, the report she brought in on February

4   6th, '69. I'm not sure if that's what

10:33   5   Superintendent Wood is referring to, but again it

6   seems to be at least you are telling the public

7   there might be some connection?

8   A   Yes.

9   Q   When this matter proceeded to preliminary hearing,

10:33 10   to trial, did you have any reason to believe that

11   Mr. Milgaard or his counsel or anybody else on his

12   behalf wouldn't have been aware of these sort of

13   rather public stories that were out there, that

14   someone had committed some sexual offences that

10:34 15   might have been the same person?

16   A   I would not be knowledgeable on those things.

17   Q   You had no indication of that one way or the

18   other?

19   A   No.

10:34 20   Q   I want to ask you, do you recall, sir, getting any

21   requests, did you receive any request on behalf of

22   Mr. Milgaard or on behalf of his counsel or anyone

23   on his behalf saying 'lookit, can you give us some

24   information about these other offences, can you

10:34 25   tell us about them, these are reported'?

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        1   A   No, I don't have that information. I've never

        2   had.

        3   Q   Do you know if you received any request to supply

        4   information on any of the people that you had

10:34   5   considered as possible suspects in the death of

        6   Gail Miller?

        7   A   No.

        8   Q   In 1969 -- let me ask you this question, I want to

        9   talk about disclosure, disclosure of information

10:35 10   by -- to defence counsel. First of all, in 1969

       11   and 1970 were the police directly involved in

       12   delivering disclosure to defence counsel?

       13   A   I would say no. I think they would respond to

       14   direction from the Crown.

10:35 15   Q   So the communication in terms of I want disclosure

       16   if I'm defence counsel or here is disclosure if I

       17   am the Department of Justice or Crown prosecutor,

       18   that would take place between the Crown prosecutor

       19   and defence counsel?

10:35 20   A   That was my understanding.

       21   Q   Direction would be you being told by the Crown get

       22   this information for me because I want to pass it

       23   on to the defence, something of that nature?

       24   A   Yes.

10:35 25   Q   And we know, and I as a defence counsel know that

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1		things evolved with disclosure after the Charter
2		was implemented, after the Stinchcomb decision
3		came down. Do you know what I mean when I refer
4		to the Stinchcomb decision?
10:36 5	A	Yes.
6	Q	Can you tell us what that is?
7	A	Well --
8	Q	Just as your understanding of it.
9	A	My understanding is that there was a -- the case
10:36 10		had provided for the required sharing of
11		information with defence on cases. That's
12		basically the limit of my understanding.
13	Q	Sure. That was a decision of the Supreme Court of
14		Canada?
10:36 15	A	Yes, I would assume.
16	Q	And certainly after the Charter and after the
17		Stinchcomb decision came down, the disclosure
18		obligations changed quite significantly?
19	A	My understanding is that they are now, it's an
10:36 20		obligation to provide.
21	Q	1969, 1970 would have been prior to the
22		implementation of the Charter and prior to
23		Stinchcomb?
24	A	That's the way I understand it.
10:37 25	Q	I'm jumping around a little bit, but there's a

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1		couple of areas I want to cover. Sexual assaults
2		and rapes were dealt by the morality section of
3		the Saskatoon Police Service in 1969-'70?
4	A	Yes.
5	Q	Was that still the situation when you retired as
6		chief in 1991?
7	A	I'm not certain. At some point we started to
8		amalgamate some of the police, police divisions,
9		and I can't be certain. I think at some point,
10		and I may be wrong, at some point morality and
11		detectives were amalgamated.
12	Q	Can you tell me what else was dealt with by
13		morality in 1969, what other types of offences or
14		areas of question?
15	A	Well, they would deal with situations of lesser
16		importance such as bootlegging and gaming and that
17		type of thing, that would be, that would also fall
18		into the area of morality, sudden deaths. When I
19		say sudden deaths, these are deaths that occur at
20		home usually of natural causes, but in any event,
21		there has to be an examination by police and the
22		involvement of the coroner, those are the kinds of
23		issues that -- suicides, sometimes suicides fell
24		into that situation, suicide was obvious and of
25		course morality would tend to that.

10:37 10:37 10:37 10:38 10:38

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1   Q   In terms of sudden deaths, would it be fair to say

2   if there was any indication of sort of foul play

3   or that it wasn't just a natural death, so to

4   speak, that it would then be moved over to the

10:38   5   detective section?

6   A   Yes, and it would probably be jointly approached.

7   Q   Looking back on it now in 2005, looking back on

8   the situation in 1969, rapes, and in this case

9   we're dealing with some very, very serious rapes,

10:39 10   and by that I mean, you know, of individuals who

11   suffered greatly because of them, they sort of

12   stand out in morality as being an extremely

13   serious offence that's lumped in with a number of

14   other offences that just aren't very serious?

10:39 15   A   I think that's a fair assessment, yes.

16   Q   Would it be fair to say that maybe our thinking

17   has changed a bit on that, that the police

18   service's thinking has changed on that a bit over

19   the years to sort of move those type of offences

10:39 20   more into the category of murder and serious

21   assaults, that sort of thing?

22   A   I would think that possibly that is occurring.

23   I've been away from police work for over 13 years

24   and I'm not sure what's happened since I've been

10:40 25   away, but the thinking was already there before I

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1   left and I'm not just quite certain when we

2   started to restructure the organization of the

3   police department to include those offences as I

4   had suggested earlier. I think we amalgamated

10:40 5   morality and the detective division. There was

6   also a youth section that was involved there and I

7   think that was separated for the very need to deal

8   because eventually you had to deal with youth in a

9   different way than you did with adults.

10:40 10   Q   Although I think you've indicated this, you would

11   hope that there would be communication between,

12   say, the morality section and the detective

13   section. The fact, however, that you had two

14   different sections, one section is dealing with an

10:41 15   offence and this section, the detective section is

16   dealing with the murder and they are separated can

17   create some communication problems?

18   A   Oh, there's no question about it, that's always,

19   always a concern throughout an organization such

10:41 20   as the police department. There's -- when I left

21   there I think there was over 400 police officers.

22   The incidence of the work load had increased very

23   much, the population of the city had increased

24   very much, and it became a greater concern as the

10:41 25   city grew.

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1   **Q**   And in this particular situation, the Gail Miller

2   situation, although notwithstanding that you

3   looked at the possibility the perpetrator of the

4   rapes may have also been the murderer of Gail

10:41 5   Miller, the fact remained that the rapes were

6   being investigated by morality and the murder was

7   being investigated by the detective section; would

8   that be correct?

9   *A*   Yes.

10:42 10   MR. FOX: Mr. Commissioner, I'm not sure

11   when you wanted to break for the morning. I can

12   carry on here for a while yet.

13   COMMISSIONER MacCALLUM: At 11.

14   MR. FOX: At 11, 15 minutes?

10:42 15   COMMISSIONER MacCALLUM: Oh, no, sorry,

16   I've got my times wrong. We can break now.

17   MR. FOX: Thanks.

18   *(Adjourned at 10:42 a.m.)*

19   *(Reconvened at 11:05 a.m.)*

11:05 20   MR. FOX: Mr. Commissioner, it's great to

21   have all this backing back here, because they can

22   correct my errors. I made another error, Mr.

23   Penkala, so don't feel bad.

24   I -- you asked for a document

11:05 25   number, this was referring to the RCMP report

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1   that indicated the time to walk, I think, from

2   the Gail Miller location to the (V4)--- location,

3   and I gave you an incorrect number. The number

4   for that report, the correct number --

11:05   5   COMMISSIONER MacCALLUM: Just a minute, if

6   I can get back to it here, please.

7   MR. FOX: It's an 02 number.

8   COMMISSIONER MacCALLUM: Well, I'll go

9   through it later, just give it to me.

11:05 10   MR. FOX: Okay. And the correct number,

11   it's the RCMP report, and it's 023167, that's the

12   document number. I made reference to, I think,

13   page 223, which was the page number, I can't

14   remember that offhand.

11:06 15   COMMISSIONER MacCALLUM: Oh yes, yeah.

16   MR. FOX: But that's the correct document.

17   BY MR. FOX:

18   Q   Now, Mr. Penkala, a couple more questions. I just

19   want to bring up, if I could, the (V5)-- (V5)---

11:06 20   statement that was given in October of 1970, and

21   that's document 012642, and if we look at -- if we

22   look at that down right about there, if we could

23   highlight that part, it looks like Mr. Fisher was

24   asked about where he was living on the date of

11:06 25   this offence, and this was in February of 1970:

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1   "Q   On that date do you remember where you

2   were living?

3   A   Yes, I lived at 1824 Avenue D North."

4   would have been the indication of his address

11:07 5   there. If we can look, then, if you can bring up

6   the (V3)------ statement and --

7   COMMISSIONER MacCALLUM: And when was that

8   date?

9   MR. FOX: Sorry, that was the date, I think

11:07 10   he was asked where he was living the date of the

11   offence, which would have been February of 1970.

12   COMMISSIONER MacCALLUM: All right.

13   BY MR. FOX:

14   Q   And then if you can bring up the (V3)------

11:07 15   statement, and that's 0126 -- 012639. Thanks.

16   And the question was asked, now we're talking

17   about November '68 offence so the question was

18   asked:

19   "Q   Did you live in Saskatoon around

11:07 20   November of 1968",

21   and he answered:

22   "A   Yes, probably at 512 Avenue F South or

23   1530 Avenue C North."

24   And I think, if you read through the two

11:08 25   statements, there is no indication that he lived,

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1		at some point in time, at 334 Avenue O South, and
2		that, of course, would have been the address
3		where Albert Cadrain lived and Larry Fisher
4		apparently lived in the basement.
11:08 5	A	Yes. Pardon me, yes.
6	Q	Are you aware of any information coming to you, or
7		coming to the Saskatoon Police Service in the fall
8		of 1970, indicating that Mr. Fisher had lived, at
9		one time, at 334 Avenue O South?
11:08 10	A	Umm, I don't recall in my personal knowledge.
11	Q	There is none in the statements that were obtained
12		and you have no recollection of that either?
13	A	That's right.
14	Q	I want to talk just a little bit about Linda
11:08 15		Fisher, and she was the wife, ex-wife of Larry
16		Fisher, who came in and apparently spoke at the
17		police station and gave a statement, or a report
18		at least, I think in 1980 it was, and you indicate
19		that you have no recollection of that?
11:09 20	A	That's, that's correct.
21	Q	And no recollection of what follow-up that took
22		place with that statement?
23	A	That's right.
24	Q	Okay. Now would I be correct just in general
11:09 25		terms, speaking to you as a former police officer,

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1   if I received a statement like that ten years

2   after the fact from an ex-wife at 4:20 in the

3   morning who was drinking, and perhaps some

4   suggestion that there had been recently announced

11:09 5   a $10,000 reward, I might at least initially view

6   it with some skepticism?

7   A   Umm, I think, I think that's reasonable to assume

8   that.

9   Q   Those are all just factors that would go into

11:09 10   where you go with that?

11   A   Yes.

12   Q   Am I correct that certainly, prior to 1980, there

13   had been never any record that you are aware of,

14   or knowledge that you have, of hearing anything

11:10 15   from Linda Fisher, or anyone on her behalf, that

16   Larry Fisher might have somehow been involved in

17   the death of Gail Miller?

18   A   I'm not aware of anything.

19   Q   Can you bring up document 213637, please. I'm

11:11 20   sorry, it might be 213627 -- yes, 627, I'm sorry.

21   Thanks. This was a letter of Mr. Merchant, who

22   appears to have been then counsel for Mr.

23   Milgaard, that Ms. Knox had pointed out and

24   Commission Counsel had then produced. It's dated

11:11 25   October 12th, 1983, it's a letter sent by

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1   Mr. Merchant to a process serving company, and in

2   the last paragraph -- if I could just highlight

3   that -- the letter begins asking him to try and

4   locate these people, and reference there is to:

11:11   5   "Linda Fisher."

6   Referred to:

7   "In 1969 she lived at 334 Avenue O

8   South, Saskatoon, Saskatchewan. She

9   married Larry Fisher who is presently in

11:11 10   prison for a rape charge."

11   Do you remember any contact by anyone on behalf

12   of David Milgaard in 1983, or through the balance

13   of the 1980s, asking you for information about

14   Linda Fisher or Larry Fisher?

11:12 15   A   No.

16   Q   I want to just, I'm -- go back to 1969. When we

17   look at the reports it looks like Mr. Karst, then

18   Detective Karst, didn't have very much involvement

19   with the Gail Miller murder investigation

11:12 20   throughout the month of February 1969; I don't

21   know if you have any recollection of that or not?

22   A   Umm, in a general sense, I recall that --

23   Q   And it looks like his first significant

24   involvement, I think he had did some

11:12 25   house-to-house in -- questioning the very first

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1   day, but after that the first significant

2   involvement seems to be when he was asked to take

3   the statement from Albert Cadrain on March 2nd,

4   1969?

11:13 5   *A*   That's consistent with my understanding, yes.

6   Q   You had written the letter that we've already

7   referred to February 5th, 1969 to the RCMP seeing

8   if they could come up with anybody that might have

9   committed a similar offence, that sort of thing?

11:13 10   *A*   Yes.

11   Q   And I'm assuming, from February 5th through to

12   March 2nd, 1969, you were also at least looking at

13   the other rapes to see 'is there any suspect that

14   we can identify in those offences, or one of those

11:13 15   offences, that we might be able to connect to the

16   Gail Miller matter'?

17   *A*   Yes.

18   Q   And it would be fair to say that by March of 1969,

19   when Detective Karst became involved in the file,

11:13 20   nobody had been identified to fit that category?

21   *A*   That, in my, in my knowledge, is consistent, yes.

22   Q   And Detective Karst would have been -- become

23   involved essentially when David Milgaard was

24   identified as really the first suspect that you

11:14 25   had where you had direct evidence that he may

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1   have, someone may have been involved in the death

2   of Gail Miller?

3   A   Yes.

4   Q   The (V1)- -- and I realize you weren't in

11:14 5   morality, but the (V1)- raped occurred in October

6   '68 and the (V2)----- one in November of '68, I'm

7   assuming morality would have been investigating

8   those offences on an ongoing basis from the time

9   they were -- occurred and reported to try and find

11:14 10   a suspect?

11   A   That would be my assumption as well.

12   Q   And certainly by March 2nd, '69, we're now four or

13   five months down the road after those offences, no

14   suspect had been identified?

11:14 15   A   Not to my knowledge.

16   Q   Umm, there was a suggestion put to you in

17   cross-examination by Mr. Lockyer that, after the

18   meeting of May 16th, 1969, the so-called theory

19   that one person may have been responsible for all

11:15 20   of these offences was basically never looked at

21   again; do you remember that suggestion being put

22   to you?

23   A   Yes.

24   Q   And I understand that -- maybe we can just bring

11:15 25   this document up, and I'm not sure if I gave this

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1   to you ladies or not, but 042513. This is a

2   report, and I think it's dated May 28th, 1969 by

3   -- sorry -- if we can highlight that there -- I

4   think it's Morality Officer Cressman?

11:15   5   A   Yes.

6   Q   And, looking at the report, I'm not sure if we can

7   -- looks like he has got some follow-up on the

8   files, some further discussions with Ms. (V1)-,

9   and it concludes he hasn't been able to locate

11:16 10   Vince Silvester:

11   "I would respectfully suggest

12   that due to the length of time this file

13   has been open and all leads have been

14   followed up, and nothing further has

11:16 15   been learned about the person

16   responsible this file be closed. In the

17   event that any new information comes to

18   light this file could then be opened."

19   So it appears as though May 28th, 1969 this

20   so-called theory, I guess, was being addressed,

21   at least to the extent that you just couldn't

22   find anybody that you could connect to the (V1)-

23   offence?

24   A   It appears that that, that was obviously the

11:16 25   conclusion of the investigator, and that's not

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1   unusual.

2   Q   Sure. And if we go back, your theory so to speak,

3   and a logical one it was at the time, kind of came

4   up very quickly after the Gail Miller murder, you

11:17 5   wrote February 5th, '69. But if we can just bring

6   up the RCMP report, the May 7th, '69 report,

7   250597, now this report is -- it's date-stamped

8   May 16th, '69, it's dated May 7th, 1969, so this

9   is -- February to March, March to April, April to

11:17 10   May -- pretty much three months since the theory

11   was espoused, and would it be fair to say that by

12   May 7th of 1969, some three months after this

13   theory was espoused, you still hadn't come up with

14   any suspect that was connected to all of the

11:18 15   offences?

16   A   It would appear by this report.

17   Q   Fair to say by May 7th, '69 you had David

18   Milgaard, who was a suspect in the Gail Miller

19   murder; correct?

11:18 20   A   Yes.

21   Q   But you still didn't have any other suspects on

22   the other offences?

23   A   It would appear that way, yes.

24   Q   And I'm going to suggest to you that there appears

11:18 25   to have been some fairly extensive work to try and

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1   find a common suspect but you just weren't getting

2   anywhere in that?

3   A   A person can certainly assume, and I think that

4   would be a very accurate assumption by the fact

11:18 5   that --

6   Q   Well just, if we could look at paragraph 15 for

7   example -- I'm sorry, I'm giving you paragraph

8   numbers, not page numbers -- but paragraph 15 is

9   -- sets out very clearly reference to the (V4)---,

11:18 10   (V4)---- (V4)--- matter and the circumstances of

11   it, so it would appear as though (V4)--- was

12   looked at as another possible, possible lead,

13   possible similar offence. And it concludes, the

14   review concludes:

11:19 15   "(V4)--- was again interviewed by Insp.

16   Riddell, however she was unable to

17   enlarge on any of the information

18   already given to the City Police."

19   I'm not sure if you have a recollection of that

11:19 20   but it appears as though you investigated it, and

21   the RCMP came in, they investigated it, you just

22   weren't getting any more from her?

23   A   It would suggest that, yes.

24   Q   I want to, if we could, move to paragraph 19. If

11:19 25   we go to paragraph 19, that's where it begins, it

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1   lists the other two rapes and attempted rape that

2   occurred in '68 that felt there might be some

3   similarities. If we could go to the next page it

4   lists the three, again (V1)-, (V2)-----,

11:19 5   (V3)------. If we could go to paragraph 20, some

6   more follow-up:

7   "As none of the exhibits obtained in any

8   of the above cases had been analyzed by

9   our Laboratory, it was suggested that

11:20 10   this be done in order to establish

11   whether or not the person responsible in

12   these incidents was the same one

13   responsible for the Miller murder.

14   Accordingly, on 20 March 69 exhibits

11:20 15   obtained from (V2) (V2)- (V2)----- and

16   (V1)--- (V1)- were transported to

17   C.D.L., Regina for serological

18   examination."

19   And it goes on to describe what was -- go to

11:20 20   paragraph 21:

21   "As a result of the foregoing, it is

22   felt there is a strong possibility the

23   three rapes and the murder are directly

24   connected. In view of this, extensive

11:20 25   interrogation was conducted with

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1   (V2)----- with negative results. She,

2   however, did indicate and named a person

3   who was later interrogated and submitted

4   to a blood test which indicated he was a

11:20   5   member of the O Group. These three

6   girls have been interviewed at length to

7   no avail. All stated that they have not

8   seen a person as described in their

9   statements nor have they any idea who

11:21 10   may have been responsible."

11   Once again, it appears as though there had been

12   some follow-up by the RCMP to what you did, being

13   the Saskatoon Police Service, and they are still

14   not coming up with anybody?

11:21 15   A   That's what it appears to say.

16   Q   And I think that conclusion is reinforced on

17   paragraph 32, which is at 607, right at the

18   bottom:

19   "As it is believed that the rapes which

11:21 20   occurred in this area in the late fall

21   of 1968 are definitely connected to this

22   offence and were committed by the same

23   person, local individuals who have been

24   interrogated have fitted the

11:21 25   descriptions as given by (V2)-----,

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1   (V1)- and (V3)------. Attempts to

2   uncover further information in this

3   respect have been to no avail.

4   Searches, etc. have been conducted in an

11:21 5   effort to recover clothing lost by the

6   victims, also without result."

7   Is it fair to say that you investigated, the RCMP

8   came in, they took a look at it, investigated,

9   there was a theory but by May of 1969 no common

11:22 10   suspect was found --

11   A   I --

12   Q   -- by yourself or by the RCMP?

13   A   That's the way it appears to me, yes.

14   Q   And what you had in May of 1969 was evidence which

11:22 15   pointed directly towards David Milgaard in

16   relation to the murder of Gail Miller; correct?

17   A   Yes.

18   Q   I have asked you some questions about Mr. Karst.

19   Umm, based on your dealings with Mr. Karst over

11:22 20   the 50 years that you have known him, your

21   supervision of him when you were a senior officer

22   and ultimately the chief, do you; what do you

23   think is the likelihood that he would have coerced

24   a statement out of Nichol John, Ron Wilson, Albert

11:22 25   Cadrain implicating Gail Miller -- or implicating

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1		David Milgaard?
2	A	I have never known Mr. Karst to be in that
3		particular area at all, I have never known him to
4		attempt that, and while I didn't always work with
11:23 5		him I just don't see it in his character.
6	Q	Detective Karst is going to be, or former
7		Detective Karst is going to be able to testify,
8		Lieutenant Short is deceased, and Mr. Pringle and
9		I were commiserating, we hope there isn't an
11:23 10		inquiry 30 years from now about this Inquiry and
11		we're deceased, because the last thing I want to
12		have is people talking about me when I'm dead and
13		you are not here to defend yourself. But
14		Lieutenant Short, I'm just going to ask you, can
11:23 15		you tell me what your impressions were of
16		Lieutenant Short in terms of his honesty or the
17		possibility that he might have been involved in a
18		coverup or fabricating evidence, anything like
19		that?
11:23 20	A	I simply would not -- pardon me -- I just would
21		not see that in Mr. Short neither.
22	Q	We've talked a little bit, and there's been some
23		documentation filed at the outset which sort of
24		lists the hierarchy, if I can describe it as that,
11:24 25		in 1969. And you had the chief, the deputy chief,

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1   and then the superintendent of criminal

2   investigations, that would have been

3   Superintendent Wood. He would have overseen all

4   criminal investigations, that included your

11:24   5   department as well, as I understand it?

6   A   Yes.

7   Q   And then the three divisions, detective, morality,

8   and investigation; detective would be headed up by

9   Lieutenant Short?

11:24   10   A   Yes.

11   Q   And morality would have been headed up by

12   Inspector Nordstrom?

13   A   Yes.

14   Q   And then you would have headed up the ident?

11:24   15   A   That's right.

16   Q   Would you three have been considered equal rank?

17   A   No, I was of a lesser rank as was Lieutenant

18   Short, and --

19   Q   So Inspector Nordstrom would have been the highest

11:24   20   rank of the three?

21   A   He was, yes.

22   Q   Okay. And just going to detectives, below

23   detectives you would have then had detective

24   sergeants, that would have been Mackie, Reid,

11:25   25   Porter and Ward; those were --

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1	A	Yes.
2	Q	Okay. And then below that you then have the
3		detectives, and there is a number of them, and
4		that's where we would find Eddie Karst?
11:25 5	A	That's correct.
6	Q	In terms of -- and I don't think Mr. Karst is
7		going to suggest otherwise, that he wouldn't have
8		had input in terms of the investigation, that sort
9		of thing -- but in terms of overall direction of
11:25 10		the investigation or decision-making would I be
11		correct that he, as a detective, would not have
12		had a direct role in that, so to speak?
13	A	Yes, I think that's fair. He would certainly have
14		an opportunity to seek direction and provide
11:25 15		input, but it wouldn't be left to his own, his
16		own --
17	Q	It wouldn't be what?
18	A	It wouldn't be left to his own devices to continue
19		with things.
11:25 20	Q	So Detective Sergeant Mackie or perhaps Lieutenant
21		Short might say 'we're going to go this direction,
22		follow up on this', and he would do that?
23	A	Yes.
24	Q	And would report back?
11:26 25	A	Yes, he would be obligated to do that.

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1   Q   And, in reporting back, might give his comments or

2   opinions or views about what he thought about what

3   he found; that sort of thing?

4   A   Yes.

11:26 5   Q   And might also give input as to where he thought

6   you should go in the next step?

7   A   Yes.

8   Q   But, ultimately, that decision would have been

9   made by someone higher up than him?

11:26 10   A   By his supervisor, yes.

11   Q   You were asked repeatedly about your position on

12   the conviction of David Milgaard and whether it

13   was correct or incorrect, or whether Mr. Milgaard

14   was innocent, as information began to come out

11:27 15   about the possibility that Larry Fisher was

16   involved, or some third party was responsible for

17   all of these offences; you obviously recall that,

18   those questions that were put to you?

19   A   Yes.

11:27 20   Q   As a police service in, or as a police officer in

21   1969-1970, after a trial takes place, and more

22   significantly I suppose a conviction is entered,

23   is there any general follow-up by a police officer

24   or a police service on a matter at that particular

11:27 25   point in time? I'm just trying to get some idea

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1   of kind of your mindset at the time, or what do

2   you do with that file, so to speak, after it's

3   gone to the Crown, a decision has been made to lay

4   a charge, it's gone through trial and there has

11:28 5   now been a conviction; where are things at then,

6   now, as far as the police service goes?

7 A   Well I, I think I mentioned it throughout my, or

8   at some point during my testimony. Usually the

9   police officers had workloads that were very

11:28 10   heavy, and once a conviction was obtained and more

11   or less a conclusion to an investigation had

12   occurred, the -- the common-sensical thinking

13   would be 'well, I'm not worrying about that any

14   more, I have set that aside and I have got so many

11:28 15   ahead of me'. So I think that was a general

16   attitude by investigators, it's no longer valid.

17   If something would bring it back

18   to light, well then that was a different

19   situation, but generally, yes, the investigators

11:28 20   would put that aside and not worry about it any

21   more.

22 Q   Did you have any ability, as a police service, to

23   deal with a conviction once it was done? I mean

24   did you have any ability to say 'we're going to

11:29 25   set aside this conviction'; anything like that?

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1   A   In terms of setting aside the conviction?

2   Q   Yeah?

3   A   I don't think it was necessary. It would be known

4   to the investigator, the file would indicate, at

11:29 5   some point would indicate that it went to trial,

6   there was a conviction obtained, and it would be

7   almost a procedural conclusion of that file which

8   then would go into storage.

9   Q   And in terms of, I suppose, carriage of what

11:29 10   happens after that, if somebody is coming along

11   saying 'there is a problem with this conviction'

12   or something like that, who is sort of overseeing

13   that process, at least from your perspective?

14   A   Well from my perspective, and relating to this

11:29 15   situation where there was a conviction, I would --

16   I would have only acted on direction from the

17   Justice Department saying 'look, we now have some

18   concerns, we want to look at this', there probably

19   would be opportunity to weigh it in terms of

11:30 20   whether the Saskatoon Police force was the

21   appropriate agency to deal with a reinvestigation,

22   but in any event I would seek the direction of the

23   Attorney General.

24   Q   Umm, Mr. Penkala, just you yourself, going back to

11:30 25   1970, did you take some comfort in the fact that,

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1   for example, a Crown prosecutor had looked at this

2   and decided that a charge should go ahead, that a

3   prelim was held, that a trial was held, that an

4   appeal took place, that he had a -- that Mr.

11:30   5   Milgaard had the benefit of what I think you would

6   agree would have been seasoned, experience defence

7   counsel at the time; did you take some comfort in

8   that, that, you know, that the process basically

9   worked, or went through or appeared to have

11:31   10   worked?

11   *A*   I was satisfied and accepted that and took a view

12   that the conviction was appropriate, and I more or

13   less stayed with that thought until the very end.

14   **Q**   Umm, I'm going to ask to bring up document 216059.

11:31   15   This is a letter, a copy of a letter that was

16   apparently sent by then -- by Mr. Merchant, then

17   counsel for Mr. Milgaard, to Justice Tallis --

18   then Justice Tallis, who was his counsel.

19   "Since it is some time since we spoke, I

11:31   20   write to remind you that I am

21   particularly interested in the

22   instructions given by Mr. Milgaard and

23   the reason why he did not testify. If

24   he in fact admitted that he committed

11:32   25   the crime, then I would like to know."

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1   I think it's common ground, and you well know,

2   there is no obligation on an accused to testify

3   and there's no adverse conclusions,

4   evidentiary-wise, that could be drawn from that

11:32 5   fact; you would be aware of that?

6   A   Yes.

7   Q   Having said that, were you aware that Mr. Milgaard

8   had not testified at his trial in 1970?

9   A   Yes, and -- and I -- yes, and then later, of

11:32 10   course, I wondered why he hadn't.

11   Q   Just something else that you looked at and kind of

12   had, the fact that he hadn't stood up at his trial

13   under oath and said 'I didn't do this', did that

14   play any part in looking at 'maybe we've got the

11:32 15   right guy here'?

16   A   Oh, of course, yes.

17   Q   The Supreme Court issued a decision in this

18   matter. On the Milgaard review, it was issued

19   April 14th, 1992. I'm assuming you were aware of

11:33 20   all -- I think you testified, did you testify

21   before the Supreme Court?

22   A   No I did not.

23   Q   Did not? You were aware of the review that was

24   taking place before the Supreme Court?

11:33 25   A   Yes, via the --

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1   **Q**   Hearing about it?

2   *A*   Yes.

3   **Q**   And were aware that a number of people testified

4   there?

11:33   5   *A*   Yes.

6   **Q**   David Milgaard testified; were you aware of that?

7   *A*   I guess maybe I was. I'm not quite certain.

8   **Q**   Were you aware, were you made aware or become

9   aware of the decision that was issued by the

11:33   10   Supreme Court?

11   *A*   At some point I had got a copy of the decision.

12   **Q**   Could we bring up document 160801. Now I think we

13   know that on the reference David Milgaard

14   testified, Mr. Justice Tallis testified, Linda

11:33   15   Fisher testified, Larry Fisher testified, those

16   are all people who gave evidence, Eddie Karst

17   testified and a number of other people. If we can

18   turn to page 804 of the document at number 804,

19   this is the finding as issued by the Supreme Court

11:34   20   April 14th, '92. Now this would have been,

21   obviously, after all of the information about

22   Fisher's involvement in the other rapes that took

23   place, and that Fisher had come forward, but we

24   didn't have the benefit of any DNA evidence at

11:34   25   that time. Paragraph 3:

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1   "It is appropriate to begin by stating

2   that in our view David Milgaard had the

3   benefit of a fair trial in January 1970.

4   We have not been presented with any

11:34   5   probative evidence that the police acted

6   improperly in the investigation of the

7   robbery, sexual assault and murder of

8   Gail Miller or in their interviews with

9   any of the witnesses. Nor has evidence

11:34 10   been presented that there was inadequate

11   disclosure in accordance with the

12   practice prevailing at the time.

13   Milgaard was represented by able and

14   experienced counsel. No error in law or

11:35 15   procedure has been established. At the

16   conclusion of the first trial, there was

17   ample evidence upon which the jury,

18   which had been properly instructed,

19   could return a verdict of guilty."

11:35 20   You became aware of that decision?

21   A   Yes.

22   Q   You agree with what was stated there?

23   A   I constantly believed that.

24   Q   You certainly took comfort that the Supreme Court

11:35 25   saw it the same way you did?

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1   A   Yes.

2   Q   If we can scroll down to paragraph 5, they said:

3   "In our view, this evidence ...",

4   and they are referring to the recantation and so

11:35   5   on:

6   "... together with other evidence we

7   have heard, constitutes credible

8   evidence that could reasonably be

9   expected to have affected the verdict of

11:35   10   the jury considering the guilt or

11   innocence of David Milgaard. Our

12   conclusion in this respect is not to be

13   taken as a finding of guilt against

14   Fisher, nor indeed that the evidence

11:35   15   would justify charging him with the

16   murder of Gail Miller."

17   You are aware of that?

18   A   Yes. I --

19   Q   Again --

11:35   20   A   Pardon me?

21   Q   Sorry, go ahead?

22   A   Oh, I must -- was just going to add that I did see

23   this before, yes.

24   Q   Right. And, again, seems to be the Supreme

11:36   25   Court -- and it speaks for itself -- but it would

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1		be a view that you saw that doesn't necessarily
2		mean that we've even got evidence to charge Larry
3		Fisher with something that took place?
4	A	Yes.
5	Q	Didn't have the DNA benefit then?
6	A	Yes.
7	Q	And if we can go on then to the top, the next
8		page, 805, first three paragraphs:
9		"As to the first --"
10		And they are talking about the three standards:
11		"As to the first, we are not satisfied
12		beyond a reasonable doubt that David
13		Milgaard is innocent of the murder of
14		Gail Miller.
15		As to the second, we are not
16		satisfied, on the basis of the judicial
17		record, the reference case and the
18		further evidence heard in this
19		reference, on a preponderance of all the
20		evidence, that David Milgaard is
21		innocent of that murder.
22		Third, we are satisfied that
23		there has been new evidence placed
24		before us which is reasonably capable of
25		belief and which taken together with the

11:35 (line 5)
11:36 (line 10)
11:36 (line 15)
11:36 (line 20)
11:36 (line 25)

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 1                    evidence adduced at trial could

 2                    reasonable be expected to have affected

 3                    the verdict.  We will therefore be

 4                    advising the Minister to quash the

 5                    conviction and direct a new trial under

 6                    s. 690(a) of the Criminal Code.  In

 7                    light of this decision, it would be

 8                    inappropriate to discuss the evidence in

 9                    detail or to comment upon the

10                    credibility of the witnesses."

11          You were familiar with that result as well?

12      A   Yes.

13      Q   At the end of the day what the Supreme Court said

14          is we're not exonerating him, we're not directing

15          he be acquitted, they are basically saying there's

16          more evidence, let's have a new trial?

17      A   Yes.

18      Q   Did you have any objection to Mr. Milgaard having

19          a new trial, to him having an opportunity to

20          present his new evidence?

21      A   No.

22                    MR. FOX:  Thank you, sir.  Those are all

23          the questions I have.

24                    MR. ELSON:  I can perhaps get started,

25          Mr. Commissioner.
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1   COMMISSIONER MacCALLUM: Yes, please.

2   **BY MR. ELSON:**

3   Q   Former Chief Penkala, my name is Richard Elson and

4   I represent the Saskatoon Police Service.

11:37 5   It would be fair to say that you

6   and I have not had any conversations at any time

7   and specifically with respect to your evidence

8   before this Commission of Inquiry; is that

9   correct?

11:38 10   A   That is correct.

11   Q   And indeed from our office, specifically from my

12   partner, Mr. John Beckman Q.C., you would have

13   received a letter, as would all the other former

14   officers of the Saskatoon Police Service, to the

11:38 15   effect that our representation was of Chief Sabo

16   and the police service and that it did not extend

17   to any former officers of the police service; is

18   that correct?

19   A   That's the way I understood it, yes.

11:38 20   Q   Now, I want to talk with you -- I'll refer to you

21   as Chief Penkala if that's all right, I think it

22   would perhaps be appropriate.

23   Chief Penkala, with respect to

24   the role of the identification unit, I believe you

11:38 25   testified that it was primarily a service unit to

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1   other sections within the Saskatoon City Police in

2   the late 1960s, early 1970s. Did I hear your

3   evidence correctly in that respect?

4   A Yes.

11:38 5   Q And as a service unit, would it be fair to say

6   that it was primarily involved in the collection

7   of physical evidence and in the site assessment

8   with respect to sudden death cases and homicide

9   cases; is that correct?

11:39 10 A Yes. It wouldn't exclude any cases really. If

11   investigators wanted your service, they would call

12   on you.

13   Q Right, I understand that. Now, other than sudden

14   death cases or homicide cases, in which other

11:39 15   cases would officers from the identification unit

16   be involved in the collection of physical evidence

17   and assessment of a crime scene, what other types

18   of crimes or offences or incidents if they were

19   not crimes or offences?

11:39 20 A We were involved in motor vehicle accidents, hit

21   and runs, assaults -- assaults basically, we would

22   photograph injuries of assaults, suicides, and of

23   course all major crimes such as murder, rape

24   cases, if the rape cases involved need for

11:40 25   photography, matters relevant to fingerprinting.

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1   Physical matching, that's where your automobile

2   accidents, you would physically match items left

3   at the scene of a hit and run and match them with

4   a vehicle that had been produced or was produced

11:40   5   with suspicions that it was involved. That's the

6   nature of the duties that ident was involved in.

7 Q   I want to pursue one aspect of your answer and

8   that is with respect to offences which we've

9   commonly now referred to as sexual assault but

11:40 10   which were previously described as rape or

11   indecent assault in 1969. Would it be fair to say

12   that it was quite common in the investigation of

13   those offences that identification may not be

14   called at all, for example, in the investigation

11:41 15   of the (V1)--- (V1)- or the (V2) (V2)- (V2)-----

16   cases?

17 A   That's right.

18 Q   And in many instances it would be either a patrol

19   officer or a detective who would be involved in

11:41 20   the investigation of those offences without any

21   assistance from identification at all and without

22   having requested any assistance from

23   identification?

24 A   That's correct.

11:41 25 Q   And your involvement in those instances, for

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1   example, in the (V1)--- (V1)- case and the (V2)

2   (V2)- (V2)----- cases, identification would not be

3   involved in any site assessment or in the

4   collection of physical evidence?

11:41 5   *A*   Not necessarily, that's right.

6   *Q*   Would there be occasions in which an officer from

7   identification would be involved in the medical

8   examination of a complainant in a rape case in the

9   same way that an office from identification would

11:42 10   attend the autopsy in the case of a homicide?

11   *A*   I'm not aware of any cases where that occurred

12   unless the identification officer was -- because

13   he's a police officer, he might have taken the

14   first complaint on a rape, then he would follow

11:42 15   that through, and I guess my explanation is that

16   if you were attending to a complaint of rape,

17   basically you would take that victim to a

18   physician and the physician would do the

19   examination, so in most cases I don't think ident

11:42 20   would be involved.

21   *Q*   And so if there was a police officer who would be

22   in attendance during the medical examination of a

23   complainant in a rape case, it would likely be a

24   patrol officer or perhaps an officer from

11:43 25   morality; would that be a fair assessment?

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1   A   Yes.

2   Q   Now, we did hear some evidence, and I'm not

3   certain, I know you were here for a part of the

4   evidence that had been presented by Mr. Chartier,

11:43 5   we did hear some evidence from Mr. Chartier with

6   respect to the stove-piping of information, that

7   there was a tendency for information to be

8   stove-piped within morality, within identification

9   and within the detective units or sections of the

11:43 10   Saskatoon Police Service at that time. He did

11   allow that it has, in his opinion, since become

12   significantly better. I wonder if you could

13   comment on that aspect of Mr. Chartier's evidence

14   as I've described it to you?

11:43 15   A   I did hear that evidence and I first had some

16   problems understanding what stove-piping is, but

17   now I understand.

18   Q   I believe he also referred to another metaphor as

19   silo, if that's of more assistance to you.

11:44 20   A   Well, I now know what he was talking about and I

21   disagree with him. There certainly is a

22   procedural flow in each of the divisions of the

23   police department, but certainly there is always

24   freedom for investigators and supervisors to

11:44 25   relate to one another and I was somewhat --

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1		COMMISSIONER MacCALLUM: Would you be
2		careful about the tense you use when you answer
3		that, sir. I'm really interested in 1969, '70.
4	A	Yes.
5		BY MR. ELSON:
6	Q	Yes. Thank you, Mr. Commissioner. If you could
7		confine your answer to that period of time.
8	A	Well, I am confining to that period of time in
9		that --
10		COMMISSIONER MacCALLUM: So there was --
11	A	Pardon me?
12		COMMISSIONER MacCALLUM: You are saying
13		there was a procedural flow at that time?
14	A	Oh, yes.
15		COMMISSIONER MacCALLUM: But laterally
16		there wouldn't be communication?
17	A	There would be the freedom for communications
18		laterally and almost an obligation to do that.
19		BY MR. ELSON:
20	Q	Could you describe the nature of that obligation?
21		How could that obligation arise?
22	A	Well, while each division has its own procedural
23		flow, it also has the knowledge that other
24		divisions can be of assistance and the sharing of
25		information which is a very important aspect of

Time stamps: 11:44 (line 5), 11:44 (line 10), 11:44 (line 15), 11:45 (line 20), 11:45 (line 25)

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1   police investigations, is the sharing of

2   information, so it would be foolish for an

3   investigator or supervisor not to consider those

4   issues.

11:45 5   Q   Now, you did indicate I believe in your testimony

6   that there were frequent meetings between the

7   heads of the detective section, the morality

8   section and yourself as the head of the

9   identification section or division, I may be

11:45 10   misnaming it. How frequent again were those

11   meetings that took place and what type of issues

12   would be discussed at those meetings?

13   A   It goes back to 1969, I recall that every morning

14   it coincided with a coffee break, the senior

11:46 15   officers would meet in the coffee room and they

16   would in turn bring, if there was a particularly

17   significant file that had been initiated during

18   the past 24 hours, they would bring a detective

19   sergeant or whoever from whatever division and

11:46 20   that would be discussed at these meetings to

21   acquaint the executive officers with the past 24

22   hours of activities.

23   Q   I see. Now, you talked a little bit, and forgive

24   me for going back to this, but you talked a little

11:46 25   bit about the involvement of officers from

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1   identification in the investigation of rape

2   offences or complaints of rape and you had

3   indicated that they would not be in attendance at

4   a medical examination of the complainant. Since

11:47   5   1969 there have been development of sexual assault

6   or rape kits. Are you familiar with the

7   development of those kits?

8   A   Not specifically, no.

9   Q   All right. So I take it that those kits had not

11:47   10   become developed during the period of time, for

11   example, that you were the head of identification?

12   A   Well, there was certainly procedures that were

13   drawn and I don't remember specifically whether we

14   had kits. I would assume that the kits are in

11:47   15   reference to vials and containers and slides and

16   things that would be necessary. In those days I

17   think the co-operation between the hospitals and

18   the police department were such that those were

19   available through the hospital.

11:48   20   Q   In the case -- we heard evidence from Dr. Emson,

21   he had testified some time earlier, if my memory

22   serves me correctly, on January 26th of this year,

23   and Dr. Emson talked at that time about the use of

24   sexual assault kits during autopsies of homicide

11:48   25   victim s who also appeared to have been sexually

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1   assaulted relatively concurrent with the homicide.

2   Are you aware of any such kit having been used in

3   autopsies during the period of time that you were

4   the head of the identification section?

11:48 5   A   No, I'm not.

6   Q   Are you aware of any such kits being used in the

7   conduct of autopsies prior to your retirement from

8   the Saskatoon Police Service in 1991?

9   A   I'm not aware, but, you know, I could be mistaken.

11:49 10   Things progressed, I changed, my responsibilities

11   changed, so I don't know if I can give you a

12   definite answer on that.

13 Q   And in fairness -- just in terms of general police

14   operations in a general way, you would agree with

11:49 15   me that as technology improves, as medical science

16   improves and as our ability to collect and

17   understand evidence that is picked up and proved,

18   there has been changes in all aspects of police

19   investigation work. Is that a fair comment?

11:49 20 A   Oh, very fair, and I can certainly indicate that

21   training had continued and had improved, methods

22   changed, science changed, so the police department

23   would attempt to keep up with those changes.

24 Q   Now, you talked a little bit about the changes

11:50 25   since 1969 and 1970. I would like to go back to

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1   1969 and specifically around the time of the Gail

2   Miller autopsy. I'll begin first with a general

3   question and I'll narrow it down subsequently to

4   my specific question, but generally what was the

11:50 5   relationship between the pathologist, such as

6   Dr. Emson, and the identification officer who

7   would be in attendance, and what I'm getting at is

8   would there be a pecking order, was there a case

9   of either one party instructing the other with

11:50 10   respect to the collection of evidence, I wonder if

11   you could explain that perhaps a little bit more?

12 A   The autopsy is the pathologist's domain and the

13   police officer was there to seek the types of

14   evidence that would be appropriate for the

11:51 15   investigation that he is conducting and we had

16   very good co-operation with Dr. Emson and St.

17   Paul's Hospital in regards to that and we benefit

18   from the expert knowledge of the pathologists that

19   were there which helped us and we were able to

11:51 20   obtain the kinds of specimens and biological

21   evidence that was necessary for the proposal to --

22   or the sending to the crime lab for establishing

23   some definite principles.

24 Q   Now, Dr. Emson testified that his primary concern

11:51 25   was to identify the cause of death and of course

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1   the police officer's concern was to collect

2   evidence which would be of assistance in

3   identifying a possible perpetrator. If there was

4   a physical piece of evidence and it was unclear

11:52 5   whether or not that physical piece of evidence

6   collected during an autopsy would be of assistance

7   in possibly identifying the perpetrator, would --

8   I'm trying to get a sense as to whose call that

9   would be. Would it be a case of your deference to

11:52 10   Dr. Emson or would it be a case of Dr. Emson's

11   deference to you in identifying whether or not

12   that piece of evidence might be of assistance?

13 A   It would be a police -- it would be a police

14   deference, yes.

11:52 15 Q   But what if the police officer were not certain or

16   did not know or did not have the expertise to

17   assess whether or not that physical piece of

18   evidence would assist in identifying a

19   perpetrator? I'm obviously speaking about the

11:52 20   vaginal aspirate that was taken from Gail Miller.

21 A   Yes.

22 Q   At that time what knowledge did you have as to

23   whether or not that material might be of any

24   assistance in identifying a possible perpetrator?

11:53 25 A   I think it would be fair for me to suggest that at

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1   that particular time, 1969, basically the concern

2   would be whether there was sperm which indicated

3   that there was, that would support that there was

4   a rape.

11:53   5   Q   And that was the extent of your knowledge at that

6   time?

7   A   I think that was appropriate, right.

8   Q   And if you had expected that Dr. Emson might

9   have -- if he was aware that this information or

11:53   10   that that physical evidence might be of some

11   assistance to you in identifying a possible

12   perpetrator, would you agree with me that you

13   would have expected him to have shared that

14   information with you?

11:53   15   A   I'm sure he would have.

16   Q   And the fact that he did not share it with you,

17   you surmised that that information would not be of

18   assistance in identifying who the perpetrator

19   might be; would that be a fair comment?

11:54   20   A   Yes.

21   Q   Now, I just want to deal a little bit with the

22   process of contacting victims after a conviction.

23   To some extent Mr. Fox has pre-empted me, as is

24   his right, with respect to that issue, but it

11:54   25   would be fair to say that in 1969 and 1970 there

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1   wasn't a specific victim support services section

2   within the Saskatoon City Police; is that correct?

3   A   Yes.

4   Q   Since that time, and indeed as I understand it

11:54 5   during the time that you were the chief of police,

6   there has since been established a victim service

7   section within the Saskatoon Police Service; is

8   that correct?

9   A   Well, I would not be surprised that that's

11:55 10   established, yes.

11   Q   And it's my understanding that it was even

12   established during the time you were the chief, or

13   that at least it was in operation during the

14   period of time you were the chief?

11:55 15   A   Well, I always wanted to believe that

16   investigators would always consider the victim in

17   all circumstances and I think the training that

18   was received by police officers would suggest that

19   there was an obligation on whatever level of the

11:55 20   police force, that there was an obligation to

21   attend to victims in terms of their needs.

22   Q   You would agree with me, though, that it was not

23   somewhat more -- it wasn't formalize, though,

24   until the establishment of a victim services

11:55 25   section?

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1   A   That's right.

2   Q   Now, Mr. Lockyer put it to you that it was unique

3   for the Saskatoon Police Service not to have any

4   contact with the media and perhaps not to disclose

11:56 5   to the complainants, and we do have evidence that

6   at least it was disclosed to Ms. (V5)---, but not

7   to have disclosed the fact to Mr. Fisher's victims

8   that indeed Mr. Fisher had pled guilty or been

9   convicted, he put it to you that that scenario was

11:56 10   unique. I would ask you to comment on how unique

11   the other aspect of that scenario is, how unique

12   is it in your experience that someone should be

13   apprehended in the process of committing an

14   offence in another jurisdiction and within a very

11:56 15   short period of time of having been caught in the

16   act confessed to crimes in which he had not

17   previously been suspected of having committed that

18   crime or he had not previously been linked in

19   another jurisdiction and then having that

11:56 20   individual transported to a completely different

21   centre from where the offences occurred and enter

22   a plea, how unique in your experience is that

23   scenario?

24   A   Well, it is pretty unique to start with, and are

11:57 25   you still asking me whether we would advise the

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1   media?

2   Q   Well, not only that, but under those circumstances

3   how likely is it that the Saskatoon Police Service

4   or the investigators would even have been informed

11:57 5   of the disposition that had taken place in the

6   scenario I've described, in the unique scenario

7   I've described?

8   A   Well, it obviously would be, it would be doubtful

9   whether they would be informed in the short period

11:57 10   of time.

11   MR. ELSON: Mr. Commissioner, this is

12   perhaps an appropriate time to break. I see it's

13   12 o'clock.

14   COMMISSIONER MacCALLUM: Yes, thank you.

01:34 15   *(Adjourned at 11:58 a.m.)*

16   *(Reconvened at 1:34 p.m.)*

17   BY MR. ELSON:

18   Q   I wonder if I could have document number 25061 --

19   or pardon me -- 609 on the screen, please. This

01:34 20   is -- if we could go to the next page which I

21   believe is 610. Chief Penkala, I don't want to

22   refer to a specific passage in this report, but

23   this is a report that you have -- your attention

24   has been commended to not only by Commission

01:35 25   Counsel but also by Mr. Lockyer and also by

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1   Mr. Fox. This is an investigation report by I

2   believe it was Sergeant Riddell at the time, if I

3   have his rank correct?

4   A   He was an inspector.

01:35   5   Q   An inspector at the time?

6   A   Yes.

7   Q   Okay. This is an RCMP investigation report and

8   you will recall that, as I understand it, the RCMP

9   were asked to assist in the murder investigation;

01:35 10   is that correct?

11   A   Yes.

12   Q   And there was not only this report but there would

13   have been other reports, notably -- and again I

14   keep forgetting the ranks -- but notably of

01:35 15   Edmondson and I believe maybe also one of

16   Rasmussen?

17   A   Yes.

18   Q   What was the normal practice with respect to

19   investigation reports that would be prepared by

01:35 20   the RCMP when they were assisting the Saskatoon

21   Police Service in the conduct of an investigation;

22   would there be a receptacle or a place where

23   copies of these investigation reports would exist

24   within the Saskatoon Police Department?

01:36 25   A   Umm, I have no knowledge that these reports were

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1   ever on Saskatoon files. Now I can tell by the

2   content that obviously that information had been

3   shared with our investigators and the case in

4   general, but I have no knowledge that any --

01:36   5   either one of those two reports were ever on our

6   file.

7   Q   All right. And, in fact, would it be fair to say

8   that you would not expect RCMP reports of this

9   kind to be located on the City of Saskatoon Police

01:36 10   Service file?

11   A   I think, if it was going to be on our report file,

12   it would show that a copy had been provided to the

13   Saskatoon Police Department, and I don't believe I

14   have seen that on this report.

01:37 15   Q   In the same context you were aware, of course,

16   that the polygrapher from the Calgary Police

17   Service had been asked to assist in this file, and

18   it's my understanding that there was no

19   polygrapher with the Saskatoon City Police in

01:37 20   1969?

21   A   That was my understanding, yeah, also.

22   Q   And if another municipal police department was

23   asked to provide assistance to the Saskatoon

24   Police Service in the conduct of an investigation,

01:37 25   any reports generated by those officers would be

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1   the property of those officers and the departments

2   by whom they were employed; is that correct?

3   A   Umm, yes, that's -- that's an assumption that I

4   would take, yes.

01:37 5   Q   And in this case, in terms of the polygraph

6   results of an examination done of Ron Wilson, that

7   may be a reason why the results have never been

8   found on any file within the Saskatoon Police

9   Service?

01:38 10   A   Well, it appears that that's what happened, yes.

11   Q   Now while we're talking about records you talked

12   at some length, and I don't want to spend much

13   time of it because it was the subject of the

14   Police Commission investigation as well, you

01:38 15   talked about the fact that there have been records

16   or files that went missing in the course of the

17   conversion to microfilm or to microfiche; is that

18   correct?

19   A   From the report that I had access to from the

01:38 20   Saskatchewan Police Commission that was stated in

21   that report.

22   Q   Since you testified I have had an opportunity to

23   make some inquiries, and I'd ask you to -- I'm

24   going to put a proposition to you and ask you

01:38 25   whether or not you have any facts within your

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1   knowledge tending to suggest that I am wrong.

2   It's my understanding that there was a process of

3   conversion that involved purging of files which

4   lasted from 1962 until 1979, and that during that

01:39   5   period of 17 years files were converted into some

6   electronic or image form; does that accord with

7   your recollection as well?

8   A   Yes.

9   Q   So the files with respect to the (V1)-, (V2)-----,

01:39 10   and (V3)------ complaints, those files would have

11   been included in the material that was being

12   converted to microfiche and purged between 1962

13   and 1979?

14   A   That's my understanding.

01:39 15   Q   So if they were lost in the conversion process

16   they would have been lost, or at least a portion

17   of those documents would have been lost or

18   unavailable, as of 1979 at the latest?

19   A   Umm, well I'm not, I'm not so sure just when --

01:39 20   when we first established that those files were

21   missing, I -- you know, I don't know that

22   specifically.

23   Q   If we were to compare the process of record and

24   file retrieval between 1969, 1970, 1971 compared

01:40 25   to the process of file retrieval and record

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1   retrieval around the time of your retirement in

2   1991, would it be fair to say that there was a

3   tightening-up of the process during that period of

4   time?

01:40   5   A   Yes.

6   Q   Is it fair to say that, although some files and

7   records could be signed out in the late 1960s or

8   early 1970s, it was a rather loose system and

9   there might not have been as much follow-up as

01:40   10   there was later on; is that fair comment?

11   A   I don't know if I would call it a 'loose system'.

12   I think it's important to identify that it was a

13   manual system until somewhere in the early '70s,

14   and then some of the procedures of file-storing

01:41   15   and recording were, I guess you would call it

16   computerized today. Instead of having manual

17   index cards for keeping track of files it was

18   converted, my understanding was it was converted

19   to a microscopic or a -- or as -- a computer

01:41   20   system where it could be drawn up on a screen.

21   Q   Okay.

22   A   And then in 19, 1977 we moved from the old

23   building into the new building, and there was an

24   effort at that time to probably conclude some of

01:41   25   those transitions because there would be an awful

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1   volume of files and papers that would have to be

2   moved maybe unnecessarily.

3   Q   I see.

4   COMMISSIONER MacCALLUM: Mr. Elson, I

01:42 5   wonder if I could interrupt from you and ask you

6   to try to find out from the witness, if you can,

7   were there three different phases to record

8   keeping; the first being hard copy, the second

9   microfilm, and the third computerized -- computer

01:42 10   stored files, because I'm confused as to --

11   MR. ELSON: I was just --

12   COMMISSIONER MacCALLUM: -- where microfilm

13   came into all this.

14   BY MR. ELSON:

01:42 15   Q   Do you understand the Commissioner's questions

16   with respect to the storage?

17   A   Yes.

18   Q   Perhaps, if you could give an explanation, that

19   might assist the Commissioner?

01:42 20   A   Yes. The keeping of records before they were

21   destroyed was a microfiche system, which was a

22   method of literally photocopying each page of the

23   documents which was -- then became a microfilm,

24   and then we had a viewing apparatus where the

01:42 25   microfilm could be placed into, and it would be

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1   enlarged so that it would be useful to anyone that

2   wanted to go back on records. You know, the

3   process was after it was micro -- microfilmed, the

4   microfilm would come back from the, from the --

01:43 5   Q   From the processor?

6   A   -- from the processor, and there was a check made

7   of the sequence of those files on that microfilm

8   to ensure that nothing was missed, and then it

9   would be designated for -- the hard copies would

01:43 10   be designated for destruction.

11   The index cards, that's the

12   initial index to kind of acquaint you with what

13   the number and where that file would be, was

14   transferred at some point from a card file system

01:43 15   to a system that could be brought up on a

16   computer. I don't know the specific times of

17   those because I was -- we had a manager in charge

18   of the central records at that time.

19   MR. ELSON: Does that assist, Mr.

01:43 20   Commissioner?

21   COMMISSIONER MacCALLUM: Yes, to some

22   degree, but the problem with your question as it

23   began is this, that he said from '62 to '69 the

24   conversion process from hard copy to electronic

01:43 25   form took place, but it didn't take place all in

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1   one jump --

2   MR. ELSON: No, it didn't.

3   COMMISSIONER MacCALLUM: -- from microfilm?

4   BY MR. ELSON:

01:44   5   Q   My understanding, former Chief Penkala, is that

6   this was very much an evolutionary process that

7   took a number of years?

8   A   Oh, very definitely, yes.

9   Q   And at the end of the day, the idea was to ensure

01:44 10   as much as possible, at least after 1979, that

11   there would be some form of electronic backup for

12   the files as they existed or as they came into

13   existence; is that a fair assessment?

14   A   Yes.

01:44 15   Q   So although these, although a number of files, and

16   it's my understanding that there were more than

17   just the files pertaining to the (V1)- and

18   (V2)----- offences that were lost, there were a

19   number of other files that were lost in the course

01:44 20   that had not yet been microfiched but

21   unfortunately were purged before the microfiching

22   had occurred; is that correct?

23   A   That's my understanding from the Saskatchewan

24   Police Commission's report.

01:44 25   Q   Now, I want to talk a little bit about the conduct

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1   of the Saskatoon Police Service after David

2   Milgaard was convicted and specifically in the

3   course of the investigation that was conducted by

4   the Department of Justice and the RCMP in 1990.

01:45   5   Yesterday I believe that there was a document that

6   Mr. Lockyer referred to, and I'm sorry, I don't

7   have the exact page, I believe it is Mr. Williams'

8   memorandum of July of 1990, and I should have made

9   a mental note of what that particular number was.

01:45 10   MR. GIBSON: It's 010019.

11   BY MR. ELSON:

12 Q   Thank you, Mr. Gibson. If I could have that

13   document placed on the screen. You will recall

14   yesterday, yesterday morning specifically, that

01:46 15   Mr. Lockyer put this memorandum of Mr. Williams to

16   you dated July 5, 1990 and, in fairness, the

17   memorandum wasn't to you, it was to the file, and

18   he referred to the passage, that paragraph, I

19   wonder if I could have that blown up, please --

01:46 20   how do I get rid of the red line? I've forgotten

21   now. Oh, clear. Where in that paragraph

22   Mr. Williams indicates that the information he had

23   received from Mr. Wolch, I quote:

24   "... did not accord with the information

01:46 25   we had earlier received from the RCMP

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1   and the Saskatoon City Police, who

2   advised us that there were not any

3   incidents of rape attributed to Larry

4   Fisher, which occurred in Saskatoon."

01:46   5   Prior to Mr. Lockyer presenting that memorandum

6   to you, I take it that you were not aware of this

7   memorandum or of the comment that Mr. Williams

8   made in it?

9   A   No, I wasn't.

01:47 10   Q   Now, I wonder if I could have document 248202

11   placed on the screen, please. Now, this document

12   that I've actually -- the first page is 248202,

13   but it then goes on for 94 pages and it's my

14   understanding that this contains information that

01:47 15   was collected not by Superintendent Goodman, whose

16   name appears on the first page, but rather

17   information that was collected by Sergeant R.A.

18   Pearson of the RCMP. Do you recall having met

19   Sergeant Pearson of the RCMP in the course of the

01:47 20   investigation that was done in 1990?

21   A   I don't have any recollection. I know Sergeant

22   Pearson, but I don't have recollection of meeting

23   him in the time frame that you are seeking.

24   Q   It's my understanding that Sergeant Pearson was

01:48 25   directly involved in the investigation and was

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1 primarily operating in association with or under

2 Mr. Williams' instructions. Was that your

3 understanding or do you have any recollection to

4 that effect?

01:48 5 A Well, I've learned that since I've been here, yes.

6 Q Now, whatever information was provided to the

7 Department of Justice, is it fair to say that that

8 information would have been provided either to

9 Mr. Williams directly or to whichever RCMP officer

01:48 10 was delegated by Mr. Williams to assist him in

11 this investigation?

12 A I would assume that that's the process and I'm not

13 aware that the Saskatoon Police Department was

14 ever privy to this information.

01:48 15 Q Now, yesterday you were asked as to who the

16 liaison might be, or might have been rather,

17 between the Saskatoon Police Service and the

18 RCMP/Department of Justice during this

19 investigation in 1990 and I believe your answer

01:49 20 yesterday was that you didn't recall who that

21 liaison was. If I were to suggest to you that it

22 was Inspector Quinn, would that refresh your

23 memory in any way?

24 A Honestly I don't remember. I would be surprised

01:49 25 that there wasn't a liaison officer. I would

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1   suggest that the liaison officer was appointed by

2   the person that was in charge of that particular

3   division of the police force. As I said

4   yesterday, Mr. Williams was free to contact me

01:49   5   directly, I was in the chief's office at that

6   time.

7   COMMISSIONER MacCALLUM: You mean -- are

8   you saying liaison as between the SPS and the

9   Department of Justice?

10   BY MR. ELSON:

11   Q   Yes, yes. And Inspector Quinn, what was his role

12   in 1990; do you recall?

13   A   I'm not certain. He was an inspector, so in all

14   likelihood he was a patrol inspector possibly or

01:50   15   he could have been an inspector in the area of the

16   detective division. I don't know that for a fact.

17   Q   Now, in the memorandum that I had earlier referred

18   to from Mr. Williams, it somehow suggests that the

19   Saskatoon City Police, or the Saskatoon Police

01:50   20   Service as it was then known at that time and

21   still is, was asked for information with respect

22   to any offences Larry Fisher had committed in

23   Saskatoon. Do you know, former Chief Penkala,

24   whether or not there was a specific request made

01:51   25   prior to that memorandum by the RCMP or the

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1   Department of Justice with respect to whether or

2   not the police service was aware of any offences

3   committed by Mr. Fisher within the City of

4   Saskatoon?

01:51   5   A   No.

6   Q   Now I would like to refer to page, in this

7   document, page 248219 and specifically paragraph

8   70. In that paragraph Sergeant Pearson indicates:

9   "Called Regina City Police and talked to

01:51   10   S/Sgt. Kline. He will check the records

11   for the 1971 rape offence in Regina and

12   determine if it is available and if a

13   blood typing was done."

14   You are familiar with the CPIC records that would

01:52   15   exist today and that existed at that time that

16   Sergeant Pearson was conducting his investigation

17   in 1990, you are aware that such records exist;

18   is that correct?

19   A   No, I'm not.

01:52   20   Q   What I'm talking about is I'm talking about CPIC

21   records generally.

22   A   Oh, the medium of, yes.

23   Q   And CPIC records with respect to a particular

24   conviction would indicate where the conviction was

01:52   25   entered, that's your understanding; correct?

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1   *A*   Oh, yes, yes, that's right.

2   **Q**   But if the conviction was entered in a judicial

3   centre or in a court other than for the area in

4   which the offence was committed, one would not be

01:52 5   able to know that in looking at a CPIC document;

6   is that correct?

7   *A*   I think this is the area that you want to go. The

8   CPIC would indicate that there was a conviction

9   provided that that conviction was registered with

01:53 10   Ottawa.

11   **Q**   Let me be more specific. In the case of Larry

12   Fisher we do now know, and the evidence and the

13   records indicate, that Mr. Fisher appeared in

14   court in Regina and his conviction was entered

01:53 15   into the Court of Queen's Bench in Regina with

16   respect to the Saskatchewan offences to which he

17   had pled guilty, notwithstanding the fact that the

18   Saskatchewan offences to which he had pled guilty

19   were committed in Saskatoon. That's the scenario.

01:53 20   Under those circumstances, you would agree with me

21   that the CPIC would show a conviction and it would

22   show the conviction entered into Regina, but it

23   would not show where the offences for which the

24   accused was convicted occurred?

01:53 25   *A*   I guess that could happen, it could happen. I

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1   think I'm somewhat -- if you were to call up a

2   criminal record on an individual, that criminal

3   record would indicate that the offence occurred in

4   Saskatoon, or at least the conviction occurred in

01:54   5   Saskatoon, but there are other messages that use

6   the same system and in those cases they are

7   abbreviated and possibly would not provide that

8   information.

9   Q   If we could go to page 248240 and specifically

01:54   10   paragraph 190. In that paragraph it says, and I

11   quote, "Mr. Williams called --" and it refers to a

12   date, and I'm sorry, if we can show the date which

13   is on the left. That would appear -- I believe

14   that refers to a date of July 4 of 1990 which

01:54   15   roughly corresponds with the memorandum I had

16   earlier brought to your attention.

17   "Mr. Williams called, wanting to confirm

18   if Saskatoon City Police had any

19   information on convictions of Fisher in

01:55   20   Saskatoon in 1968 to 1970. It was

21   originally believed these were Regina

22   offences but is now believed Fisher went

23   to court in Regina and the offences

24   actually took place in Saskatoon."

01:55   25   So I take it it is, the scenario I put to you

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1   from these documents is that up until that

2   memorandum of July 5, 1990 and up until the

3   conversation between Mr. Williams and Mr. Wolch,

4   there had been no request from the RCMP or the

01:55 5   Department of Justice of the City of Saskatoon

6   with respect to offences committed by Mr. Fisher

7   in Saskatoon?

8   *A*   It would certainly appear that way.

9   Q   So therefore when Mr. Lockyer suggests, as he did

01:55 10   yesterday morning, that the City of Saskatoon

11   withheld information from the Department of

12   Justice, you would agree with me that's not true?

13   *A*   Yes.

14   Q   I wonder if we can turn then to pages 248 and 249,

01:56 15   and actually if we could have 244 -- sorry, if we

16   could go back to 249. 248, 249, thank you. In

17   paragraph 240, from the information within that

18   paragraph:

19   "At this time Mr. Williams also revealed

01:57 20   that the report from Centurion

21   Ministries suggested that a source in

22   the Saskatoon Police Department provided

23   certain material which is not officially

24   released. This portion of the report

01:57 25   was vetted out and the identity is

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1   unknown. Mr. Williams is also

2   interested in securing any old police

3   reports on the Saskatoon victims of

4   Larry Fisher. It should be noted that

01:57 5   this had been pursued previously and I

6   have been told by the city police

7   officials that these reports no longer

8   exist."

9   And the reason of course they no longer exist,

01:57 10   we've already canvassed, and that was as a result

11   of a process that you described having taken

12   place up to roughly 1977 and 1979?

13 A   Yes.

14 Q   Also Mr. Lockyer dealt with this matter yesterday,

01:58 15   if I could ask for paragraph 244 to be

16   highlighted. In that paragraph, partway down,

17   about the fourth line, it says:

18   "The suggestion is that city police

19   quietly had Fisher taken to court,

01:58 20   knowing he may have been involved in the

21   Miller offence. Mr. Williams will be

22   pursuing this further and apparently has

23   since talked with Sask. AAG Murray Brown

24   and the record suggests that this was a

01:58 25   preferred indictment brought in by the

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1   provincial A.G., as Fisher was

2   represented by lawyer Lawrence Greenberg

3   of Winnipeg and the Regina appearance

4   was apparently a convenience. I have no

01:58 5   explanation why the victims were never

6   advised of the fact Fisher had been

7   convicted for these attacks. This

8   remains a mystery at this time."

9   From this, and consistent with the evidence that

01:59 10   you gave in answering Mr. Lockyer's questions,

11   would you agree with me it is apparent that the

12   decision for this matter to be dealt with in

13   Regina had nothing to do with the Saskatoon City

14   Police; is that a fair assessment?

01:59 15 A   Yes.

16 Q   And in fact, the Saskatoon City Police would have

17   no involvement and virtually no input in

18   determining where an accused would enter his or

19   her guilty plea?

01:59 20 A   Yes.

21 Q   Now, Mr. Lockyer spent some time yesterday talking

22   about the role and the responsibility of the

23   police to provide information to the counsel for a

24   convicted prisoner. Former Chief Penkala, in your

02:00 25   view how important in the operation of a police

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1   service is the aspect of finality to an

2   investigation where that investigation has

3   ultimately resulted in either a conviction or an

4   acquittal and appeals have been exhausted, how

02:00   5   important is the aspect of finality, if at all, in

6   that assessment?

7   A   Well, I think the fact of what the disposition

8   was, I think there's an interest in that, but once

9   that is established, I think the police force

02:00 10   would, and those interested in that particular

11   issue, would just forget about it and go on to

12   their next case or their case load that they have.

13   Q   Is it practical for files to be kept open beyond

14   the date, for example, in this case of a

02:01 15   conviction and to continue to work on that file,

16   continue to collect evidence and continue to

17   assess evidence after a conviction has been

18   entered and after all of the appeals from that

19   conviction have been properly exhausted?

02:01 20   A   Definitely not. It would be a waste of resource

21   time.

22   Q   And typically, and going back also to that period

23   of time after 1970-'71 and after the application

24   for leave from the Supreme Court of Canada, how

02:01 25   busy was the police service? This may be a silly

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1   question to ask of you, but how busy was the

2   police service and how much time would they have

3   to devote to ongoing investigations after a

4   conviction?

02:01 5   *A*   I suppose the best way I could answer that, there

6   was constantly more work than we had resources to

7   do and you did have to priorize your work, and of

8   course under the circumstances, unless you had

9   assigned somebody specifically, there would be no

02:02 10   interest in approaching a dead file in reality.

11 Q   How common is it in your experience for

12   individuals, after conviction, to continue to

13   proclaim their innocence?

14 *A*   Who would be -- you mean --

02:02 15 Q   Generally speaking.

16 *A*   The accused?

17 Q   The accused, the convicted prisoner.

18 *A*   Oh, I'm not aware of, other than this particular

19   case, I'm really not aware of any others.

02:02 20 Q   Now, you are aware that there is a provision of

21   the *Criminal Code* which does permit a convicted

22   prisoner to make application to the Minister of

23   Justice for review on the grounds of a miscarriage

24   of justice. You are aware such a provision

02:02 25   exists?

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1   *A*   Generally, yes.

2   **Q**   And you are aware that that provision was indeed

3   employed by Mr. Milgaard and his counsel on two

4   occasions, one unsuccessfully and the second time

02:03 5   successfully?

6   *A*   Yes.

7   **Q**   Other than, and to some extent I'm asking you a

8   legal question, and forgive me for doing so and if

9   you don't feel qualified to answer it I

02:03 10   understand, other than that provision of the law,

11   are you aware of any other provision of provincial

12   law, federal law or any regulation which

13   authorizes or gives authority to any municipal

14   police service to review cases post conviction

02:03 15   outside of a review done by the Minister of

16   Justice?

17   *A*   That's the auspices under which I operated and I

18   don't believe there is, but I'm not a legal

19   person.

02:03 20   **Q**   Now, my friend Mr. Fox pre-empted me and took away

21   my closing question that I wanted to ask you by

22   referring to the decision of the Supreme Court of

23   Canada and as he put it to you, the Supreme Court

24   of Canada, notwithstanding that they heard the

02:04 25   evidence of Larry Fisher, they heard the evidence

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1   of Linda Fisher, they heard the evidence of

2   (V4)---- (V4)---, at the end of hearing all of

3   that evidence -- admittedly they didn't hear from

4   you, but they did hear from Eddie Karst -- after

02:04 5 hearing all of that evidence they came to the

6   conclusion that there was no police wrongdoing,

7   how vindicated or not did you feel from the

8   decision of the Supreme Court of Canada in the

9   result that they ultimately applied to that case?

02:04 10 A   Well, because there was a great degree of

11   controversy and aggressiveness by the media, I

12   think we were vindicated to hear what came from

13   the Supreme Court.

14   Q Now, you had indicated that despite the fact that

02:04 15 there had been an earlier police theory indicating

16   that possibly the perpetrator of the 1968

17   offences, the (V1)-, (V2)----- and (V3)------

18   offences may also have been the perpetrator of

19   Gail Miller's murder, and Mr. Lockyer asked you

02:05 20 some questions about that and you candidly

21   acknowledged that that was one of the theories

22   that was being assessed and employed at that time,

23   and then ultimately when evidence came to light

24   with respect to Mr. Milgaard and ultimately the

02:05 25 charge was laid, you indicated that the police

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1   theory did not necessarily exculpate Mr. Milgaard,

2   I believe that was your evidence, the original

3   theory did not exculpate?

4   A   Yes.

01:44   5   MR. ELSON: Mr. Commissioner, there is a

6   document that was disclosed in CaseVault -- and I

7   have had discussions with My Friend Mr. Frayer

8   and also with Commission Counsel -- which refers

9   to the opinion of former Justice William McIntyre

02:06   10   of the Supreme Court of Canada.

11   That opinion was apparently

12   disclosed to the Provincial Department of

13   Justice, and I gather was ultimately included in

14   the material that was provided to Commission

02:06   15   Counsel and, as a consequence of that, found its

16   way into CaseVault.   I was wondering, I don't

17   have a copy of that opinion, that opinion

18   apparently has not yet been disclosed, but there

19   is a memorandum which summarizes the opinion of

02:07   20   Mr. -- of former Justice McIntyre with respect to

21   whether or not a miscarriage of justice had

22   occurred in this particular case.

23   I have spoken with Mr. Frayer,

24   Mr. Frayer is concerned about the fact that that

02:07   25   document did find its way into CaseVault, and he

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1   is somewhat concerned that the solicitor and

2   client privilege may not have been waived, but

3   indeed it may have been waived, and unfortunately

4   he has not had an opportunity to seek

02:07 5   instructions.

6   COMMISSIONER MacCALLUM: Who is the client?

7   MR. ELSON: Well, that's a good question,

8   and I'll have to let Mr. Frayer deal with that.

9   It was a document that I simply

02:07 10   found in the course of my search and, not to put

11   too fine a point on it, I was planning to put it

12   to former Chief Penkala to show that he was in

13   good company with respect to the opinions he had

14   of the case, and that was the context in which I

02:08 15   was wanting to put -- former Chief Penkala has

16   not seen that document, I would expect, I'm sure

17   he hasn't -- but Mr. Frayer was indeed concerned.

18   If it is your view, sir, that

19   the disclosure of that document, or the further

02:08 20   disclosure of that document and the raising of

21   that document before any witness ought to await

22   Mr. Frayer receiving instructions, then I won't

23   deal with it any further. But, in light of the

24   fact that it is in the material, I thought it

02:08 25   might be somewhat helpful to put it to the

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1   witness as again -- as I say, again, simply to

2   show that he was in good company with the opinion

3   that he held.

4   COMMISSIONER MacCALLUM: Well the fact that

02:08 5   you don't put it to him at this time, of course,

6   won't prevent you from doing so in the future so

7   long as its relevant.

8   MR. ELSON: That's right.

9   COMMISSIONER MacCALLUM: Mr. Frayer, do you

02:08 10   take any position on this?

11   MR. FRAYER: Thank you, Mr. Commissioner.

12   I have had some discussions, as

13   have been outlined by Mr. Elson, with respect to

14   this particular document, and some discussions

02:09 15   with Commission Counsel at the same time.

16   I am concerned about the fact

17   that I have been unable to trace how this

18   document got into the hands of the Inquiry,

19   ultimately, other than to say that it appears to

02:09 20   have come from the Department of Justice to the

21   Government of Saskatchewan, to the RCMP when they

22   did their review in 1993, to the Inquiry.

23   And, without going into the

24   document itself, it's a memorandum from Douglas

02:09 25   J.A. Rutherford, who was at that time an

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1   Associate Deputy Attorney General to the Deputy

2   Minister of Justice, and has as part of its

3   contents discussions that took place with the

4   Honourable W.R. McIntyre, Q.C., a former Justice

02:09   5   of the Supreme Court of Canada, then in practice

6   in the City of Vancouver.

7   COMMISSIONER MacCALLUM: Oh.

8   MR. FRAYER: And so I haven't had an

9   opportunity to trace the background of this, I

02:10   10   was only advised of Mr. Elson's intentions late

11   yesterday afternoon, and we have had some

12   discussions with respect to it.

13   I'm having some difficulty with

14   respect to the relevance of it in any event. To

02:10   15   put, as I expect, the opinion or the thoughts of

16   a person whose advice was sought by the Minister

17   of Justice to this witness is a method by which

18   he is endeavouring to confirm that Chief Penkala

19   was of the same view as the -- as was

02:10   20   Mr. McIntyre. So --

21   COMMISSIONER MacCALLUM: Umm, that is a

22   difficulty, one which I'm sure we can deal with

23   at some point in the future.

24   The business about

02:10   25   solicitor/client privilege, however, is of

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1   immediate concern and, on the face of it, it

2   would seem to be a privileged communication --

3   MR. FRAYER: Yes.

4   COMMISSIONER MacCALLUM: -- for all we

02:10 5   know, and I would be reluctant to have it aired

6   at this moment without determining what that

7   position is with respect to privilege.

8   In the meantime, perhaps it

9   should be expunged from CaseVault until we -- it

02:11 10   can be re-introduced.

11   MR. FRAYER: All counsel have had access to

12   it but it isn't out in the general public.

13   COMMISSIONER MacCALLUM: Now -- yes?

14   MR. WOLCH: If you could excuse my dress,

15   which has been explained, --

16   COMMISSIONER MacCALLUM: Yes.

17   MR. WOLCH: -- a few comments. This issue

18   will arise later, for certain, in the systemic

19   review of the -- of 690 in the sense that our

02:11 20   complaint has been, always has been that we have

21   never even seen this document until even now, and

22   we've always questioned how the Minister can make

23   a decision that we have no input as to the

24   Milgaard position on what is being given to

02:11 25   Justice McIntyre. We can't -- we never had a

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1   chance to speak to him, to put forward our case,

2   to do anything at all, and that is one of the

3   systemic complaints that we will ask you to

4   address.

02:12   5   But, having said that, I think

6   the, one of the first issues on solicitor/client,

7   I think Mr. Frayer may wish to check -- I don't

8   know the answer to this -- whether Justice

9   McIntyre qualifies as a solicitor? I don't know

02:12 10   if he was practicing law.

11   COMMISSIONER MacCALLUM: But he has just

12   said he was practicing law.

13   MR. FRAYER: Well, that's my understanding,

14   Mr. Commissioner. By that time I believe -- and

02:12 15   it's subject to confirmation -- that he was in

16   practice in Vancouver after having served as a

17   Justice of the Supreme Court of Canada.

18   MR. WOLCH: That would be the answer. I

19   don't know, I didn't know then if he was brought

02:12 20   in a quasi-judicial position or as a lawyer, but

21   in any event that issue will really be addressed

22   because one of our main concerns systemically was

23   that we were not allowed to speak to him at the

24   time to say 'well what about this' and 'what

02:12 25   about that'.

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1   COMMISSIONER MacCALLUM: Uh-huh?

2   MR. WOLCH: And so I'm not sure how helpful

3   it is to have the chief say he is in good

4   company, we don't know what Justice McIntyre had.

02:13 5   COMMISSIONER MacCALLUM: Well I'll cross

6   that bridge if -- when I have to, but not before.

7   The question of relevancy can await us, can await

8   further development, but privilege can't.

9   Mr. Hodson, if this document is

02:13 10   in CaseVault, can we remove it for the time?

11   MR. HODSON: If I can just -- my

12   understanding of the document, it's not the

13   actual opinion.

14   MR. ELSON: It isn't.

02:13 15   MR. HODSON: And Mr. Frayer had conveyed to

16   me earlier that they were claiming privilege on

17   the opinion given by Mr. Justice McIntyre to the

18   Minister, so I was aware of that opinion.

19   What this document is is a

02:13 20   memorandum from Douglas Rutherford to the Deputy

21   Minister, and I believe Mr. Rutherford was legal

22   counsel at the time?

23   MR. FRAYER: Yes.

24   MR. HODSON: And providing a summary of the

02:13 25   opinion, and I think Mr. Frayer's concern is that

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1   in order to assert privilege over the opinion,

2   whether or not the disclosure of this memorandum

3   talking about the opinion may impact that waiver,

4   and it may well.

02:14 5   Now this document was given to

6   the government we believe some time ago, in the

7   early '90s I believe to the Government of

8   Saskatchewan, not the opinion but the memo

9   talking about the opinion.

02:14 10   COMMISSIONER MacCALLUM: But it was from

11   the Federal Department of Justice to the

12   Saskatchewan Department of Justice?

13   MR. HODSON: A copy -- the memorandum from

14   Mr. Rutherford to the Deputy Minister which talks

02:14 15   about the opinion, --

16   COMMISSIONER MacCALLUM: Okay.

17   MR. HODSON: -- a copy of that memorandum

18   was given to the Government of Saskatchewan we

19   believe in the early '90s, but for what purpose I

02:14 20   can't say.

21   COMMISSIONER MacCALLUM: But the document

22   that you hold there was a Federal in-house

23   document; was it?

24   MR. HODSON: Yes.

02:14 25   COMMISSIONER MacCALLUM: All right. So

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1   it's simply a derivative document to which, on

2   the face of it, the privilege would attach as

3   well if attached to the original.

4   MR. HODSON: And I think --

02:14 5   COMMISSIONER MacCALLUM: The fact that it

6   was transmitted to Saskatchewan, I suppose one

7   might say unless some restrictions were placed

8   upon it that would constitute a waiver of

9   privilege, but we don't know all that yet so why

02:15 10   don't we just put a lid on it somehow, to put it

11   in the vernacular.

12   MR. HODSON: Yeah, and if I can just

13   suggest a solution, and I think that's

14   Mr. Frayer's concern as expressed to me; twofold,

02:15 15   one, he wishes to be in a position to assess the

16   privilege issue and to make whatever argument he

17   wishes, and he may wish to say that it's still

18   privileged, in which case we would deal with it.

19   He's not in a position to deal with that today

02:15 20   but what I would suggest, this is on CaseVault,

21   the parties have it, it's not a public document,

22   and subject to what Mr. Elson has to say, who

23   wishes to use it, certainly that's the quandary

24   we're in right now. If he -- there is two ways

02:15 25   of going about it; one, he can put it to the

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1   witness and use it and we try to preserve

2   Mr. Frayer's arguments saying that doesn't

3   prejudice it, but then the document becomes

4   public; or, of course, secondly we simply defer

02:15   5   it, allow Mr. Frayer to address the Commission on

6   the issue when he has instructions and time to

7   prepare, and I guess I would ask Mr. Elson how

8   that affects him? Because I can bring Mr.

9   Penkala back.

02:16   10   MR. ELSON: It really doesn't affect me a

11   great deal. And, in fact, I was aware the

12   document existed because I came across it. The

13   only reason it dawned on me at all was because

14   Mr. Lockyer, in the course of cross-examining

02:16   15   former Chief Penkala, was basically putting the

16   proposition to him in his question that Dr. (sic)

17   Penkala's opinion about the impact of the Fisher

18   evidence was extraordinary, and he was seeming to

19   suggest that no rational human being could

02:16   20   possibly hold such an opinion, and with the

21   greatest of respect I was wanting to hold Mr.

22   Justice McIntyre as being a rational human being.

23   COMMISSIONER MacCALLUM: And not being, I

24   forget the expression, Mr. -- what was the noun

02:16   25   that was used?

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1   MR. HODSON: I believe it was 'buffoon'.

2   COMMISSIONER MacCALLUM: Buffoon. Okay,

3   yes, I can see your point. But it's something

4   that can be done later on, if indeed it's

02:17   5   relevant, so -- but at this moment the privilege

6   concern is --

7   MR. ELSON: Mr. Commissioner, for my

8   purposes, having raised it, I think I have just

9   accomplished what I wanted to accomplish.

02:17   10   MR. HODSON: Perhaps I could just suggest

11   that I will deal with Mr. Frayer on that, obtain

12   his position, and that I will advise counsel and

13   would ask counsel not to use this document

14   without first checking with either myself or

02:17   15   Mr. Frayer.

16   COMMISSIONER MacCALLUM: Well I'll make an

17   order to that effect.

18   MR. HODSON: Okay.

19   COMMISSIONER MacCALLUM: Not to use it or

02:17   20   to disclose it to anybody. Thanks, Mr. Frayer.

21   MR. FRAYER: Thank you.

22   BY MR. ELSON:

23 Q   Mr. -- former Chief Penkala, one final question,

24   and I'm going to make reference to an institution

02:17   25   that you have made comments about before, and that

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1	is the media. This morning there appeared in the
2	National Post an editorial, specifically on page
3	A10 of the National Post an editorial by Brian
4	Hutchinson -- I don't have it and I'm not sure I
02:18 5	can pull it up. There are a number of passages I
6	suppose I could refer to but I will only refer to
7	one, and that is the one that appears up near the
8	top of the page. That image is suddenly becoming
9	darker, I don't know whether or not we have the
02:19 10	technological capacity to blow that up or not?
11	MR. HODSON: Yeah, we do.
12	COMMISSIONER MacCALLUM: I think they can
13	do anything around here, Mr. Elson.
14	MR. ELSON: I'm impressed. If push comes
02:19 15	to shove I can probably just refer to the
16	passage, and it's the passage, it's the passage
17	here. Drop it down just a little bit, please.
18	BY MR. ELSON:
19 Q	In that, Mr. Hutchinson makes a number of comments
02:19 20	with respect to the conduct of the Saskatoon City
21	Police and then makes reference to matters which
22	he conveys as being matters of fact, and
23	specifically he says:
24	"Mr. Wilson and Mr. Cadrain eventually
02:20 25	recanted, saying they had made up the

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1   story because of pressure applied to

2   them by Saskatoon police."

3   And it goes on to talk about Nichol John.

4   To your knowledge, based upon

02:20 5   what you understand of this investigation, had

6   Mr. Albert (Shorty) Cadrain ever, to the day he

7   died, recanted the story he gave on March the

8   2nd, 1969 about David Milgaard having blood on

9   his clothes?

02:20 10   A   I'm not aware that he did.

11   Q   And if I were to suggest to you that the evidence

12   already received before this Commission of Inquiry

13   is that he did not, would that surprise you, that

14   he did not recant his story?

02:20 15   A   No, it doesn't surprise me.

16   Q   When you talk about your concerns about the media,

17   is this the kind of thing that you would have been

18   concerned about, is this an example of the kind of

19   thing that you would have been concerned about and

02:21 20   were identifying both to Commission Counsel and to

21   Mr. Lockyer in the questions that were being asked

22   of you?

23   A   Exactly, and the amounts of such inferences by the

24   media, yes.

02:21 25   Q   Thank you former Chief Penkala, I have no further

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1   questions.

2   MR. HODSON: I'm not sure, I think we have

3   four more counsel to cross, I'm wondering whether

4   we might want to take the break now. We've got

02:21   5   --

6   COMMISSIONER MacCALLUM: Oh yes, we --

7   MR. HODSON: And then I can sort out --

8   COMMISSIONER MacCALLUM: We stop at 3:30

9   today, don't we?

02:21 10   MR. HODSON: Yes, we stop at 3:30, so maybe

11   this is an appropriate time to break.

12   COMMISSIONER MacCALLUM: 15 minutes.

13   *(Adjourned at 2:21 p.m.)*

14   *(Reconvened at 2:39 p.m.)*

02:40 15   COMMISSIONER MacCALLUM: Mr. Beresh?

16   **BY MR. BERESH:**

17   Q   Thank you, Mr. Commissioner. Mr. Penkala, I will

18   not be long with you, and I can assure you that

19   the aim of my questioning is not to attract any

02:40 20   national media, in fact I have spent most of my

21   life trying to shun the media, --

22   MR. HODSON: Is there an objection?

23   MR. BERESH: -- not always successfully.

24   BY MR. BERESH:

02:40 25   Q   Mr. Penkala, since 1969 through to the present

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1		time, in your exhaustive review of files and
2		documents that have been made available to you in
3		your exhaustive involvement in this case, is it
4		correct that nowhere have you observed, in any of
5		the documents or in any of the information you
6		have received, any arrangement or agreement in
7		which Mr. Fisher was involved that his matters in
8		1970-71 would be dealt with in any location of his
9		choosing?
10	A	Never.
11	Q	Is it also correct, from that exhaustive
12		involvement and review, that you have seen no
13		agreement wherein there was any arrangement that
14		his judicial matters be dealt with in a fashion
15		where there would not be media present?
16	A	No.
17	Q	And is it correct as well, sir, that you are not
18		privy to any information which would suggest that,
19		in any respect, any sentence he received was
20		untoward or something that might be improper?
21	A	Never.
22	Q	Okay. There was discussion or a suggestion to you
23		I think yesterday that there was something
24		untoward about entry of pleas by him in Regina,
25		Saskatchewan; do you recall that?

02:40 — line 5
02:41 — lines 10, 15, 20, 25

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1   A   Yes.

2   Q   I did -- I wonder, sir, if you are aware of

3   documented attempts by his Winnipeg lawyer to try

4   to have Saskatchewan matters waived to Manitoba

02:42 5   for concurrent resolution?

6   A   I was not aware of that.

7   Q   Okay. But I take it that wouldn't be unusual for

8   a lawyer to want to try to conclude all matters on

9   behalf of an accused in one location, at one time,

02:42 10   before one sentencing judge?

11   A   Yes.

12   Q   Okay. Let me suggest to you that the documents in

13   fact exist and that, as a result of legal opinion,

14   that could not be achieved. But I take it, sir,

02:42 15   that you likewise have no personal knowledge, or

16   even indirect knowledge, of any plea arrangements

17   between Mr. Fisher's then-counsel in Winnipeg and

18   Crown counsel?

19   A   No, I don't have any.

02:42 20   Q   You wouldn't be privy to any discussions vis-a-vis

21   having seen any memos or documents to that effect;

22   is that correct?

23   A   That's correct.

24   Q   Okay. But I take it you are aware of what we know

02:43 25   as the principle of global sentencing?

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1   *A*   Yes.

2   *Q*   That is that, although somebody may commit

3   multiple offences, we take the view that they

4   should not receive individualized sentences but

02:43   5   one global sentence taking into account those

6   offences?

7   *A*   Yes.

8   *Q*   I take it you wouldn't be aware of whether or not

9   there was an arrangement for a global-type

02:43   10   sentence to be imposed on Mr. Fisher?

11   *A*   I was not aware.

12   *Q*   You wouldn't be aware, specifically, if there was

13   a -- there were discussions and an agreement for a

14   global-type sentence dealing with all of the

02:43   15   convictions of Mr. Fisher, even though the pleas

16   occurred in separate jurisdictions?

17   *A*   I would have no information.

18   *Q*   And, if a global sentence was in fact imposed,

19   then it would be incorrect and probably misleading

02:43   20   to suggest that he received not one day extra in

21   Saskatchewan; is that correct?

22   *A*   That's right, yes.

23   *Q*   You were asked, also, about the fact that Mr.

24   Fisher was transported to Regina instead of

02:44   25   Saskatoon and, for those of us who are not

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1		geographically challenged, I take it you were
2		fully aware of the fact that there were RCMP
3		planes travelling from Prince Albert to Regina on
4		a regular basis?
02:44 5	A	Yes.
6	Q	Couriering either accused appearing in trial
7		courts or accused appearing in appellate courts in
8		Regina?
9	A	Yes.
02:44 10	Q	And my understanding, correct me if I'm wrong, is
11		that the appellate court criminal division, in
12		1969-'70, in the early '70s in Saskatchewan, sat
13		only at Regina?
14	A	I don't know that for a fact, but that's
02:44 15		reasonable, yes.
16	Q	Yes. So there would be nothing unusual about him
17		being taken from Prince Albert to Regina?
18	A	I wouldn't think so.
19	Q	Okay. And I take it, as well, you wouldn't be
02:44 20		aware of any discussions between his counsel at
21		the time and Crown prosecutors in Saskatchewan
22		about the convenience of defence counsel in terms
23		of resolution of the case?
24	A	No.
02:45 25	Q	But I take it you are now aware from information

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1   you received, albeit not personal information,

2   that the plea took place in a public courtroom?

3   A   Yes.

4   Q   That the courtroom was not closed to the public?

02:45 5   A   That's my understanding.

6   Q   It was not closed to the media?

7   A   That's my understanding.

8   Q   Okay. Sir, I wanted to ask you very quickly,

9   yesterday you were shown the document by

02:45 10   Mr. Wolch -- and I could have it produced if you

11   wish -- which was a, I'll call it a schematic

12   prepared by the RCMP about similarities or

13   dissimilarities of the various allegations against

14   Mr. Fisher; do you recall that?

02:45 15   A   Yes.

16   Q   There was a large schematic?

17   A   Yes.

18   Q   All right. And I'm wondering in that regard, you

19   weren't asked this question, were you aware that

02:45 20   when that schematic was subject to judicial review

21   by Mr. Justice Allbright that, of those

22   allegations, only three were found to be similar?

23   A   I wasn't aware of that.

24   Q   Okay. You were never made aware of that; were

02:46 25   you?

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1   A   No.

2   Q   Okay. And, in that regard, you were asked by Mr.

3   Fox, able counsel, today about the dissimilarities

4   and you agreed that there were dissimilarities?

02:46   5   A   Yes.

6   Q   Okay. You will recall, sir, that there was

7   discussion about -- a theoretical discussion about

8   whether Ms. Miller was attacked at or about the

9   scene where she was found, or whether she was

02:46   10   dropped there after having been attacked

11   potentially in a car; are you?

12 A   Yes.

13 Q   You will recall as well that, from information you

14   now have, Mary Marcoux went up to Ms. Miller's

02:46   15   body thinking that she was asleep or passed out in

16   the alley?

17 A   I wasn't personally aware of that, but --

18 Q   But you are now?

19 A   Yes, yes.

20 Q   You are aware that Linda Duffus claims that she,

21   independent of Ms. Marcoux, went up to the body?

22 A   No, not specifically, no.

23 Q   No? Let me advise you that that's, in fact, her

24   evidence; that people from the funeral home came

02:47   25   up around the body?

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1   A   Yes.

2   Q   Okay. And the reason I ask that is because

3   obviously any markings in the snow which the

4   police might have believed to be marks of a

02:47 5   struggle could well have been explained by people

6   walking around curious as to whether the person

7   was conscious, needed help, in that regard; is

8   that correct?

9   A   Umm, I didn't see it that way.

02:47 10   Q   I appreciate that, but clearly that's one

11   interpretation one could reasonably put on the

12   circumstantial evidence; isn't that fair?

13   A   I suppose that could be entertained, yes.

14   Q   So, and if we accepted that -- and we're not

02:47 15   saying it's the truth or not -- but if we accept

16   that, then it would suggest that the body was

17   dumped after attack or after assault in the alley;

18   is that correct? That's one interpretation.

19   A   That could be an interpretation I suppose.

02:48 20   Q   Which would mean that a vehicle would have been

21   involved?

22   A   Yes.

23   Q   Which would have been a major distinction from any

24   of the other circumstantial modus operandi that

02:48 25   was found on that chart or anywhere else?

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 1    A    Yeah, that would have been a difference, yes.

 2    Q    Total difference?

 3    A    Yes.

 4    Q    Okay.  Sir, I was interested, you were asked about

02:48  5         Linda Fisher and why the police didn't follow up

 6         on that or didn't do more, and I'm wondering; are

 7         you aware that Linda Fisher, from proven

 8         information, was a severe alcoholic?

 9    A    I didn't know that.

02:48 10   Q    Were you aware that she had psychiatric problems

11         or psychiatric illness?

12    A    I didn't know that.

13    Q    Were you aware that she had knowledge of an

14         offered reward of some $10,000?

02:49 15   A    I was not aware of that.

16    Q    Okay.  That she was under the influence of alcohol

17         when she went to the police with her complaint?

18    A    I wasn't really aware of that neither.

19    Q    That she had a major falling out with her husband

02:49 20        and there was substantial animosity between the

21         two of them?

22    A    I gathered that, somewhere along the lines, I had

23         some knowledge of that.

24    Q    And of course there was a delay of some 10, 11

02:49 25        years before she came forward with her
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1   information?

2   A   Yes.

3   Q   And, by that time, substantial information about

4   Gail Miller's death had been made public?

02:49 5   A   Yes.

6   Q   For example, it's my recollection that if anyone

7   followed David Milgaard's trial publicly, they

8   would have seen that it was believed that a paring

9   knife was involved?

02:49 10   A   Yeah, very obviously that would have happened.

11   Q   And, obviously, you found a paring knife handle at

12   the scene?

13   A   I found the blade.

14   Q   The blade, I'm sorry, which would have been made

02:50 15   public?

16   A   Yes.

17   Q   So for someone to take, it wouldn't have been

18   difficult for someone to take even that little bit

19   of information and use it to their own benefit, if

02:50 20   they just so chose?

21   A   That's possible, yes.

22   Q   I take it all of that information would have been

23   important in someone assessing the veracity of her

24   complaint?

02:50 25   A   Yes.

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	1	Q	And it may well have been that, had that been
	2		known at the time, that no one would have pursued
	3		the complaint; is that correct?
	4	A	Well I, I think that those would be reasons not to
02:50	5		pursue it.
	6	Q	Sir, you were asked about what occurred to police
	7		files which were unsolved; can we talk about that
	8		for a moment?
	9	A	Yes.
02:50	10	Q	So, as I gathered yesterday and today and even
	11		before in examination-in-chief, there were two
	12		broad categories of police files, obviously,
	13		solved and unsolved?
	14	A	Yes.
02:51	15	Q	You told us that solved, I believe in 19 -- we're
	16		talking the time frame of '69-'70, early '70s;
	17		fair?
	18	A	Yes.
	19	Q	So, as I understood your evidence, the solved
02:51	20		files were microfilmed and eventually hard copies
	21		destroyed after ten years?
	22	A	Yes.
	23	Q	Okay. Unsolved, though, remained, I take it, hard
	24		copy?
02:51	25	A	Yes.

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1	Q	Probably were never microfilmed, or were they?
2	A	I'm not sure whether they were microfilmed or not.
3	Q	Oh.
4	A	But, in any event, they could have been
5		microfilmed but the hard copy would have been
6		retained. It had a different statutory
7		requirement to keep.
8	Q	And would it have been retained, that is the
9		unsolved hard copy files, would they have been
10		retained at the police station, physically, or
11		some other location?
12	A	Umm, at that time they would have been at the
13		police station, physically, in a separate locked
14		room.
15	Q	Okay. So, so as Mr. Commissioner can understand,
16		from say '69 until the new building they would
17		have been retained at the police station?
18	A	Oh, I'm sorry, we're talking about -- I just lost
19		track of that -- we're talking about the old
20		building. There was a dead storage lockup in the
21		old building as well, yes.
22	Q	Okay. And so were unsolved files kept in dead
23		storage?
24	A	Yes.
25	Q	Okay. The reason I ask that is that we now hear

02:51 — lines 5, 10
02:52 — lines 15, 20, 25

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1		often about new departments within the police
2		forces where they deal with cold, they're called
3		'cold files'?
4	A	Yes.
02:52 5	Q	Are you aware of that phrase?
6	A	Yes.
7	Q	My understanding is that it refers to unsolved
8		cases?
9	A	Yes.
10	Q	Is that your understanding?
11	A	Yes.
12	Q	Was there a cold file unit, in 1969 and up to
13		1975, in the Saskatoon Police force?
14	A	There was not.
02:52 15	Q	Then who supervised the review of unsolved files?
16	A	It would be, it would be a situation that the
17		department that was responsible, for example the
18		detectives for a murder file, that would be
19		constantly at the elbow of, of the coordinators
02:53 20		within that file, and basically unsolved crimes of
21		that nature were, were well-remembered by the
22		department as a whole.
23	Q	I appreciate that, but you agree that police
24		personnel then, as now, change and move from
02:53 25		department to department?

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	1	*A*	Yes.
	2	**Q**	Then whose job was it to supervise the review of
	3		that, like every two years, every five years?
	4	*A*	I'm not certain that there was anybody in the time
02:53	5		frame that you have identified.
	6	**Q**	Was there a review process?
	7	*A*	I'm not aware of one specifically.
	8	**Q**	Like someone saying, 'well let's go back and look
	9		at the files that we haven't solved'?
02:53	10	*A*	I think that, if an issue came up, availability
	11		would then exist to go back and re --
	12	**Q**	Okay.
	13	*A*	-- look at the record, yeah.
	14	**Q**	So was there either a hard copy or some type of
02:54	15		electronic copy of the list of those files?
	16	*A*	I'm not sure --
	17	**Q**	So I come into the department, morality, I'm
	18		new -- and I would be a likely candidate for
	19		morality -- I come into that department and I want
02:54	20		to know what files haven't been solved; is there
	21		somewhere I can look at that list?
	22	*A*	I think you would have to go to central records
	23		and they could provide you that, that list.
	24	**Q**	Had you ever seen such a list?
02:54	25	*A*	I can't say that I have, specifically.

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1   Q   So I take it there was no specific protocol about

2   review of those files on a regular, ongoing basis?

3   A   I'm not aware of a routine review.

4   Q   And, just so we can dovetail that, what happened

02:54   5   to the unsolved file; how long did it remain open?

6   A   Well some of those files, well those files are

7   never closed in reality, they may be inactive but

8   they are not closed, and the destruction of that

9   file would just simply not occur.

02:55 10   COMMISSIONER MacCALLUM: I wonder if we

11   could see if there is a distinction between major

12   crimes and thefts, for example?

13   MR. BERESH: Thank you. Good point.

14   COMMISSIONER MacCALLUM: There must be

02:55 15   innumerable theft files which are closed but not

16   solved.

17   BY MR. BERESH:

18   Q   So, without offending anyone, can we agree that

19   there is a major, there are major files which

02:55 20   cause, well let's say cause either serious harm,

21   serious assaults, murder, that sort of thing, --

22   A   Yes.

23   Q   -- as opposed to less-serious?

24   A   Yes.

02:55 25   Q   Was there a distinction in the period say 1969 to

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1   1975, please, unsolved?

2   A   A distinction between unsolved and -- in terms of

3   the type of file?

4   Q   Let me put the question this way. Was there a

02:55 5   difference in the protocol or policy in terms of

6   destruction of unsolved files in categories of

7   serious versus not serious or minor?

8   A   I don't think so.

9   Q   That is, were some minor files closed simply

02:56 10   because they were minor, even though they were

11   unsolved?

12   A   Yes.

13   Q   But some -- but the major ones were not closed?

14   A   The major ones were not closed.

02:56 15   Q   And we see --

16   A   A murder, a murder file would not be closed.

17   Q   Okay. So, and when you say 'not closed', does

18   that mean that the hard copy remained at the

19   police station all the time?

02:56 20   A   Yes.

21   Q   Was never microfilmed?

22   A   I can't be sure whether that would have been

23   microfilmed but a hard copy would be retained. As

24   a matter of fact, during my tenure as the chief, I

02:56 25   had directed that files of that nature be

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1   catalogued and put together because we didn't have

2   anyone specifically assigned, and sometimes these

3   files get kind of --

4 Q And --

02:57 5 A And we -- and I had them assign someone to

6   specifically go through them, catalogue them, so

7   that if you were referring to any specific aspect

8   of it, it would be easily retrievable.

9 Q And when was that done, sir, that you asked for it

02:57 10   to be catalogued?

11 A I became chief in '82, so it would be sometimes

12   between '82 and my retirement in '91.

13 Q Prior to that, had there been the cataloguing

14   process that you put in place?

02:57 15 A There may have been, but under, under direction of

16   another supervisor, or maybe specific cases were

17   set out that way.

18 Q Now I want to get back, I want to press you on

19   this if I can. Was there, or had you ever seen a

02:57 20   physical list, before you became chief, of

21   unsolved cases identifying the nature of the

22   allegation; murder, sexual assault, name of

23   deceased, complainant, victim?

24 A No, I didn't see one.

02:57 25 Q Is there anyone who you think may be testifying at

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1   this Commission who can tell us whether or not one

2   existed, or would have more knowledge than

3   yourself?

4 A   I don't know. As I said a few moments ago, that

02:58 5   responsibility would lie with the manager of

6   central records, and he would have been in a

7   position -- at that time it was a Mr. Gerry

8   Keelan -- he would have been in a position to help

9   any supervisor or any investigator to retrieve and

02:58 10   find cases that, that needed to be referenced.

11 Q   But Keelan, I understood, was off-premise?

12 A   No.

13 Q   He was on-premise?

14 A   Oh yes.

02:58 15 Q   But supervised the off-premise location?

16 A   No, the -- all of the, all of the record system

17   was on-premise.

18 Q   Okay, all throughout 1969 and 1970?

19 A   Oh yes.

02:58 20 Q   Okay. And available for access by anyone -- a

21   member of the police force?

22 A   Yes, and only by permission. It was -- it was

23   secured to the point that you would have to

24   inquire and, as long as you were a police officer,

02:59 25   you would be provided the opportunity to even take

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1		the file out if you so desired.
2	Q	Would you have to sign in so we would know who
3		accessed what files?
4	A	You would have to sign for the file, yes.
02:59 5	Q	Okay. This is an obvious question but, for the
6		record, let's make it clear. Obviously, Larry
7		Fisher had no control over any police files?
8	A	No, oh no, nope.
9	Q	Larry Fisher never entered into any agreement that
02:59 10		his files be destroyed in any way, or lost, or
11		anything else?
12	A	I don't know how.
13	Q	I wouldn't think so. Finally, sir, I'm interested
14		in one area which is -- are these binders. My
02:59 15		understanding is that the binders that you kept at
16		your home were two in number?
17	A	Yes.
18	Q	And they included material relevant to this case?
19	A	Relative to this case, yes.
02:59 20	Q	And I apologize, I'm not sure and I'm not clear in
21		my mind; when did you start to accumulate that
22		material?
23	A	Actually it was accumulating at the time of the
24		incident, which was in 1969, and then it
03:00 25		progressively grew. Most of the contents of those

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1   personal files were copies of my own reports.

2   Q   Let me be clear. I understand when the materials

3   surfaced and were recorded, my question is when

4   did you start to, first start to accumulate the

03:00 5   materials in the binders?

6   A   Oh, I -- specifically what happened is when I left

7   work I took the file, which was loose copies, I

8   took that with me and took it home, it -- I

9   interpreted it as my property, I took it home.

03:00 10   Later, with all the controversy surrounding this

11   very case, I sat down and put these copies in a

12   sequence of date-wise and put them in the binders.

13   Q   And were your superiors, or at least the then, the

14   chief who followed you, was he aware you had the

03:00 15   file?

16   A   I don't know if he was or not.

17   Q   Was it with his permission that these items were

18   copied and kept?

19   A   I don't think I had to get permission from him.

03:00 20   Those were my copies. I dictated those reports, I

21   wrote them. As far as I was concerned they were

22   my personal --

23   Q   Had you ever done that with any other file in

24   which you were directly or indirectly involved as

03:01 25   a police officer?

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1	A	I'm not sure. I think I have. I can't just
2		specifically -- they were reserved to the very
3		serious type of investigations that were taking
4		place which involved considerable time and the
5		expectation that you might at some time have to
6		return with information.
7	Q	And finally, sir, you had those binders I take it
8		then in 1997, '98, '99?
9	A	Yes.
10	Q	And you were aware that Mr. Sinclair, Mr. Johnston
11		were prosecuting Mr. Fisher?
12	A	Yes.
13	Q	Is it correct that the existence of those binders
14		was not made known to either of those prosecutors?
15	A	I don't recall other than the fact that I had my
16		notebook. I was visited by RCMP officers who I
17		guess took a statement from me, I don't recall
18		signing a statement, but they interviewed me and
19		of course I testified at the preliminary and at
20		the trial of Larry Fisher.
21	Q	Did you reveal to the RCMP that you personally had
22		those two binders?
23	A	I don't recall if I did or not. There would be no
24		reason not to reveal it.
25	Q	Did you ever reveal to Mr. Johnston or Mr.

The timestamps in the left margin: 03:01 (line 5), 03:01 (line 10), 03:02 (line 15), 03:02 (line 20), 03:02 (line 25).

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1		Sinclair that you had those binders?
2	A	I don't know at this stage. There would have been
3		no -- there would have been no reason to deny that
4		I had them, that would be for sure, but --
03:03 5	Q	Well, did they ask that you produce them?
6	A	No, not that I'm aware of. I don't remember that
7		being --
8	Q	By 1997, even though you weren't chief and not
9		involved directly with police matters, you were
03:03 10		well aware of the Supreme Court of Canada's
11		decision in Stinchcomb as you mentioned this
12		afternoon?
13	A	Yes.
14	Q	And the need to disclose?
03:03 15	A	Yes.
16	Q	Did Mr. Sinclair or Mr. Johnston ever ask for
17		those binders, to either review them, to look at
18		them?
19	A	Well, basically the information that's in those
03:03 20		binders would have been shared with them and
21		whether they saw them or not, they would in
22		fact -- I would suspect that they would even have
23		copies of those reports.
24	Q	Where was it shared with them, please, physical
03:03 25		location?

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  1   A     Where was it shared with them?

  2   Q     Yes.  You said you shared it with them?

  3   A     Well, they would have, Sinclair and Mr. Johnston

  4         would have had access to the police file I would

  5         think.

  6   Q     I appreciate that.  I just want to focus on the

  7         binders if we can.  Did you physically take the

  8         binders and show it to them or did they go to a

  9         location where you had the binders or go to your

 10         home and look at them, please.

 11   A     No, I don't recall showing them the binders nor

 12         them asking me about them.

 13             MR. BERESH:  I see.  Those are my

 14         questions, sir.

 15             COMMISSIONER MacCALLUM:  Thanks.

 16     BY MR. PRINGLE:

 17   Q     Mr. Penkala, I'm Alex Pringle, I'm counsel for

 18         Calvin Tallis.  I doubt whether my questions will

 19         even attract local media attention.

 20                         There was a suggestion yesterday

 21         that the Crown's case back in 1970 against David

 22         Milgaard as it approached the trial was not a

 23         strong case.  Do you remember that?

 24   A     Yes.

 25   Q     You are aware of the major evidence that the Crown
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1   had against Milgaard back prior to trial in 1970,

2   the evidence of Cadrain, John, Wilson, Melnyk,

3   Lapchuk?

4   A   Yes, in generalities, yes.

03:05   5   Q   Looking at it from the point of view of defending

6   this case, this was not an easy case to defend

7   when you had witnesses giving, you know,

8   potentially giving testimony that was contemplated

9   at that trial; is that fair to say?

03:05   10   A   Yes, very much so.

11   Q   And there wasn't -- were you aware of any, back in

12   1970, were you aware of any motive as to why

13   Messrs. Lapchuk or Melnyk would want to fabricate

14   testimony against Mr. Milgaard?

03:06   15   A   No.

16   Q   And yesterday with respect to -- yesterday and

17   today you've been asked about disclosure and I

18   gather that you were not involved yourself in the

19   process of determining what disclosure Mr. Tallis

03:06   20   should have received?

21   A   That's correct.

22   Q   So you are not aware of what disclosure or lack of

23   disclosure that he received when he was preparing

24   for the defence of David Milgaard?

03:06   25   A   That's correct.

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	1	Q	Mr. Tallis -- I gather, let's put it this way, Mr.
	2		Penkala, by the time this trial came along, you
	3		would have been a police officer for 15 1/2 years?
	4	A	That's approximately right, yes.
03:07	5	Q	And you were the head of the identification
	6		department?
	7	A	Yes.
	8	Q	So you would have had more than a passing
	9		familiarity with the court system and the criminal
03:07	10		justice system in Saskatoon?
	11	A	Yes.
	12	Q	You were aware of, probably aware and had observed
	13		many of the lawyers in Saskatoon?
	14	A	At that time, yes.
03:07	15	Q	And Mr. Tallis, how would you rate him as far as
	16		being a criminal defence lawyer at that time?
	17	A	My understanding of Mr. Tallis at that time, that
	18		he was the best defence lawyer in Saskatchewan. I
	19		remember him as a very thorough, very thorough
03:07	20		defence lawyer and yet a very fair person and I
	21		don't know of any specifics, but I appeared before
	22		him and I always thought he was a gentleman.
	23	Q	And that would be what you felt his reputation to
	24		be at the time that he took this case back in 1969
03:08	25		and then represented Mr. Milgaard at the trial in

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1   1970?

2   *A*   Yes, and one of the things, that people that would

3   have to come before the cross-examination of

4   Mr. Tallis were in some fear because they knew of

03:08 5   his thoroughness and a police officer on the

6   witness stand wants to do a good job, so he was a

7   very thorough, very thorough defence counsel.

8   MR. PRINGLE: Thank you very much. Those

9   are my questions.

03:08 10   COMMISSIONER MacCALLUM: Thanks.

11   **BY MR. WILSON:**

12   Q   Chief Penkala, my name is Garrett Wilson, I

13   represent Serge Kujawa, and I'm from that school

14   similar to that of Mr. Elson where once a chief,

03:09 15   always a chief, so I will regard you as chief

16   today.

17   *A*   Thank you very much.

18   Q   Now, I was interested in your comments on Calvin

19   Tallis, defence lawyer, as he was in 1970. I was

03:09 20   also listening with interest the other day when

21   Mr. Lockyer put to you some questions about my

22   client Mr. Kujawa. In 1971, the 1970s generally

23   and the 1980s generally you were either a senior

24   officer in the Saskatoon Police Force or the chief

03:10 25   thereof?

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1   A   Yes.

2   Q   Did you come to know Mr. Kujawa and his employment

3   with the Department of Justice in Regina during

4   those years?

03:10 5   A   Yes, I had dealings with Mr. Kujawa, not

6   specifically with this case that's before this

7   Inquiry, but as the chief of police I had

8   opportunities and the privilege of seeking his

9   advice on legal issues and he was always readily

03:10 10   forthcoming with information, information that

11   sometimes you may have been disappointed with

12   learning, but he was respected to the point that

13   if Mr. Kujawa said that's the way it is, I don't

14   think there was anybody that would deny him the

03:11 15   right of making that kind of a decision.

16   Q   He was the director of public prosecutions in the

17   Department of Justice during most of the period I

18   speak of?

19   A   Yes.

03:11 20   Q   I take it from the explanation you just gave me,

21   that you held his advice in high regard?

22   A   Very much so.

23   Q   You found him very competent in his professional

24   duties?

03:11 25   A   Yes.

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1	Q	How about his integrity and standards of honesty?
2	A	Oh, there was no -- it was never questioned.
3	Q	The sort of person who might be involved in a
4		coverup such as we've been hearing in this
03:11 5		Inquiry?
6	A	I can't even think of it in those terms. That's
7		just not -- that's just not Mr. Kujawa.
8	Q	Uh-huh. Could we look at 261053, please. You
9		were queried about this piece of correspondence by
03:12 10		Mr. Lockyer I believe?
11	A	Yes.
12	Q	And Mr. Lockyer felt free to question you about
13		Mr. Kujawa's knowledge and responsibilities, you
14		were questioned about this letter. I notice it is
03:12 15		addressed to the attention of K.W. MacKay, Crown
16		solicitor?
17	A	Yes.
18	Q	Do you know Mr. MacKay as well?
19	A	I know of him, I don't know him.
03:13 20	Q	But he was a Crown solicitor in the Department of
21		Justice at that time?
22	A	Yes, that's how I -- that's what it reminds me of,
23		yes.
24	Q	Are you aware of any protocol or procedure that
03:13 25		was in place in the Department of Justice in 1971

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1   that would require Mr. Kujawa to reply to Mr.

2   MacKay's mail?

3   A   I don't know their policies and procedures at all,

4   but it sounds highly unlikely.

03:13 5   Q   I would think so. Would you take that down,

6   please. Now, my notes from your service records

7   suggest that in 1962 you were an identification

8   officer with the Saskatoon Police Department?

9   A   Yes.

03:14 10   Q   Did you, in May of 1962, have any part in the

11   investigation of a murder of a young nurse on the

12   river bank in Saskatoon near the weir?

13   A   I did not, but I'm aware of the murder.

14   Q   You are aware of the file, a young lady by the

03:14 15   name of Alex Wiwcharuk?

16   A   Yes.

17   Q   Date of death, 18th of May, 1962?

18   A   That seems about right, yes.

19   COMMISSIONER MacCALLUM: What was her name,

03:14 20   Mr. Wilson?

21   MR. WILSON: Wiwcharuk, W-I-W-C-H-A-R-U-K.

22   COMMISSIONER MacCALLUM: Thanks.

23   BY MR. WILSON:

24   Q   She was, I believe, 20 years of age?

03:15 25   A   That's approximately right.

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1   Q   Her body was not found on the day of death in that

2   instance I believe, but some days later, some

3   attempt had been made to cover up the body?

4   A   She was buried in a shallow grave on the river

03:15 5   bank, yes.

6   Q   That was a highly-publicized murder and subsequent

7   investigation in Saskatoon?

8   A   Yes.

9   Q   Still unsolved?

03:15 10   A   Still unsolved as far as I know.

11   Q   And has received some recent publicity in fact?

12   A   Quite recently I recall reading.

13   Q   Yes. So speaking of cold cases, this one has come

14   up for review and has been worked upon?

03:16 15   A   That would be a prime example of cold case review,

16   yes.

17   Q   A couple of questions about that case relative to

18   the work you were doing in the Gail Miller murder.

19   Was any thought given to a comparison between that

03:16 20   1962 killing and the one you were dealing with in

21   January of 1969?

22   A   I suspect there was. I don't have a specific

23   recollection. I know that the Wiwcharuk murder

24   was also a sex attack, so I would think that

03:16 25   probably that was brought back into the minds of

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1   the investigators at that moment, not only just

2   for comparison, but there's always a desire to

3   solve cases regardless of how old they are.

4 Q   Can you tell us whether there was another sex

03:17 5   killing of a young woman in Saskatoon between 1962

6   and 1969 when the Gail Miller murder happened?

7 A   I can't off the top of my head. Between 1969

8   and --

9 Q   Between '62 and '69.

03:17 10 A   Oh, '62 and '69. I can't from, just from my

11   general knowledge, I can't think of any specific

12   case.

13 Q   If there was an unsolved murder of that sort out

14   there, you would remember it; would you not?

03:17 15 A   Oh, yes, and I'm starting to recall, we had a

16   murder at the Saskatoon golf course, I think it

17   remains unsolved.

18 Q   And what year did that happen?

19 A   I believe that was '62. I'm sort of guessing at

03:17 20   that, but --

21 Q   That was also a young female was it?

22 A   No, that was an elderly gentleman and he was a

23   janitor at the clubhouse at the golf course.

24 Q   Can you tell us if there was any feeling of

03:18 25   additional pressure to solve the Gail Miller

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1   murder because of the still outstanding 1962

2   murder we're speaking of?

3   A There was certainly pressure to solve the crime,

4   but I don't think it was related to any other

03:18 5   outstanding unsolved crimes. I think most

6   credible police officers recognize the importance

7   of pursuing and solving a serious crime and I

8   think every police officer, at least that's my

9   feeling, is under pressure to do whatever is

03:18 10   possible to find the perpetrator.

11   Q And do you recall any political or media pressure

12   in 1969 relating back to the '62 killing?

13   A Not really. I think there was publicity about its

14   occurrence, but -- there certainly was about the

03:19 15   Wiwcharuk, there was probably more about the

16   Wiwcharuk case than there was about the Hartz

17   case, that was the male person. Certainly there

18   was publicity.

19   Q Now, speaking about sentencing, I want to be

03:19 20   delicate about this, chief, but it wouldn't

21   surprise me if you shared what I suggest is a

22   general feeling among the police and prosecutors

23   in Saskatchewan that the judiciary is somewhat

24   lenient on sentencing in this province?

03:19 25   A Well, I suppose our personal thoughts, if you get

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1   into our personal thoughts and because of the

2   involvement, I'm sure that police officers think

3   in those terms, but I don't think they would dare

4   voice them publicly.

03:20 5   Q   No, of course not, but they would harbour those

6   feelings when they see one of their customers back

7   on the street a lot earlier than they would prefer

8   to see them?

9   A   I think that's a fair assessment, yes.

03:20 10 Q   Now, Mr. Beresh was asking you about the global

11   sentencing with respect to Mr. Fisher and the fact

12   that the 10 year sentence concurrent out of

13   Saskatchewan didn't add any time to the 13 years

14   he had already received in Manitoba; correct?

03:20 15 A   That's right.

16   Q   And I believe we have evidence before us that Mr.

17   Fisher was out on the street again in 1980 and in

18   1980, in fact within a few months of that,

19   committed a very vicious rape and a determined

03:20 20   attempted murder in North Battleford; correct?

21   A   I think that's right, yes.

22   Q   And he was convicted of that offence and appeared

23   for sentencing?

24   A   That's correct.

03:21 25 Q   And when he appeared for sentencing, he would have

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1		had on his record at that time the two convictions
2		from Manitoba and the four from Saskatchewan; is
3		that correct?
4	A	Yeah.
5	Q	Six vicious rapes, or five vicious rapes and one
6		indecent assault; right?
7	A	Should have, yes.
8	Q	And that he had already served a sentence of 13
9		years?
10	A	Yes.
11	Q	And now only by a fluke did he escape a murder
12		charge, but he's up against a very vicious,
13		heinous crime. One would expect that the
14		sentencing he would receive for that would be in
15		excess of the one that he had previously served;
16		wouldn't you agree?
17	A	Well, again, it goes back to personal opinions and
18		I always felt that it was improper for a police
19		officer to get involved in those issues.
20	Q	But there still is an elevated level of punishment
21		assumed to exist within the system; is there not?
22	A	Oh, yes, of course.
23	Q	But in fact, as we know, Fisher received only 10
24		years for that offence in North Battleford; is
25		that correct?

03:21 (line 5)
03:21 (line 10)
03:21 (line 15)
03:22 (line 20)
03:22 (line 25)

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 1   *A*   I don't know for a fact.

 2   **Q**   I think that's in evidence before us.

 3   *A*   Yeah.

 4   **Q**   May we have document 324970. This is a letter

03:23 5   about which we've heard so much in the last few

 6   days, chief, written in April, 1991, and you make

 7   some strong comments, you express some strong

 8   opinions about the media. Now, there was a second

 9   high profile murder trial that took place in

03:23 10   Saskatoon some years before that, the Colin

 11   Thatcher trial in 1984. Do you recall that?

 12   *A*   Yes.

 13   **Q**   The offence occurred in Regina, but the trial took

 14   place here?

03:23 15   *A*   Yes.

 16   **Q**   Conviction took place in the fall, November I

 17   think, of 1984, the appeal process was followed,

 18   Saskatchewan Court of Appeal, Supreme Court of

 19   Canada finally I think rendered a decision in

03:24 20   1987, and that was a situation where there were

 21   strong contentions of wrongful conviction; were

 22   there not?

 23   *A*   I understand -- I remember this going on, but the

 24   specifics is pretty difficult. I had maybe not as

03:24 25   much interest in that case as I had in our

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1		home-grown cases.
2	Q	True, but a lot of that was happening in
3		Saskatoon, there was an application by Thatcher
4		under 690 of the Code then for a review by the
03:24 5		Federal Minister of Justice. Were you aware of
6		that?
7	A	No, not specifically.
8	Q	Your department was not involved in any way with
9		the investigation that was called for by that
03:24 10		application?
11	A	I'm not aware that we were.
12	Q	Do you recall the media being rather replete with
13		claims of wrongful conviction on the part of
14		Thatcher and his supporters?
03:25 15	A	Again, I don't know how I could not remember, but
16		I don't seem to have any recollection of what
17		actually --
18	Q	Well, I was going to suggest to you that the air
19		was so thick with claims of wrongful conviction in
03:25 20		the late 1980s and early 1990s that even a saintly
21		chief of police might be provocable arising out of
22		two different cases. However, if you don't
23		recall, I'm going to leave it.
24		Some of the allegations that
03:25 25		were made in the Milgaard matter respecting your

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1   department were extreme in the least. Do you

2   recall an allegation being made by counsel on

3   behalf of Mr. Milgaard and carried by the media

4   that two of the Crown witnesses in the Milgaard

03:26 5   trial had been paid, specifically Lapchuk and

6   Melnyk?

7   A   I don't have personal knowledge of that, but I

8   think I heard that before.

9   Q   Yeah. That couldn't have happened without the

03:26 10   complicity of your department could it?

11   A   I would not think so.

12   COMMISSIONER MacCALLUM: I'm sorry, I don't

13   know if you purposely avoided naming the counsel

14   who made such allegations, but would you mind

03:26 15   doing so if you know his name, as long as you can

16   tell us it was or wasn't the trial counsel.

17   MR. WILSON: No, it was Mr. Wolch.

18   COMMISSIONER MacCALLUM: Pardon me?

19   MR. WILSON: Mr. Wolch made those

03:26 20   allegations.

21   COMMISSIONER MacCALLUM: All right.

22   BY MR. WILSON:

23   Q   And specifically Mr. Wolch claimed publicly that

24   the witnesses had been bought and paid and the

03:27 25   remuneration was a reduced sentence on some

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1   criminal matters they were facing in Regina?

2 A I heard about it, but I wasn't a party or I wasn't

3   specifically informed on that.

4 Q So what's your reaction when you hear a comment

03:27 5   like that being made about your department, chief?

6 A It's very hurtful, especially when in your heart

7   you know that you've never experienced or known

8   any people within the department that would stoop

9   to those tactics.

03:27 10   COMMISSIONER MacCALLUM: I'm sorry, I

11   missed your answer to the question. Do you

12   regard the -- do you recall Milgaard's counsel

13   having made such an accusation, I missed your

14   answer.

03:27 15 A No, I don't recall that specifically, no.

16   COMMISSIONER MacCALLUM: But in general you

17   would find such comments hurtful?

18 A Yes.

19   BY MR. WILSON:

03:28 20 Q Many of the statements you make in your letter of

21   April 17th, of course, I suggest could have had

22   equal application to the case of Colin Thatcher,

23   who is also pleading wrongful conviction; would

24   you agree?

03:28 25 A That could be. I'm not very familiar with the --

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1   Q   Everything you say in your letter about the due

2   process and the administration of justice would

3   have been correct in the <u>Thatcher</u> case, in which

4   all those contentions of wrongful conviction were

03:29 5   made but were never established; correct?

6   A   Yes, in my case that's the feeling, and that's

7   what I felt.

8   Q   In your 37 years in law enforcement did you ever

9   encounter another case where someone convicted of

03:29 10   an offence was later discovered not to have

11   committed that offence?

12   A   No, this is the first one.

13   Q   First and only one is the Milgaard affair?

14   A   Yes.

03:29 15   Q   In 37 years of your hands-on experience?

16   A   That's right.

17   Q   Have there been perhaps one or two occasions when

18   someone you were quite convinced of being guilty

19   was acquitted?

03:29 20   A   Yes, in my opinion there were a lot of people that

21   were acquitted that I felt were guilty.

22   Q   And if we believe the adage that *better ten guilty*

23   *go free than one innocent be convicted* that means

24   the justice system, in your experience, worked

03:30 25   pretty well; didn't it?

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1   A   Yes, I accept that, yes.

2   Q   It's not a perfect system, it's run by human

3   beings. When you go on to say in the bottom

4   paragraph of the first page of your letter that

03:30 5   our justice system is recognized as the best in

6   the world, Mr. Wolch gave you some query on that;

7   do you still hold to that belief?

8   A   Yes I do.

9   Q   I suggest that you may find it well-shared with

03:30 10   others in this room.

11   A   I'm, I'm encouraged by that.

12   Q   Thank you, chief.

13   COMMISSIONER MacCALLUM: Thanks,

14   Mr. Wilson.

03:31 15   MR. HODSON: I believe Ms. Knox is next, it

16   is 3:30 and I believe she will be more than a

17   minute.

18   COMMISSIONER MacCALLUM: More than a

19   minute? So we're 1:00 Monday?

03:31 20   *(Adjourned at 3:31 p.m.)*

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5   contain a true and correct transcription of our shorthand

6   notes taken herein to the best of our knowledge, skill,

7   and ability.

8

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12   _____, CSR

13   Karen Hinz, CSR

14   Official Queen's Bench Court Reporter

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18   _____, RPR, CSR

19   Donald G. Meyer, RPR, CSR

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