

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

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Volume 88

Inquiry Proceedings



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 (Retired)



INDEX OF PROCEEDINGS

DESCRIPTION:

PAGE:

THOMAS DAVID ROBERTS CALDWELL, CONTINUED

- BY MR. HODSON	17699
- BY MR. LOCKYER	17702



Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

THOMAS DAVID ROBERTS CALDWELL, continued:

BY MR. HODSON:

Q Mr. Caldwell, just one further question. Last week I had mentioned that the Commission had been making efforts to obtain a copy of the parole board pamphlet referred to in your June 14th, 1972 letter, and I think we've now received it, if I could call up 006824. And we went through this, this is your first letter to the parole board June 14th, 1972, and in the first paragraph you say you've recently had the opportunity to read the booklet entitled *an outline of canada's parole system for judges, magistrate's and the police*, and I think your evidence was to the effect that that document influenced what you wrote or your decision to write; is that correct?

A Yes, sir.

Q And if we could call up 332055, and this is a new document, and for the benefit of counsel this was put up today, or will be up on CaseVault this week, we just received it by fax from the parole



1 board. It's called an outline of canada's parole
2 system for judges, magistrates and the police, and
3 the information we have from archives and the
4 parole people is that this is likely a document
5 that existed in 1972. Are you able to tell us,
6 Mr. Caldwell, whether this in fact was the booklet
7 that you referred to in your June 14th, 1972
8 letter?

9 A Mr. Hodson, I have to say I assume it was, I just
10 had a glance at the one you have now and I have no
11 reason to think that it was not the one. I don't
12 happen to see that date on this, but I'm satisfied
13 it is the same book, if that helps.

14 Q If you go to the next page, to the foreword, there
15 is a date of 1969, being the foreword, --

16 A Okay.

17 Q -- which certainly would have it after that date?

18 A Yeah.

19 Q And perhaps, Mr. Commissioner, I might file at
20 some point the Email that we received from the
21 parole board archives where we basically went to
22 them and said "give us -- find this document",
23 they got back to us and said "we believe, based on
24 the following factors, that this would be it", so
25 maybe I'll file that Email and we'll leave it at



1 that.

2 A Very good.

3 Q And do you have anything else to add about this
4 document, Mr. Caldwell, as to whether or not this
5 was the one you saw?

6 A No, sir.

7 Q Thank you, those are all my questions, and I
8 believe Mr. Lockyer is examining first.

9 COMMISSIONER MacCALLUM: Yes, please come
10 forward, please.

11 MS. KNOX: I apologize for asking for an
12 indulgence, but I need a quick minute with
13 Mr. Pringle before Mr. Lockyer starts, I may or
14 may not have something to say.

15 COMMISSIONER MacCALLUM: Oh, I see. All
16 right. We'll adjourn for two minutes then.

17 MS. KNOX: Yes, just for a couple minutes.

18 COMMISSIONER MacCALLUM: Okay.

19 *(Adjourned at 9:09 a.m.)*

20 *(Reconvened at 9:13 a.m.)*

21 MS. KNOX: Thank you, I just wanted to
22 thank you for that brief indulgence, and we're
23 ready to proceed.

24 MR. LOCKYER: I'm seeking a ban, Mr.

25 Commissioner, on anyone referring to the Gomery



1 report during my cross-examination.

2 BY MR. LOCKYER:

3 Q Mr. Caldwell, as I've watched you over the last
4 couple of weeks you seemed, as you've given your
5 evidence, to be really quite comfortable as you've
6 given your evidence; do you think that's a fair
7 assessment, sir?

8 A 'Comfortable' sir, did you say, 'quite
9 comfortable'?

10 Q 'Comfortable' in terms of what you did and didn't
11 do over the 30 -- or sorry -- the 27, 28 years of
12 this case?

13 A I'd agree with that, sir.

14 Q Yes. You seemed to have felt that you did your
15 job and that whatever happened to Mr. Milgaard
16 really wasn't as a result of any misconduct or
17 negligence on your part; is that fair?

18 A I think that's right, sir.

19 Q In fact if we look at your press release, sir, at
20 332039 that came up yesterday -- and presumably
21 you consulted with your counsel before he issued
22 this press release; am I right?

23 A Yes. This is the 1997 one, sir.

24 Q You did?

25 A Yes, --



1 Q Yes.

2 A -- I'm sure I did that.

3 Q Before he spoke, yes. And just looking there,
4 sir, right from the outset it seems that despite
5 your shock, as I think you've talked about, and
6 the fact that you were floored by the DNA results,
7 right there on page 1 one of the first things
8 that's coming to mind is yours and Mr. Kujawa's
9 claims that, to read it:

10 "... they maintain and will continue to
11 maintain that there was absolutely no
12 wrong doing on their part with respect
13 to the prosecution of David Milgaard
14 based on the evidence available as it
15 was then known."

16 And:

17 "... further maintain that it is their
18 belief that there were no improprieties
19 in the trial process or on the part of
20 the jurors who made the determination of
21 guilt based on the evidence presented to
22 them."

23 Right?

24 A That's correct, sir.

25 Q And that's your position from July 21st, '97 up



1 until November 1, 2005?

2 A I would think so.

3 Q Uh-huh. And, in fact, at times during the course
4 of your questioning by Commission Counsel there
5 was sort of some indignation expressed, if I can
6 use that word, at some of the allegations that
7 have been made against you over the years; is that
8 right?

9 A Yeah, that's right.

10 Q For example the non -- the allegation, I think,
11 that Mr. Asper apparently made to the media once
12 that you hadn't disclosed the original statements
13 of Ronald Wilson and Nichol John, I think it was a
14 reference to both; you remember that, sir?

15 A Umm, yes, I -- those two were disclosed, and I
16 expect I was unhappy about that assertion, sir.

17 Q And it's something that we know is not so; is that
18 right?

19 A What's not so?

20 Q You did disclose them?

21 A Yes, that's what I was trying to say, yeah.

22 Q Yeah. And that was referred to at one point as a
23 very serious allegation, but when you step back a
24 bit, sir, and think about it, there were -- there
25 was, of course, a legion of material that wasn't



1 disclosed -- leaving aside why it wasn't -- that
2 wasn't disclosed to Mr. Milgaard's counsel back in
3 1969-1970; correct?

4 A Well, broadly speaking, that's right. I would
5 suggest that on the prosecution file I wouldn't
6 refer to it, sir, as a legion. If we're talking
7 about the Gail Miller murder investigation file, I
8 -- it was a massive set of documents, and clearly
9 I don't think they were disclosed, and clearly
10 didn't come to me in the main sense. I wonder if
11 that is what you are getting at, sir?

12 Q Well the police reports came to you?

13 A Right.

14 Q You didn't disclose any of them?

15 A That's right.

16 Q Right. So there is something you didn't disclose.
17 So if we just substitute for 'the original
18 statements of Wilson and Nichol John' that you
19 didn't disclose the police reports, that would
20 have been a completely fair comment; right?

21 A Well the original statements of Wilson and Nichol
22 John were to Inspector Riddell and it was very
23 important they be disclosed, and they were,
24 because they essentially indicated that they
25 weren't in Saskatoon almost, so I think that's



1 a -- that's one heading, sir.

2 Q But don't you think the police reports contain
3 highly material information that Mr. Tallis, and
4 indeed any defence counsel of Mr. Milgaard, would
5 have loved to have in their possession, sir?

6 A Well you will have to show me, sir, what you are
7 speaking of. It was --

8 Q Well, no, I'm just talking generally. Don't you
9 think that? Surely you can answer that question
10 generally.

11 A I --

12 Q Probably, I don't know, 3, 400 pages, I have never
13 counted them, but don't you think any defence
14 counsel would have liked to have had them?

15 A I don't think, sir, there was that much in the
16 prosecution file. Are you suggesting that?

17 Q Don't you think, sir -- just let's focus on the
18 question, can we --

19 A Yeah.

20 Q -- don't you think defence counsel would have
21 loved to have had all those police reports that
22 you read that were in your file?

23 A Yes, but I believe our policy was not to give them
24 out, sir.

25 Q Uh-huh. And don't you think, sir, that the



1 defence would also have loved you to have gone to
2 the police and said "I want your entire file so
3 that I can consider disclosing your -- the police
4 file to the defence"?

5 A Yeah.

6 Q Don't you think the defence would have liked that
7 too?

8 A I (a), of course, did not do that, I was, in my
9 memory was not asked to do that by Mr. Tallis. I
10 used the file I had, and I certainly would have
11 pursued any individual things that he -- in fact I
12 think I did that in the sense of rereading the
13 witness statements, sir.

14 Q Don't you think defence counsel would loved to
15 have seen those statements that you read, sir,
16 from people like (V)-- (V)----, (V6)--- (V6)-,
17 (V4)---- (V4)---; don't you think they would have
18 loved to have seen those as well?

19 A Sir, I don't know at this point what (V)----
20 (V)---- and (V)-- did you say (V6)-'s statements
21 were?

22 Q (V6)--- (V6)-.

23 A (V6)--- (V6)-.

24 Q Commission Counsel went through them with you a
25 few weeks ago in your first week of evidence.



1 A At the moment, sir, I don't recall what --

2 Q They were the ladies who, in short, were attacked
3 all within two weeks of the murder of Gail Miller.
4 Remember, there were a bunch of women who were
5 attacked on the streets of Saskatoon, all within
6 two weeks of Gail Miller's murder?

7 A Well, I eventually became aware of that.

8 Q Well you became aware of it -- I'm not sure
9 whether you mean by "eventually" -- you became
10 aware of that in 1969, that the statements were in
11 your file. Have you forgotten about these cases?

12 A Well, I can't say I can place them right now, sir,
13 but if you tell me that I guess they were.

14 Q Well these were the ladies who were attacked -- I
15 mean (V4)---- (V4)---, you surely know who she
16 is, --

17 A Yeah.

18 Q -- she's one of the four, --

19 A Yeah.

20 Q -- for example.

21 A Her statement was in my file, --

22 Q Yes.

23 A -- was it not?

24 Q Yes, it was. Let's just focus on that one for a
25 minute.



1 A Okay.

2 Q Don't you think Mr. Tallis would have loved to
3 have had that, sir?

4 A I -- I -- I can't tell you much more than that
5 right now, sir. Was it, you say it was one of the
6 ones that was attacked around that time?

7 Q Yes, it was in your file, yes.

8 A All right. Did it not go to Mr. Tallis?

9 Q No, it did not.

10 A Okay.

11 Q That's the lady who was attacked minutes after
12 Gail Miller was murdered.

13 A All right. And I don't know at this point,
14 Mr. Lockyer, was that on my file all through this?

15 Q I'm sorry, are you not aware, even now you are not
16 aware that (V4)---- (V4---'s existence didn't --

17 A I know the name now, sir.

18 Q Please don't interrupt.

19 A Okay.

20 Q -- didn't become known to anyone on behalf of Mr.
21 Milgaard until 1991; you are not aware of that?

22 A I can't tell you that right now, sir.

23 Q All right. So -- okay, so you aren't even aware
24 as to whether or not you disclosed (V4)----
25 (V4)---?



1 A I would have to see --

2 Q All right.

3 A -- my letter to Mr. Tallis.

4 Q Let's assume for a moment you didn't.

5 A Okay.

6 Q All right. Because you went through this with

7 Commission Counsel.

8 A All right.

9 Q And I'm going to come back to it.

10 A Very good.

11 Q I'm just trying to talk generally for the moment.

12 Let's assume for the moment you didn't, sir.

13 Don't you think that Mr. Tallis would love to have

14 known that 20 minutes later another woman was

15 attacked seven blocks from where Gail Miller was

16 murdered?

17 A I assume so, sir.

18 Q Yes. And you read that statement, we've heard

19 that, you said that in your examination-in-chief?

20 A Okay. If I said that, I did.

21 Q And you didn't disclose it?

22 A Pardon me?

23 Q You didn't disclose it?

24 A Apparently not.

25 Q Right. So then if we substitute (V4)---- (V4)---



1 for the original statements of Ron Wilson or
2 Nichol John, that would be a fair statement, that
3 you failed to disclose (V4)---- (V4---'s
4 statement; right?

5 A I don't know what they would have to do with
6 substituting Wilson and John's statements, sir.

7 Q It's just I was troubled, Mr. Caldwell, by the
8 indignation that you were accused of not
9 disclosing these original statements, which in
10 fact we know you did disclose.

11 A Yeah.

12 Q That I sort of cast my mind to, well, if Mr. Asper
13 had a little more knowledge, and of course when he
14 made that allegation (V4)---- (V4---'s wasn't on
15 this earth as far as he was concerned, he didn't
16 know a thing about her, but if he made the
17 allegation about (V4)---- (V4---'s there wouldn't
18 really be cause for indignation, the indignation
19 might be more indicated more at you rather than
20 from you; fair?

21 A I don't know what he knew, sir, at that point at
22 all.

23 Q And I'm going to suggest to you, sir, though, that
24 in a sense your indignation about that accusation
25 of Mr. Asper's in a funny sort of way gives --



1 perhaps provides you with some kind of a window
2 into what David Milgaard went through for so many
3 years, not a false accusation, you didn't disclose
4 two original statements, but a false accusation
5 that he raped and murdered a lady he didn't rape
6 and murder; right?

7 A I'm sure he went through a very great deal of --

8 Q It gives you a kind of a window into it you might
9 say?

10 A I don't know -- I don't think anything that I've
11 heard about this so far compares to what he went
12 through, if you want me to try to sum it up.

13 Q I want to just go through what we now know
14 happened in 1969 and list the sexual assaults on
15 strangers that we know happened in this really
16 very short period of time surrounding Gail
17 Miller's murder, both before and after it. I'm
18 not sure there's ever been a list made of these,
19 of all of them sort of put together one after the
20 other, because I'm going to suggest to you it's
21 very striking.

22 A Okay.

23 Q We start with (V1)--- (V1)-, sir, that's October
24 21st of 1968, she's a stranger -- she's assaulted
25 and raped by a stranger on the streets of



1 Saskatoon?

2 A Uh-huh.

3 Q You then move to Miss (V2)----- who suffered the
4 same indignities on November the 13th of 1968, so
5 we're at sort of less than three months and now
6 two months -- sorry, we're at three months and now
7 two and a half months from the murder of Gail
8 Miller?

9 A Yes, sir.

10 Q Okay. The third incident, sir, is Miss
11 (V3)-----, assaulted but managed to get away from
12 her attacker on November the 29th of 1968, so
13 we're now two months before Gail Miller's murder.
14 The next incident, sir, is January 15th of 1969,
15 this is number 4, and this is Miss (V9)----. Miss
16 (V9)---- was attacked again on the streets of
17 Saskatoon on that date, we're now two weeks before
18 Gail Miller's murder. Miss (V6)-, sir, was
19 attacked either January 15th or January 22nd, she
20 wasn't sure which, she didn't report it until the
21 middle of February, one might think it was
22 probably on January 15th but we'll never know, so
23 again either one week or two weeks before the
24 murder of Gail Miller; right? That's incident
25 number 5.



1 A All right.

2 Q Incident number 6, sir, is the murder of Gail
3 Miller on January 31st; all right?

4 A Right.

5 Q Incident number 7, 20 minutes later, is the
6 assault on (V4)---- (V4---'s; all right?

7 A Yes, sir.

8 Q Incident number 8, sir, is three days later on
9 (V)-- (V)----, February 3rd of 1969, which,
10 interesting enough, is the day -- this is really
11 only a point of interest, I'm not sure anyone has
12 picked up on it before, just happens to be the day
13 -- she was attacked in the evening of February
14 3rd, sir, and it was the morning of February 3rd
15 that Larry Fisher was approached at the bus stop
16 by the police, coincidentally or whatever.

17 A All right.

18 Q So what you have there, sir, is eight sexual
19 assaults on -- by strangers or a stranger on eight
20 women in the space of three months, four of them
21 happening -- sorry, five of them, I should say,
22 happening in the space of less than three weeks,
23 including right in the middle of that three weeks,
24 or towards the end of it I suppose to be more
25 accurate, the murder of Gail Miller; all right?



1 A All right, sir, I'm sure you are correct in your
2 dates.

3 Q I am.

4 A Thank you.

5 Q And you had, sir, in your file, as we found out in
6 your examination-in-chief, the statements of Miss
7 (V9)----, that's the January 15 one, Miss (V6)-,
8 that's the January 15 or 22nd one, Gail Miller
9 obviously, not her statement but you had the case,
10 (V4)---- (V4---'s, you had the statement, and
11 (V)-- (V)----, you had the statement, all right,
12 we've heard that in your examination-in-chief, you
13 acknowledge that?

14 A Yes.

15 Q And I'm going to come back to these --

16 A Very good.

17 Q -- individually shortly. So you knew then, as you
18 went through the file, that you had four attacks
19 on -- five attacks on women with Gail Miller's in
20 the middle of that time period. Do you understand
21 that?

22 A I don't know that I ever lined them up that way,
23 but I'll accept your --

24 Q Well, you said your inability to work out that
25 information in your own mind, sir?



1 A Presumably so.

2 Q Yes. But leaving aside what you saw in your file,
3 Mr. Caldwell, for a moment, you, as you've told
4 us, I think I'm right in saying, back in 1969 were
5 the senior prosecutor in Saskatoon; is that right?

6 A Yes.

7 Q And there were two of you?

8 A That's right.

9 Q All right. So, sir, it was a small office to say
10 the least?

11 A Yes, it was.

12 Q And surely, sir, as a prosecutor, a senior
13 prosecutor in this city, you weren't living in an
14 ivory tower presumably, you were familiar with
15 what was going on around you in the city?

16 A In a broad way I would be.

17 Q In a what?

18 A In a broad sense or a broad way.

19 Q You would read the local paper at a minimum
20 wouldn't you?

21 A I would read it, sir, yes.

22 Q All right. And surely, Mr. Caldwell, you would
23 have known that there was a surfeit of attacks on
24 women in Saskatoon commencing in late '68 into
25 early '69, you must have known that, didn't you?



1 A Mr. Lockyer, I think I mentioned before, and my
2 memory still is that I have no memory of other
3 offences at the time of the Gail Miller matter
4 except this, that murder.

5 Q Isn't that almost impossible to believe, sir --

6 A I don't see why.

7 Q Please -- that the senior prosecutor in Saskatoon
8 was literally living in such an ivory tower that
9 he had no knowledge that on an almost bi-weekly
10 basis women were suddenly being attacked by a
11 stranger on the streets of Saskatoon culminating
12 in a murder? I can't imagine how you couldn't
13 have known that as a senior prosecutor while it
14 was happening.

15 A Sir, I have no memory of other accounts of
16 offences at that time when this whole matter was
17 going --

18 Q Let me try it like this, Mr. Caldwell. You say
19 you've got no memory. Do you not agree with me,
20 sir, that logic dictates to us that you, or indeed
21 to you, that you must have known back in January,
22 early February of 1969 that this had been going
23 on?

24 A I can't say that now, sir.

25 Q Uh-huh. I suggest to you, sir, you've just got a



1 convenient memory and that you are simply
2 "forgetting" these incidents because it works for
3 the purposes of your present position.

4 A Not in that sense, sir.

5 Q Uh-huh.

6 A That's not correct.

7 Q And I suggest to you, sir, it is simply
8 inconceivable that the senior prosecutor in
9 Saskatoon does not know that there was a surfeit
10 of attacks on women by a stranger or strangers
11 going on around the time of Gail Miller's murder,
12 and particularly applying to the prosecutor who
13 was prosecuting the alleged offender or the
14 alleged culprit in Gail Miller's murder?

15 A You said applying to? What did you mean, sir,
16 particularly applying to the prosecutor.

17 Q And in particular when one also considers the
18 fact, sir, that you were the person assigned to
19 prosecute as the senior prosecutor the man accused
20 of Gail Miller's murder.

21 A I don't know how I can expand on what I've told
22 you, sir.

23 Q And in fact, sir, when we look at it, at that
24 series of sexual assaults, some of which were
25 recorded in the newspapers, there was a warning to



1 women in the newspaper, the local newspaper, for
2 example, I'm sure you are aware of that?

3 A Yes, that I did see.

4 Q Yes, that particularly interesting is the apparent
5 escalation, if we assume for the moment it's one
6 person committing all these crimes, the obvious
7 escalation of crimes commencing mid January to
8 February 3rd?

9 A Do you mean in point of frequency, sir, or
10 seriousness?

11 Q Escalation. That's another word, frequency, if
12 you prefer that word, yes.

13 A Okay.

14 Q You've got one, two, three, four, five in the
15 space of two and a half weeks, five women
16 separately attacked on the streets of Saskatoon --

17 A Yes.

18 Q -- in two and a half weeks and you plead
19 ignorance; is that right, sir?

20 A In the sense I've told you today, sir, that's
21 right.

22 Q Umm. You also claim ignorance with respect to the
23 document that you've referred to, I think you were
24 the first to use the term, maybe the police
25 introduced it to you, the script, you say you were



1 unaware of that document; is that right, sir?

2 A Well, Mr. Lockyer, I will expand on that a little
3 bit. We've all called it the script document. I
4 know the one you are speaking of. I saw it twice,
5 once in the Regina court house at the time when
6 the Regina prosecutors were preparing to go to the
7 Supreme Court as I understand it, again in the
8 office of Superintendent Quinn of Saskatoon police
9 as part of the overall Gail Miller murder
10 investigation. That's -- those are the times I
11 saw it and each time I was struck by the fact that
12 I had not seen it and it was not ever on my file,
13 sir.

14 Q And I sort of wondered about that. You said
15 yesterday, Commission Counsel was questioning you
16 just yesterday about this and you said, I think
17 I'm quoting you, it struck me as something I had
18 never seen before, and you went on to express
19 really, if I can call it that, absolute certainty
20 you had never seen it before. Is that right?

21 A Except in the -- before, that's correct, except in
22 the two exceptions we just went --

23 Q Obviously that's what I'm referring to. I'm
24 talking about '69.

25 A That's fine.



1 Q Yes. And I must say, sir, I don't understand how
2 you can have absolute certainty in that regard
3 when we consider so many of the other documents
4 that you did see that you now can't remember that
5 you ever saw. I'm wondering how you are able to
6 put all these other documents in front of you and
7 say I must have seen it because it was in my file
8 but I don't remember ever seeing it, but when it
9 comes to the script you have this absolute
10 certainty that because you don't recognize it from
11 '69 you had never seen it before. Can you explain
12 that?

13 A Yes, Mr. Lockyer.

14 Q Thank you.

15 A I had never seen a, if you will, a parallel
16 document on any of the other serious prosecutions
17 we had had up until that point come into -- pardon
18 me, come into our office. I think it has now been
19 identified as being Sergeant Ray Mackie's work,
20 but in any event, we never had similar documents
21 surface in other files and of course that in
22 itself made it stick out.

23 Q Well, was it a fact that it was a script that made
24 it stick out; is that what you are saying?

25 A Well, it's the -- it has been called the script



1 here.

2 Q By you.

3 A Well, I think by others, but in any event.

4 Q I think you started it.

5 A Okay.

6 Q Go back to that interview with Flicker, I got the
7 impression that you started the use of the term.

8 A Well, if I didn't -- I don't know, sir.

9 Q You certainly adopted it; yes?

10 A Oh, yeah, we talked about it in that sense.

11 Q Yes.

12 A And what were you asking me?

13 Q And the question was was it because it was such an
14 alarming document, a script; in other words, a
15 sort of a forerunning of what was to subsequently
16 transpire, is it the serious implications behind
17 the document that make you say to yourself, well,
18 I couldn't have possibly seen this in '69 because
19 it would have immediately struck me as sort of the
20 holy smoke kind of reaction?

21 A No, it wasn't the contents as much as the form of
22 the document, sir. It's about what, a five or six
23 page document?

24 Q It is.

25 A It appears now to be almost a discussion point for



1 police in going on with the investigation. We
2 never got things like that and this is the only
3 one I ever --

4 Q But you had any number of kinds of documents in
5 your file, sir, you had synopses, you had police
6 opinions, you had letters?

7 A Yes, I did.

8 Q Occurrence reports, you had this, that and the
9 other. I'm not sure why this particular -- you
10 are saying it's because the document was a five
11 page --

12 A Well --

13 Q -- document written by police you didn't get it,
14 you didn't see it?

15 A No, I know, sir, I didn't, and I've tried to tell
16 you the times I did see it, and I'm quite
17 satisfied that those are correct.

18 Q Let me ask you this, sir, Mr. Caldwell. If you
19 had seen it in 1969, shall we say, let's assume
20 you didn't and --

21 A Okay.

22 Q Let's assume for a minute that you did is what I'm
23 trying to say.

24 A All right.

25 Q Do you think it might have given you the shivers,



1 sir, to see it?

2 A I can't at this time, Mr. Lockyer, tell you what
3 the contents were except a series of possible ways
4 to go on with the investigation as I recall, so I
5 don't know why it would give me the shivers. I
6 didn't see it in any event.

7 Q You don't remember that it set out a thesis as to
8 how Gail Miller had been murdered by David
9 Milgaard that subsequently came to be adopted in
10 so many ways by Nichol John and Ronald Wilson a
11 few days later?

12 A I can't say I know that, sir, but --

13 Q Maybe let's just look at it for a minute.

14 A Okay.

15 Q It's 301002 is the bundle and 301019 is the
16 particular page we could refer to. So this is a
17 part of it, sir, this can be best described as --
18 the author is apparently Mackie setting out his
19 thesis as to how this crime happened before -- as
20 to how Gail Miller met her death at the hands of
21 Mr. Milgaard before what I'm calling the second
22 statements of Nichol John and Ronald Wilson.

23 A Okay.

24 Q Do you follow?

25 A I'm sure your dates are right and I accept what



1 you are saying on that.

2 Q And I think we've fixed this to likely being May
3 16th, a matter of just, less than -- no, a week,
4 about a week before the second statements of John
5 and Wilson.

6 A Okay.

7 Q I'm not going to take you through all of it, but
8 just to look at a few little bits of it, sir.

9 A All right.

10 Q You'll see here:

11 "- On seeing nurse (Miller) she was
12 approached on pretence of getting
13 directions with a view to stealing her
14 purse."

15 A Right.

16 Q They haven't received any information in that
17 regard, the police at this point, from anyone, but
18 that was potentially the motive for the original
19 encounter with Gail Miller; right?

20 A Yeah.

21 Q No one said that?

22 A I agree with that, sir, because the Wilson,
23 etcetera, party had not got back to Saskatoon at
24 the time of this document as I understand it.

25 Q Right. So -- and yet a week later we've suddenly



1 got Wilson and John saying that very thing; right?

2 A Well, the sentence here you pointed out to me:

3 "- On seeing nurse (Miller) she was
4 approached on pretence of getting
5 directions with a view to stealing her
6 purse."

7 It would seem to me to be an hypothetical
8 suggestion about how the offence may have
9 started. I don't see anything sinister about
10 that.

11 Q No, no, the sinister point, sir, is this, what's
12 sinister about this document is that one week
13 later Wilson and John were to tell the police,
14 including Mackie, that that is indeed what
15 happened. You see, Mackie has predicted in
16 advance what happened before he has any knowledge
17 that that is what happened.

18 A Mr. Lockyer --

19 Q You see the sinister nature of this document --

20 A Okay. If I may --

21 Q -- to use your word.

22 A The very next paragraph --

23 Q I'm coming to that.

24 A Okay, why don't I just go into that, and the
25 answer to your question:



1 "- This would be around funeral home
2 which would coincide with statements of
3 Nichol John - Diewold seeing lights in
4 alley - Doell saying Miller took bus at
5 Avenue N."

6 So this part appears to me to be -- I suppose,
7 yeah, I have to recall there were two Nichol John
8 statements, so this could be the so-called first
9 one --

10 Q No, it's not.

11 A -- is what I'm saying.

12 Q Nichol John had said nothing about a funeral
13 home --

14 A No, but --

15 Q Please --

16 A Okay.

17 Q -- in her first statement, sir.

18 A Okay.

19 Q This is another accurate prediction of Mackie.

20 A Okay.

21 Q That when he takes her to the funeral home a week
22 later, bingo, she says yes, this is where it
23 happened right in accordance with his prediction
24 in the paragraph you've just read.

25 A Okay, sir, but it is true that Nichol John had



1 given a previous statement to Inspector Riddell;
2 is it not? Is that not correct?

3 Q It said nothing about a funeral home.

4 A No, but what I'm getting at is it was a previous
5 statement by her which I think is right; is it
6 not, the one to Inspector Riddell?

7 Q I have no idea what you are talking about, Mr.
8 Caldwell.

9 A Okay.

10 Q You just lost me.

11 A Okay.

12 Q I think you are talking nonsense.

13 A Why thank you, sir.

14 Q That's all right.

15 A Inspector Riddell, a Regina RCMP gentleman who is
16 deceased, took statements, as I recall, from the
17 three, John, Wilson, and Cadrain I believe. Now,
18 that was the first statement to my knowledge that
19 Nichol John made and the second one was the one at
20 or about the time of the polygraph as I understand
21 it. Is that your understanding, sir?

22 Q I don't know why we're -- I don't know what you
23 are talking about.

24 A Well, that's my answer to what you've told me,
25 asked me.



1 Q All right. It's not an answer, with respect, Mr.
2 Caldwell, but I'll move on to the next paragraph.

3 A Very good.

4 Q Look at the sinister nature of this document. The
5 next paragraph:

6 "- Wilson appears to be driver of car,
7 therefore, Milgaard would leave the car
8 to get the purse - having seen Miller
9 closer his sex drive takes over and he
10 forces her down alley to where she is
11 found."

12 Now, that statement, sir, if we can try and focus
13 you as best I can, is contrary to the statements
14 of Wilson and John that they had already given to
15 the police which is that Milgaard was never out
16 of their sight for more than one or two minutes
17 and that is when he drove the car around the
18 block.

19 A Okay.

20 Q All right. So here --

21 A Now, are you --

22 Q Let me finish.

23 A Okay.

24 Q -- we have Mackie premonitting (ph), if there's
25 such a word, and I don't think there is,



1 premonitting that what happened is again contrary
2 to what John, Wilson and indeed David Milgaard
3 himself had already told the police, and then
4 bingo, look at the sinister nature of it, sir, a
5 week later, that's what they both end up saying.
6 You see the point, you see how sinister this
7 document is, sir? It's a document that sets out a
8 scenario which is contrary to the statements that
9 the police already have, but which becomes the
10 statements a week later when the police bring
11 Wilson and John into your city. You see the
12 point?

13 A I understand what you are getting at.

14 Q Yes. It was a genuinely sinister document; don't
15 you think, sir?

16 A I don't think I'm qualified to editorialise on it,
17 sir.

18 Q I'm just working off your word.

19 A Okay, that's fine.

20 Q You've used that word, sir.

21 A Okay.

22 Q I found it helpful. And is that perhaps the
23 reason, sir, why you won't admit that you saw this
24 document back in 1969?

25 A I --



1 Q Because you realized the implications of it?

2 A I won't admit that, sir, because it did not
3 happen --

4 Q Uh-huh.

5 A -- period.

6 Q And of course you may not remember this, I don't
7 know, I'm not sure what you remember and what you
8 don't, that the opening lines of this script, sir,
9 refer to the first rape that happened in this
10 series of attacks on women in Saskatoon, the rape
11 of (V1)--- (V1)- on October the 21st of 1968,
12 linking the blood type of the assailant to the
13 blood type of David Milgaard.

14 A Is that on this page or a previous one?

15 Q I'll show, sir.

16 A Okay, that's fine.

17 Q It's on page 301002, it's on the first page, the
18 first line no less. Sorry, it's 301016 is the
19 first page of the script. My mistake. There, you
20 see? Right there.

21 "(V1)- shown 19 spread on table from
22 which she picked Milgaard and another.
23 Done on April 7.

24 (V1)- blood group "O".

25 (V1)- clothing revealed to crime



1 laboratory that her attacker was "A"
2 Group Secretor."

3 And then we go down and find the same with
4 Milgaard.

5 A Those three refer to (V1)-, all three of those, as
6 you've said.

7 Q Something, of course, that was never disclosed to
8 Mr. Tallis?

9 A I assume it was not from what you've said, sir.

10 Q Yes. But you must know that by now, Mr. Caldwell,
11 it's like -- have you been sitting here in a daze?

12 A No.

13 Q Or have you been following the Inquiry?

14 A What I have done, Mr. Lockyer, is attempted to
15 follow it very carefully. I have found some
16 difficulty in keeping the thing in chronological
17 order and keeping aware of what I learned when,
18 that has been some difficulty.

19 Q You understand --

20 COMMISSIONER MacCALLUM: Let him finish,
21 please.

22 A I'm sorry, sir?

23 COMMISSIONER MacCALLUM: You weren't
24 finished.

25 A Yeah, I have had difficulty, Mr. Lockyer, in



1 keeping things that have been said here in
2 chronological order and keeping track of what I
3 learned when, to put it very awkwardly.

4 BY MR. LOCKYER:

5 Q But one thing I would have thought you might have
6 got by now, Mr. Caldwell, is that of those eight
7 assaults on women that took place in Saskatoon in
8 that three month period of which you essentially
9 claim ignorance, that not one of them was
10 disclosed to Mr. Milgaard's defence, not one,
11 except of course Gail Miller's murder. You
12 understand that don't you?

13 A Well, from what you are saying, sir, I take it
14 that that's correct, but I can't recite that of my
15 own knowledge.

16 Q Umm?

17 A No, I can't.

18 Q Even what you found out in 1990 and 1991 and
19 thereafter, you still don't realize, until I've
20 just told you, that not one of the sexual assaults
21 committed by Larry Fisher or any of those that
22 remain unsolved that one might well think were
23 committed by Larry Fisher were ever disclosed to
24 David Milgaard's trial counsel?

25 A Sir, at this point I can't tell you when those



1 things were done.

2 Q Well, let's go -- I want to go through the
3 statements that you had in the file in front of
4 you, sir, that you had the opportunity to
5 disclose, all right, and we start with (V9)
6 (V9)----, and My Friend Mr. Hodson took you
7 through all of these, but I feel sort of an
8 obligation to go through them again to some
9 degree, and I'm going to bring up the documents,
10 but I'm just going to summarize them to you, sir,
11 without taking you to each line, because that has
12 already been done and it would kind of take
13 forever if I had to do that, but the first one in
14 order that you had in your file was the statement
15 of (V9) (V9)----, 006402, and (V9) (V9)----, sir,
16 you had this in your file, you've read it, you
17 told us you read it at least twice, everything
18 that was in this file?

19 A Okay.

20 Q And you would have read, as you read (V9)
21 (V9)----, that on January 15th, two weeks before
22 the murder, at 8:15 a.m., my God, there's someone
23 else being attacked, a really unusual hour of the
24 morning. One generally thinks of rapes as
25 happening in the night; wouldn't you agree?



1 A I can't tell you, sir.

2 Q Just as a matter of experience, you are a
3 prosecutor for God knows how many years, sir?

4 A I'm sure --

5 Q Just usually rapes happen in the night-time?

6 A That could be the case, yes.

7 Q From strangers?

8 A That's one of the times and places.

9 Q It's usually as they walk home, not as they walk
10 to work, so to speak; do you follow?

11 A Uh huh.

12 Q So there you go, you've got something that really
13 would make you think Gail Miller. You might have
14 thought, two blocks she's attacked from where Gail
15 Miller was murdered, two blocks; all right?

16 A Uh-huh.

17 Q She's a nurse, you find that out from her
18 statement, she's walking home from hospital as
19 she's been on the night shift, from the St. Paul's
20 hospital, she's attacked from behind which one
21 might have assumed Gail Miller was, she's hit, she
22 manages to escape by hitting the man in the face
23 who attacks her; how could you not have read this,
24 sir, and said to yourself under those
25 circumstances, "my God, I better disclose it"? I



1 don't understand how you could have read this and
2 not said that to yourself two weeks earlier a
3 nurse 8:00 in the morning two blocks from where
4 Gail Miller was murdered?

5 A Well I -- one reason, sir, could be the note in
6 the upper left corner, "indecent assault only, no
7 connection", I think that was mentioned in
8 evidence earlier but I may be incorrect.

9 Q Aren't you a gatekeeper, Mr. Caldwell, do you --
10 do the police do your work for you or do you ever
11 exercise some independent judgement?

12 A Oh, I hope I do, sir.

13 Q I hope so too. As you read this, sir, I mean
14 how -- imagine yourself reading this at the time,
15 you say holy smokes, we've got someone attacked
16 two weeks earlier, same time of the morning in
17 essence, an hour later to be more precise --

18 A Yeah.

19 Q -- a nurse yet again, an attack by a stranger,
20 this sounds like the same thing.

21 A Uh-huh.

22 Q But you didn't say that to yourself, did you, it
23 seems, or you claim you didn't anyway?

24 A Well I -- if -- I'm taking it as a given that this
25 was on my file, this statement, sir?



1 Q Yes it was. Yes, take it as a given, you've
2 already acknowledged that.

3 A Yes, but if you will just bear with me, sir, I'll
4 try to work with this.

5 Q Okay.

6 A The annotation is, in the upper left corner is
7 "indecent assault only, no connection". I expect
8 that in my evidence I said that I looked at that
9 and didn't feel it was in any way related to the
10 Miller murder, but I stand to be corrected if I
11 didn't say that.

12 Q So you just -- so, in essence, you delegated your
13 consideration of this report to an unknown author
14 that someone had written "indecent assault only"
15 on the document; is that right?

16 A I expect I read the statement itself, sir, --

17 Q Uh-huh?

18 A -- and did whatever I did with it.

19 Q Well, you did nothing with it.

20 A Oh.

21 Q You just put it back in your file.

22 A Okay. If that's what I said in my evidence,
23 that's what happened.

24 Q Yes. But -- so essentially, sir, despite
25 reading -- I mean do you agree with me, at least,



1 it's impossible not to see the correlation between
2 what happened to (V9) (V9)---- and what happened
3 to Gail Miller?

4 A The, yeah, it does sound as if there are some
5 parallel factors here.

6 Q Is there ever. So did you say to yourself, sir,
7 at the time, well, there are clearly parallels but
8 someone there is telling me that, whoever it is,
9 someone has written there in scrawl that there is
10 no connection so I'll just assume there is no
11 connection, Tallis, you're out of luck, you're not
12 seeing it; is that essentially the way your mind
13 went?

14 A I think I read it and I think I acted on the note
15 both, sir.

16 Q You acted on what?

17 A On that note I've just gone over with you.

18 Q Okay. Let's go back. I wonder how you can still
19 feel comfortable in your own skin about what you
20 did in this case when you look at this document
21 and you didn't disclose it. I don't know how you
22 can feel comfortable, I don't know why you're not
23 saying to yourself "did I ever miss the boat
24 here", because if you had disclosed that, sir,
25 this whole thing may not have happened. That's



1 all you had to do, "I've got a document of an
2 almost identical occurrence two weeks earlier",
3 give it to Tallis, and then all of you would have
4 sat back and said "hang on a sec", there's
5 someone" -- you would have taken this and then
6 presumably moved into the other incidents as well,
7 and then it would have been "David Milgaard lives
8 in Regina, he can't be doing all these things".
9 Do you see how you might perhaps at least
10 reasonably blame yourself, sir, --

11 A In --

12 Q -- for what happened for the ensuing 28 years?

13 A I don't accept that, sir, --

14 Q You don't.

15 A -- in that sense at all.

16 Q But at least, sir, in your evidence to Mr. Hodson
17 you acknowledged -- and perhaps we can go to it --

18 A Okay.

19 Q -- 16, this is for October 5th, 16213. You were
20 being asked about this very statement of (V9)
21 (V9)----, and Mr. Hodson put it perhaps in
22 slightly nicer terms than I have, that you might
23 have thought essentially what I am putting to you
24 now, and this is what you say here:

25 "I could see -- I can think, now, that



1 that would be a consideration."

2 A Yeah.

3 Q Namely that it should be disclosed.

4 A Yeah.

5 Q Do you want to perhaps go back a bit --

6 A Yeah, I see that, sir.

7 Q -- so Mr. Caldwell can see what's before.

8 A Yeah.

9 Q All right. But you say you think now, and one
10 would certainly hope so, but don't you think the
11 fact that you think now, sir, might cause you to
12 cast your mind back and say, well, I should have
13 done it then too. What's the difference 30 years
14 later, what you should have done now is what you
15 should have done then too?

16 A Well the whole matter of -- it -- I tried to be
17 very careful in what I disclosed. As this case
18 went on I think it became clear that things like
19 this very well should have been disclosed, and
20 that's why I make the answer I did:

21 "A I -- is it -- it is one I disclosed, is
22 it."

23 and the answer is:

24 "Q No, I don't believe so."

25 by counsel, my answer:



1 "A Oh, okay, I'm sorry. I could see -- I
2 can think, now, that that would be a
3 consideration.

4 Q Okay."

5 And the bottom line:

6 "A I don't think I recognized it in that
7 manner ...",

8 and I assume it says 'at the time' or something
9 that --

10 Q So you are acknowledging, now, you should have
11 disclosed it?

12 A Yeah, that's correct, with what I know now.

13 Q No, no, what you knew then, sir?

14 A No.

15 Q What you knew then was what this lady was saying.
16 You are saying "I should have disclosed it now
17 because I read her statement and I see how similar
18 the events are two weeks earlier with (V9)
19 (V9)---- to what happened to Gail Miller two weeks
20 later; isn't that what you are saying?

21 A Well I think the "now" aspect of this refers to
22 what we've learned as this Inquiry has gone along
23 about the --

24 Q We haven't learned anything about (V9) (V9)----,
25 sir.



1 COMMISSIONER MacCALLUM: Just a minute, he
2 is not finished, please.

3 BY MR. LOCKYER:

4 Q Yes, go ahead?

5 A As the Inquiry has gone on, Mr. Lockyer, there's
6 been an emphasis on what did -- or what should
7 have been disclosed, what was disclosed at -- I
8 felt that our disclosure in this case had been
9 proper by the standards of that time. I think, as
10 the case has gone on, I've become more aware of
11 things that could be useful to defence that could
12 be, should have been disclosed, and this may well
13 fit into that category, sir.

14 Q Well the standards of disclosure at that time were
15 *Boucher*; is that right, sir?

16 A I believe that's right, sir.

17 Q What Justice Rand said in *Boucher* in 1955?

18 A Yes, I think the -- yeah, that's fine, sir.

19 Q And (V9) (V9----'s statement, sir, spoke for
20 itself when you read it in 1969, --

21 A Yeah.

22 Q -- just as it speaks for itself as we read it
23 today?

24 A Yeah.

25 Q Do you agree?



1 A Yeah, it speaks for itself.

2 Q Speaks for itself.

3 A I'm sure it set out accurately what happened to
4 her.

5 Q Exactly. And all I've focused on is what it says
6 in it, and what it says in it, sir, should surely
7 have caused you to disclose it?

8 A Well, evidently it didn't, sir.

9 Q I know it didn't, --

10 A Well.

11 Q -- but don't you think it should have, sir?

12 A Well Mr. Lockyer, without being facetious, I
13 believe that through the -- through what we've
14 heard in this case I've developed a wider
15 appreciation of the breadth of disclosure that
16 should take place. Now the -- evidently what we
17 did in this case was approved by the Supreme
18 Court, as you know, in terms of disclosure at that
19 time, but that, of course, doesn't mean that one
20 couldn't improve in some aspects as time goes on.

21 Q I don't recall the Supreme Court saying anything
22 about disclosure as such. I don't think they even
23 knew about (V9) (V9----'s statement, I may be
24 wrong, --

25 A Yeah, I believe --



1 Q -- I don't know they did. So I'm not sure you can
2 resort to the Supreme Court of Canada as your
3 support system, sir.

4 A Okay. I --

5 Q Why don't we just focus on you talking about
6 yourself; all right?

7 A Okay. Why don't you let me say, sir, that the
8 Supreme Court in fact did find that, in the
9 Milgaard trial, disclosure was made in accordance
10 with the practice of that day, and I hope in -- I,
11 in turn, am not misquoting that.

12 Q I don't recall them saying -- I don't recall them
13 saying that, --

14 A Okay.

15 Q -- sir, for what it's worth.

16 A Yeah.

17 Q But if they did --

18 A Yeah. I think, Mr. Lockyer, you will find that's
19 right.

20 Q They said disclosure was in accordance?

21 COMMISSIONER MacCALLUM: With the standards
22 of the day.

23 BY MR. LOCKYER:

24 Q Yeah. I don't believe they even knew about this
25 statement, sir, I don't think it even came up.



1 A That may well be.

2 Q Is that your ultimate resort, that what the
3 Supreme Court of Canada says means you didn't do
4 anything wrong?

5 A No. But I felt, sir, that that was a fairly
6 comprehensive pronouncement of what we did do.

7 Q It sort of surprises me, Mr. Caldwell, when you --
8 when this document alone is in your possession, in
9 your file, you've got a request from Mr. Tallis to
10 disclose anything that might tend to show David
11 Milgaard did not commit the crime, --

12 A Uh-huh.

13 Q -- you read this document, you fail to disclose
14 it, you now appreciate I think that if you had
15 disclosed it things could have been so
16 different, --

17 A That could well be, sir.

18 Q -- that maybe a 16-year-old would not have spent
19 the next 23 years in prison for something he
20 didn't do; I don't understand why you won't take
21 responsibility for that, Mr. Caldwell, I really
22 don't?

23 A All right.

24 Q And it just seems to be a common feature of cases
25 like this, taking responsibility. I don't get it.



1 Why can't you just sort of say "you know what, I
2 did, I kind of screwed up, I wish to God I had
3 disclosed that, I screwed up, I'm sorry"?

4 A All right. I don't -- I understand where you are
5 coming from, sir, and in that sense I agree that
6 it could have been done and would have been a good
7 idea.

8 Q All right. Why don't we leave it at that, I'll
9 move on, all right?

10 A All right, that's fine, sir.

11 Q (V6)--- (V6)-, 006486, was the next statement that
12 was in your file, Mr. Caldwell.

13 A Okay.

14 Q This is the lady who came forward on February the
15 18th, all right, to describe an event that had
16 happened, and she wasn't sure if it was the 15th
17 or the 22nd of January. All right, are you with
18 me?

19 A Yes.

20 Q Right. So it would seem that she saw the
21 potential connection between what happened to her
22 and what happened to Gail Miller; do you see the
23 point? That's why she came forward on February
24 the 18th, was in response to the police request
25 for people to come forward; do you see the point?



1 A I'm just looking at it now, sir.

2 Q So (V6)--- (V6)- made the link that, as it turns
3 out, you didn't make?

4 A All right. I take it, sir, this was a statement
5 that I had on the prosecution file?

6 Q It sure was.

7 A All right. That's fine.

8 Q Yes.

9 A And I --

10 Q All right.

11 A I take it I didn't send it to Mr. Tallis?

12 Q You did not.

13 A Okay, that's fine.

14 Q Well it's not 'fine', no, perhaps that's not the
15 best word to use. You understand that?

16 A I accept that that's the state of the facts.

17 Q Yes. So here we have a lady who, herself, seems
18 to feel that there is a potential link between
19 what happened to her and what happened to Gail
20 Miller. And when you read it, sir, we have, if we
21 take the January 15th date, a lady being -- in
22 particular, a lady being attacked on the same day
23 as (V9) (V9)----; all right?

24 A Yes.

25 Q The man tried to unzip her sweater, it happened on



1 8th Street, which I don't know how far that is but
2 it's not a huge distance from whatever happened --
3 from where Gail Miller was murdered? I'm not
4 familiar with Saskatoon.

5 A Yeah. It's the other side of the city, sir, but
6 I'm not --

7 Q Oh, is it?

8 A Yes, it is.

9 Q So it's a fair distance?

10 A Yes, it is.

11 Q All right.

12 A It's essentially towards the exit for Regina, if
13 you want to put it that way, but just so you know
14 that, sir.

15 Q But when a man in a car came over and interrupted
16 the sexual assault on Ms. (V6)- he had his hand,
17 he had his hand under his sweater, which might
18 make one think he had a weapon, --

19 A Okay.

20 Q -- potentially, under his sweater?

21 A Could well be.

22 Q Right? Which would tie in with, potentially with
23 Gail Miller of course, who we know was killed with
24 a weapon; is that right?

25 A That's correct.



1 Q Yeah. And, again, despite reading this, sir, you
2 come to the conclusion this is not something to be
3 disclosed?

4 A Well if -- I'm -- accept that it was on my file, I
5 accept I read it, and I did not disclose it, if
6 that's the facts as I understand them.

7 Q Even in combo with what you have also read -- I'm
8 not sure quite which way 'round you read 'em, --

9 A No, I'm not either.

10 Q -- but in combo with what you also read about (V9)
11 (V9)----?

12 A Yes. The --

13 Q All right. Not discloseable; that's what you
14 decided?

15 A I didn't disclose it in any of them.

16 Q Obviously, as a criminal lawyer, sir, you are very
17 familiar with the notion of circumstantial
18 evidence, a chain of circumstances leading to
19 almost inevitable conclusions?

20 A Yes, sir, --

21 Q All right.

22 A -- I hope so.

23 Q And you talk about 'stacking it up', and 'how do
24 things stack up', all right, you are familiar with
25 that expression as well?



1 A Well, I accept that it exists, sir.

2 Q Yes. And the jury is sort of told that "you have
3 to consider whether there's any other, when you
4 are considering it from the Crown's perspective,
5 from the perspective of the Crown's case, you have
6 to consider whether there's any other reasonable
7 explanation other than that one put forward by the
8 Crown"?

9 A I agree with you.

10 Q Right. And do you see how the circumstantial
11 evidence in this case sort of builds up, sir, as
12 we visualize you going through the -- this file
13 that you have, reading these statements, so far
14 we've done two of them, one after the other, --

15 A Uh-huh, okay.

16 Q -- and deciding that they weren't relevant to Mr.
17 Tallis' specific request?

18 A Okay. I'm not sure, sir, that I viewed them, if
19 you will, in -- together. I certainly viewed them
20 singly, so I don't know that -- what was the term
21 you used, 'stacking up'?

22 Q I'm suggesting even now that we should view them
23 together?

24 A Yeah, that's fair.

25 Q You should look at them, you are looking at this



1 file, going through these statements --

2 A Okay.

3 Q -- in the context of Mr. Tallis' request, and one
4 by one you are rejecting them as being
5 discloseable?

6 A All right, that's --

7 Q And that that's the circumstantial evidence that
8 the Commissioner has to deal with where you are
9 concerned?

10 A Well now circumstantial evidence, sir --

11 Q That you suppressed them because you didn't want
12 them to go to Mr. Tallis?

13 A Yeah, well, that did not happen in respect of any
14 of these statements, that I suppressed them for
15 any improper reasons. I may have made judgement
16 decisions that are -- have proven to be unwise in
17 the light of today's situation.

18 Q And as well, sir, whenever we come to these things
19 you don't have a memory of them?

20 A No.

21 Q Is that right?

22 A Very largely I don't, sir.

23 Q Yes. Which sort of takes us back to something
24 that Mr. Hodson put to you about Nichol John who,
25 remember, she had the same kind of memory lapse by



1 the time she testified, right, she couldn't
2 remember --

3 A Yeah.

4 Q -- everything, right, and how difficult it becomes
5 to cross-examine someone who claims not to have a
6 memory --

7 A Yeah.

8 Q -- of things?

9 A Right.

10 Q Right?

11 A Well, if they are claiming it legitimately, sir,
12 that's a consideration.

13 Q Uh-huh.

14 A I have difficulty in keeping all the things that
15 have happened on this case since 1969, and sorting
16 out what happened when, and I say that quite, you
17 know, sincerely.

18 Q But in your case, sir, one crucial thing after
19 another you have no memory of; is that fair?

20 A Well that's, I think, an editorial comment, --

21 Q It is.

22 A -- but if you'd like to go ahead?

23 Q Well we've got two statements right here, --

24 A Okay.

25 Q -- (V9) (V9)---- and (V6)--- (V6)-, --



1 A Yeah.

2 Q -- you say you have no memory of their statements?

3 A I am sure, sir, that I read them, I'm sure now
4 that I didn't send them, so I have no memory of
5 them. I can't, without seeing them on this
6 screen, tell you what I did.

7 Q Okay.

8 A There's been too much happen over the years. But
9 I wish to be --

10 Q But you do remember that you never saw the script;
11 correct?

12 A I saw it in those two limited places that I have
13 told you about only, sir.

14 Q The next statement that you saw, sir, in your
15 file, and decided was not to be disclosed, was the
16 statement of (V)-- (V)----, 006400. And about
17 'the next', I'm just looking, the next that I am
18 going to draw your attention to --

19 A That's fine, sir.

20 Q -- is what I mean by that.

21 A Right.

22 Q And what I pointed out is she was assaulted on
23 February the 3rd, sir, so we're now three days
24 after Gail Miller's murder, so you've now got two
25 two weeks before and one three days later, --



1 A Yeah.

2 Q -- in the 1900 block of 20th Street, which is how
3 far from Gail Miller's murder roughly?

4 A Oh, very close. Just give me a moment to -- a
5 block, two, three, something like that.

6 MR. HODSON: Five blocks.

7 BY MR. LOCKYER:

8 Q Five blocks?

9 A Okay.

10 Q Commission Counsel suggests five blocks?

11 A I will defer to his experience, sir.

12 Q And there was a man, she said, lurking in St.
13 Paul's Nurse's Residence in some trees. So this
14 should have immediately brought back to mind
15 Ms. (V9----'s complaint, she was walking home from
16 St. Paul's nurse's hospital -- or from St. Paul's
17 Hospital, should I say, when she was attacked?

18 A Uh-huh.

19 Q And brought to mind Gail Miller, a nurse on her
20 way to work at hospital?

21 A Right.

22 Q All right? She is also attacked from behind. And
23 yet once again, sir, and again the chain of
24 circumstantial evidence, so at some point you have
25 to say "can you keep breaking that chain", because



1 that's really what you are asking us to do?

2 A Uh-huh.

3 Q What -- somehow, sir, you look at this and just
4 say "this is irrelevant, I'm not giving this" --

5 A Sir, --

6 Q -- "to Mr. Tallis"?

7 A Okay, sir. I undoubtedly read it, and I note
8 again the note in this statement "indecent assault
9 only, not connected", similar to the last one,
10 undoubtedly that was part of my decision-making
11 process.

12 Q And again, sir, in your evidence to Mr. Hodson on
13 October 5th at page 16208 --

14 A Uh-huh.

15 Q -- you again made the statement, not unlike what
16 you had said in the context of Ms. (V9)----, you
17 said:

18 "... yeah, I would think now is
19 something that I would notice."

20 That's in the context of Ms. (V)----'s statement,
21 sir, all right?

22 A I think, sir, that --

23 Q But -- let me finish.

24 A Oh, that's fine, yeah.

25 Q But once again, sir, that's said simply in the --



1 in regards to what's within the four corners of
2 (V)-- (V)----'s statement?

3 A Uh-huh.

4 Q Nothing has changed, it reads the same now as it
5 did in 1969 when you read it and decided not to
6 disclose it?

7 A Okay. And the -- the -- I think now, Mr. Lockyer,
8 is the same thing I was trying to convey a few
9 minutes ago about what I, for one, have learned as
10 this matter has gone ahead, so I don't think you
11 -- that's my position on that, sir.

12 Q If we go back to your press release, sir, issued
13 on July 21st of 1997, --

14 A Uh-huh.

15 Q -- do you now begin to feel some responsibility
16 for what happened to David Milgaard, sir?

17 A Well the wording of the press release, sir, had --
18 has nothing to do, in my view, with what I did
19 with these various statements.

20 Q Well I suggest to you it has a great deal to do.

21 A Okay. The press release was made honestly and
22 sincerely by counsel in consultation with Mr.
23 Kujawa and myself and attempted to, you know, to
24 deal with what the situation was as of then.

25 Q Now these statements that we have been going



1 through, sir, were revealed to you courtesy of
2 Detective Ullrich; is that right?

3 A Yeah, the case prep man, he would have sent them
4 over.

5 Q Right, right.

6 A Yeah.

7 Q So, clearly, you would be saying to yourself as
8 you are going through these 95 documents,
9 presumably you would be saying to yourself, "well
10 I presume that Ullrich has done his job and
11 essentially given me the stuff that he thinks
12 could be relevant to Gail Miller's murder"; is
13 that a fair assumption?

14 A Yeah, I would assume that as well.

15 Q Yeah. And here you are, you've got all these
16 statements that you are in fact rejecting as being
17 relevant --

18 A Yeah.

19 Q -- to who killed Gail Miller --

20 A Okay.

21 Q -- despite your assumption as to why they were
22 given to you in the first place?

23 A Well --

24 Q Did you ever perhaps pick up the phone or speak to
25 Ullrich, who as best I can tell was all around you



1 during the Gail Miller prosecution, --

2 A Uh-huh.

3 Q -- and say "why are these statements in this file,
4 why do I keep reading statements about other women
5 being sexually assaulted, what's that got to do
6 with Gail Miller?" Did you ever do that?

7 A I doubt it, sir.

8 Q Why not?

9 A Well I -- it seems to me there were some 95
10 statements, I know I went through them all, --

11 Q Uh-huh.

12 A -- I made some decisions about, evidently, four or
13 five of them, I don't think I consulted Ullrich.
14 That's all I can tell you.

15 Q But why wouldn't you have? Why wouldn't you have
16 said "Ullrich, why are you putting these things in
17 here?" It just seems such a logical thing to do
18 and causes me to suggest to you you must have done
19 it?

20 A Yeah, well I don't think I did, sir. And the
21 things that Ullrich sent to us, I don't think we,
22 in a sense, used every one of them, that there
23 would be some decisions made about which you
24 called as witnesses, which you didn't, but none --

25 Q I'm sorry, --



1 A Yeah, go ahead?

2 Q -- but that's not what we're talking about. We're
3 talking about a file, as to whether you should
4 disclose some or all of its contents to Mr.
5 Tallis, we're not here talking about who you
6 should and shouldn't call.

7 A Okay. Well you --

8 Q That's a different issue altogether, sir.

9 A That's fine. I don't think I called him,
10 Mr. Lockyer, on that issue.

11 Q You don't think you called who?

12 A Ullrich.

13 Q You mean telephoned him?

14 A Yeah, that's correct, sir.

15 Q You don't mean called him as a witness, you mean
16 telephoned him?

17 A That's correct, sir, yeah.

18 Q Right.

19 COMMISSION MacCALLUM: Excuse me a minute
20 please.

21 MS. KNOX: Mr. Commissioner, in speaking to
22 the witness, the evidence before us is that there
23 were a number of statements that were sent by Mr.
24 Ullrich, the witness then requested all of the
25 statements taken in the file as a result of a



1 request of Mr. Tallis, so the reason he got all
2 of the statements was because he asked for them.
3 Mr. Ullrich sent him a specific number early on
4 that appeared to be relevant, all 95 came because
5 this witness asked for them.

6 COMMISSIONER MacCALLUM: Thank you.

7 BY MR. LOCKYER:

8 Q Let me come to the fourth statement, sir, that you
9 had, and before I come to that it would seem that
10 one of your -- one of the things that really
11 bothered you about the perpetrator of Gail
12 Miller's murder, something that really concerned
13 you and made you think that the perpetrator of
14 Gail Miller's murder was a particularly dangerous
15 individual, --

16 A Uh-huh.

17 Q -- one of the features, I'm not saying the only
18 one, --

19 A Okay.

20 Q -- was the temperature at the time of the
21 rape/murder; is that fair?

22 A Mr. Lockyer, I -- we all know what the temperature
23 was, I -- maybe you can help me with this; I don't
24 recall myself raising that as a concern. I think
25 everyone, in due course, felt that the -- that the



1 act in that temperature, if it occurred outdoors,
2 would be highly improbable, if you will. I don't
3 know if that answers you or not, sir.

4 Q I -- in a way it does.

5 A Okay.

6 Q Highly improbable, highly unusual too?

7 A Oh, absolutely, yeah.

8 Q Just unique?

9 A That's right, I agree with that.

10 Q And you referred to it, do you remember, sir, that
11 you referred to it in your August 15th, 1997
12 letter to the parole board as to one of the
13 reasons why David Milgaard should never be
14 released?

15 A Yeah, I'm sure I did, sir.

16 Q Yeah. That's at, I don't propose to bring it up,
17 that's at 006822.

18 A I'm sure you're right, sir.

19 Q And you referred to it in your evidence as there
20 being nothing paralleling it when you were
21 answering Mr. Hodson's questions on October 25th?

22 A In that respect, I'm sure that's correct.

23 Q That's at page 17037 --

24 A Okay.

25 Q -- which, again, I don't propose to bring up.



1 A That's fine, sir.

2 Q And it's in that context, sir, I want us to now
3 move to the (V4)---- (V4---'s statement, which is
4 in your file and which you read, --

5 A Uh-huh.

6 Q -- 006404. Once again this was a statement that
7 was in your file, sir, it was one of your 95, --

8 A Uh-huh.

9 Q -- and you did not disclose it to --

10 A Okay.

11 Q -- Mr. Tallis.

12 A I'm sure that that is correct, and once again, I
13 note the --

14 Q Don't be quite so trusting, --

15 A Okay.

16 Q -- Mr. Caldwell, please.

17 A All right.

18 Q I would be very uncomfortable if you are that
19 trusting.

20 A In any event, sir, the -- I'm sure it was on the
21 file, I'm sure I didn't disclose it, and I do draw
22 out the attention to the endorsement "indecent
23 assault, not connected" in the upper left corner,
24 sir.

25 Q And you read it, sir, --



1 A Yeah.

2 Q -- we know that, at least twice?

3 A Sure.

4 Q All right. And what we read is that this lady was
5 attacked in the same minus 40 degrees --

6 A Uh-huh.

7 Q -- seven blocks away from where Gail Miller was
8 murdered and she was sexually assaulted by a
9 stranger; that's what you read if you read this
10 document?

11 A Certainly.

12 Q All right. So the unique aspect of the murder of
13 Gail Miller had suddenly lost its uniqueness
14 completely, it now seems that since you didn't
15 disclose this, that you must have said to yourself
16 there were two unique people -- which is, means
17 they are not unique -- roaming around the streets
18 of Saskatoon that very morning chasing after
19 women; right? That's what you must have said to
20 yourself?

21 A I can't recall that, sir.

22 Q But you must have said that, it's a matter of
23 common sense, a matter of logic?

24 A You mean to say -- and this -- what was the day of
25 this offence?



1 Q It's 20 minutes after Gail Miller's murder, sir.

2 A Okay. All right, I see that sir, yes.

3 Q Yes. So you are saying to yourself, the purpose
4 of the exercise, do I disclose this to Mr. Tallis
5 or not?

6 A Uh-huh.

7 Q Well clearly, if you had thought to yourself this
8 would have to be the same person who assaulted
9 (V4)---- (V4)--- as murdered Gail Miller, you
10 would have said I must disclose this to Mr.
11 Tallis?

12 A If -- I would presume so.

13 Q Yes. So, since you didn't disclose it to Mr.
14 Tallis, aren't we forced to the conclusion that
15 you must have said to yourself there are two
16 separate people accosting women in minus 40
17 degrees on the streets of Saskatoon within 20
18 minutes of each other within seven blocks of each
19 other on the same day?

20 A Yeah, I wasn't --

21 Q You must have said that to yourself?

22 A I can't say that I did, sir, whatever you might
23 think.

24 Q Well can you think of anything else you would have
25 said to yourself? What other justification could



1 you have now, sir? Just think, any -- free
2 thought, --

3 A Yeah.

4 Q -- think whatever you can think of. What other
5 justification could there have been in your mind
6 when you decided Tallis ain't seeing this?

7 A I don't know, sir.

8 Q There isn't one, is there, sir?

9 A I can't --

10 Q There is not one in existence?

11 A I can't recite it to you now.

12 Q And I think if you sat there for a week, sir, you
13 couldn't recite another explanation?

14 A That could be.

15 Q Yeah. Perhaps, sir -- perhaps, sir, you just --
16 your exercise for Mr. Tallis was just something
17 you weren't really being very serious about?

18 A No, I was serious about it --

19 Q All right.

20 A -- and attempted to do it carefully, sir.

21 Q Because, of course, you would have known, if you
22 put your mind to it when you read the (V4)---
23 statement that you have before you now, if you had
24 put your mind to it, sir, and thought it through,
25 you would also have known, when you are reading



1 it, that it simply wouldn't jibe with everything
2 you knew of what Nichol John and Ronald Wilson
3 were telling the police, it wouldn't jive with
4 what they had told the police that the person who
5 had attacked (V4)---- (V4)--- could be David
6 Milgaard; you agree with that, do you?

7 A Umm, --

8 Q Doesn't work?

9 A Wouldn't jibe with it, sir?

10 Q Yeah. What they said in their May statements
11 wouldn't enable David Milgaard to suddenly attack
12 someone seven blocks away the same morning?

13 A That may well be.

14 Q Right. So what you may have said to yourself,
15 sir -- is this a legitimate possibility -- maybe
16 you said to yourself, well, since that could not
17 have been David Milgaard who attacked (V4)----
18 (V4)---, then clearly this has no relevance, and I
19 don't have to disclose it to Tallis; is that a
20 possible line of thinking that you engaged in,
21 sir?

22 A I, at this point sir, I can't tell you.

23 Q Uh-huh. Because I just want to take you to a
24 comparison, sir, --

25 A Okay.



1 Q -- in -- if I may, and recite it to you quickly,
2 in the Guy Paul Morin Inquiry where a prosecutor
3 explained that the reason he didn't disclose a
4 statement of Christine Jessop's brother, the
5 deceased Christine Jessop's brother --

6 A Uh-huh.

7 Q -- as to the time that she must have
8 disappeared -- all right, are you following me --

9 A Yeah.

10 Q -- was because, if she had disappeared at that
11 time, then Guy Paul Morin had a complete alibi for
12 that time.

13 A Uh-huh.

14 Q Since Guy Paul Morin, in his belief, must have
15 committed the crime he didn't have to disclose
16 this statement of Ken Jessop because, clearly, Ken
17 Jessop was wrong in his statement.

18 A Yeah.

19 Q You see the reasoning?

20 A I see what you are saying about the Morin
21 matter --

22 Q So he didn't disclose it.

23 A -- but I did not apply that to this case, sir.

24 Q Well I'm suggesting that's what you must have
25 done, sir.



1 A Okay. Well --

2 Q When you really think about it you must have said
3 it couldn't be David Milgaard who attacked
4 (V4)---, therefore it's irrelevant, and I don't
5 have to disclose it to Mr. Tallis?

6 A At this point, sir, I can't tell you why I decided
7 that.

8 Q Yeah. Because you surely appreciate that if that
9 document that you had the opportunity to disclose
10 in 1969, it was right in front of you --

11 A Uh-huh.

12 Q -- right in your file, would have blown your case
13 potentially to smithereens against David Milgaard
14 wouldn't it?

15 A Sir, whether or not it, the case against David
16 Milgaard was blown to smithereens --

17 Q It wasn't it seems.

18 A What I'm saying to you, sir, is I wouldn't decide
19 things based on that, I would decide them based on
20 what I knew or thought I knew about the evidence
21 as the matter went on.

22 Q Yeah, I'm not suggesting to you at the moment that
23 you didn't make the decision for that reason.

24 A Yeah, okay.

25 Q I'm just pointing out to you that had you



1 disclosed it to Mr. Tallis back in 1969, it had
2 the potential --

3 A Oh.

4 Q -- to blow your case against David Milgaard to
5 smithereens.

6 A Possibly, sir, yes.

7 Q Yes, yes. So if we go back to responsibility,
8 sir, you missed the boat badly, you agree, at a
9 minimum?

10 A Yeah. I can't comment on that, sir.

11 Q Well, I'm asking you to. I guess I can't compel
12 you to.

13 A Okay.

14 Q Isn't that a fair comment, sir, don't you think
15 that's a fair comment?

16 A I can't -- I can't deal with it in those terms,
17 Mr. Lockyer.

18 Q You can't do what?

19 A I say I can't deal with it in those terms is what
20 I'm saying.

21 Q But your counsel dealt with it in those terms in
22 the press release of July 21st; in essence,
23 Caldwell and Kujawa did nothing wrong.

24 A Yeah.

25 Q So I'm really asking you in that context. Is that



1 a fair statement any more do you think?

2 A I think it is a fair statement in view of the
3 things that I've learned since and the things that
4 have come out in the earlier part of the Inquiry,
5 sir.

6 Q Tell me, sir, just before we break, I want to ask
7 you this: Did you think that you had a strong
8 case against David Milgaard?

9 A Yes, I did.

10 Q You did. This, despite the fact first of all that
11 there were, you were aware of there being, I think
12 to use your words, that there were two schools of
13 thought in the police force about whether or not
14 he committed the crime?

15 A Yeah, that's correct, sir, and I think I've
16 mentioned a couple of names the other day.

17 Q Well, it's interesting, you did, yet you mentioned
18 the name Wood and you mentioned the name Weir?

19 A Yes.

20 Q Now, Weir didn't come to your knowledge until
21 quite a long time after you spoke to
22 Carlyle-Gordge; is that right? Weir didn't come
23 into the picture until the '90s I don't believe.

24 A Well, at this point, sir, I'm assuming he was not
25 a witness at the prelim or trial?



1 Q No, he wasn't.

2 A Okay.

3 Q So the only one you knew about when you spoke to
4 Gordge was Wood from what you are telling us now?

5 A Presumably so.

6 Q All right. I mean, is Wood a school of thought?
7 You seem to be potentially making him a lot more
8 than what I might have thought one person would
9 be, a school of thought implies to me a group of
10 officers, --

11 A Yeah.

12 Q -- not one officer.

13 A No, I think, sir, I meant him, and school of
14 thought is not a term I would apply to it, it
15 was -- I know that he had doubts that this was the
16 correct accused, if you will, and I don't recall
17 another, you know, member in that respect.

18 Q Just your words to Mr. Gordge, sir, that there
19 were two schools of thought in the police force.

20 A Yeah. Well, I will be more careful next time when
21 I'm interviewed by Mr. Gordge, Mr. Lockyer.

22 Q I want you to be careful, sir, there's a great
23 advantage to that phone call being taped because
24 it's produced for us some really quite interesting
25 remarks that you made.



1 A Uh-huh, yeah.

2 Q And that's one of them, the two schools of
3 thought.

4 A Yeah. Well, in that sense school of thought I
5 would have applied to Superintendent Wood or
6 deputy or whatever his rank was.

7 Q Superintendent Wood, sir, was right there in the
8 thick of things when Nichol John and Ron Wilson
9 gave their new versions.

10 A I believe that's so.

11 Q Right. So he wasn't someone who was on the
12 fringes, he was someone who was right in the thick
13 of the case; right?

14 A Yeah. He was a commissioned officer in the force
15 and above Short and others.

16 Q Did you ever ask him what his doubts were?

17 A Again, I doubt if he was a Crown witness.

18 Q No, that's not what I asked you.

19 A No, I realize that.

20 Q Did you ask him why he had doubts?

21 A I suspect that I did in our office. I have a
22 recollection of him being there at some point
23 during the trial.

24 Q What did he tell you?

25 A I have no idea.



1 Q Well, why wouldn't that be something that you
2 would retain, sir, that the senior police officer
3 involved in the investigation present at the
4 crucial times in May with the two crucial
5 witnesses, why can't you remember why he had
6 doubts about the case? I don't get it.

7 A I think it was well on in the case at the time
8 when I spoke with him and I simply, I felt the
9 case was solid and I did not pursue whatever it
10 was that he said.

11 Q That's not necessarily a good explanation, sir,
12 because you described the case to Carlyle-Gordge
13 as being a very shaky case. Do you remember that?

14 A I guess that terminology was used.

15 Q You guess what?

16 A That terminology was used, which I think was
17 unfortunate. I think the shaky, Mr. Lockyer,
18 would refer to the case in its early stages, if
19 you will, but I clearly used that statement to
20 him, that term I should say.

21 Q You actually said a very shaky case.

22 A Yeah, very.

23 Q I'll just go to 325653 is the bundle and 655 is
24 the quote.

25 A I'll accept the very as well, sir.



1 COMMISSIONER MacCALLUM: I would like to
2 see the quote, please.

3 A Okay.

4 BY MR. LOCKYER:

5 Q Sorry, real shaky. I got it wrong. Not very,
6 real.

7 "Uh, Crown prosecutor's, we used to have
8 City and Crown and uh, I got the case
9 and, uh, it was a, and I you know, I
10 don't mean this to sound egomaniacal,
11 but it was a, a real shaky bloody case
12 at the outset."

13 Do you remember saying that?

14 A Yeah, and I went on to say there were all kinds of
15 problems with it. We had a long preliminary
16 inquiry.

17 Q Uh-huh. And then in your evidence, sir, this
18 Inquiry on October 5th, can we go to 16178, 20 --
19 October 5th, 16178, it's line 20 I'm interested
20 in. You are being asked here, sir, by Mr. Hodson
21 on October 5th about why or how you determined
22 what to disclose and you are being asked about the
23 statement, the last one you were being asked about
24 was the statement of (V1)-, or the police account
25 reports refer to (V1)- and (V2)-----, and you said



1 down here, sir, you said -- sorry, right here:

2 "I don't know, Mr. Hodson, quite how to
3 answer that. I didn't think I had a
4 strong case against Mr. Milgaard."

5 There was no follow-up question on that, sir, I
6 just picked up on it when you said it.

7 A Okay.

8 Q It alerted my ears and I then found the quote and,
9 as I say, you weren't asked any more questions
10 about it. That seems pretty consistent with what
11 you said to Carlyle-Gordge isn't it?

12 A Yeah. Mr. Lockyer, I'm going to suggest, I
13 suggest here that in fact I may have said I did
14 think I had a strong case.

15 Q No, I remember hearing you say it.

16 A Okay.

17 Q I distinctly remember you saying it.

18 A Okay. That doesn't make sense to me as didn't, I
19 thought I did, if I can help you with that.

20 Q Well, I remember hearing it and that's why I
21 searched the transcript to find it.

22 A I thought I said did.

23 MR. LOCKYER: Is this a good time to break,
24 Mr. Commissioner?

25 COMMISSIONER MacCALLUM: Okay.



(Adjourned at 10:29 a.m.)

(Reconvened at 10:52 a.m.)

BY MR. LOCKYER:

Q Thank you. Mr. Caldwell, there's one thing I wonder, if you ever put your mind to this. Mr. Fisher ultimately was charged after he gave his statements in Winnipeg with the sexual assaults on Miss (V1)-, Miss (V2)----- and Miss (V3)----- and then what I might call the ninth sexual assault, the one against (V5)-- (V5)--- on February 21st of 1970, which I haven't referred to this morning.

A Uh-huh.

Q It's not part of the cluster of sexual assaults, the eight in the three and a half months preceding or surrounding Gail Miller's murder, and one thing that has always made me curious and I've never really quite known who to ask about it, so I'm going to ask you about it, is why do you think the police, or the prosecutors for that matter, would have left out the assaults of Miss (V9)----, Miss (V6)-, Miss (V4)--- and Miss (V)----?

A Left out, sir? In what sense?

Q Not charged him with them.

A Fisher?

Q Yes.



1 A Well, he was arrested in Winnipeg, as I understand
2 it, gave some statements, came back, what now
3 turns out to be Prince Albert as I understand it,
4 and ended up in Regina pleading guilty to --

5 Q Four.

6 A Four was it? All right.

7 Q They charged him with four. He confessed to two.

8 A Okay.

9 Q It would seem that the prosecution had no evidence
10 on the other two other than possibly similar fact
11 because he denied them.

12 A Yeah.

13 Q But there was then a letter that we saw, and I'm
14 not going to bring all this up, I'm sure everyone
15 here remembers it, there was a letter saying
16 obviously he committed the other two as well
17 because they are so similar.

18 A Now --

19 Q I forget who wrote that letter.

20 A Okay.

21 Q But what I've always wondered is what happened to
22 the other four? Why wouldn't he have been charged
23 with the (V9)----, (V6)-, (V4)---, (V)---- ones as
24 well?

25 A I cannot tell you, sir, of my own knowledge.



1 Q What --

2 A Go ahead.

3 Q Sorry. What's interesting about those four is
4 that they are the ones that immediately surrounded
5 the Gail Miller murder and I have a bit of a
6 suspicious mind sometimes and I can't help
7 wondering if it wasn't because that might have
8 alerted people to the possibility he committed the
9 Gail Miller murder if they had gone to the ones
10 that all happened within two weeks of her murder,
11 why not in fact on the day of her murder.

12 A I don't know, Mr. Lockyer, if indeed those were
13 not charges, why they were not.

14 Q Right. It's hard to understand, if you've got a
15 series of eight sexual assaults in this very
16 limited time period, and we've heard from at least
17 two police officers, senior police officers, that
18 it's the only serial rapist case they can recall
19 in the history of Saskatoon, all right.

20 A Uh-huh.

21 Q Presumably the same holds for you, you are not
22 aware of a serial rapist --

23 A I wasn't even, frankly, aware of the term, but I
24 agree with what you are saying.

25 Q The Larry Fisher type?



1 A Yeah.

2 Q In Saskatoon. So here we had what surely looks
3 like a serial rapist with the eight crimes, if we
4 include Gail Miller, seven if we don't, in this
5 three and a half month period. It's odd, isn't
6 it, that ultimately the police focused on four of
7 them and left out three of them, if we eliminate
8 Gail Miller from the equation?

9 A Okay, well, the Manitoba --

10 Q Sorry, left out four of them --

11 A Okay, the Manitoba --

12 Q -- if I have my numbers right.

13 A The Manitoba matters, as I understand it, sir, he
14 pled guilty I believe to two matters in Manitoba
15 if I'm not mistaken, and I may be mistaken.

16 Q I'm interested in Saskatoon.

17 A Okay.

18 Q Keep Manitoba out of it.

19 A Well, I'm not prepared to do that, sir, because
20 there was a sequence of events which I was, tried
21 to make it clear that my office was not involved
22 in Fisher cases in Saskatoon and the sequence was
23 that he was arrested in Manitoba, I believe pled
24 guilty there, was interviewed by the two Saskatoon
25 policemen, ended up in, as I understand it, Prince



1 Albert, either jail or penitentiary, then went to
2 Regina and pled guilty to I believe four counts in
3 a direct indictment. Is that -- that's my
4 understanding of it right now, sir. Now, as far
5 as four or five other offences, I have no idea why
6 they did or didn't go ahead, and they didn't
7 certainly come through my office, for whatever
8 that's worth.

9 Q It seems, perhaps we can just say a little odd --

10 A Yeah.

11 Q -- that they selected the three that happened in
12 October, November and November, they left out the
13 ones that happened in January, January, January
14 and February.

15 A Yeah.

16 Q And then went to the one that happened in February
17 the following year.

18 A I don't know who they are, sir, but I'm sure your
19 sequence of events is correct. I don't know why
20 that happened, in a word.

21 Q Going to the other signals that were in your file,
22 sir, about this, the rapes that were taking place,
23 or the sexual attacks on women that were taking
24 place --

25 A Uh-huh.



1 Q -- in Saskatoon, as we know in that file that you
2 had was the report of Mackie of February 4th, '69
3 at 004090.

4 A Uh-huh.

5 Q And in this report, sir, we have reference up here
6 to Gail Miller's murder, in particular remember
7 you were asked about the keys. Do you remember
8 that?

9 A Yes.

10 Q And then we get to the bottom and there's a
11 reference to (V2) (V2)- (V2)----- who was one of
12 the sexual assault victims back in November of
13 1968; right?

14 A Yes.

15 Q And you say that you thought that that was
16 irrelevant. Why? That had nothing to do with
17 Gail Miller's murder. Why did you think that?

18 A I can't say -- one thing about it, it clearly is,
19 that there was not an accused identified at this
20 point, Mr. Lockyer. That could be part of it.

21 Q Well, there wasn't in Gail Miller's murder either.

22 A No, that's right.

23 Q There wasn't in either; right?

24 A No, that's correct.

25 Q So why wouldn't you read this and say to yourself,



1 well, maybe the (V2) (V2)- (V2)----- attack was
2 carried out by the same person as the person who
3 attacked Gail Miller and therefore I should
4 disclose it to Mr. Tallis?

5 A At this point, sir, I can't tell you.

6 Q Uh-huh. As you read it now -- so what you are
7 saying as you read it now, you can't tell us why
8 you wouldn't have done that?

9 A That's right.

10 Q It's not something you can account for?

11 A I don't know why either way, sir.

12 Q Yes. Okay. The February 5th, '69 letter from
13 Penkala to the Crime Index section, sir, 009299,
14 that makes the link between the assaults on
15 Ms. (V1)- and Ms. (V2)----- as clear as daylight
16 I'm going to suggest to you.

17 A All right.

18 Q You had this in your file. You have Penkala, you
19 look at the top, talking about Gail Miller, the
20 murder of Gail Miller, the circumstances of the
21 murder, the circumstances of the state of her
22 undress and so on and so forth; right? Have a
23 quick look at that, skim it.

24 A Are you telling me that it was in my file, sir? I
25 don't know --



1 Q Yes, it was.

2 A Has that been --

3 Q Yes.

4 A -- testified to that?

5 Q Yeah, Commission Counsel examined you on this.

6 A Okay.

7 Q Yes.

8 A I presume I agreed to that did I?

9 Q Yes, you did.

10 A I thought this thing was, as I recall, either a
11 notice to the public to be careful of what's going
12 on or a document intended to go to the RCMP as I
13 recall.

14 Q Well, no, you had a covering letter for it, it was
15 a letter from Penkala to the Crime Index
16 section --

17 A Okay.

18 Q -- saying that attached is this document. All
19 right?

20 A All right.

21 Q So this document, the first page of this document
22 is all about Gail Miller, I don't think you need
23 to read it.

24 A Okay, that's fine.

25 Q The circumstances of the crime, how she's found,



1 how she's dressed or undressed and so on and so
2 forth, you can catch that as you skim it; right?

3 A Okay.

4 Q And then you turn the page, sir, and then you'll
5 see they talk about, at the top, pathological
6 examination, this again would be of Gail Miller,
7 and then you have the link made for you right in
8 front of you:

9 "Our Department has two unsolved cases,
10 dating back into October and November of
11 1968, which involve complaints of rape.
12 In both those cases, the victim was
13 attacked from behind while walking in
14 the late evening, forced into a lane
15 and, under threat with a knife, made to
16 undress and submit to intercourse. The
17 victims were always threatened and
18 forbidden to see the attacker who, after
19 the attack, carried away some of the
20 victim's clothing. In these cases, the
21 attacker allowed the victims to replace
22 some of the clothing, usually the outer
23 garment or coat."

24 And it's signed by Penkala who is of course an
25 important witness on the Gail Miller homicide.



1 A That's right.

2 Q And you read this at least twice; all right?

3 A If -- I assume I did if I said so before.

4 Q Yes. So the link is made there by your
5 identification officer, sir, and indeed there's
6 something in there that you would have thought
7 might particularly have come to your attention
8 because it was seemingly an explanation for
9 something that you were never able to explain as
10 you told the jury in your opening and closing, how
11 do I explain, and ultimately you said to them I
12 can't explain --

13 A Yeah.

14 Q -- how there's knife slits on the coat, but not on
15 her dress.

16 A Uh-huh.

17 Q All right? And here it is in black and white for
18 you, an explanation that would, if it's the same
19 chap who did (V1)- and (V2)-----, which Penkala is
20 suggesting here back on February 5th of '69 and
21 that you are reading sometime after David
22 Milgaard's arrest, you suddenly got your
23 explanation for it. Do you see that?

24 A I see what you are saying, sir.

25 Q All right. So how do you explain not disclosing



1 this to Mr. Tallis?

2 A I -- if it was on my file and I apparently
3 testified that I read it, I can't explain that
4 right now at this moment.

5 Q It's just one thing after another that you had
6 sitting in your file, sir, that cried out to be
7 disclosed to Mr. Tallis, both individually and
8 cumulatively, these documents. You put them all
9 together in a bundle and you've got such a strong
10 case of disclosure to Mr. Tallis don't you?

11 A I assume so, sir.

12 Q Yeah. So do you see now, sir, how you missed the
13 boat in 1969, how we could have avoided what
14 happened to David Milgaard if you had disclosed
15 these documents to --

16 A Well, sir, it's -- I don't know what more I can
17 tell you. I made some decisions. Evidently I'm
18 assuming all the things I've been told about what
19 wasn't --

20 Q But they were ghastly decisions, Mr. Caldwell,
21 weren't they?

22 A I wouldn't agree with that.

23 Q You wouldn't? Even now that you know the
24 consequences of it?

25 A I don't think, sir, that it's up to me to judge



1 how good or otherwise my decisions were at that
2 time.

3 Q But you had judged them, sir, you judged them if
4 only in your press release on July 21st, your
5 lawyer judged them for you.

6 A Pardon me?

7 Q Your lawyer judged them for you with your
8 permission when you gave a press conference saying
9 you did nothing wrong.

10 A Yes, sir, that's correct, and that was our view at
11 that time, sir.

12 Q So why can't you judge yourself now, sir? If you
13 could judge yourself then, why can't you judge
14 yourself now?

15 A I find it, Mr. Lockyer, difficult to know when I
16 learned what about all these matters. Apparently
17 some of the documents you've been examining me on
18 this morning came in at different times, according
19 to what my counsel said a moment ago, and I have
20 not spoken to her during the intermission of
21 course.

22 Q Well, Commission Counsel, sir, has pointed out to
23 you carefully that each of the documents I've
24 taken you through this morning were part of your
25 portfolio when you were determining what to give



1 to Mr. Tallis.

2 A All right.

3 Q And you say you don't want to cast judgment on
4 yourself, but you cast judgment on yourself right
5 at the introduction of my cross-examination when I
6 said to you, and your position is that you did
7 nothing wrong either by way of malfeasance or
8 negligence.

9 A That was my position.

10 Q And you said yes, that's my position.

11 A That's right.

12 Q But when I sort of put you in a corner, so to
13 speak, and confront you with specific documents,
14 you suddenly don't want to judge yourself any
15 more; is that right?

16 A Well, what I said, sir, is all I can tell you on
17 that point.

18 Q You see, when Mr. Hodson showed you this document
19 that Mr. Penkala sent to the Crime Index section,
20 this is what you said, you said -- this is October
21 5th, again 16176, this is in the context of the
22 very same document, sir, you said -- Mr. Hodson
23 said to you:

24 "That's apparent in looking at the
25 document now."



1 And you said:

2 "A Yes, it is --"

3 And that's the Penkala document.

4 A Yeah, okay.

5 Q "-- and the benefit of hindsight, I
6 certainly would have, if I had it to do
7 all over, which hopefully I won't, I
8 might have pursued those things --"

9 A Yeah.

10 Q Why do you need the benefit of hindsight, sir? It
11 was there in black in white in front of you in
12 1969. Why do you need hindsight? Penkala said
13 it, he laid it out for you in black and white.
14 What's hindsight got to do with it? I don't
15 understand.

16 A Well, that's the terminology I used there, sir. I
17 don't know how I can improve on it.

18 Q Hindsight has nothing do with it does it?

19 A In your view maybe it doesn't.

20 Q And then you said, almost dismissively at 179 of
21 the same transcript, look what you said here --
22 well, perhaps I'll ask the question:

23 "Q To what extent --"

24 Commission Counsel asked you -- sorry, could you
25 go to the end,



1 "-- would you be relying on the police
2 to bring to your attention this type of
3 information about other theories and
4 other suspects that may have been
5 eliminated?"

6 This is again in the context of the Penkala
7 document.

8 A All right.

9 Q "A Well, completely, other than the other?
10 Narrow field of Mr. Tallis which we've
11 spoken of --"

12 So just to stop there for a minute. Completely?
13 So you were relying completely on the police; is
14 that right? Is that your explanation ultimately,
15 it's their fault, not mine, because I relied on
16 them completely? Is that really the bottom line?

17 A I answer at the end of that answer to say there
18 was no one I could rely on but the police. They
19 were the ones I would inquire of and get whatever
20 answer.

21 Q I'm going to finish the answer in a minute. I
22 just want to know, did you rely completely on the
23 police and just didn't use your own discretion or
24 your own --

25 A I would think I used my own discretion in



1 addition.

2 Q Let's read the rest of the answer:

3 "A Well, completely, other than the other
4 narrow field of Mr. Tallis which we've
5 spoken of, I was not an investigator and
6 I had to resist temptations to run
7 around on the fringes of these things,
8 so I had -- there's no one I could rely
9 on but the police, they are the ones I
10 would inquire of and get whatever answer
11 I got."

12 Do you remember saying that, sir?

13 A Yeah, I did.

14 Q But let's go back to what you were talking about,
15 the Penkala letter, sir. You are not running
16 around on the fringes of things that you need to
17 inquire about, Penkala has written it down for you
18 in black and white, there's no fringes here.

19 A Yeah.

20 Q There's no need to inquire here, all you've got to
21 do is read what he wrote, it's right in front of
22 you.

23 A I see that.

24 Q Yes. It's not a satisfactory answer, that at all,
25 is it, Mr. Caldwell, with respect?



1 A Well, possibly not in your view, sir.

2 Q No, leave my view out. What about yours, sir?

3 A It was the answer which I thought was honest at
4 the time I was asked the question.

5 Q I'm sure you did, sir, I'm sure you thought it was
6 honest, but did you think on reflection it's a
7 satisfactory answer, sir, in the context of that
8 Penkala letter?

9 A Well, I again, sir, it's my reaction to what I was
10 asked by Commission Counsel.

11 Q You know, you kept getting hypotheticals from Mr.
12 Hodson during his examination-in-chief.

13 A Uh-huh.

14 Q Do you remember, for example, the Riddell report
15 which he referred you to which made a possible
16 link back in March, as I recall, between some of
17 the previous sexual assaults and the murder of
18 Gail Miller? Do you remember that yesterday?

19 A I -- if it is an RCMP record, sir, I doubt that I
20 got it based on what we've learned in the
21 meantime.

22 Q And that's why Mr. Hodson was posing hypotheticals
23 to you --

24 A Okay.

25 Q -- for that very reason, and he posed to you a



1 hypothetical, if you remember yesterday, in the
2 context, and I don't have the reference for it, I
3 just remember it, and said to you, if you had this
4 before you, if you had had this RCMP document,
5 would you have disclosed it to Mr. Tallis, and you
6 responded yes. Do you remember?

7 A Yes.

8 Q And I suggest to you that you have done absolutely
9 nothing of the sort, sir. All we have to do is
10 look at what you did with the Penkala document.
11 If you would have had the Riddell document, you
12 wouldn't have disclosed that any more than you
13 disclosed the Penkala document.

14 A The Riddell document, sir, I wouldn't know what it
15 was because it never came to my office.

16 Q You missed the point. Mr. Hodson asked you a
17 hypothetical, if you had had this back in '69
18 would you have disclosed it to Tallis, to which
19 you said yes.

20 A All right.

21 Q And I'm suggesting to you, sir, your answer should
22 have been no, any more than I disclosed the
23 Penkala document, for example, of February 5th,
24 '69.

25 A I don't agree with that.



1 Q Uh-huh. Well, what was it about the Riddell
2 document, sir, that was so different from what you
3 had on the Penkala document of February, '69?
4 Essentially they were saying the same thing.

5 A I can't tell you what the difference was at this
6 point.

7 Q Well, there isn't a difference really, sir, they
8 were really the same thing, and just as you didn't
9 disclose Penkala, you wouldn't have disclosed
10 Riddell, you wouldn't have disclosed any of this,
11 sir, if you had everything in front of you, would
12 you? That's the reality?

13 A I do not agree to that, sir.

14 Q You don't, uh-huh. The Mackie report, sir, April
15 7th, '69, 009251, once again we know you had this.

16 A Okay.

17 Q Once again, sir, we've got the linkage, you've got
18 the talking about the murder of Gail Miller as you
19 go down the document, and then you've got --
20 sorry, at 252, part of the same document, the next
21 page in other words, you've suddenly got the
22 reference to (V2) (V2)- (V2)----- in the middle of
23 the document. You see that?

24 A Yeah, I do.

25 Q On April 2nd (V2) (V2)- (V2)----- was taken to the



1 Red Cross where her blood was grouped, and then
2 you've got a whole outline about (V2)-----, you've
3 got Inspector Riddell reappearing again, and once
4 again, sir, you decide that this is not something
5 you are going to disclose to Mr. Tallis; right?

6 A If --

7 Q I mean you've got linkages coming out of your
8 ears, sir, in your file, in essence, they are all
9 over the place in your file. Document after
10 document is referring to these other incidents and
11 yet, again and again and again, you are just
12 saying no, not disclosing them; right?

13 A Evidently so, sir.

14 Q Yeah.

15 A In this case I believe (V2)----- was one for which
16 -- whom there was a statement, I believe, and I
17 believe I had decided not to disclose it, if my
18 memory is correct -- the document, the statement,
19 that is.

20 Q And then there is the forensic documents, sir, of
21 Paynter's which talks about (V1)--- (V1)-.

22 A Uh-huh.

23 Q You remember that, the one you wrote "omit" on?

24 A Umm --

25 Q The one you wrote "omit?"



1 A Omit?

2 Q O-M-I-T.

3 A Yeah, I remember the --

4 Q And you wrote a few other words, but you remember
5 the document?

6 A Yes I do.

7 Q I can bring it up if you want to see it, but --

8 A No.

9 Q -- I'm not sure it's necessary. What I am more
10 interested in is what you said about that document
11 at the discovery, sir, when Mr. Rodin was asking
12 about it.

13 A Okay.

14 Q The bundle of documents 149733, if we can go to
15 149792, this is in reference to this very same
16 document, the one you wrote "omit" on, sir.

17 A Uh-huh.

18 Q And you are asked -- could you just go up a
19 trifle, please? Yeah, that's good. Question,
20 'Did somebody -- did you call somebody?'

21 A No.

22 Q Sorry, go up about bit more to put in it context
23 here. Answer, 'I could see no connection
24 whatsoever', you said, 'with the Miller and/or
25 Milgaard when I saw this document', meaning the



1 forensic document about the (V1)--- (V1)-, 'and
2 that's why I wrote "different file" and put a big
3 question mark there.'

4 A Yeah.

5 Q Question, 'Did somebody -- did you call somebody?'
6 Answer, 'No'. Question, 'Paynter, for example,
7 and ask him what's this doing here?' Which is the
8 kind of question I'm asking you today, sir; did
9 you call Inspector Wood to ask him what his doubts
10 were about the case?

11 A No.

12 Q Did you call Detective Ullrich and say "why are
13 you putting these documents in my file"; do you
14 see that?

15 A Okay. Inspector Wood was a personal discussion
16 with him in my office, as I may have mentioned
17 earlier, --

18 Q Okay.

19 A -- Ullrich I've mentioned previously. The way
20 this answer is -- pardon me, 'I didn't call
21 Paynter, once this has been discussed' --

22 Q I'm just going to read your answer.

23 A Okay, that's fine, yeah.

24 Q And your answer, 'Did you call Paynter and ask him
25 what's this doing here?' Answer, 'No, I didn't,



1 and once this case has been discussed, the way
2 that, in a case like that I would have expected
3 some investigator or lab fellow to phone up and
4 say, eh, we also sent you this and this is why we
5 sent it to you, there's some significance and this
6 is what we think it is, do you think we should use
7 it or not. I simply, I didn't hear from anyone
8 and I didn't pursue anybody to try to find out why
9 it was on the file.'

10 A Yeah, that's what I said.

11 Q If we can go down, just skip a couple of
12 questions, they're on point but just to speed up,
13 question at 205, 'You're saying that you would
14 have expected the onus to be on someone in the
15 police or RCMP to phone you and say this is why
16 it's here?' Answer, 'If there was anything on the
17 file that appeared to be the extraneous, to belong
18 to a different thing completely, the next thing I
19 would expect to happen is someone to phone up and
20 say eh, it's me, I put that on there because I
21 didn't think we should consider (a), (b) and (c).
22 That didn't happen and equally I didn't launch any
23 inquiries myself going the other way.'

24 A Yeah.

25 Q Is that really your best answer, sir, in a



1 homicide where a 16-year-old boy is charged with a
2 vicious rape/murder, that when you've got
3 questions on your file that raise questions that
4 it's not for you to find out why they are there,
5 they should be calling you to explain why they are
6 there?

7 A That answer --

8 Q That's not a satisfactory answer, is it, Mr.
9 Caldwell?

10 A Okay. That answer was what I gave at the --

11 Q Yes.

12 A -- at that time, --

13 Q Yes?

14 A -- and I thought that was an accurate answer, I
15 would have expected that to happen.

16 Q Okay. And I'm suggesting to you, sir, it's a very
17 unsatisfactory answer, isn't it; that in a
18 homicide case, with the freedom of a 16-year-old
19 boy at stake, that you would just say, well, I got
20 these documents, here I've got a forensic report,
21 they haven't called me about it, --

22 A Uh-huh.

23 Q -- it's obviously irrelevant, I'm not going to
24 bother to pick up the phone to see why it's here,
25 end of story?



1 A It didn't appear to me to be --

2 Q Yeah.

3 A -- you know, up to me to do that at that time, and
4 I did not in fact hear from anyone about it.

5 Q But one of the issues in these types of Inquiries,
6 sir, that frequently has arisen is this; what's
7 the role of the Crown as opposed to the police,
8 does the Crown play a role of gatekeeper in a
9 prosecution? What do you think?

10 A You --

11 Q Eh?

12 A I hadn't heard that term before, sir, but I
13 believe that it could be applied to prosecutors.

14 Q 'Could be'; shouldn't it be?

15 A Presumably.

16 Q Shouldn't that be a part of the role of a
17 prosecutor in every case, to play the gatekeeper
18 between the police and the prosecution, so to
19 speak?

20 A Uh-huh. I suppose that could be appropriately
21 said.

22 Q It should be, shouldn't it, sir?

23 A Could well be, sir.

24 Q Okay. I'm trying to get you to say it should be.
25 If you don't want to say that, tell me, but



1 don't -- just please try not to answer me just by
2 avoiding the question.

3 A Okay.

4 Q Do you think it should be?

5 A In the best sense of the word, yes, I do.

6 Q Thank you. And do you think you played that role
7 in the David Milgaard prosecution, sir?

8 A I believe I did my best to do so at that time,
9 sir.

10 Q Do you think you successfully played the role,
11 sir?

12 A I don't think, Mr. Lockyer, that's for me to
13 answer. I believe I did, but I don't think that's
14 within my, you know, jurisdiction to answer that.

15 Q And you say that, despite everything that you read
16 in your file, you never even spoke to Ullrich,
17 who's sitting in the body of the Court throughout
18 the trial, presumably in your office before Court
19 and after Court every day, the other officers
20 involved, --

21 A Uh-huh.

22 Q -- Mackie was there I think all the time, remember
23 you spoke to Carlyle-Gordge, you were trying to
24 keep them hidden so the jury didn't see them all
25 so they didn't realize quite how much help you had



1 in this case, --

2 A Yeah, I recall that.

3 Q -- you never said to one of them or never heard
4 from one of them --

5 A Yeah.

6 Q -- about these other sexual assaults that you'd
7 read about in your file time and again as you went
8 through it, --

9 A Yeah.

10 Q -- that had been in the media, that had been
11 happening in the very city you were the senior
12 prosecutor, not a word, nary a word; is that
13 right?

14 A Well, sir, that's quite a broad question.

15 Q It is. I agree.

16 COMMISSIONER MacCALLUM: Just a minute,
17 please.

18 MS. KNOX: Just before the witness answers,
19 it's my memory the evidence was it was Lieutenant
20 Short who was at the courthouse all the time
21 shepherding witnesses, I don't recall any
22 evidence that Mackie was there all the time.

23 BY MR. LOCKYER:

24 Q I will accept the correction.

25 A I believe that's right, sir.



1 Q I'll accept the correction. Go on?

2 A I would have made those inquiries at that time
3 had -- if I had felt there was a need or -- to do
4 so, sir. There's several. You've mentioned
5 Sergeant Ullrich, the case prep man, there were
6 investigators around, if I'd have thought it
7 useful to ask them I certainly would have.

8 Q I want to talk, Mr. Caldwell, for a bit about the
9 phrase "tunnel vision".

10 A Okay.

11 Q It's something that, presumably, you would
12 appreciate can infect a police investigation?

13 A Can which, sir?

14 Q Infect a police investigation?

15 A Oh yeah, yes, I do.

16 Q And infect a prosecution?

17 A I would think so.

18 Q Could infect the defence counsel?

19 A All of the above, sir, I agree with.

20 Q And could infect a member of the judiciary?

21 A Umm, yeah, under some circumstances it could.

22 COMMISSIONER MacCALLUM: Was your verb
23 "infect" or "affect"?

24 MR. LOCKYER: "Infect".

25 COMMISSIONER MacCALLUM: "Infect".



1 BY MR. LOCKYER:

2 Q "Infect".

3 A Oh, I thought you said "affect", but --

4 Q It is actually an expression used by Justice Cory
5 in the Sophonow, --

6 A Okay, sir.

7 Q "-- how it infects", so I have sort of stolen his
8 word.

9 A Yeah. Okay, I'm sorry, I took it as "affect", but
10 I agree with those --

11 Q Same thing, "infect"/"affect", "infect" is a bit
12 stronger but --

13 A Okay. I agree with those three or four categories
14 you advanced.

15 Q In fact, sir, just last week -- or was it last
16 week, week before last, week before last -- just
17 for your information, --

18 A Uh-huh.

19 Q -- several of us in this room heard Mr. Justice
20 Watt talk for perhaps 25 minutes about how tunnel
21 vision can affect members of the judiciary.

22 A Uh-huh.

23 Q He spoke about it specifically for 25 minutes as a
24 topic.

25 A Okay. Was that at the law college?



1 Q It was in Winnipeg, at a conference in
2 Winnipeg, --

3 A Oh, I'm sorry, I'm sorry.

4 Q -- Mr. Justice Watt talked about it. That's all
5 he talked about for about 25 minutes, as to how
6 judges can be affected by tunnel vision, like
7 everybody else, --

8 A Uh-huh.

9 Q -- and the impact that that kind of thing can have
10 on the fairness of a trial if a judge is infected
11 by it in a particular case.

12 A Yeah.

13 Q All right?

14 A That's fine, sir, I don't doubt that that
15 happened.

16 Q It's just a matter of -- it's human beings --

17 A Yeah.

18 Q -- that can react that way to things; right?

19 A That's right, Mr. Lockyer.

20 Q Uh-huh. And you, as you told us so dramatically
21 yesterday, were always convinced that David
22 Milgaard had murdered Gail Miller; right?

23 A I was, sir, right up to and at the time of the
24 revelation about the DNA late -- years later.

25 Q Even despite your acknowledgement that there was



1 a -- that you knew that there was two schools of
2 thought in the police?

3 A Umm.

4 Q That you com -- that you described your case as a,
5 being a weak case?

6 A Yeah, okay.

7 Q We've been through that this morning already?

8 A I can deal with those two, if I may, sir. Umm,
9 I -- the first one was what again, Mr. Lockyer,
10 you just gave me, the first category?

11 Q The acknowledgment there were two schools of
12 thought.

13 A Yes. I spoke about two schools of thought, and
14 that, what that was was the view taken by Deputy
15 Chief Wood I regarded, I talked about as being a
16 school of thought, I think that's possibly an
17 incorrect description, but he had views to that
18 effect. What was the second thing, sir?

19 Q And I put to you just before the break --

20 A Yeah.

21 Q -- that you had viewed this as a weak case, --

22 A Yeah.

23 Q -- both in your evidence at the Inquiry, and in
24 what you said to Carlyle-Gordge?

25 A Now Mr. Lockyer, if -- I'm sure that what you



1 heard was "weak", I'm sure the transcript will
2 show that. What I meant, sir, and --

3 Q What you said was "wasn't a strong", I think was
4 the quote, I don't have it in front of me --

5 A Okay.

6 Q -- but it's a question of whether it was or wasn't
7 is what it's --

8 A Okay. What I thought, sir, was it was a strong
9 case, and if in a slip of the tongue it got in as
10 "wasn't", that I would attribute to myself. But
11 if -- for -- my views on the matter was it was,
12 indeed, a strong case.

13 Q Did you get an impression sir, from Chief Justice
14 Bence's charge, that he might well have acquitted
15 if this had been a judge alone trial?

16 A No, sir.

17 Q You didn't?

18 A No I did not.

19 Q You didn't sense that, in the lingo of criminal
20 lawyers, that Justice Bence's -- Chief Justice
21 Bence's charge was a pro-defence, not a pro-Crown
22 charge?

23 A Mr. Lockyer, I did not take that out of it.

24 Q Okay.

25 A I thought it was an even and level charge, and at



1 the end of it I did not suggest any changes, nor
2 did I after some changes were made based on the
3 requests of Mr. Tallis.

4 Q I'm going to suggest to you, sir, your certainty
5 in David Milgaard's guilt --

6 A Uh-huh.

7 Q -- was reflected, first of all, in the way you
8 prosecuted him?

9 A I prosecuted him, sir, as carefully as I could,
10 and as thoroughly as I could, and --

11 Q Could I give you an example?

12 A Yeah.

13 Q And I am interrupting but --

14 A Okay, go ahead.

15 Q To give you an example, your failure to question
16 -- and I'm going to go into this in more detail
17 later --

18 A Uh-huh.

19 Q -- how it was that John and Wilson came to give
20 different statements in May; you never questioned
21 that; did you?

22 A In the trial?

23 Q Even to yourself --

24 A Okay.

25 Q -- before the trial and during the trial?



1 A Now were those the Riddell statements, sir? I
2 don't know that at this point.

3 Q No, no, I'm talking about the May statements.

4 A Okay. That's the time --

5 Q The incriminating statements.

6 A Okay. And what was the question?

7 Q You never questioned how they came about, did you,
8 you never questioned to yourself "you know, why
9 would I assume that these couldn't be the result
10 of police compulsion", for example, you never said
11 that to yourself; did you?

12 A Yeah, I would not assume they were the result of
13 police compulsion.

14 Q Yeah.

15 A And what they said at the time, sir, I felt had
16 been obtained by -- with the assistance of the
17 polygraph, I felt it was a -- as close an
18 approximation to the truth as they could produce,
19 is how I felt.

20 Q Your certainty in his guilt, sir, was reflected in
21 your letters to the parole board, sir; isn't that
22 fair?

23 A Yeah, that's right, yeah.

24 Q And I can't help asking you this: Were they in
25 fact, those letters, a reflection of the fact



1 that, really, you weren't quite sure, inside
2 yourself, they had convicted the right man?

3 A No, they weren't, sir. I think we were quite
4 emphatic, and I --

5 Q They weren't?

6 A -- believe those letters --

7 Q They certainly were.

8 A -- pardon me -- I believe those letters encouraged
9 the parole board to seek out their own opinions
10 from proper sources, psychiatric and otherwise.
11 It didn't -- if I looked at those letters I'd say
12 whoever wrote them seemed very certain of the
13 validity of the conviction.

14 Q But I was wondering if it was almost like you were
15 trying to convince yourself, sir?

16 A No, sir.

17 Q Uh-huh. I mean there really is an ultimate irony,
18 isn't there Mr. Caldwell, that the only case that
19 you ever did this turned out to be a wrongful
20 conviction?

21 A That, that's certainly unique.

22 Q How ironic can you be --

23 A Yeah.

24 Q -- so to speak?

25 A That's so.



1 Q Yeah.

2 A I think I agreed, and I have no reason to change
3 that, that this was the only case in which I wrote
4 them, unless it was on those other two dangerous
5 sexual offender matters. At the moment,
6 Mr. Lockyer, I don't think I wrote on those.
7 And --

8 Q But you --

9 A I'm sorry, go ahead?

10 Q And your -- I'm going to suggest, sir, your
11 certainty was also reflected in your reaction to
12 Milgaard's, to David Milgaard's claims of
13 innocence, that you just rejected them out of
14 hand?

15 A Well, I know he made those from time to time, but
16 he wouldn't, of course, be dealing, you know, face
17 to face with me. In other words, he would be
18 dealing with other personnel, I never -- never
19 dealt with him person to person, sir.

20 Q Mr. Kujawa had some interesting remarks in that
21 regard, sir, to the media at 004343.

22 A Okay.

23 Q Can we enlarge it a little bit, I can't -- it's
24 too small for me to read. Thank you.

25 A Okay. May I just read it, Mr. Lockyer, before you



1 go on here?

2 Q I was going to read it out loud, sir.

3 A Okay, that's fine.

4 Q "The former head of prosecutions for
5 Saskatchewan is furious the David
6 Milgaard case will be reviewed by the
7 Supreme Court of Canada."

8 So this is in '92? Could we just get a date, is
9 there a date on at the top?

10 A '91 it appears.

11 Q Okay, '91, right. December 1st, '91, which is
12 after the reference is ordered; all right?

13 A All right, sir.

14 Q "It doesn't matter if Milgaard is
15 innocent of the 1969 murder for which
16 he's spent 22 years for prison - his
17 case should remain closed, said Serge
18 Kujawa, now an NDP MLA."

19 Now hopefully you don't agree with that
20 sentiment, sir?

21 A Umm, no I don't, no.

22 Q Good. Good.

23 "I'm not primarily concerned with his
24 guilt or his innocence - what I'm
25 concerned with is that you (the media)



1 and the lawyers are selling us down the
2 river.'

3 'The whole judicial system is
4 at issue - it's worth more than one
5 person,' he said."

6 A Yeah.

7 Q You don't share those sentiments either, I take
8 it?

9 A No, sir, I do not.

10 Q It's reminiscent, and I don't know if you know,
11 sir, of something like what Lord Denning said in
12 Britain back about 20 years ago about some of the
13 claims of people who said they had been wrongly
14 convicted of IRA bombings.

15 A I -- I wouldn't doubt that that's so, sir.

16 Q The same kind of remarks. Then he said, if you
17 look down here:

18 "Kujawa called Milgaard a 'kook,' and
19 blamed the media for forcing Justice
20 Minister Kim Campbell to order the
21 review nine months after she refused an
22 earlier application for a new trial."

23 A Uh-huh.

24 Q "'The whole system of justice is built on
25 the rights of the community are more



1 important than the rights of the
2 individual,' he said.

3 'That the rights of one
4 individual are more important than the
5 rights of everyone - that's the American
6 way. That's not the British (or
7 Canadian) way.' "

8 A Yeah.

9 Q And then it refers to you having been advised by
10 Mr. Kujawa during Mr. Milgaard's trial --

11 A Yes.

12 Q -- in January of 1970?

13 A Can I -- I'll just read that, sir, that last
14 paragraph if I may?

15 Q By all means.

16 A Yeah. Up to -- I don't agree, sir, with those two
17 or three or however many paragraphs, and they, I
18 think, end with the new paragraph:

19 "Kujawa advised Crown attorney ...",
20 etcetera. So I don't agree with that sentiment
21 that he put out there.

22 Q And pre-'97 would you have called David Milgaard a
23 'kook', for example?

24 A No, I didn't use that terminology.

25 Q I know you didn't. I'm not suggesting you did.



1 A Okay. No, I -- I didn't, wouldn't, don't, in a
2 word, so I guess that's three words.

3 Q But it's that kind of attitude on the part of Mr.
4 Kujawa gives us some idea of what was perhaps
5 going on in Saskatchewan prosecutions back in '69
6 and thereafter; does it not?

7 A Yeah, it absolutely --

8 Q Very troubling attitudes.

9 A It absolutely does not, Mr. Lockyer, and I'm going
10 to tell you --

11 Q Glad to hear it.

12 A -- okay -- I -- our department, as you know, had
13 several branches at various cities in the
14 province, a head office in Regina, and there was
15 no trickle-down of anything, for instance, that
16 Mr. Kujawa might feel about things in general. We
17 dealt with specific cases and how they came out
18 and how they got there, clearly, but there was no
19 prevailing attitude of that sort in my office, I'm
20 not aware of any elsewhere in the province among
21 prosecutors at that time, or it -- I don't know if
22 that answers you, sir?

23 Q Well, I don't know, I'm going to ask you; what was
24 Mr. Kujawa's position at that time --

25 A Well --



1 Q -- in 1991?

2 A He was, the titles changed, I would believe he was
3 Director of Public Prosecutions.

4 Q Whoa.

5 A Pardon me?

6 Q I say "whoa". And he is making these kinds of
7 comments as Director of Public Prosecutions?

8 A All I can --

9 COMMISSIONER MacCALLUM: Just a 'sec.

10 A I'm sorry.

11 COMMISSIONER MacCALLUM: Yes?

12 MS. KNOX: It states in the body of the
13 story that he was then an NDP MLA, he had
14 retired --

15 MR. LOCKYER: Sorry, it does, it does.

16 MS. KNOX: -- and he was a member of the
17 government.

18 MR. LOCKYER: Sorry, you're quite right, it
19 does, I've read it out.

20 BY MR. LOCKYER:

21 Q He was Ex-Director of Public Prosecutions you
22 should have said?

23 A I should have indeed, sir. I didn't notice that
24 either, sorry.

25 Q Okay.



1 A But he, indeed, had been that.

2 Q And what was he in 1969-'70, sir?

3 A Well that's when, in my memory, he would in effect
4 be our boss, and I believe the title then would
5 be the Director of Public--

6 Q Usually -- sorry.

7 A -- yeah, Director of Public Prosecutions.

8 Q Usually the attitudes of the boss --

9 A Yeah.

10 Q -- can sort of permeate through to the people who
11 work for the boss?

12 A Yeah.

13 Q And if Mr. Kujawa had these kinds of attitudes,
14 sir, did they fairly reflect the kind of attitudes
15 that Saskatchewan Justice had in '69-'70?

16 A I can't speak for other offices, in that respect,
17 they didn't fairly reflect my attitude.

18 Q Well, I mean, these attitudes are just -- they are
19 really quite outrageous; don't you think?

20 A Well, it's a matter of --

21 Q Don't you have trouble with the word, to -- with
22 that word to describe them?

23 A No, I do not adopt what he said, Mr. Lockyer, in
24 those paragraphs whatever.

25 Q But they would certainly be what you might call,



1 in the context of David Milgaard's case, given
2 that's what he is talking about, I mean tunnel
3 vision at its worst; --

4 A Uh-huh.

5 Q -- wouldn't you think?

6 A Yeah.

7 Q Doesn't get much worse than that; does it?

8 A I would -- it's a -- it's a -- it is not a set of
9 commentaries, if you will, that I would adopt then
10 or now.

11 Q All right. I mean I realize I'm putting you in
12 not a very happy position, Mr. Caldwell, --

13 A No, that's fine, sir.

14 Q -- and you are having a bit of difficulty
15 answering the questions as a consequence.

16 A Okay.

17 Q I appreciate that.

18 A Okay.

19 Q But I think it's perfectly fair for me to ask you
20 these kinds of questions.

21 A No, no, go ahead, sir, and I'll try to --

22 Q Saskatchewan Justice is what was such a huge part
23 of David Milgaard's life; --

24 A Yeah.

25 Q -- you see?



1 A Where is that sentence, sir?

2 Q Which sentence?

3 A The "Saskatchewan Justice"?

4 Q I don't know what sentence you are talking about,
5 that was just me talking.

6 COMMISSIONER MacCALLUM: That was his
7 comment.

8 A That wasn't quoting? Yeah, okay, I'm sorry.

9 BY MR. LOCKYER:

10 Q I'm just saying it was such an important part of
11 David Milgaard's life, Saskatchewan Justice, --

12 A Absolutely.

13 Q -- and here's the chap in charge making these kind
14 of remarks --

15 A I see that.

16 Q -- 20 years later.

17 A Yeah.

18 Q I mean have you said to yourself sir, given your
19 reaction to the DNA results that you were floored,
20 that you were shocked, --

21 A Yeah.

22 Q -- have you said to yourself, "how could I have
23 been so wrong? What happened? How could I,
24 Caldwell, have got it so wrong for such a long
25 period of time?"



1 A Yeah. Well, Mr. Lockyer, I didn't, do not, did
2 not feel that it was I, Caldwell, who got it wrong
3 for that period of time. The results were
4 terrible but, as I look back on the case, I
5 thought that I assembled it and prosecuted it in
6 an ethical fashion, sir.

7 Q You misunderstood the question.

8 A Okay. Go ahead?

9 Q Got it wrong in terms of being absolutely
10 convinced he committed the crime, that's what I
11 meant.

12 A That's right.

13 Q Have you said to yourself, "how could I have been
14 so wrong for so many years" --

15 A Uh-huh.

16 Q -- "in my certainty that David Milgaard had killed
17 Gail Miller?"

18 A Since?

19 Q Have you said that to yourself?

20 A Since the DNA evidence come out I undoubtedly
21 have.

22 Q Yes, right. Like it's not like there weren't an
23 awful lot of people, sir, who saw right through
24 the Crown's case long before the DNA results ever
25 came in?



1 A What I --

2 Q Lawyers, media people, public citizens, all sorts
3 of people saw through the case long before DNA,
4 and I couldn't understand why you couldn't have
5 done that yourself?

6 A Okay. All sorts of people had views on the case,
7 sir, before the DNA results came out. At the time
8 we were dealing with this we had a case which had
9 gone to the Supreme Court, the original trial, and
10 leave had been denied, so that gave me some, you
11 know, reassurance that we hadn't done things
12 outrageously at the time, if you will.

13 Q I mean did you ever feel in the '90s, sir, '91,
14 '92, indeed right up to '97, that maybe you should
15 go back and reassess the case, or did you just say
16 "there is no doubt he did it so I'm not going to
17 bother"?

18 A No. I didn't feel, Mr. Lockyer, at that time
19 there was a need for me to go back and reassess
20 it, it was out of my hands and going through all
21 of these processes we've heard about of
22 applications, appeals, etcetera.

23 Q Yes.

24 A Essentially, it was out of my hands.

25 Q You didn't feel a responsibility as a human being



1 is what I am asking you?

2 A Well I, once I learned what happened I very, you
3 know, gravely regretted it, obviously.

4 Q And when you considered what you did in terms of
5 his parole, sir, I mean at one point you
6 suggested, do you remember in one of the letters
7 to the parole board you said "I know of no one in
8 the community who would assist him on parole"; do
9 you remember saying that?

10 A Yeah, that was with the topic, one of the headings
11 they put out was 'would there be any available
12 community help', that may have been (e), (f), (g)
13 or whatever, and I answered it in -- with that
14 sentence or paragraph, sir.

15 Q Because you said in your opinion -- I mean let's
16 go to it.

17 A Okay.

18 Q 006824 is the bundle, 827 is the page.

19 A Uh-huh. Yeah, I see -- go ahead, sir, I see a
20 sentence --

21 Q "I know of no one in the community who
22 would be prepared to assist him if he
23 were released on parole ..."

24 A Yeah.

25 Q But you knew, of course, that his parents had been



1 in Court throughout the trial; right?

2 A In the -- yeah.

3 Q You were writing this in -- I'm sorry, I forget
4 the date, if we go back to 824, the first page?

5 A It looks like 1972, sir, at the top.

6 Q In June of 1972.

7 A Yeah.

8 Q How could you write "there is no one out in the
9 community who would assist him", or were you just
10 careless in your use of words?

11 A No, I would assume that parents would be a
12 category that they were not looking for, you would
13 assume they would help in any event.

14 Q Well they are in the community, I'm not sure what
15 --

16 A Yeah, but they are parents as opposed to
17 employers, friends, whatever.

18 Q That's not what you say, sir.

19 A Okay.

20 Q Is that just careless use of words on your part:

21 "I know of no one in the community ...
22 prepared to assist him if he were
23 released on parole ..."?

24 Maybe you should have put in brackets "except his
25 mother and father and family?"



1 A I could have said that and didn't.

2 Q Yes, sir. And this is a letter, sir, of enormous
3 responsibility --

4 A Yeah.

5 Q -- because you are saying, in this letter, "this
6 man should never be released"?

7 A Yeah.

8 Q "He should go from 16 years old 'til the day he
9 dies and be taken out of the prison and put in a
10 grave", essentially --

11 A Well --

12 Q -- that's what you are saying?

13 A Yeah.

14 Q That's what this letter says; isn't it?

15 A Well that's -- that's not what it says, but I
16 understand your point of view, sir.

17 Q Well you said at this same page, just go down:

18 "... I would be unalterably opposed to
19 this individual ever gaining his freedom
20 again ..."

21 A Yeah, I see that.

22 Q That's -- it says, really, he should be taken out
23 in a coffin; that's what he's -- that's what you
24 are saying in effect, isn't it?

25 A Well, yeah, I don't see it that way but I



1 certainly said what I said there.

2 Q I mean isn't it true, sir, that the tunnel vision
3 that you -- I'm going to suggest to you you had --

4 A Okay.

5 Q -- the most terrible tunnel vision in this
6 case, --

7 A Yeah.

8 Q -- what was referred to in the Morin inquiry as
9 the 'staggering tunnel vision', is an expression
10 that Justice Kaufman used.

11 A Okay.

12 Q And that it was such that it really turned you
13 into David Milgaard's tormenter?

14 A No.

15 Q You wouldn't leave him alone, you had to keep
16 going at him.

17 A No, I don't agree with that, sir.

18 Q All right.

19 A I felt in view of the invitation that I came
20 across from the parole board, that it would be
21 legitimate for me to forward information to them.
22 That's what I did and I think there were about
23 three letters as the thing went on. It's --
24 it's -- you know, I was very concerned about other
25 events not involving the Milgaards in any sense in



1 which persons who turned out to be dangerous were
2 released when they could have been held if there
3 was better and more current information on them,
4 is how I would put it, but that clearly is not
5 what I'm --

6 Q In the literature, sir, on wrongful convictions,
7 there's two types of tunnel vision.

8 A Uh-huh.

9 Q The first type is the type which is based on a
10 belief of guilt and infects your decisions and
11 views so that you assume, as the police officer,
12 the prosecutor, the defence counsel, you have to
13 modify the words a bit to fit the defence, and I
14 suppose the trial judge too, but focusing on
15 police and prosecutor, it infects your decisions
16 and views such that you assume anything that may
17 point to something other than guilt must be wrong.
18 You follow that?

19 A That could be a danger.

20 Q Right. So, for example, if it was a prosecutor,
21 you have tunnel vision in a particular case, it's
22 going to impact on what you think is relevant
23 evidence; right?

24 A That's a danger for sure.

25 Q Right. And I'm going to suggest to you, sir, that



1 maybe that helps account for what you didn't
2 disclose to Mr. Tallis, you didn't disclose
3 documents because you decided they weren't
4 relevant because they didn't fit the bill for
5 David Milgaard's prosecution.

6 A That is not why I didn't, failed or did not do
7 that, sir.

8 Q It affects as well for a prosecutor what you are
9 going to disclose, what's relevant, what you are
10 going to disclose as sort of two parts of the same
11 thing in a way. Do you agree?

12 A Yeah, I think those are two considerations.

13 Q It's going to affect potentially what evidence you
14 believe should be led at the trial; right?

15 A I would think so.

16 Q For example, and I'm going to come to this later,
17 one of the things you decided not to lead in this
18 trial was David's statements to the police; right,
19 because you decided they weren't true? Well, that
20 was predicated on an assumption that he was
21 guilty; correct?

22 A Well, there's a discretion in the Crown, sir, as
23 you know --

24 Q Right.

25 A -- to lead or not lead statements of accused



1 persons. Because they gave one or two or three
2 does not put an onus on the Crown to lead them.
3 Now, the reason for that, of course, that would be
4 a statement not under oath and not subject to
5 cross-examination in that sense, but he did give
6 one or more statements and I clearly felt they
7 were in --

8 Q False, to give you a word?

9 A Well, more than that, sir. The first one I think
10 was rambling and ended up with sketches and so on,
11 but in any event, I decided not to lead them.

12 Q Right. And I'm going to suggest to you, sir, the
13 reason you didn't lead them was because you had
14 already decided that David Milgaard was guilty.

15 A No, that's not the reason.

16 Q That's not, all right. It's going to infect, sir,
17 what evidence you believe as a prosecutor should
18 be questioned by you as a prosecutor; fair?

19 A And what is that, tunnel vision?

20 Q Yeah.

21 A Yeah, in a broad sense it would.

22 Q And I'm going to suggest to you in this case, sir,
23 an application of that idea would apply to your
24 failure to question in your own mind how it was
25 that Nichol John and Ron Wilson came to completely



1 change their statements between March and May.

2 A Yeah.

3 Q You failed to question that because you had tunnel
4 vision by this time.

5 A I don't agree with that, Mr. Lockyer. They had
6 given original statements, they gave two more, the
7 ones I think we're talking about, March and May
8 here. The statements they gave in May I felt to
9 be correct, the ones they gave in March I felt
10 simply could not be true, and once they gave the
11 May statements, in my view they were doing their
12 very best to be truthful and accurate.

13 Q And the reason the ones in March couldn't be true
14 was because if they were true, you were
15 prosecuting an innocent man, and the reasons the
16 ones that they gave in May were true was because
17 if they were true, then indeed David Milgaard had
18 committed the crime?

19 A I don't agree with that --

20 Q You don't, all right.

21 A -- division, sir.

22 Q Another thing, sir, that tunnel vision can cause
23 in a prosecutor is it can cause you to ignore
24 theories that tend to demonstrate innocence, not
25 guilt; fair?



1 A I assume so.

2 Q Right. So in your case, for example, if we now
3 move to Milgaard, I'm talking general proposition,
4 and you are agreeing with the general
5 propositions, but you are saying you are not
6 agreeing with the specific propositions in the
7 context of the case --

8 A All right.

9 Q -- but I'm going to suggest to you in the context
10 of David Milgaard's prosecution, you, for example,
11 ignored or didn't give any consideration to the
12 problem caused by the state of Gail Miller's
13 clothing, you just saw it as a problem I can't
14 explain, doesn't mean I should then begin to
15 question David Milgaard's guilt; fair?

16 A Yeah. I think I said, sir, that I never did
17 understand or have it explained to me how the
18 clothing ended up like that. I said that in my --

19 Q Yes.

20 A -- closing address and the Chief Justice in his
21 charge I believe said that was something that they
22 could deal with as they saw fit. I didn't have an
23 answer for that, Mr. Lockyer.

24 Q It didn't fit the evidence that you were calling
25 to prove David Milgaard committed the crime.



1 A I don't see it that way, sir. There was a very
2 unusual situation with the clothing, we all know
3 about it. I did not ever figure out myself or
4 have anyone explain to me why it was that way.

5 Q But it was so easy to figure out, that she must
6 have had her coat removed, her dress pulled down
7 and then she got her coat back on before she was
8 killed.

9 A All right.

10 Q That had to have been what happened.

11 A All right.

12 Q Correct? So there it was in one of your documents
13 that we've already been through, your 95
14 documents, that this is what happened to (V2)-----
15 or (V1)-?

16 A Uh-huh.

17 Q But you didn't make the linkage because your mind,
18 I'm suggesting to you, was infected with an
19 absolute belief from day one to July 17th at
20 least -- 16th of 1997, that David had committed
21 the crime?

22 A I don't agree with that.

23 MS. KNOX: Before the witness answers, my
24 impression from that question is the suggestion
25 that the prosecutor had the (V2)----- and (V1)-



1 statements describing how the assaults on them
2 occurred and that in fact is not the case. Those
3 statements were not in his file and the
4 description of how they were assaulted was not
5 known to him.

6 MR. LOCKYER: I'm talking about the Penkala
7 April -- February 5th, '69 document which makes
8 the linkage which I talked about half an hour
9 ago.

10 COMMISSIONER MacCALLUM: Perhaps you better
11 rephrase your question then.

12 MR. LOCKYER: I phrased it in that very
13 context.

14 COMMISSIONER MacCALLUM: But you didn't say
15 Penkala did you? She didn't take it that way.

16 BY MR. LOCKYER:

17 Q I said in one of the documents that we've been
18 through in the file, meaning the Penkala document
19 of February 5th, you understood it that way, sir.

20 A I didn't, sir, as a matter of fact.

21 Q The linkage was made or the explanation was given
22 about how (V1)- and (V2)----- had had their
23 clothes removed and were then given a chance to
24 redress after they had been raped; right?

25 A That was in that document.



1 Q And I'm suggesting -- yes, right. And I'm
2 suggesting to you, sir, you didn't put two and two
3 together, as you should have, and realized that
4 that means David Milgaard couldn't have committed
5 the crime because you were so convinced that he
6 had, that anything that disturbed that theory just
7 had to be rejected and put to one side?

8 A No, sir, I do not agree with that.

9 Q You understand, sir, I think we could all
10 understand how police officers particularly can
11 become infected with tunnel vision, I think that's
12 an easy proposition to understand?

13 A I wouldn't, yeah, limit it to them, but I agree
14 with you.

15 Q Yes. I mean, there they are, particularly in a
16 ghastly case like Gail Miller's murder, it's
17 completely understandable that as police officers
18 who have seen the scene, have seen the body are
19 going to be outraged by what happened and
20 absolutely determined to try and catch the
21 culprit, that's a matter of human instinct?

22 A Yeah, I would not fault them for that obviously.

23 Q Yeah, nor me, and it's easy then for that human
24 instinct , and quite understandable, for that
25 human instinct to fall into a tunnel vision trap;



1 wouldn't you agree?

2 A I would think so.

3 Q Yes. And don't you think, sir, then that that's
4 where again it becomes so important, the role of
5 the prosecutor, for the prosecutor to see that
6 danger existing and to be in a very important
7 second line of defence?

8 A Yeah.

9 Q And question the police investigation and examine
10 it minutely to see whether it could be wrong
11 rather than to defer as we keep seeming to see you
12 were doing, to defer to those very police officers
13 in your consideration of how to prosecute?

14 A It's -- I think there's a real role for the
15 prosecutor to look carefully at all these things.
16 I do not -- I can't wrap that up in one sentence
17 with the suggestion that I kept deferring to
18 police officers in this case, because I worked
19 with the various evidence I had from police,
20 civilians, etcetera, sir.

21 Q We've heard you weren't picking up the phone to
22 say Penkala, since we talked about Penkala a
23 moment ago, tell me more about (V1)- and
24 (V2)-----, especially the clothing situation.

25 A Okay.



1 Q You weren't picking up the phone to speak to
2 Ullrich, why did you put these in the file, you
3 weren't picking up the phone to speak to Mackie
4 about his insertion of (V2)----- in one of his
5 reports and so on, you just weren't -- you weren't
6 playing that role of a second line of defence,
7 were you, Mr. Caldwell?

8 A Well, sir, to the best of my abilities, such as
9 they were, I attempted to treat the case very
10 carefully to sort out things that were not
11 evidence, to, you know, to construct the case as
12 carefully as I could. We did a very complete
13 preliminary hearing which virtually matched the
14 evidence that ended up going in at the trial,
15 Mr. Lockyer. I don't know what more I can say. I
16 agree with the principle.

17 Q There's a second kind of tunnel vision, sir, that
18 has been identified in the literature, and I just
19 want to read a passage to you from a book --

20 A Okay.

21 Q -- that was written in the United Kingdom in 1996,
22 it's called "In the Name of the Law" and it's by a
23 man called David Rose, "In the Name of the Law,
24 the Collapse of the Criminal Justice System."
25 It's published by Vintage in 1996. I can



1 provide -- I've shown this to Commission Counsel.
2 I meant to bring the book, I left it behind
3 unfortunately, I didn't bring it with me, and it's
4 about, it's a book that reflects on a large number
5 of wrongful convictions that have taken place in
6 the United Kingdom.

7 A All right, sir.

8 Q All right. And the book tells us about a phrase
9 that had been coined in the context of tunnel
10 vision by a police officer in these cases and I
11 just want to read the passage to you.

12 A All right.

13 Q It's at page 12 of the book.

14 "The following year, in September 1992,
15 Sir John Woodcock, the Chief Inspector
16 of Constabulary, went several stages
17 further. In an early public statement
18 of an analysis which has since come to
19 dominate police arguments about criminal
20 justice, he admitted that the artificial
21 'improvement' of evidence had been
22 widespread. However it derived from the
23 workings of the rest of the criminal
24 justice system, he insisted, which
25 had for decades connived in the



1 practice. He --"

2 Meaning Sir John Woodcock,

3 "-- coined a memorable phrase, 'noble
4 cause corruption'; the idea held by some
5 officers, that it was permissible for
6 police to fabricate evidence or commit
7 perjury in order to convict 'factually
8 guilty' suspects who would otherwise be
9 acquitted.

10 For example, before the
11 compulsory introduction of
12 contemporaneous note-taking in 1986,
13 police officers had to tell the courts
14 they had performed what Woodcock
15 described as 'the amazing feat of
16 memory', in recording complete
17 conversations with a suspect verbatim,
18 hours or days after the event. If
19 interrogations were carried out with two
20 officers present, both would routinely
21 claim to have produced the same
22 identical record -- while maintaining
23 they had not collaborated. Woodcock
24 said that the toleration of such
25 evidence by the courts had allowed



1 officers to believe this was 'only part
2 of the game', essential to shore up the
3 judicial system's eccentricities.

4 'The result is malpractice,'
5 Sir John went out, 'not out of malice or
6 desire for personal gain, but which
7 begins out of good intentions. Once an
8 officer has lied in one case and gets
9 away with it, then he or she feels less
10 compunction another time.'"

11 So that's the notion of notable cause corruption
12 which is obviously a corrupt form of tunnel
13 vision, sir, not the less maligned -- the more
14 benign form where it infects your decisions and
15 views so that you assume anything to the contrary
16 must be wrong, but rather that you corruptly
17 create evidence to create a situation that you
18 believe in; namely, to take David Milgaard, if a
19 police officer decided David Milgaard must have
20 committed the crime, to then create evidence to
21 prove that he had committed the crime. You
22 understand --

23 A Yeah.

24 Q -- the difference?

25 A What I go back to in that, Mr. Lockyer, I think it



1 mentioned both perjury, if I'm not mistaken, and
2 the improvement of evidence, which are, of course,
3 things that should not happen in my understanding.
4 Q Of course not, and I'm going to get into, sir, in
5 this regard the statements of Nichol John and
6 Ronald Wilson, and perhaps, Mr. Commissioner, this
7 would be a good time to break.

8 COMMISSIONER MacCALLUM: Yeah.

9 *(Adjourned at 11:56 a.m.)*

10 *(Reconvened at 1:34 p.m.)*

11 BY MR. LOCKYER:

12 Q Mr. Caldwell, just to -- one matter I left out in
13 the morning when I was talking about the, your
14 knowledge and appreciation of the potential
15 significance of the many crimes that Mr. Fisher
16 had in fact committed and a bunch of other crimes
17 that he had never actually been charged with,
18 Commission Counsel questioned you yesterday about
19 some of your evidence during the discovery
20 proceedings and I wanted to take you back to that
21 and just take you through it. It's at page 150056
22 that I want to start, and here we're in the midst
23 of the, your examination for discovery, sir. Some
24 of this Mr. Hodson read to you and I'm going to be
25 a little more, I'm going to take you right through



1 it. What you are being asked about here is the
2 conversation that you had with Mr. Carlyle-Gordge
3 back in 1983; all right?

4 A Yes.

5 Q 1099 question, you are being asked by Mr. Rodin:

6 "Q "Okay, dealing with page one of the
7 transcript --"

8 That is of your interview with Mr. Gordge.

9 A All right.

10 Q "-- I direct your attention to the first
11 page."

12 Q And just where you say, "Yeah, I think
13 to some extent things were in police
14 reports that didn't get in, probably
15 into evidence. Now, I think it's great
16 if you -- the investigation was done
17 this way, boom, boom, boom" --"

18 "Q -- "so on. And then there's at least
19 one place in there where they're talking
20 about other rapes where he was a
21 suspect, and that was never brought home
22 to him, and I think --"

23 Now, the "he" there would be where David Milgaard
24 was the suspect?

25 A That's right, sir.



1 Q Pardon?

2 A That is correct, sir.

3 Q Yes, it would have to be.

4 "... and that was never brought home to
5 him, and I think --" And then Gordge
6 says, "Okay." And it appears you say,
7 "Could be bloody well, you know,
8 slanderous."

9 And then the question from Mr. Rodin:

10 "I take it the other rapes you are
11 referring to are the series of Saskatoon
12 offences which Larry Fisher ultimately
13 pled guilty to?"

14 And you say:

15 "-- at this point, I can't say that that
16 crisply, if you will, but obviously at
17 that time I thought he was a suspect in
18 other rapes. Obviously they were not,
19 you know, brought home or attributed to
20 him, so I couldn't -- that makes sense
21 to me, but I can't narrow it necessarily
22 to that.

23 Q And the only other rapes that you'd have
24 had occasion to learn about, according
25 to your evidence, I believe, are those



1 that you read about in the police
2 reports or may have read about in the
3 police reports?

4 A Generally speaking, yeah, I'm sure
5 that's right.

6 Q Because you didn't see any press reports
7 of any rapes?

8 A Well, I have no memory of seeing them,
9 I -- in that period. I mean, I may
10 well have, but who knows.

11 Q Okay.

12 A Yeah, that's one of the cautions, Mr.
13 Rodin, that I was, I guess, talking
14 about. I'll still find the rest of it
15 somewhere, I think.

16 Q What are you referring to?

17 A The business of telling Carlyle-Gordge
18 of things that I didn't think he --

19 Q It's not necessary, Mr. Caldwell.

20 A Okay.

21 Q The transcript will speak for itself.
22 You've made your point quite clear. On
23 the four-page document your notes
24 indicate "Suggest omit."

25 A Okay."



1 Now, here we've suddenly moved onto the -- you
2 know what document we're talking about now?

3 A Well, this all relates to the, this whole thing
4 relates to the allegation of the bathtub incident
5 which was a Calgary-based venture.

6 Q That's not what you are saying here, sir.

7 A Okay. Well, I'm telling you, sir, that that is
8 what it relates to. Mr. -- I suggest --

9 Q Can I finish the passage I'm reading?

10 A All right, sir.

11 Q All right, and then I'll let you say what you
12 will.

13 A Okay.

14 Q "On the four-page document your notes
15 indicate "Suggest omit."

16 A Okay.

17 Q Do you agree with me, Mr. Caldwell, that
18 the transcript, Exhibit P-10 --"

19 That's the Carlyle-Gordge conversation,

20 "-- together with your notes, the
21 four-page notes which have been marked
22 P-9, I believe --"

23 "Q Suggest that you were aware of the other
24 rapes at the time of your prosecution of
25 Mr. Milgaard?



1 A Well, of some other rapes, I was aware
2 of some allegations of rapes. And the
3 way I read this, it seems to -- it
4 strictly deals with Milgaard, and I
5 know that none of that ever -- well,
6 ever came home to him. I'm not
7 suggesting it should have, but didn't
8 do that. And of course just -- I
9 think I tried to -- well, in any event
10 you couldn't essentially call evidence
11 of those rapes to prove this murder if
12 they did exist, unless you had some
13 very, very narrow heading of similar
14 act or something. It didn't happen
15 so --

16 Q I'm suggesting to you that what you knew
17 was based upon police reports which we
18 went over perhaps at painful length
19 yesterday --

20 A Yes.

21 Q -- indicating that the police
22 interviewed (V2)-----, (V1)- --

23 A M'hm, yeah.

24 Q -- took blood tests, did investigations?

25 A Yeah, I would think that my general



1 knowledge of that came from police
2 reports.

3 Q And you would agree then that the name
4 (V2)-----, (V1)-, (V9)----, (V4)--- then
5 were the other victims anyway --"
6 I think that should be they were the other
7 victims anyway,

8 "-- mentioned in the police report from
9 time to time?

10 A I think that's right. In other words,
11 what we went through yesterday, all of
12 those names showed up on the David
13 Milgaard prosecution file, as I
14 understand it, and the police reports
15 dealing certainly with some of them.
16 I think maybe in one case it was --"
17 And then you ask a question that doesn't really
18 pertain to this. Now, as I read that, sir, it's
19 quite, perfectly clear to me that your
20 conversation with Carlyle-Gordge, when you are
21 complaining that the other rapes weren't brought
22 up, that what you are referring to are the
23 (V2)-----, (V1)-, (V9)----, (V4)--- assaults
24 along with the other ones that you had in your
25 file, right, that's what you are saying here?



1 A The only way I can answer this to you is that that
2 Calgary episode and the heading of four things
3 that I told Mr. Carlyle-Gordge did refer to Mr.
4 Milgaard. They were never -- that bathtub thing
5 obviously was never brought home to him and I was
6 cautioning him not to print things under those
7 four headings, one of which being that, I'm sorry,
8 Calgary bathtub episode.

9 Q That's not what you are saying here, is it, sir,
10 in this discovery at all, it has nothing to do
11 with Calgary, it has to do with a series of
12 reports, police reports that you have in your file
13 relating to all the other victims, that's what you
14 are talking about here at this discovery
15 proceeding --

16 A Okay.

17 Q -- isn't it?

18 A Yeah, it is.

19 Q Yes.

20 A And it appears that I possibly got the two of them
21 run in together through fatigue in the process of
22 a lengthy examination for discovery with Mr.
23 Rodin.

24 Q All right. So we've finally got you to the point,
25 have we, that you've acknowledged that the link



1 you made when you answered Mr. Rodin's questions
2 regarding the other assaults that you had referred
3 to in your conversation with Carlyle-Gordge, that
4 the link you made about the other assaults was
5 with the assaults that you had in your files;
6 right, the (V1)-, (V9)----, (V4)---, (V2)----- and
7 other assaults. Correct?

8 A Yeah.

9 Q That's how you answered it?

10 A It appears to me that I wasn't entirely clear on
11 these matters.

12 Q I think you were entirely clear here, sir, but you
13 are now just saying you got it wrong at the
14 discovery, that's all you are saying isn't it?
15 You are saying your evidence here is utterly
16 wrong, the (V1)-, (V9)----, (V4)---, (V2)-----
17 files and the others had absolutely nothing to do
18 with what you meant when you were talking about
19 George, that's what you are saying now?

20 A At this time I don't know what the status of those
21 four statements or reports was.

22 Q I'm sorry, don't take us off subject, please, Mr.
23 Caldwell, stay on the point here. Don't start
24 going off on a tangent. I'm not that stupid, stay
25 where we are. At this discovery, sir, you were



1 asked about what you meant when you talked to
2 Carlyle-Gordge about the other rapes that weren't
3 brought up and you quite clearly acknowledged that
4 what you meant by that were the (V1)-, (V9)----,
5 (V4)---, (V2)----- victims along with the other
6 victims that were in your files; correct?

7 A It appears that way.

8 Q Right. It is that way, I don't know why you say
9 it appears that way, it is that way; isn't it?
10 It's as plain as daylight isn't it? We just went
11 right through it.

12 A I can see how it is here, sir.

13 Q Good. It's just taking a bit of time to have you
14 acknowledge how it seems, how it can be seen. And
15 it's interesting, sir, that you would -- that you
16 would think that way because what I'm really
17 suggesting to you is that when you spoke to
18 Carlyle-Gordge you had decided by this time,
19 tunnel vision being what it is, that all those
20 other rapes that you still remember, or sexual
21 assaults because they weren't all rapes, all the
22 other sexual assaults that you still remembered
23 reading about, although you say today you don't
24 remember, but back in '99, I think this was, you
25 did apparently remember quite well when you spoke



1 to Mr. Rodin, that you have now decided that David
2 Milgaard must have committed all of them as well.

3 A No, I don't read it that way, sir.

4 Q In other words, you had made the very link that
5 David Milgaard's counsel had been trying to make
6 for so long, that indeed the same person had
7 committed all those crimes, but you are now saying
8 that same person was David Milgaard, not Larry
9 Fisher?

10 A I was restricting Mr. Milgaard to the Calgary
11 bathtub episode and saying that Mr. Carlyle-Gordge
12 should not print anything that wasn't -- and that
13 clearly wasn't proven.

14 Q I know that's what you are saying today, sir. You
15 don't say anything about that at this discovery.

16 COMMISSIONER MacCALLUM: Didn't he
17 mention -- just turn it up a little bit.

18 MR. LOCKYER: Not that I saw. Maybe I'm
19 wrong.

20 COMMISSIONER MacCALLUM: Can you help us
21 out, ma'am?

22 MS. KNOX: If we go to either the
23 typewritten version of the handwritten transcript
24 or the handwritten transcript of the
25 Carlyle-Gordge interview, where the recording



1 starts there's an interruption of a sentence by
2 Mr. Caldwell and it is about Calgary, bad things
3 happened in Calgary, so if we bring up the
4 transcript, he did in fact discuss that
5 specifically with Mr. Carlyle-Gordge.

6 MR. LOCKYER: Right now I'm focused on the
7 time of the discovery.

8 COMMISSIONER MacCALLUM: I thought it was
9 in the discovery.

10 MR. LOCKYER: What date was that, was
11 that --

12 MS. KNOX: '97.

13 MR. HODSON: '96.

14 MR. LOCKYER: '96? I wasn't sure what year
15 it was.

16 COMMISSIONER MacCALLUM: We'll have to
17 scroll through the whole thing.

18 MR. LOCKYER: I'm focused on '96.

19 COMMISSIONER MacCALLUM: We began on
20 050056?

21 MR. LOCKYER: 56 through to 59.

22 COMMISSIONER MacCALLUM: Next page, please.
23 Next page, please. I must have got that
24 impression, Mr. Lockyer, from his answer at the
25 bottom there:



1 "... you were aware of the other rapes
2 at the time of your prosecution of Mr.
3 Milgaard?

4 A Well, of some other rapes. I was
5 aware of some allegations of rapes."

6 MR. LOCKYER: Right.

7 COMMISSIONER MacCALLUM: The way I read
8 this it seems to me it's still strictly with --

9 MR. LOCKYER: Yeah, but this would be the
10 rapes of (V2)-----, (V1)-, etcetera, that's the
11 whole context.

12 COMMISSIONER MacCALLUM: Okay.

13 A Mr. Lockyer, it was --

14 MR. LOCKYER: Let me --

15 COMMISSIONER MacCALLUM: I'm afraid I can't
16 find any other reference --

17 MR. LOCKYER: Right.

18 COMMISSIONER MacCALLUM: -- in the
19 discovery transcripts.

20 MR. HODSON: If we go to 149981.

21 COMMISSIONER MacCALLUM: Thanks.

22 MR. HODSON: 980 and 981.

23 MR. LOCKYER: It's the same transcript?

24 MR. HODSON: Yes. The next page down at
25 the bottom.



1 A Mr. Lockyer, the answer to 816 is what I'm
2 attempting to deal with here. If I may, it says,
3 'Well, it says, 'I certainly didn't read that in
4 the trial --'

5 BY MR. LOCKYER:

6 Q Could we go back? I just want to read this.

7 A Okay, that's fine.

8 Q Can we go back to 980? I'm now reading the bottom
9 four lines there. Thank you. Yes, and turn the
10 page. Okay. So earlier on you had said, you had
11 referred to the Calgary episode, and then Mr.
12 Rodin, I'm looking here on 241, carries on with a
13 quote where you refer to I think to some extent
14 things are in police reports that did not get in
15 evidence. And we're back to this boom, boom, boom
16 remark, and then you come to, he talks about you
17 being -- sorry, Mr. Rodin says, you were talking
18 about the police reports, you were talking about
19 him being a suspect in other rapes, etcetera.
20 Right?

21 A But, Mr. Lockyer, for me I would like to go back
22 to where we just were a moment ago, to the top of
23 I guess the last page.

24 Q You refer to the Calgary, the goings-on in
25 Calgary?



1 A Yeah, and I would like to read that. My answer
2 there was, 'Well, it says I certainly didn't read
3 that in the trial,' and that appears to be
4 speaking about the -- about Cadrain reporting some
5 bad goings-on in Calgary. 'I think that's the
6 famous bathtub episode, I would say at a glance
7 there.' And the question is all right, and
8 answer, and then it says, 'I certainly didn't read
9 that in the trial. I presume there should be a
10 'the' in there.' And then the question, something
11 about a criminal record. Now, this next -- oh,
12 this is -- I see, this is a question, but that 818
13 refers to the Calgary matter, sir.

14 Q No, 818 is moved on.

15 A Oh, I see.

16 Q You've moved on from there.

17 A Oh, back.

18 Q Now you are onto back, you are onto where I read
19 to you, albeit I have read you a passage further
20 along in the same examination, where you adopt the
21 idea that in fact what you were referring to when
22 you were talking about --

23 A Yeah.

24 Q -- police reports that didn't get into evidence,
25 that you were talking about the other --



1 A Yeah.

2 Q -- sexual assault incidents --

3 A Yeah.

4 Q -- that were contained in your file?

5 A Okay.

6 Q All right? You follow?

7 A I do, sir.

8 Q Yes.

9 A But what I said a minute ago, and I believe of
10 course that I am accurate and truthful in this, is
11 that during this exam for discovery, which was a
12 three-day matter in my case, I think I, in effect,
13 ran down, if you will, and agreed to some things
14 that I truthfully should not have done. I think
15 that's what we're seeing here. But that's --

16 Q Okay. So you say you specifically reject some of
17 the answers that you gave at your examination for
18 discovery; is that where we end up, sir?

19 A Well, I'd have to see them. What I am saying to
20 you, I know that I got fatigued as this thing went
21 on, and I believe that I agreed to some things
22 that I shouldn't have.

23 Q Because if what you are saying in the passage I
24 read to you to Mr. Rodin is correct, and if we go
25 to the document yesterday that we looked at, that



1 was given to us yesterday, 332049 going to 052, if
2 we read --

3 COMMISSIONER MacCALLUM: Excuse me.

4 MR. LOCKYER: Sorry.

5 MS. KNOX: If I could, just for one moment,
6 for the record. Copies of those documents were
7 provided to Commission Counsel yesterday, they
8 were provided to counsel for Mr. Milgaard in
9 1995-'96, in fact Mr. Rodin referenced them
10 during the examination for discovery. So these
11 weren't new documents given yesterday to counsel
12 for Mr. Milgaard.

13 COMMISSIONER MacCALLUM: No.

14 MR. LOCKYER: I'm sorry, I wasn't trying to
15 make a point that they'd just been thrown at us,
16 I just saw them yesterday, let me put it that
17 way, all right?

18 MS. KNOX: When did you get them?

19 MR. LOCKYER: I have no idea. I assume
20 that's correct, I wouldn't know, I wasn't around
21 in those days.

22 MS. KNOX: It's referenced in the
23 examination for discovery.

24 MR. LOCKYER: Okay.

25 BY MR. LOCKYER:



1 Q But if we now look at this, this passage from this
2 document, if what you were telling Mr. Rodin was
3 correct that I was reading to you, 'the other
4 rapes where he was suspect', what you would be
5 referring to there would be the (V1)-, (V2)-----,
6 and various other offences that you have listed in
7 your file; correct?

8 A No, sir, that's not correct.

9 Q I hear you saying it's not correct.

10 A Well I'm saying it, sir, because I believe it's
11 the truth.

12 Q All right.

13 A If I may go on, 'n.b. other rapes where he is
14 suspect', that --

15 Q Uh-huh?

16 A -- the "he" was Mr. Milgaard. Now the beginning
17 of this 'suggest omit list is re bathtub Calgary,
18 young girls reported by Cadrain', I suggested of
19 course none of that go into any story he was
20 writing; 'any witnesses or accused criminal
21 records if there were some'; 'generally things in
22 police reports that didn't get into evidence',
23 which is I think a motherhood statement, and 'n.b.
24 other rapes where he suspect'. The suspect, sir,
25 I was attempting to make sure that Mr. Cadrain --



1 pardon me -- Mr. Carlyle-Gordge did not, in
2 effect, slander Mr. Milgaard about things that
3 were -- had no business, you know, being brought
4 home to him in any way. That was what that was
5 about, sir.

6 Q You are not going to say to anyone at a later
7 date, Mr. Caldwell, that anything you may have
8 said at this Inquiry, if it's wrong, was just
9 because you were too tired; are you?

10 A I -- I think it would be too long a process, sir,
11 to sell that argument.

12 Q Right.

13 A But I -- it is a, it is a difficulty, sir, as I'm
14 sure you will appreciate. I could not say that
15 anything I said at this inquiry or case X was
16 wrong without a specific being looked -- shown the
17 thing.

18 Q So I'll move on to where I had left off at lunch,
19 the notion of noble cause corruption.

20 A Okay, sir.

21 Q And I want to look at it in the context of the
22 statements of Nichol John and Ronald Wilson.
23 First of all you had, obviously, the original
24 statements of Nichol John, Ronald Wilson, and of
25 course David Milgaard; right?



1 A Yeah. You mean the --

2 Q The March statements.

3 A -- the Inspector Riddell or the --

4 Q Well, he didn't take all three of them, --

5 A Okay.

6 Q -- in the case of John she gave her first
7 statement March 11th, '69.

8 A Uh-huh.

9 Q In the case of Wilson, Ronald Wilson and David
10 Milgaard, they both gave their statements on March
11 3rd, '69.

12 A Okay.

13 Q As I recall, Wilson was in jail at the time, and
14 David was in Vancouver -- he was out west, wasn't
15 he, Vancouver? Winnipeg, my mistake, he was out
16 east then.

17 A So there were --

18 Q Winnipeg.

19 A There were two, sir, or three, I'm sorry?

20 Q I'm sorry, two and one.

21 A Was there two statement for those three, or two?

22 Q No, they each gave one on those dates in March.

23 A Okay, that's fine. And then what?

24 Q Two of them on March 3rd and one of them on March
25 11th.



1 A All right, sir.

2 Q All right. And do you remember, sir, did you
3 compare the statements, the one with the other?

4 A The --

5 Q The contents in other words?

6 COMMISSIONER MacCALLUM: The contents of
7 which statements?

8 BY MR. LOCKYER:

9 Q The contents of those three statements, the one
10 with the other?

11 A Of one with the other of them? I may well have,
12 Mr. Lockyer.

13 Q If you had, sir, you would have noted a number of
14 comparisons between them. I'm just going to take
15 you through some of them. All right?

16 A Okay.

17 Q You'd have noted that in the case of all three of
18 them, and I can give references if anyone wants
19 them, that all three of them said that when they
20 came into Saskatoon they got stuck behind a car
21 that was already stuck in an alleyway; all right?

22 A Okay. I'm -- sir, you don't need to show it to
23 me, I'm assuming you are correct in what you're
24 saying.

25 Q I'm sure I'll hear complaints if I'm not correct.



1 A All right.

2 Q And that would presumably fit well in your mind,
3 when you read those statements, with the Danchuks;
4 if they got stuck behind a car that was stuck that
5 would be the Danchuks?

6 A No. I don't think, sir, at -- in those first
7 statements, that the -- that degree of detail
8 developed. In other words I, I wouldn't make that
9 leap to --

10 Q Sorry, in your mind, or in the statement?

11 A No, in general. Is it in something about Danchuks
12 in that statement?

13 Q No, they wouldn't have known about the Danchuks'
14 names, --

15 A Yeah.

16 Q -- but as you read them you could have said to
17 yourself, well, the three of them each say they
18 got stuck behind a car in an alleyway --

19 A Yeah.

20 Q -- and that, of course, matches what we now know
21 about the Danchuks who, indeed, got stuck, and
22 their car got stuck behind the Danchuks. That's
23 all I'm suggesting to you, nothing particularly
24 spectacular about it.

25 A If indeed I knew about them at that time, and I



1 can't think that I made that comparison,
2 Mr. Lockyer.

3 Q Well you had the Danchuk statements at a very
4 early date, I would think, as a part of your Crown
5 brief?

6 A Frankly, I don't know. I know they came
7 eventually.

8 Q All three of them said they went into the house of
9 this person behind whose car they got stuck --

10 A Uh-huh.

11 Q -- and explained how a tow truck came by to help
12 the Danchuks or the person, they didn't give the
13 name, --

14 A Okay.

15 Q -- and themselves?

16 A All right, sir.

17 Q So that would have made some sense to you in the
18 context of what the Danchuks were saying as well?

19 A It would.

20 Q Correct?

21 A Yeah.

22 Q They also, they all three of them said that they
23 then found Albert Cadrain's home, --

24 A Uh-huh.

25 Q -- and that David then drove the car around the



1 block, at which point the transmission broke, --

2 A Uh-huh.

3 Q -- in the statements; all right?

4 A I assume that's correct, sir.

5 Q Both Ronald Wilson and Nichol John explained that
6 David was never out of their sight for more than
7 one to two minutes, and that would have been when
8 he drove around the block?

9 A I'm sure that's in the statement, sir.

10 Q Right. And both Ronald Wilson and Nichol John,
11 and David really by implication, I'm not sure he
12 ever specifically said it because he wasn't
13 specifically asked, --

14 A Uh-huh.

15 Q -- but Nichol John and Ronald Wilson both said
16 that David, or indeed none of them, had a knife
17 that morning; right?

18 A That, I'm sure, is right.

19 Q So you also had the benefit, sir, and I think My
20 Friend went through this in his questioning of
21 you, that there were favourable comments about the
22 credibility of all three of them, David himself,
23 David Milgaard himself, Ronald Wilson, and Nichol
24 John, --

25 A Uh-huh.



1 Q -- there were favourable comments about their
2 credibility contained within the police reports
3 that you would have read?

4 A I'm sure that happened.

5 Q That were made -- let me finish --

6 A Yeah.

7 Q -- that were made long before May of 1969?

8 A I'm sure that in the police reports --

9 Q Right?

10 A -- there were favourable comments made by the --

11 Q That you would have read?

12 A -- just a minute, sir -- by various policeman
13 about them. I recall that myself and I am sure
14 that's the case.

15 Q You recall that, you say?

16 A I do.

17 COMMISSIONER MacCALLUM: I misunderstood
18 the question I guess, I'm sorry, I thought you
19 were saying there were favourable comments
20 inherent in these statements?

21 MR. LOCKYER: No, no, favourable comments
22 in police reports --

23 COMMISSIONER MacCALLUM: Police reports?

24 MR. LOCKYER: -- by officers, about each
25 one of them, about what they'd first said to the



1 police.

2 A That's how I took it, Mr. Lockyer, and I agree
3 with you.

4 BY MR. LOCKYER:

5 Q All right. For example, and I'll help you out,
6 Mr. Commissioner, Riddell described Wilson as
7 being 'straightforward with apparently nothing to
8 hide', that's 042090 that Riddell says that in a
9 report.

10 A Uh-huh.

11 Q Karst said about Nichol John, and this is at
12 009255, that 'she appears very convincing with her
13 story, if one believes her there is no way David
14 Milgaard can be connected with this crime.'

15 In the case of David Milgaard,
16 in the same report, Karst said that there -- there
17 was -- there seemed to be no way to shake David
18 Milgaard's story.

19 A Yeah. So those are all favourable things, and
20 I --

21 Q Right.

22 A -- accept they were said in that way, sir.

23 Q So, when you think about it, you are then
24 confronted, by the time you get to look at these
25 various -- when you -- by the time you get to look



1 at your file, --

2 A Uh-huh.

3 Q -- and let's assume maybe we're in September,
4 August --

5 A Okay.

6 Q -- I forget when the preliminary was but let's say
7 just before the preliminary -- when did the
8 preliminary start, August -- August, right, so
9 let's say we're in late July --

10 A All right, sir.

11 Q -- as a fair thought; you had a chance to read
12 these three statements and see that there were a
13 series of similarities between them where the
14 three of them had described, really, much the same
15 series of events that had taken place that
16 morning?

17 A I think that's fair, sir.

18 Q All right. You also had the comments by these
19 officers about the apparent credibility of each
20 one of them as it happened, right, --

21 A Yes, that's --

22 Q -- in their police reports? And there was no
23 suggestion anywhere in the police reports, and it
24 didn't really seem to make much sense, that the
25 three of them had got together to create their



1 stories, certainly never suggested anywhere --

2 A I can't --

3 Q -- they matched stories?

4 A I can't say it was, sir.

5 Q Uh-huh. So the question then becomes, if you were
6 analysing these statements with an open mind, why
7 would you have decided, as you've put it not just
8 in the past but you've put it at this Inquiry, --

9 A Uh-huh.

10 Q -- that their statements couldn't be reconciled
11 with the known facts or some -- let me take you
12 there.

13 A Okay.

14 Q October 4th at page 15944, I just want to find
15 it --

16 A Okay.

17 Q -- because I've marked it up, you said here:

18 "A Well, I concluded that in my view the
19 statements certainly given by Wilson, if
20 not John, and if not Milgaard, were --
21 couldn't be reconciled with what were
22 the known facts, so I, in that sense,
23 Mr. Hodson, I wouldn't place, what did
24 you ask me, much strength in it or -- I
25 wouldn't -- because I don't think it was



1 true is what I'm saying."

2 A Uh-huh.

3 Q Do you remember saying that at the Inquiry, sir?

4 A Yeah, I no doubt did.

5 Q What known facts could their statements not be
6 reconciled with? That's what I don't understand.

7 A I couldn't tell you that without looking at the
8 statements, sir.

9 Q Well, you know, that's -- I'm not sure how to deal
10 with that, because I was worried you were going to
11 say that, I don't want to -- I don't think we can
12 all sit here for 45 minutes while you go through
13 them and compare one to the other. Perhaps what
14 I'll say, maybe you can do that overnight, and
15 Mr. Wolch might want to come back to it.

16 COMMISSIONER MacCALLUM: Well don't leave
17 us with the impression that it was unjustified
18 without giving him a chance to look at the
19 statements.

20 MR. LOCKYER: No, no, sorry, you didn't
21 hear me, Mr. Commissioner. We can't all sit here
22 for 45 minutes -- well we could but prefer not
23 to -- so perhaps you could look at the statements
24 overnight and Mr. Wolch might follow up on this
25 when he comes to question you tomorrow.



1 BY MR. LOCKYER:

2 Q All right?

3 A Yeah, if someone --

4 Q So it won't be left hanging, Mr. Commissioner,
5 that's the whole point, I don't want it to be left
6 hanging any more than what you do.

7 A Mr. Lockyer --

8 Q But certainly what I have taken you through so
9 far, sir, insofar as I've tried to highlight
10 certain parts of the statements, --

11 A Uh-huh.

12 Q -- they sound very credible and convincing; don't
13 they?

14 A No. What you have taken me through, sir, was
15 three or four policeman who had favourable
16 opinions of these three or four witnesses
17 individually, which I think is -- I know happened,
18 and I think there's nothing, you know, remarkable
19 about that. I'm --

20 Q I've highlighted the contents of statements for
21 you too, if you remember, --

22 A Yeah.

23 Q -- the three of them, how they matched about --

24 A Okay.

25 Q -- how they all broke down behind a car that was



1 already stopped, or they got held up by a car that
2 had broken down in front of them, a tow truck
3 came, --

4 A Yeah.

5 Q -- and they went to the house and so on.

6 A I recall that.

7 Q There was all these similarities which I can
8 imagine we can now assume were true given that we
9 all now acknowledge that David didn't commit the
10 crime, but leaving that aside, I don't know what
11 you mean and I haven't been able to work it out
12 what you mean by "they didn't match with the known
13 facts"? I'm going to suggest to you rather the
14 contrary, they could be reconciled with the known
15 facts, and if they weren't reconciled with the
16 known facts you might have expected the police,
17 back at the time the statements were given, the
18 very investigators themselves, not to be recording
19 notes about how they seemed to be, in effect, --

20 A Uh-huh.

21 Q -- good witnesses in what they were saying, that
22 you might have expected them to, themselves, have
23 noticed, if it were true, that their statements
24 couldn't be reconciled with the known facts, but
25 there is no document to that effect at all in the



1 police reports?

2 A Well I wouldn't be surprised, sir, if, as time
3 went on, various of those investigators changed
4 their view over the witnesses. That's a
5 possibility.

6 Q Oh, I've no doubt, by the time they decided David
7 Milgaard had killed Gail Miller, they'd decided
8 that those statements couldn't be reconciled with
9 the known facts. That's the point. That's tunnel
10 vision at work here.

11 A Yeah.

12 Q If you know, in fact, that David Milgaard killed
13 Gail Miller --

14 A Uh-huh.

15 Q -- then of course they couldn't be reconciled with
16 the known facts, but that presupposes the known
17 fact that he killed Gail Miller in the first
18 place; do you see the point?

19 A But, sir, that's not what I am speaking about.

20 Q Right. Well I'm going to give you a chance,
21 overnight, to see if you can find out what you
22 were speaking about; all right?

23 A Okay.

24 COMMISSIONER MacCALLUM: I remember him
25 being examined by Commission Counsel, and I think



1 one thing he mentioned was an indication in the
2 statements in question that they hadn't been in
3 Saskatchewan -- in Saskatoon on that morning, as
4 an example.

5 MR. LOCKYER: Okay.

6 COMMISSIONER MacCALLUM: So I, talk about
7 tunnel vision being at work, I don't want
8 selectivity being at work in this examination.

9 MR. LOCKYER: You don't want what?

10 COMMISSIONER MacCALLUM: Selectivity,
11 pointing out portions of a statement without
12 showing it to the witness.

13 MR. LOCKYER: I'm sorry, the statement said
14 they hadn't been in Saskatoon?

15 COMMISSIONER MacCALLUM: That's what I
16 recall him saying as one difficulty with the
17 statements before.

18 MR. LOCKYER: But the statements say they
19 were in Saskatoon.

20 COMMISSIONER MacCALLUM: I don't know, I
21 don't know what the statements say, you won't
22 show them to him.

23 MR. LOCKYER: We've been through them
24 countless times in this Inquiry.

25 COMMISSIONER MacCALLUM: I mean now,



1 Mr. Lockyer, obviously now.

2 MS. KNOX: Mr. Commissioner, if I can, I
3 was arising on the same point but on a slightly
4 different approach to it.

5 There were other known facts
6 that came into the possession of the prosecutor
7 as this case was being investigated that caused
8 the credibility or the overall reliability of
9 these statements to come into question. A
10 striking one, for example, --

11 MR. LOCKYER: No, no, hang on, counsel is
12 not allowed to brief her client.

13 MS. KNOX: I'm not briefing my client, I'm
14 asking that --

15 MR. LOCKYER: It sure sounds like it.

16 MS. KNOX: -- the facts be put properly.
17 For example, in his file there was a police
18 report of a break-in at elevators in Aylesbury,
19 or somewhere in Saskatchewan, the first
20 statements said they came here. One made
21 reference to stopping for coffee at Davidson,
22 when the statements were investigated it was
23 determined that they'd done a break and enter,
24 stolen a flashlight, etcetera, etcetera. So
25 there were lots of known facts that came into



1 possession of Mr. Caldwell after those statements
2 were taken and that's one very concrete
3 illustration of it.

4 COMMISSIONER MacCALLUM: That's fair, she
5 can bring up an illustration of it.

6 But I -- at any rate, for
7 obvious reasons, I'm not going to allow this to
8 go on any longer. You've said yourself,
9 Mr. Lockyer, the best thing to do is to leave it
10 overnight and allow the witness to look over the
11 statements and then he can -- a return can be
12 made to the subject matter tomorrow if need be,
13 so that's all. He can't answer you now.

14 MR. LOCKYER: I mean, I'm sorry, I'm the
15 one who suggested that, I don't know why I'm
16 coming in for criticism on this, I suggested
17 that. Seemed like --

18 COMMISSIONER MacCALLUM: You are coming in
19 for criticism because you won't leave the
20 subject, you came right back to it.

21 MR. LOCKYER: No, no, I'm just pointing out
22 the things that he said that are what he should
23 be bearing in mind. He said that they couldn't
24 be reconciled with the known facts, and I've
25 asked him to come back tomorrow and tell us what



1 he meant by that.

2 COMMISSIONER MacCALLUM: Fine.

3 MR. LOCKYER: And I'll take him to some
4 other passages where he said the same thing and
5 ask him to take -- bear that in mind too.

6 But I must say, Mr.
7 Commissioner, I don't understand your point about
8 saying they weren't in Saskatoon, I --

9 COMMISSIONER MacCALLUM: Well,
10 Mr. Lockyer --

11 MR. LOCKYER: We've been over these
12 countless times.

13 COMMISSIONER MacCALLUM: Well, I'm only
14 going by memory, if my memory is wrong, fine,
15 we'll find out as soon as he gets the statements
16 in front of him.

17 MR. LOCKYER: Well you said it with a
18 criticism of me about something about tunnel
19 vision and that I am being selective, and I'm
20 sorry, I find that difficult to deal with.

21 COMMISSIONER MacCALLUM: Well, that is
22 being selective, If you are only --

23 MR. LOCKYER: I'm not being selective, not
24 at all.

25 COMMISSIONER MacCALLUM: If you are going



1 to bring out points in a statement without
2 showing a statement, how many times have you run
3 into this problem in cross-examination?

4 MR. LOCKYER: With you, many times, but
5 with respect, I'm not selective in my
6 cross-examinations, period.

7 COMMISSIONER MacCALLUM: That is no
8 respect. You are, at this moment, at any rate.

9 MR. LOCKYER: I get -- sorry -- I get
10 criticized time and again, Mr. Commissioner, and
11 I have some difficulty with it, and I'm allowed
12 to protest if I have that kind of difficulty, and
13 I do.

14 COMMISSIONER MacCALLUM: Well I'm sorry
15 about that, sir, but the fact of the matter is
16 your cross-examination is always argumentative,
17 and it is inflammatory, and you simply have to --

18 MR. LOCKYER: Uh-huh.

19 COMMISSIONER MacCALLUM: -- accept
20 criticism if you are going to carry on
21 cross-examination in that manner. Am I supposed
22 to sit here and listen to argument indefinitely,
23 put in the guise of cross-examination, do you
24 expect me to do that?

25 MR. LOCKYER: I expect you to listen to my



1 cross-examination, Mr. Commissioner, and draw
2 from it what you should, and I'm sorry you don't
3 like my style. I'm not sure what else to say.

4 COMMISSIONER MacCALLUM: You don't have to
5 say anything.

6 MR. LOCKYER: I don't get criticised for it
7 elsewhere.

8 COMMISSIONER MacCALLUM: You don't have to
9 say anything else, Mr. Lockyer, nothing at all.

10 MR. LOCKYER: Uh-huh.

11 COMMISSIONER MacCALLUM: Yes, ma'am?

12 MS. KNOX: Once again, just as a
13 clarification, as I -- and I don't want to get
14 drawn into this particular debate -- but these
15 statements and the references that Mr. Lockyer
16 put to the witness about assessments of
17 credibility made by the police happened in May,
18 there was a subsequent unfolding of various
19 pieces of evidence over the ensuing months and
20 what was established or what were believed to be
21 known facts. So to suggest that my client can go
22 through those three statements tonight and then
23 determine what the known facts are doesn't seem
24 to me to give me -- give any indication of how
25 that could satisfy the known facts. It can give



1 him what they said at the time, however, there is
2 a whole police report and a series of statements
3 and lab reports, and so forth, that go to facts
4 that he knew after, between the time of these
5 initial statements and when he took the matter to
6 preliminary inquiry and subsequently to trial.

7 So I have a little difficulty,
8 and particularly since I can't talk to Mr.
9 Caldwell as he is under cross-examination, as to
10 how the suggestion by My Learned Friend is going
11 to allow for him to be able to assess that
12 statement. And I think, by the look on your
13 face, I'm not making a lot of sense and maybe
14 somebody can help me with that.

15 COMMISSIONER MacCALLUM: No, it's all
16 right. The matter, as I see it, is this: Mr.
17 Caldwell has objected fairly, I believe, that he
18 can't simply answer the question without
19 reference to the statements in question, so we
20 are going to take an adjournment, and I want Mr.
21 Caldwell to be given written copies of the John
22 statement of March the 11th and the Milgaard and
23 Wilson statements of March the 3rd, and then you
24 can return to the question after the adjournment.

25 MR. LOCKYER: Mr. Commissioner, I'm flying



1 out tonight, this -- I have to complete my
2 cross-examination today, as everyone here has
3 known for some time.

4 COMMISSIONER MacCALLUM: Well, you can
5 continue on a different subject if you want, but
6 --

7 MR. LOCKYER: That's why I said Mr. Wolch,
8 perhaps, could follow up on the questions when he
9 comes to question this witness.

10 COMMISSIONER MacCALLUM: All right.

11 A Mr. Commissioner --

12 BY MR. LOCKYER:

13 Q In the same --

14 A I'm sorry, should I deal with --

15 COMMISSIONER MacCALLUM: No, no, don't come
16 back to that subject, if that's what you are
17 thinking of.

18 A Of the three statements?

19 COMMISSIONER MacCALLUM: No.

20 A All right. I -- that's fine.

21 BY MR. LOCKYER:

22 Q Something else you said on October 4th, sir, in
23 this context I would also like you to consider
24 overnight when you look at the statements.

25 A Okay.



1 Q This is on October 4th at 15982.

2 COMMISSIONER MacCALLUM: 15982? Oh, this
3 is the transcript?

4 BY MR. LOCKYER:

5 Q It is, of October the 4th. You said:

6 "Q And do you recall whether ...",
7 and you are talking about Mr. Milgaard's
8 statement here, sir:

9 "Q And do you recall whether you had made
10 any impressions about that statement
11 ...",
12 meaning Mr. Milgaard's statement:

13 "... as far as your assessment of the
14 case against him?

15 A Well, I don't recall the details now,
16 I don't -- at that time I didn't
17 believe it represented an accurate
18 account of what had happened.

19 Q And why was that?

20 A Well I'd have to see it, sir, versus
21 the evidence that I knew about then."

22 So will you also please do the same exercise
23 overnight, please, in that regard?

24 A If I'm having to, sir, I can.

25 Q Uh-huh.



1 A I can.

2 COMMISSIONER MacCALLUM: "That statement"
3 refers to what?

4 MR. LOCKYER: David Milgaard's statement.

5 BY MR. LOCKYER:

6 Q And then, sir, on October the 27th, which was last
7 Thursday -- yes -- 17503. This is in the, this is
8 a part of the transcript, and I don't have the
9 original reference from the Flicker interview,
10 sir, --

11 A All right.

12 Q -- but this is a part of the transcript of the
13 Flicker conversation that was played to us on
14 Thursday --

15 A Very good, sir.

16 Q -- taken out of the Commission hearing transcript
17 rather than the original transcript of the
18 conversation itself.

19 A All right.

20 Q And, again, you said:

21 "Now, the first round of statements
22 given by these people to Inspector
23 Riddell in Regina, my memory tells me it
24 was all three, Milgaard ... Wilson and
25 John, were false, period. And my memory



1 is, and, and I'll have to leave it at
2 that, that they were simply all false,
3 and as the rest of the investigation
4 went on, you could very clearly tell
5 that they were false."

6 A Uh-huh.

7 Q And this seems to be what the Commissioner was
8 saying:

9 "For instance, saying they hadn't been
10 in Saskatoon or had just driven through,
11 or I don't even remember the details.
12 But there's a lot of other supporting
13 evidence against which you could judge
14 them and very quickly figure out they
15 were not correct."

16 All right?

17 A That was my --

18 Q And I want you to go through that, sir, when
19 you -- bear that statement in mind when you look
20 at these statements overnight, because presumably
21 today, knowing what we know now, you should sort
22 of eat those words; is that fair?

23 A No, I don't think that, sir.

24 Q You don't? You still think the statements were
25 false?



1 A The orig -- the statements I have in mind in my
2 memory were false in those very kind of broad
3 generalizations such as --

4 Q I want to explore this.

5 A Okay.

6 Q So you are saying that, even today, you think that
7 David Milgaard, Nichol John, and Ronald Wilson
8 lied to the police in their March statements; is
9 that what you are saying?

10 A I would like to look at them in the manner I've
11 been asked to, sir, and come back, and I could
12 maybe be more use.

13 Q All right. So you are not necessarily saying what
14 I said --

15 A Well, I'd need to look at them, Mr. Lockyer.

16 Q -- but you might be saying then?

17 A Who knows.

18 Q You don't know?

19 A Who knows.

20 Q I see. Hmm. It reminds me, sir, in the Guy Paul
21 Morin Inquiry, that the Crowns took the position
22 that they still thought the jailhouse informants
23 had heard Mr. Morin confess to the crime, but Mr.
24 --

25 COMMISSIONER MacCALLUM: Is this a



1 question?

2 MR. LOCKYER: Yes, it is.

3 COMMISSIONER MacCALLUM: Okay.

4 MR. LOCKYER: That --

5 MS. KNOX: Mr. Commissioner, before the
6 question is put, we've at various times this
7 morning had Mr. Lockyer quote excerpts or
8 examples from the Morin report.

9 COMMISSIONER MacCALLUM: Uh-huh.

10 MS. KNOX: As far as I know Mr. Caldwell
11 hasn't read the Morin report, I haven't read the
12 Morin report in totality, and I'm not sure what
13 it brings to him to give him this information
14 from another forum and say 'judge yourself by
15 that', or to that effect. He can only stand up
16 to what he did and why he did it in 1969-1970.

17 The Morin report is a document
18 of the late '90s I believe, or early 2000, out of
19 Ontario, and it has nothing to do with what my
20 client did in this case, and the continual
21 referencing it I submit to you, sir, is of no
22 purpose and is an improper line of questioning
23 with this witness.

24 COMMISSIONER MacCALLUM: Well I -- we'll
25 let him finish the question, perhaps it has



1 relevance.

2 MR. LOCKYER: It's not a bad objection
3 actually, Mr. Commissioner, I'll carry on. I
4 will withdraw the question.

5 BY MR. LOCKYER:

6 Q So then we come to their next story, sir, Wilson
7 and John in May -- and, again, I'll happily take
8 you to the actual references if anyone wants me
9 to, but for the sake of moving along, and we've
10 looked at these statements countless times in the
11 course of this Inquiry -- Wilson's new statement
12 in May, he now adds in or changes, first of all he
13 now says there was a knife, that David Milgaard
14 had a knife, and purports to identify the knife
15 from a group of five that are shown to him by the
16 police?

17 A That's right.

18 Q Right?

19 A I believe that's right.

20 Q And indeed picks, I don't think it was the actual
21 knife, but an identical knife to the one found
22 under Gail Miller's body?

23 A I think it was one purchased because of the --

24 Q Yes.

25 A Clearly it resembled the broken one, Mr. Lockyer,



1 if I'm not wrong.

2 Q Uh-huh. He introduces a second breakdown of the
3 car --

4 A Uh-huh.

5 Q -- or a second stopping, which was a breakdown,
6 before they stopped behind the broken-down car of
7 the Danchuks?

8 A All right, sir.

9 Q All right. He now introduces a period of time
10 when he was indeed separated from David Milgaard
11 that morning when they each got out of the car and
12 went in different directions?

13 A All right.

14 Q He is now sure that David Milgaard was the person
15 who killed Gail Miller?

16 A Yeah, I believe that's correct, sir.

17 Q Yes. He introduces the idea, for the first time,
18 that David Milgaard threw a compact out of the
19 window --

20 A Yeah.

21 Q -- en route after they left Saskatoon?

22 A I'm assuming, Mr. Lockyer, that was the first time
23 that was introduced, and I agree with you.

24 Q It was.

25 A Yeah.



1 Q He introduces the claim that David Milgaard had
2 stabbed Gail Miller; he brings in that she had --
3 sorry -- that he had, he understood, put her purse
4 in a trash can?

5 A Yeah, that's right, sir.

6 Q And of course you knew that her purse had been
7 found in a garbage can; is that right?

8 A I knew that some time previous, so --

9 Q Right, McCorriston had referred to finding it on
10 February 3rd?

11 A Right, and it would be in police reports.

12 Q Just three days after her murder McCorriston found
13 it?

14 A I'm sure that's correct, sir.

15 Q Yes. So if we'd look at what Wilson adds in in
16 May, he has added in a number of items, but two
17 items particularly would seem to suggest that he
18 was at the scene of the crime; one is the
19 identification of the knife, agreed?

20 A Umm, yes, sir.

21 Q It would be hard for him to identify the knife if
22 he hadn't seen it?

23 A Yeah.

24 Q Right?

25 A That's correct.



1 Q And, as well, the fact that David had put Gail
2 Miller's purse in a trash can; hard for him to
3 know that unless he knew it had happened?

4 A I would agree with you.

5 Q Yes. So there are two things there that seem to
6 contain knowledge that would put him at the scene
7 of the crime; would you agree?

8 A I would.

9 Q Yes. Which is a kind of classic denom -- I don't
10 know if denominator is the right word, the kind of
11 thing you look for if you want to know whether a
12 statement is true or false; right?

13 A I don't follow you on that one, sir.

14 Q Well, it's a way of corroborating the truthfulness
15 of a statement of someone if they are providing
16 you with information about a crime scene that
17 would really seem to necessitate them having been
18 at the crime scene in the first place?

19 A Yes, and it could be checked against facts known
20 about the crime scene, etcetera.

21 Q Which in this case is true of Wilson at least in
22 those two regards particularly?

23 A I would agree with you, sir.

24 Q Yes, all right. And then Nichol John in her new
25 statement in May, she adds in, or changes her



1 statement in such a way that she now, just like
2 Wilson, identifies a second breakdown?

3 A I assume that's correct, sir.

4 Q And says it happened at the funeral home?

5 A Yeah, I'm sure you are right, Mr. Lockyer.

6 Q I am.

7 A That's fine.

8 Q I'll give references if anyone wants to challenge
9 it.

10 A Not on my account anyway.

11 Q All right. And the funeral home, you'll remember,
12 she identified during a trip around the area with
13 Mackie in the car. Do you remember that?

14 A I do, sir.

15 Q Right. And then introduced or incorporated it
16 into her statement?

17 A I'm sure that's -- yes.

18 Q She also talks of the maroon-handled knife; right?

19 A Yeah, no doubt.

20 Q She also talks of how Wilson and, Ronald Wilson
21 and David Milgaard went their separate ways and so
22 David Milgaard was alone for a period of time in
23 direct contradiction of her March statement?

24 A I'm sure that's right.

25 Q All right. She also talks about the purse and the



1 garbage can?

2 A Yes, sir.

3 Q Right. So when you come to look at these -- when
4 you come to look at her statement then, sir,
5 insofar as her statement would seem to
6 legitimately place her at the scene of the crime,
7 you've got the funeral home?

8 A Yes.

9 Q We know the crime happened near a funeral home?

10 A Right.

11 Q We've got the maroon-handled knife?

12 A Right.

13 Q And we know that's found under her body, and we've
14 got the purse in the garbage can and we know that
15 the killer threw the purse into the garbage can?

16 A That's right, sir.

17 Q All right. One of the particularly interesting
18 things about the purse in the garbage can, sir,
19 although you say you didn't know it at the time,
20 is the script. Can we go back to the script,
21 301002 is the bundle, 301019 is the page, because
22 neither of them had said anything, neither John
23 nor Wilson, just for your -- take a look, sir.

24 A Oh, yes.

25 Q Neither John nor Wilson had said anything about a



1 purse in a garbage can when they spoke to the
2 police in March, obviously not because when they
3 spoke to the police in March they said nothing
4 that would incriminate David, or either of them
5 for that matter, in the murder of Gail Miller.

6 A All right, sir.

7 Q When you look at this document written a week
8 before they start talking about the purse in the
9 garbage can, you see here, right there --

10 A You want me to look at it now?

11 Q Yes.

12 A Okay.

13 Q It's being brought up for us:

14 "He --"

15 And that would be David Milgaard,

16 "-- may have been intent on keeping the
17 purse and it is put in garbage after
18 Wilson looks for money in it, and at
19 time Nichol John returns to car."

20 A Uh-huh.

21 Q So you see there you may not have known this at
22 the time from what you've told us, but you can see
23 there that the police are there, in a sense,
24 predicting what's one of the items that I focused
25 on in their two statements. Do you see that?



1 A Yeah, he says he may have been intent, etcetera,
2 and further on he says:

3 "... after Wilson looks for money in it,
4 and at time Nichol John returns to car."

5 Mr. Lockyer, I have no memory anywhere of hearing
6 that Wilson looked in that purse for money.

7 Q No, no, I'm not interested in --

8 A Well --

9 Q In fact, if you read on, two lines down:

10 "Wilson has purse, goes through it and
11 puts it in garbage can while waiting on
12 Milgaard who he is aware is raping
13 Miller."

14 So that's the second --

15 A Another hypothesis.

16 Q It is, but the important aspect of the hypothesis
17 is the way Mackie, before he gets to deal with
18 Wilson and John a week later, has already got it
19 in his mind that they would know something about
20 the purse being in the garbage can. You see that?

21 A I see that.

22 Q And low and behold in May that's what they say.
23 Sorry, a week later that's what they say.

24 A That paragraph begins with or. Apparently he's
25 putting out two or three things that may have



1 happened, the way I'm reading it.

2 Q I'm not sure that has anything to do with my
3 point. The point I'm making, sir, is that Mackie,
4 in drafting this document, has focused on the
5 purse in the garbage can which, low and behold, a
6 week later he hears about, or we hear about from
7 Nichol John and Ronald Wilson; right?

8 A I notice, and I haven't read this thing, sir, but
9 I notice they deal with various other items from a
10 glance at the screen.

11 Q They do, and many of those items also appear in
12 these statements.

13 A Okay.

14 Q But right now I'm not focused on those, I want to
15 just focus on a few others if I may, all right?

16 A Fine.

17 Q And I want to take you through, sir, why I would
18 suggest on the one hand you might believe the new
19 statements --

20 A All right.

21 Q -- of John and Wilson, and on the other hand you
22 might not believe them. Let's start with why you
23 might believe them. First of all, once again, in
24 a sense, like in March, they are both saying
25 similar things in May; right?



1 A You mean to each other, sir?

2 Q No, to the police. They are giving similar
3 stories to the police in May when they give their
4 new statements.

5 A But, Mr. Lockyer, I'm assuming you are suggesting
6 similar to each other's statements?

7 Q Correct.

8 A Yeah, that's what I --

9 Q They are not identical, but they are similar.

10 A That's what I was wondering about, and they
11 certainly would be similar.

12 Q Right. So that's a reason to perhaps believe
13 them?

14 A It would be one thing you would look at.

15 Q Right. Just like I suggested you might have
16 looked to it for the March statements as well.

17 A Yeah, that's correct.

18 Q Another reason is for you, is that you thought
19 they, and particularly Nichol John, were both
20 afraid of David Milgaard; correct?

21 A I did.

22 Q A third reason is you had, you were aware that
23 Albert Cadrain was claiming he had seen blood on
24 David's jeans?

25 A Yeah. I don't know, sir, when I learned that, but



1 I'll, for the sake of this discussion -- I don't
2 know when that came to my attention.

3 Q A fourth reason is that you knew where the various
4 exhibits were found in terms of, so to speak,
5 leading towards the house of Albert Cadrain?

6 A I assume I knew that then, sir.

7 Q Right. Which ultimately, unbeknownst to you at
8 the time, would be equally incriminating of Larry
9 Fisher?

10 A Absolutely.

11 Q Of course. But at that time, and I don't blame
12 you for that, it was incriminating insofar as
13 thinking about David Milgaard was concerned and in
14 the context of, would you believe, the May
15 statements; right?

16 A Yeah, and that, sir, I would have attributed all
17 those things to Milgaard at that time.

18 Q Of course. I have no doubt you did.

19 A Yeah.

20 Q And would.

21 A All right.

22 Q But I'm going to suggest to you, sir, perhaps
23 above all the reason why you would believe the May
24 statements is because both John and Wilson
25 included within them facts that could really only



1 be known to them if they had been at the scene.

2 A That would certainly be a factor without a doubt.

3 Q Huge factor?

4 A Well, it would be something that I would look at.

5 Q I mean, how could the two of them independently
6 guess or create a story, because that's their only
7 other option, they are either creating a story or
8 they are telling the truth.

9 A Uh-huh.

10 Q How could both of them independently create a
11 story which includes putting a purse in a garbage
12 can, which just happens to be where they found
13 Gail Miller's purse, so we know the killer did
14 just that; right?

15 A That we know.

16 Q So that gives you a very, very good reason to
17 believe what they said in May; is that fair?

18 A That would be one reason, sir, it would.

19 Q Wouldn't you think it's a really good reason? I'm
20 not trying to lead you down the garden path, sir.
21 It seems to me it's a good reason.

22 A I could advance it to a good reason, sir.

23 Q Yes, okay, thank you. And then let's look at it
24 on the other side of the coin, why you might
25 disbelieve what they said in May. First of all,



1 they encountered Gail Miller, and I don't want to
2 get into this in detail --

3 A Okay.

4 Q -- just in passing, so to speak, but they
5 encountered Gail Miller in a spot that didn't make
6 a lot of sense if she was going directly from her
7 home to catch a bus that morning?

8 A That's right, in the sense that one would expect
9 her to be on Avenue O if my memory is correct.

10 Q Avenue N? You expect her to be on O, not N?

11 A That's what I'm saying, sir, I believe it was N,
12 but what I'm saying, I hope, in the line of what
13 you said, one would expect she may have walked
14 straight down O is what I'm saying.

15 Q As opposed to end up somehow on N on the block
16 adjacent to her house?

17 A Well, yes, sir.

18 Q Right.

19 A I can understand people who thought Avenue O would
20 be the obvious way to go.

21 Q There was the timing problem if this story, this
22 new story was true about how could, how come Gail
23 Miller wouldn't have sort of been long gone and on
24 the bus by the time the car broke down and they
25 went back and David supposedly went back and



1 grabbed her. I don't want to spend a lot of time
2 on that either, but it's an inherent problem.

3 A Okay, it is a question that exists and certainly
4 could be argued that, hey, how come she wasn't
5 gone, I realize that, sir, and it's -- that's how
6 that was I think.

7 Q Another reason to disbelieve, sir, was the
8 consistency of the original statements of all
9 three of them in March; fair?

10 A To disbelieve --

11 Q The May statements. Remember, I've gone through
12 the reasons to believe the May statements?

13 A Okay.

14 Q I'm now going through some reasons to disbelieve
15 them. I'm suggesting to you a third reason to
16 disbelieve the May statements would say, well, you
17 know, when you look back at what they said in
18 March, those statements were consistent and they
19 even were consistent with what David Milgaard said
20 as well.

21 A That's a possibility, sir.

22 Q All right. There's the fact that you might take
23 into account in deciding whether or not to believe
24 their statements, that David Milgaard, the
25 supposed perpetrator, has denied committing the



1 crime?

2 A I'm sure that was apparent from the material I
3 had.

4 Q There was the fact that the police apparently had
5 had some sense that their original statements in
6 March were reliable at least until, although they
7 didn't know it at the time, the drafting of the
8 script?

9 A That's arguable, sir.

10 Q You might also have considered in saying to
11 yourself maybe these May statements aren't true,
12 that Nichol John is now backing off what she
13 originally -- or what she said, rather, in May?

14 A You'll have to refresh my memory on that, sir.

15 Q Well, she's not -- when you call her at the
16 preliminary hearing she doesn't adopt it, that's
17 what I'm referring to.

18 A Okay. In Court she did not come out with what I
19 believed to be her accurate statement.

20 Q And I don't think she did in interviews with you
21 either, did she? I think that's what you told us.

22 A I know I interviewed her some three times. The
23 way my report read, I conclude that, at least one
24 occasion, she did tell me what had happened.

25 Q She did?



1 A Did, and I think the two others --

2 Q I'm sorry, what are you -- when she says she did
3 tell you what happened, do you mean she did tell
4 you what she said to the police in May; is that
5 what you mean?

6 A What I mean, sir, is that the way -- one of my
7 report and completed cases indicate that I
8 interviewed her some three times. My memory, the
9 way that was structured, it sounds as if she told
10 me what I thought was the accurate story once,
11 clearly didn't a couple of times.

12 Q And you attributed her running out of your office
13 and her general refusal to sort of cooperate as
14 being something to do with her dislike of Mackie;
15 is that right?

16 A That came to my attention and I suspect that was
17 true.

18 Q Never occurred to you she was just in fear of
19 Mackie --

20 A No.

21 Q -- for some reason?

22 A Absolutely not. There's no utter reason for her
23 to be --

24 Q Well, you wouldn't know, you weren't present when
25 Mackie was talking to her in May were you?



1 A No, but I was present when she took off from my
2 office.

3 Q Right.

4 A If my memory is correct, I think Mackie was there
5 too, but I'm not positive.

6 Q Right. So she didn't want to be around Mackie?

7 A That was explained to me by someone and I took
8 that as accurate.

9 Q Oh, I understand, but it didn't occur to you that
10 maybe she was getting away from Mackie because of
11 what had happened between him and her in May?

12 A What had happened in what sense, sir?

13 Q Well, whatever led her to give a statement that we
14 now know isn't true.

15 A Okay, I didn't attribute that to it, or it to
16 that.

17 Q I know you didn't.

18 A That's what I'm trying to tell you.

19 Q You might also consider in determining whether or
20 not to believe the May statement, sir, that there
21 was some inherent flaws, one being that no one was
22 ever found to help push their car, there was a
23 claim that two people helped them push their
24 car --

25 A Yeah.



1 Q -- after it had broken down and you never found
2 out who those people were?

3 A That's true, sir. I knew that episode evidently
4 happened and I equally know that the police never
5 did track down who those persons were.

6 Q But Wilson and John in the same context had not
7 agreed on the location of where they broke down at
8 all?

9 A Mr. Lockyer, that may well be the case. I don't
10 know offhand.

11 Q John said in an alley way, Wilson said in the
12 road, in the middle of the road.

13 A I suspect you are right, and there was some
14 disagreement over where. I think, sir, there may
15 have been more than one breakdown, but that's --

16 Q In determining that their statements, in
17 considering that perhaps they weren't true, you
18 might also have taken into account the rather
19 remarkable decision by David Milgaard, if we
20 assume for a moment he, your hypothesis, your
21 belief that he had been the one who killed Gail
22 Miller --

23 A Right.

24 Q -- did he do it when his get-away vehicle was
25 broken down a matter of yards from where he did



1 it.

2 A Yeah, I think I mentioned that before, that would
3 seem to make little sense to me, for sure.

4 Q Right.

5 COMMISSIONER MacCALLUM: Are we speaking
6 about the vehicle being stuck or being
7 mechanically broken down?

8 MR. LOCKYER: Stuck as I recall.

9 COMMISSIONER MacCALLUM: Okay.

10 MR. LOCKYER: The first time around it was
11 stuck, that's what they said, John and Wilson.

12 COMMISSIONER MacCALLUM: I think the
13 evidence was it was only mechanically broken down
14 once.

15 MR. LOCKYER: That was the transmission
16 after David had driven around the block.

17 COMMISSIONER MacCALLUM: Let's say stuck if
18 it was stuck, okay?

19 MR. LOCKYER: Did I say broken down?

20 COMMISSIONER MacCALLUM: Yes.

21 MR. LOCKYER: I'm sorry, I apologize,
22 stuck.

23 A I took it that way, Mr. Lockyer.

24 BY MR. LOCKYER

25 Q Okay. Another reason, these aren't exhaustive,



1 just the ones I've made a list of, is the fact
2 that Nichol John's account in particular, her
3 claim to being essentially an eye witness to the
4 homicide did not accord with the state of Gail
5 Miller's clothing, right, the location of her, the
6 presence and absence of puncture wounds in her
7 clothing, that's what I mean by that.

8 A Okay. What I would say about that, sir, is there
9 was evidence that Nichol John, in her second
10 statement, said she saw stabbing going on, as I
11 recall. Now -- and clearly the way Gail Miller's
12 clothing ended up could not, in no way, be, in my
13 view, described -- excuse me. Could no way be
14 accounted for by what Nichol saw, sir.

15 Q So you are agreeing with me?

16 A Yeah.

17 Q That's a reason to question the truthfulness of
18 the -- the accuracy of the statement?

19 A Yeah, it's a reason to look at it again.

20 Q Okay. And another reason, sir, is whilst on the
21 one side of the coin you've got Cadrain and by May
22 Wilson saying they saw blood on David's jeans --

23 A Uh-huh.

24 Q -- on the other side of the coin you've got Nichol
25 John still saying she didn't, the Danchuks not



1 seeing it?

2 A Uh-huh.

3 Q And, for what it's worth, Celine Cadrain not
4 seeing it and indeed the gas station attendants
5 not seeing. I'm not sure if the last one is as
6 important, but the Danchuks particularly being
7 important in that regard.

8 A Yeah, certainly -- did not Mr. Rasmussen, the
9 motel gentleman --

10 Q Yeah, him too.

11 A Yeah.

12 Q He didn't see it.

13 A Okay, that's fine. There were various people,
14 sir, who did not see blood.

15 Q Right.

16 A And I --

17 Q Which would be on the equation side of
18 disbelieving the statements; am I right?

19 A In that sense.

20 Q Yeah. Now, having gone through what you might
21 call the pros and cons of the May statements of
22 John and Wilson, sir, let me ask you this. Did
23 you go through a critical assessment like this in
24 your own mind back in 1969?

25 A Of those statements?



1 Q In this kind of way, did you do this, did you sort
2 of --

3 A I'm sure I looked at them carefully and compared
4 them one to the other.

5 Q So I'm wondering, given that really one might say
6 the prosecution above all rested on these, the
7 truthfulness of the May statements, what could
8 make you so certain that they were true for the
9 next 28 years?

10 A All right, sir, I didn't, number 1, didn't have
11 them under my scrutiny, if you will, for 28 years.
12 I had the John statement -- the first statement
13 given, if I'm not incorrect, was that of Wilson,
14 it was given to a polygraph operator who came out
15 with the suggestion that he was then being
16 truthful. The next statement given was by Nichol
17 John not using the polygraph as I recall it, sir,
18 and -- but she -- she was shown some clothing and
19 my understanding at the conclusion of that process
20 is that that, that statement would be truthful.

21 Q I didn't give you -- the polygraph is a pro, I
22 didn't take you through that, but that's another
23 pro?

24 A It is in my view.

25 Q Right. What I want to suggest to you, sir, is



1 this, that the reason that perhaps in your own
2 mind that you assumed that the May statements were
3 true was because if they weren't true, if they
4 weren't at the scene of the crime, Nichol John and
5 Ronald Wilson, then the information, some of the
6 information they were providing could only have
7 come from one source, the police. The only way
8 they could know about the purse in the garbage
9 can, to take that as the most striking example,
10 was if they had been told about it by the police,
11 and you weren't prepared to countenance the idea
12 that the police had essentially created these
13 statements?

14 A I didn't think they had, sir.

15 Q Because if they did, sir, that's a classic example
16 potentially of noble cause corruption?

17 A Uh-huh.

18 Q If we assume, taking this document, the script
19 that they had written the week before which
20 demonstrates the belief that David Milgaard
21 committed the crime --

22 A Uh-huh.

23 Q -- that's clearly what the script says, that's
24 what they believe, then if they were on John and
25 Wilson a week later, that is a classic example of



1 noble cause corruption isn't it?

2 A Well, sir, I was not there.

3 Q I know you weren't.

4 A The polygraph I believe was resorted to in an
5 attempt to get an accurate statement from
6 Mr. Wilson. The operator saw Ms. John after that
7 as I recall it and they were shown various things
8 and I did not have anything to do with arranging
9 that, but I certainly felt it was an aid to
10 getting accurate statements from them.

11 Q I asked Detective Karst many weeks or months ago
12 if he could come up with any other explanation
13 other than that the police provided the
14 information to John and to Wilson --

15 A All right.

16 Q -- if he could come up with any -- he didn't
17 accept that as an explanation, that the police
18 provided it, but could think of no other
19 reasonable explanation, and indeed as I imagine as
20 you sit there it's hard to think of any other
21 reasonable explanation. Now, we know what we know
22 for how John and Wilson could have come up with
23 facts that would presumably only be known to
24 people at the scene of the accident; right?

25 A Yeah.



1 Q Can you think of any other explanation other than
2 the police provided them with the information?

3 A Not in that sense.

4 Q Nor can I.

5 A Yeah.

6 Q And if we assume then that the police did what it
7 seems they must have, it's hard to think of
8 anything else that could have brought it about,
9 then do you agree, sir, that we seem to have here
10 a classic example of noble cause corruption when
11 you take the script into account as well, the
12 belief that that's who committed the crime,
13 followed by the corruption which creates the
14 statements that prove he committed the crime? You
15 see the point?

16 A I see what you are getting at, sir.

17 Q Uh-huh.

18 A What corruption are you speaking of?

19 Q Briefing -- or creating the statements of John and
20 Wilson to include information that they could not
21 possibly have known because they weren't at the
22 scene of the crime.

23 A All right, I understand that point of view, sir.

24 Q Right, which is why I sort of brought in this
25 notion of noble cause corruption in the first



1 place. When you bring in that script document,
2 sir, written a week earlier and you see how -- I'm
3 not challenging the genuineness of their belief --
4 I mean, let's look at it this way. I don't know
5 how you knew -- you said you had some dealings
6 with the investigation, sir --

7 A Yeah.

8 Q -- before the arrest of David Milgaard; in fact,
9 probably in March, April I think I'm right in
10 saying?

11 A I suspect so.

12 Q Yes. So it wouldn't be unfair to suppose that by
13 April, shall we say, the police weren't very happy
14 campers about this case because they had some
15 awful crime and no solution to it; right?

16 A Well, Mr. Lockyer, whether that was the case, that
17 would certainly not affect my, the way I --

18 Q No, it's not meant to.

19 A -- dealt with it.

20 Q You are making assumptions about the purpose of my
21 questions.

22 A Okay. Do you want to try it again?

23 Q Don't think, don't try and think ahead of me
24 because there's no need to, all right?

25 A Very good. Try again.



1 Q Not in this case anyway. I'm just putting to you,
2 sir, that if you think about it, I'm talking
3 systemically here, but really in the context of
4 this case too, if you can imagine three months
5 have past and the police see by the end of April,
6 and you've seen in the materials, you know this,
7 by the end of April there seems to be no way of
8 solving the crime than they were on February 1st.

9 A Arguably so.

10 Q That's not necessarily their fault, they're just
11 not getting anywhere.

12 A I understand.

13 Q About the only thing they've done that you might
14 consider substantive that seems to be leading them
15 in some direction is it looks like whoever killed
16 Gail Miller might have committed other crimes as
17 well in Saskatoon in the previous -- around the
18 same time?

19 A Well, I understand that point of view at this
20 time, sir.

21 Q Right. But apart from that, they don't seem to be
22 any closer to finding the culprit?

23 A Yeah, I --

24 Q I'm sorry?

25 A Arguably so.



1 Q And then David Milgaard comes into the equation in
2 early March, all right, and they find out about
3 this group of three who had driven into the city
4 and driven to a home that was within a block or
5 two, two blocks, of where Gail Miller was
6 murdered.

7 A Correct, Cadrain's.

8 Q You can quickly see how they could lock onto that
9 as perhaps being the solution to the crime; can
10 you not?

11 A I wouldn't be surprised if they took that very
12 seriously and pursued it.

13 Q Nor me. In fact, that's what they did, and that
14 then took us to the script document a week before
15 the new statements of Wilson and John where they
16 set out what happened which takes us to the
17 statements of John and Wilson upon which you came
18 to place so much reliance when you prosecuted
19 David Milgaard --

20 A I certainly did --

21 Q -- after his arrest?

22 A -- place reliance on the statements, sir.

23 Q When we're talking about Nichol John's, how she
24 then of course recanted her second statement, we
25 sort of end up with her -- not recanted, not



1 remembering I guess is a better way of putting it,
2 not recant, that's the wrong word to use -- by the
3 time we get to the end of the preliminary, and
4 indeed much the same at the trial, we end up with
5 the first statement is completely exculpatory, the
6 second statement is entirely incriminating, and
7 then the third statement is she doesn't remember;
8 right?

9 A The third, sir, in the sense --

10 Q She doesn't remember.

11 A What she said in Queen's Bench, is that what --

12 Q Not so much -- yes, that's when she said she
13 didn't remember, yes.

14 A That's what I thought you meant.

15 Q Queen's Bench and the preliminary hearing.

16 A All right. I assume that's right, sir.

17 Q She took the same position at the prelim as at the
18 trial essentially.

19 A All right.

20 Q Tell me this. You seem to have, you tried to
21 question her, you say certainly before the
22 preliminary hearing, I think you said three times?

23 A Yeah, I think the three, sir, was the total of
24 both, but --

25 Q In circumstances where a witness like Nichol John



1 is either backing off a statement that she's given
2 the police in the past or alternatively is
3 actually recanting a statement --

4 A Uh-huh.

5 Q -- that he or she has given in the past, who do
6 you think, sir, and this is a systemic question
7 reflecting on Nichol John particularly, who do you
8 think might have been in the best position to
9 explore what was really the truth where Nichol
10 John was concerned?

11 A In what way, sir, do you mean? For instance, her
12 parents or someone like that or what?

13 Q No, no, I'm not necessarily, it's not someone in
14 the system, but wouldn't you think -- do you think
15 it might be a good idea in the future, sir, when
16 something like this happens, first of all, for the
17 police officers who took the previous statement or
18 statements to have nothing to do with the witness
19 thereafter?

20 A In this same case?

21 Q In these kinds of circumstances.

22 A I would think that would be a good idea, sir.

23 Q Do you think it might be a good idea, sir, if the
24 Crown, who is prosecuting the case, also had
25 nothing to do with further interviews of the



1 witness?

2 A That could well be helpful, depending on the
3 gravity of the matter in terms of --

4 Q Obviously I'm not talking about a shoplifter here.

5 A Yeah, that's what I would say.

6 Q I'm talking about a serious case.

7 A Yeah.

8 Q Do you think, sir, that perhaps a good idea would
9 be to use police officers perhaps from another
10 force and a Crown from another office who has
11 played no role in the prosecution to date?

12 A Yes, sir, that's, as you know, it's the sort of
13 thing that happens with accusations against
14 policemen, that's done quite regularly, a Crown
15 from another part of the province, for instance,
16 or investigators from another part of the
17 province, and that seems to be a good system.

18 Q No reason why it shouldn't be applied to a
19 recanting witness if we use or call Nichol John a
20 recanting witness? It's a broad use of the term.

21 A Yeah. I wouldn't think so, sir. In other words,
22 that's an ideal situation. If it could happen,
23 that would be great.

24 Q And insofar as you talked about Mr. Tallis'
25 defence of Mr. Milgaard, sir, I want to ask you



1 this, were you aware that Mr. Tallis in the
2 defence of Mr. Milgaard -- I think I'm right in
3 saying -- made no reference at all to Nichol
4 John's statement of March 11th?

5 A Would this be in the jury closing, sir?

6 Q No, in the cross-examination of Nichol John he
7 made no reference to the March 11th statement, so
8 the jury never heard not only the contents of what
9 she had said on March 11th, but didn't even know
10 she had been interviewed on March 11th.

11 A Mr. Lockyer, I didn't recall that of my own
12 knowledge. I don't challenge what you are saying
13 happened.

14 Q Would that not surprise you somewhat, sir, that
15 perhaps the jury might have benefitted
16 considerably if they had heard Nichol John's
17 cross-examination, what she had told the police on
18 March 11?

19 A I don't think, Mr. Lockyer, that it's seemly for
20 me to give opinions on how a defence was run by a
21 capable defence counsel who did or didn't do
22 certain things a certain way. I don't happen to
23 recall that, but I don't -- I expect what you are
24 telling me is correct, sir.

25 Q All right, fair enough. One thing that I think



1 that Mr. Hodson was questioning you about was when
2 you had a witness in Nichol John's situation where
3 she is purporting not to remember anything that
4 happened -- that's a bit of an exaggeration, she
5 did remember some things, but didn't remember what
6 might be called the crucial times.

7 A Yes, sir.

8 the -- the situation was that I felt that the
9 declaration by Nichol John in the corridor, or the
10 one we've been over a number of times, all other
11 things being equal, could be evidence that was,
12 you know, of im -- incriminating evidence against
13 David Milgaard the way it came out. Now, whatever
14 else happened with it, I spoke to Mr. Beresh it
15 seems to me. I hope I've got my facts straight on
16 this. The -- the situation was that I felt that
17 the declaration by Nichol John in the corridor, or
18 the one we've been over a number of times, all
19 other things being equal, could be evidence that
20 was, you know, of im -- incriminating evidence
21 against David Milgaard the way it came out. Now,
22 whatever else happened with it, I spoke to Mr.
23 Beresh it seems to me. I hope I've got my facts
24 straight on this.

25 Q Of her May statement, and I use "remember" in



1 quotation marks, obviously, at this point?

2 A All right.

3 Q Mr. Hodson pointed out to you how hard or how
4 impossible it is to cross-examine someone who is
5 making that kind of claim; do you remember him
6 questioning you around that?

7 A In the sense that this person would be examined in
8 chief and then someone is going to cross-examine
9 her; is that what you --

10 Q It's going to be very hard to cross-examine her if
11 she claims not to remember?

12 A I would think so.

13 Q Which is something, incidentally, I raised with
14 you this morning, if you remember; do you
15 remember?

16 A I'm afraid I don't. Is that a bad sign? I'm
17 afraid I don't.

18 Q I did.

19 A Okay.

20 Q And I'm going to suggest to you, sir, that's not
21 really accurate?

22 A Okay. Go ahead?

23 Q As a cross-examiner of Nichol John, if I sort of
24 try and imagine myself confronted with her, I --
25 it may not be cross-examination Mr. Commissioner



1 ap proves of -- if I may throw that in by way of
2 humour -- but I can imagine how I could
3 cross-examine her, sir. You could -- you could
4 put to her, for example, what she said on March
5 11th, '69; right?

6 A Yes.

7 Q And say "this is what you said to the police"?

8 A Yes.

9 Q You could put to her how she had changed things --

10 A Umm --

11 Q -- when she had given her May statement, and of
12 course the jury had already heard the May
13 statement through the 9(2) process?

14 A Yes.

15 Q You could suggest to her how she had lied when she
16 had spoken to the police in May as a
17 cross-examiner?

18 A You could, I believe.

19 Q And you could suggest to her that her memory
20 failure is nothing more than a convenient memory
21 failure?

22 A Uh-huh.

23 Q Because she now knows that she lied to the police
24 in May but doesn't want to get charged with
25 perjury and testify to that effect?



1 A Those would all be possibilities, Mr. Lockyer,
2 depending on the judgement of the person who is
3 doing --

4 Q Doing the cross.

5 A -- the cross-examination.

6 Q It's just that you kind of agreed with Mr. Hodson,
7 and I thought maybe a little too quickly, that
8 it's almost impossible to cross-examine someone in
9 those circumstances, and I'm not entirely sure
10 that that's necessarily so; do you follow me?

11 A Well one of the possibilities you run into is the
12 witness saying "I'm not answering anything, I
13 don't know a thing", that would be one.

14 Q Well, that's a bit of a different story, but --

15 A Well, it may be, --

16 Q Yeah.

17 A -- but there are dangers, of course, or downsides
18 to cross-examining as --

19 Q Even then you could put to her her March 11th
20 statement, as a minimum, that that's what she had
21 said to the police?

22 A You could do that, sir.

23 Q Is this a good time to break, sir?

24 COMMISSIONER MacCALLUM: 15 minutes.

25 (Adjourned at 2:56 p.m.)



(Reconvened at 3:13 p.m.)

BY MR. LOCKYER:

Q Thank you. I just want to do a quick, not a quick, but a sort of a summary of the years, Mr. Caldwell, by way of conclusion here. We have seen from the materials, I think it's fair to say and I think you've agreed, that it would look like the police committed themselves to the David Milgaard theory sometime -- and Commission Counsel pointed this out to me during the recess -- in late April to mid-May when the -- oh, I've forgotten what it's called, they have, what did you call it, the, it's your word -- umm, the script -- I couldn't think of the word, I'm sorry -- when the script was drafted?

A I don't know, Mr. Lockyer, that it's correct to say they committed themselves to whatever it was.

Q Began to?

A I don't know that. Pardon me?

Q Began to commit themselves, put it that way?

A Oh, okay.

Q I think you would have no problem with that?

A Yeah.

Q And I say this, Commission Counsel corrected me, I've been talking as though it was drafted in



1 mid-May and I understand the evidence is that
2 sometime between late April and mid-May it was
3 drafted, but there was a meeting in mid-May
4 between a bunch of senior officers where it was
5 circulated among the officers; all right?

6 A The script?

7 Q It was.

8 A If you say so, sir. I don't have that knowledge,
9 but I'll -- I'm sure you're correct.

10 Q Again, I don't like you trusting me so much, Mr.
11 Caldwell, but never mind.

12 A I may never see you again, sir.

13 Q Well, I don't know about that, I hope that's not
14 your wish?

15 A No, no.

16 Q And, again, that culminated in Mr. Milgaard's
17 arrest in June; all right?

18 A That is something that did happen.

19 Q Yes. And I'm going to suggest, sir, that in the
20 period between his arrest and his conviction in
21 January of 1970 you had a chance to second-guess,
22 and review, and be a gatekeeper of the police
23 investigation, and I'm going to suggest to you you
24 failed in that regard, sir?

25 A Okay. It's no doubt I had the opportunity. 'The



1 gatekeeper' is a new term to me, but I'm accepting
2 it as a proper one. And what was the other thing,
3 sir? In any event, I do not feel --

4 Q That you had the opportunity, I think I said you
5 had the opportunity to sort of --

6 A Look everything over?

7 Q -- turn things around, yes.

8 A All right. And I do not --

9 Q And you failed?

10 A I don't agree with that, sir.

11 Q Uh-huh. David Milgaard is convicted, sir, and
12 then I'm going to suggest that once Larry Fisher
13 appeared in Winnipeg in 1970, between 1970 and
14 1971 a combination of the police and Saskatchewan
15 Justice -- and I'll just put it at that most
16 generic level --

17 A Uh-huh.

18 Q -- lost a chance, there, to get Mr. Milgaard out
19 of the awful situation he was in, and failed.

20 A Now in what sense, sir?

21 Q That they didn't make the links and provide the
22 necessary information to Mr. Milgaard's counsel in
23 the period 1970 to '71 between which Mr. Fisher
24 was apprehended, confessed to Saskatoon crimes,
25 and pleaded guilty to Saskatoon -- to being the



1 Saskatoon rapist?

2 A All right. The --

3 Q And there was a failure there, sir?

4 A In what sense, sir?

5 Q In the sense that there was an opportunity for it
6 to be seen that David Milgaard was an innocent
7 victim of a wrongful conviction, but that chance
8 was lost?

9 A That could well be the case, sir.

10 Q Uh-huh. Now you said a couple of things with
11 respect to that period, sir, when you were
12 questioned by Mr. Hodson, that I just wanted to go
13 through. You said, first of all, you said -- and
14 you said it more emphatically than I am. I wrote
15 it down, --

16 A Okay.

17 Q -- but I only managed to get it down this way.
18 You said, "I see no reason why I would have been
19 told about Karst' trip to Winnipeg or about Mr.
20 Fisher's confessions or his guilty pleas"?

21 A That's correct.

22 Q And I think you said it more emphatically than
23 that?

24 A Well I --

25 Q "I can see no reason on earth why", or something



1 like that, you put it very emphatically; is
2 that --

3 A That may very well be. And I wasn't, of course,
4 as you know.

5 Q And I want to question that, sir. Don't you
6 think, as the chief prosecutor in Saskatoon, that
7 someone in that police force would have told you
8 that they had apprehended the Saskatoon rapist?

9 A Well, sir, I was not aware of the trip by the two
10 police to Winnipeg, I was not aware that Fisher
11 was there until he -- he eventually came back, or
12 very soon, to Saskatchewan, I don't --

13 Q I don't think you were even aware of that?

14 A Pardon me?

15 Q You weren't even aware that he came back to
16 Saskatchewan?

17 A No, I --

18 Q You weren't aware of the Regina plea, in other
19 words, were you?

20 A No, sir. All I did, and I -- was the phone call
21 to Corey which produced the letter that we have
22 been through.

23 Q I understand that.

24 A Yeah, I wasn't aware of that, sir.

25 Q And I'm going to suggest to you, sir, that that's



1 really hard to believe, that the chief prosecutor
2 of the city is not informed and consulted by the
3 police about the serial rapist of Saskatoon who's
4 been apprehended?

5 A Well in that factual situation, sir, I do not
6 believe that I knew of his, umm, sentencing,
7 etcetera, in Regina.

8 Q Let's do it like this, --

9 A Okay.

10 Q -- Mr. Caldwell, to try and get a meaningful
11 answer. Does it, looking back on it now, does it
12 surprise you that no one in 1970-'71 said "eh,
13 guess what Mr. Caldwell," -- from the police
14 force -- "guess what, Mr. Caldwell, we've
15 apprehended the man who was committing all those
16 rapes here in 1969-1970"?

17 A I suppose that would surprise me.

18 Q Yes, fair enough. '68, '69, I guess.

19 A Yeah. It didn't happen, sir, I'm -- as you know.

20 Q Yes. Does it surprise you, sir, that no one
21 consulted you on the appropriate sentence, the
22 senior prosecutor?

23 A Yeah.

24 Q No one came to Mr. Caldwell and said "Mr.
25 Caldwell, what do you think this chap should get



1 by way of a sentence, he raped four of the ladies
2 of this town?"

3 A Uh-huh. No sir, no one did do that, and in that
4 particular factual situation I wouldn't have
5 expected anyone to do that.

6 Q And you wouldn't expect them to consult you for an
7 opinion on the appropriate sentence for raping
8 four women of Saskatoon?

9 A Not unless it was, as they say, my file, and it
10 clearly was not that, sir.

11 Q Well there was only one of two of you, sir.

12 A Yeah.

13 Q Presumably, if they didn't consult you and your --
14 the other chap in your office had nothing to do
15 with it either, as far as I know --

16 A Yeah.

17 Q -- I say chap or woman, I don't know who it was.

18 A Yeah.

19 Q Who was it?

20 A It's Del Perras. Last I looked he was a chap, but
21 --

22 Q All right.

23 A But --

24 Q Mr. Perras, presumably he had nothing to do with
25 the Fisher plea in Regina that I know of, --



1 A No.

2 Q -- so presumably no one spoke to a Saskatoon
3 prosecutor?

4 A Well, sir, that's -- that is my understanding of
5 the thing.

6 Q Do you find that remarkable, sir?

7 A There were all -- various things went on, quite
8 legitimately, in which I was not consulted, sir.

9 Q That's -- this is the only serial -- I know you
10 didn't know the expression --

11 A Yeah.

12 Q -- but the only multiple rapist of Saskatoon in
13 your career and the career of a bunch of police
14 officers we've heard from.

15 A Right.

16 Q And they never even say to you "well what do you
17 think of four years concurrent, what do you think
18 if he doesn't get a day in jail for it?"

19 A Mr. Lockyer, it didn't come to my attention.

20 Q I know. Do you think it's remarkable that it
21 didn't, sir?

22 A Well, that is, that is remarkable in that sense,
23 sir.

24 Q Uh-huh.

25 A But there was no, if you will, procedural reason



1 why I should have been involved.

2 Q Because you are the senior prosecutor in Saskatoon
3 I would have thought was reason enough, since you
4 asked me?

5 A Well I, in this particular factual situation, I
6 don't think I --

7 Q Uh-huh?

8 A -- (a) I know I wasn't and I don't know that I
9 should have been.

10 Q And don't you think, sir, that it's in the public
11 interest that someone who had committed the crimes
12 that were then known --

13 A Uh-huh.

14 Q -- that Larry Fisher had committed in your town or
15 city in 1968-'69-'70; don't you think it was in
16 the public interest that he enter his plea in the
17 city where it took place or they took place, --

18 A It --

19 Q -- each and every one of them?

20 A It didn't, it wasn't entered here, as we know. I
21 don't know what to tell you about that. It was
22 clearly done in Regina.

23 Q I -- that question presupposed that.

24 A Okay.

25 Q Don't you think it was in the public interest,



1 sir, for it to have been done in Saskatoon, or did
2 the public interest not have any significance in
3 those days? I don't get it.

4 A Well all things -- putting everything else aside,
5 sir, that probably would have been a good idea.

6 Q It would be in the public interest, wouldn't it?

7 A Yes, in that sense it would, because it would be
8 publicized here to people who may have been
9 involved with it.

10 Q And, as well, it would be in the public interest
11 to ensure that the people of Saskatoon, leave
12 aside the complainants, --

13 A Uh-huh.

14 Q -- that the people of Saskatoon knew that this
15 rapist had been apprehended?

16 A Yeah, I understand that, sir.

17 Q But, of course, they didn't know that because the
18 media didn't know anything about it --

19 A Yeah.

20 Q -- having taken place because no one told them
21 about it?

22 A That, sir, may be the case but the -- the -- there
23 is a, in a -- in Regina, for that matter in
24 Saskatoon, there are legitimate things go on in
25 Court at times when the media does not happen to



1 be there, and it's easy to get into criticism if
2 counsel, in effect, round them up and say "why
3 don't you be down here at 3:00, something is going
4 to happen". I've heard of that happening, sir.

5 Q In the case of someone who's going to plead guilty
6 to multiple rapes in your city I don't think
7 that's going to apply, is it, that principle sir?

8 A Well I don't know that, sir, I'm just telling you
9 that there's a --

10 Q Yes.

11 A That that's a double-edged business, that one.

12 Q I would have thought the public interest, which
13 you represent --

14 A Uh-huh.

15 Q -- as the senior Crown attorney of Saskatoon,
16 would be to make sure that the citizens of this
17 city knew that the person who had been committing
18 these awful crimes had been apprehended?

19 A That could well be, sir.

20 Q Yes. And, of course, very much in the public
21 interest to ensure that each and every one of the
22 victims was notified of the apprehension of him?

23 A Yeah. Mr. Lockyer, that was a commendable
24 principle, and still is. I can't tell you that,
25 at that time, that was carried through by, for



1 instance, our police force. I know it's a good
2 idea, but I know it was not applied with, you
3 know, with rigour.

4 Q And very much in the public interest, sir, to
5 ensure that consideration was given to whether Mr.
6 Fisher had also been the perpetrator of the crimes
7 on (V6)--- (V6)-, (V4)---- (V4)---, Miss (V9)----
8 and Miss (V)----?

9 A I would assume so.

10 Q Never done, not as far as we can tell?

11 A Not to my knowledge.

12 Q Yes. And, certainly, one might have thought it in
13 the public interest to at least explain why Larry
14 Fisher received a sentence that didn't add a
15 single day to the sentence he was already serving
16 for the crimes?

17 A To explain that did you say?

18 Q Well the public might have had some interest, --

19 A Yeah.

20 Q -- the Saskatoon public might have had some
21 interest, that the man who had committed these
22 crimes wasn't going to serve another day because
23 of them?

24 A They may very well have had that, sir.

25 Q But they didn't get the chance to give it any



1 thought until, I guess, 20 years later?

2 A Well it certainly wasn't something that was in
3 front of me as a duty of mine, I didn't (a) know
4 about it, or (b) carry it out.

5 Q I mean your own lawyer was quoted about all of
6 this?

7 A Yeah.

8 Q Did you know that, sir?

9 A In the?

10 Q In the media.

11 A In what respect?

12 Q Expressing surprise at how all this had taken
13 place. 004366.

14 A Uh-huh.

15 Q Look what your lawyer had to say.

16 A Okay.

17 Q "At least one longtime Saskatoon lawyer
18 believes the handling of the case was '
19 extremely unusual,' considering Fisher's
20 vicious sexual assaults and the public
21 interest in seeing justice done.

22 'Surely you'd have thought that
23 the police department and the justice
24 system would want to insure the
25 community was made aware that the person



1 responsible for those crimes had been
2 apprehended, dealt with and sentenced,'
3 says Silas Halyk, who's been practicing
4 law for about 30 years.

5 'That, to me, is extremely
6 unusual and it makes you wonder why they
7 wouldn't want it to be known at the
8 time,' Halyk added."

9 A Yes, I see that.

10 Q That's your own lawyer?

11 A That's right.

12 Q I don't know if he was your lawyer back then,
13 this -- let's get the date. Could we get the date
14 of this story?

15 A I suspect that it's --

16 Q September 14th, '91. Do you know when he became
17 your lawyer, sir?

18 A At the time of the civil action, I believe, and I
19 think this would predate it.

20 Q Oh, so it was before?

21 A Yeah.

22 MS. KNOX: March of 1993, actually.

23 BY MR. LOCKYER:

24 Q Okay, so well before. So before he was your
25 lawyer, sir, he had his own remarks to make --



1 A That's right.

2 Q -- about the --

3 A That's right.

4 Q A man of 30 years experience is not to be scoffed
5 at, and he obviously found it extraordinary, --

6 A Yeah.

7 Q -- looking at it back then?

8 A Certainly appears that way, sir, --

9 Q Yes?

10 A -- and I don't doubt he was sincere about that.

11 Q Uh-huh. Anyway, that chance was missed, sir, in
12 the -- or the chances were missed in 1970 to 1971.
13 And I guess we can say another consequence of that
14 was that that, in a sense, gave Mr. Fisher the
15 opportunity to attack (V10) (V10)- in North
16 Battleford in March of 1980?

17 A He --

18 Q He wouldn't have been free if we had worked out
19 that he was the one who had murdered Gail Miller;
20 right?

21 A So that last attack obviously was after his
22 sentence had run; was it?

23 Q He had completed his sentence in Winnipeg -- or
24 the, sorry, not in Winnipeg --

25 A Yeah.



1 Q -- completed his sentence for the Winnipeg
2 offences along with the concurrent four years. He
3 got 13 years in Winnipeg, four years concurrent in
4 Regina for the Saskatoon rapes, --

5 A Yeah.

6 Q -- or three rapes and an attempted rape, he was
7 out for a matter of months, I think it was three
8 or four but I stand to be corrected, and then in
9 March of 1980 he is at it again and all but kills
10 (V10) (V10)- in the midst of raping her in North
11 Battleford.

12 A Yeah. If he had been sentenced on other offences,
13 the ones we have been discussing here, he may well
14 have gotten a longer sentence, which would have
15 either prevented or delayed -- I don't think that
16 other thing, in effect, would have happened the
17 way it did, sir, in North Battleford is what I am
18 saying.

19 Q Well if he had been apprehended, as one wished he
20 had been, early on for the murder of Gail
21 Miller, --

22 A Yeah.

23 Q -- and if it had been picked up on -- and you say
24 it wasn't for innocent reasons -- in the
25 1969-1970-'71 period, but if it had been picked up



1 then presumably he would not have been a free man
2 and (V10) (V10)- would be a lot happier lady?

3 A Exactly.

4 Q Yes. And then in August of -- so the consequences
5 in this case go well beyond just David Milgaard,
6 of course, --

7 A Yes. The --

8 Q -- and his family, and the Miller family?

9 A Yes. The sentence that he did get between
10 Winnipeg, and I think you said, and they were
11 concurrent sentences in Regina, was certainly a,
12 you know, a meaningful sentence I think by
13 anyone's -- did you say 14 years, sir?

14 Q 13.

15 A 13? All right. That's --

16 Q 13 for Winnipeg, two Winnipeg offences.

17 A Okay. That's right. And, in effect, nothing
18 additional in Regina because whatever he got
19 there, as I understand, was concurrent?

20 Q Correct.

21 A All right. That, in I hope Manitoba and in
22 Saskatchewan terms, was a very, you know, very
23 severe sentence by our terms.

24 Q Not for the crime he committed in Winnipeg, sir,
25 it wasn't. He almost killed the lady.



1 A No, but I'm saying to you, sir, that was not an
2 inconsequential sentence, however you look at it.
3 I agree that --

4 Q No, I wasn't suggesting 13 years isn't a long
5 sentence, --

6 A Okay, no, that's fine.

7 Q -- but I'm certainly not suggesting it was a
8 severe sentence for what he did.

9 A Well not a -- I'm just saying, sir, that he got
10 what were, by our standards, a, you know, a very
11 -- I'm trying to think of the word here -- a very
12 meaningful sentence in the sense that it wasn't,
13 you know, many years less that he got.

14 Q In August of -- sorry, I'm moving on.

15 A Yeah, no, that's fine, sir, if you have --

16 Q In August of 1980, sir, Linda Fisher walks into
17 the police station and that results -- the net
18 effect of that is zero, right, you are aware of
19 that?

20 A That's what I hear.

21 Q Certainly can't blame that one on Saskatchewan
22 Justice, but somehow there was a serious failing
23 at the police level?

24 A I take it that way, Mr. Lockyer, --

25 Q Yes.



1 A -- from what I have learned in the meantime.

2 Q And then in 1990 Mr. Fisher is exposed; right?

3 A Umm --

4 Q It's -- his name becomes available and his
5 exploits become known to David Milgaard and his
6 defence team?

7 A I assume that's the date, sir.

8 Q Right. And I want to take you to something you
9 said yesterday, sir, October 31st transcript,
10 17610, and just read to you something you said
11 yesterday. It's a couple of pages, --

12 A Okay.

13 Q -- if you'll bear with me, and then I want to
14 point out a few things about what you said. You
15 are asked by Commission Counsel down here:

16 "Q And let's say, Mr. Caldwell, that the
17 police officers, or whoever got back to
18 you and said the following, "lookit,
19 before Mr. Milgaard was a suspect and
20 for a short time after we did pursue
21 this as a theory, we initially thought
22 that the perpetrator of the earlier
23 rapes and attempted rape was the same
24 person who killed Gail Miller and we
25 pursued that theory for some time, we



1 thought it was a good one, but when Mr.
2 Milgaard came along and the evidence
3 developed to the point where we had Ron
4 Wilson and Nichol John's statement we
5 now concluded that it's a different
6 person" --

7 A Uh-huh.

8 Q -- "that committed the murder than the
9 rapes and we abandoned that theory",
10 what, if that generally was the type of
11 information that you got back from the
12 police, what if anything would you have
13 done with that information?

14 A Well I wouldn't have changed what I
15 just told you. If that information
16 was in my possession I would have,
17 whatever their current view was, I'd
18 likely have interviewed them first
19 ..." ,

20 being the police, the "them" being the police
21 there.

22 A Uh-huh.

23 Q "... to see if that was still their view,
24 or current, I would have --

25 Q You would have interviewed who, I'm



1 sorry?

2 A The police, first of all.

3 Q Right.

4 A And then I would have certainly
5 contacted Mr. Tallis, at or about the
6 same time, and said "lookit, this has
7 just come to my attention", the same,
8 sir, as the last document, if you
9 will, and -- because it's very
10 important, it could very well have,
11 among other things, resulted in the
12 charge not going ahead against Mr.
13 Milgaard.

14 Q And what, if anything, would that have
15 done as far as your -- and if you are
16 able to tell us -- your view of the case
17 you had against Mr. Milgaard and --

18 A Well it would have opened up some very
19 strong other avenues to suggest that
20 he had not -- wasn't guilty of the
21 matter, because these would be
22 concrete references to, you know,
23 victims who had something to say about
24 those kind of events.

25 Q So again, if you would have received



1 this RCMP report and the previous RCMP
2 report ...",

3 that's the reports about the other rapes, all
4 right?

5 A Right.

6 Q Just to remind you:

7 "... do you think you would have shared
8 this information with Mr. Tallis?

9 A I absolutely would, and as well as the
10 other things I just mentioned to you,
11 there'd be no way not to do that.

12 Q And would that be the case even if the
13 police told you, Mr. Caldwell, that they
14 abandoned that theory?

15 A Yeah, it would Mr. Hodson, because it
16 would appear to me that those were,
17 you know, concrete examples of things
18 that could point to innocence on his
19 part, to say nothing of guilt on
20 someone else's part; that being
21 Milgaard, I'm speaking of, his
22 innocence."

23 A Uh-huh.

24 Q Remember saying that yesterday, sir?

25 A I'm sure I did, sir.



1 Q Stand by it, what you said?

2 A Yes, I do, in this sense.

3 Q All right. Now I want to just think through the
4 implications of what you said there, because in
5 1990 it did become exposed?

6 A 1990?

7 Q All right?

8 A Referring to the --

9 Q The knowledge that was acquired by David Milgaard
10 and his defence --

11 A Uh-huh.

12 Q -- of Larry Fisher's crimes; all right?

13 A Yeah, I --

14 Q An act -- a fact that you say would -- may well
15 have stopped you even continuing with the charge
16 against him.

17 A Uh-huh.

18 Q That was a part of your answer; right?

19 A I see that.

20 Q But let's look at the reaction of the system in
21 1990. The reaction of the system was one year
22 later the justice minister turned down his
23 reference.

24 A His which, sir?

25 Q One year later the Minister of Justice turned down



1 David Milgaard's reference despite getting the
2 information --

3 A Oh --

4 Q -- that you are saying here pointed to his
5 innocence?

6 A So that's the first of the attempted references --

7 Q Correct.

8 A -- which was turned down by the federal minister?

9 Q After the reference is granted in 1992 the
10 Government of Saskatchewan, in particular, does
11 everything it can to resist Mr. Milgaard's
12 application to overturn his conviction on the
13 basis that the evidence involving Larry Fisher is
14 not even admissible in proceedings against him?

15 MS. KROGAN: Mr. Commissioner, if I might
16 just rise?

17 COMMISSIONER MacCALLUM: Yes.

18 MS. KROGAN: My friend speaks in
19 generalities about that, if he might be more
20 specific it might be helpful to the witness, it
21 might also be helpful to the rest of us.

22 BY MR. LOCKYER:

23 Q Well, Mr. Neufeld represented the Crown in the
24 Supreme Court of Canada, and Mr. Neufeld sought to
25 sustain the conviction of Mr. Milgaard. That's



1 all I'm saying, no more, no less.

2 A Well, sir --

3 Q On the basis that the evidence about Larry Fisher
4 was irrelevant to David Milgaard's culpability.

5 A Yeah. Well, sir, I was not with the provincial --

6 Q No, I'm not blaming you for this, don't
7 misunderstand me.

8 A All right.

9 Q I --

10 A I was not with the province at that time, I --

11 COMMISSIONER MacCALLUM: Then why are we
12 asking him, then, what's the relevance?

13 MR. LOCKYER: Because I couldn't agree with
14 his comments more, that he made yesterday, I
15 entirely agree --

16 A Uh-huh.

17 MR. LOCKYER: -- with what Mr. Caldwell
18 said yesterday and I'm comparing it to what
19 actually happened, --

20 COMMISSIONER MacCALLUM: That's fine, yeah.

21 MR. LOCKYER: -- which was the opposite,
22 resistance at every step of the way to finding
23 Mr. Milgaard innocent.

24 COMMISSIONER MacCALLUM: Yes, that's right.
25 Mr. Lockyer.



1 MR. LOCKYER: You see, that's the point.

2 COMMISSIONER MacCALLUM: How is this
3 witness expected to shed any light on that?
4 That's my point.

5 MR. LOCKYER: I think his opinion that he
6 expressed yesterday, about the significance of
7 the evidence when it came up, is very pertinent
8 to understand how the system, in fact, reacted
9 when that evidence came forward. They reacted by
10 resisting Mr. Milgaard's attempt to quash his
11 conviction right through to '97 really, because
12 they were not prepared to acknowledge his
13 innocence until '97, and Mr. Caldwell has
14 effectively said yesterday how significant that
15 evidence was to him once he had a chance to see
16 it as the prosecutor. That's the point.

17 COMMISSIONER MacCALLUM: Ms. Knox?

18 MS. KNOX: Mr. Commissioner, Mr. Caldwell
19 wasn't the prosecutor when he finally got to see
20 this, he was a private citizen retired from his
21 position with the Department of Justice as chief
22 prosecutor for Saskatoon.

23 Additionally, he does not have
24 an -- and I don't think there's any evidence to
25 suggest that he has a full working knowledge of



1 what was brought before the Minister of Justice
2 by Mr. Neufeld, or anybody else, with respect to
3 the matter. And I would suggest that the point
4 that My Learned Friend is attempting to make is
5 either a question to be asked the witnesses who
6 were actually involved, like Mr. Neufeld, or more
7 properly is a matter of argument, but it is not
8 an area that this witness should be asked to
9 comment on as he wasn't involved in it, doesn't
10 have knowledge. As I recall, I have boxes and
11 boxes of reference material in my basement that
12 went to Supreme Court of Canada, that they were
13 voluminous, and there were lots of parties
14 involved, and I don't think it's a proper
15 question to be put to this witness.

16 COMMISSIONER MacCALLUM: Yes, Mr. Lockyer?

17 MR. LOCKYER: I didn't expect objection to
18 this question, sir, it's a question to Mr.
19 Caldwell where I'm agreeing with everything he
20 says, Mr. Commissioner. It seems to me he is in
21 an ideal position, as the prosecutor, who now
22 knows what he knows, and it's been alleged knew
23 it a lot earlier by myself, certainly, to see the
24 impact it had on his thinking, but then compare
25 it to the impact it had on those people who were



1 still playing an adversarial role against Mr.
2 Milgaard.

3 COMMISSIONER MacCALLUM: Yes, and it is
4 precisely to the latter part of your question
5 that objection is taken, because -- on the
6 grounds of irrelevance I take it.

7 MR. LOCKYER: I didn't hear you, on the
8 grounds of?

9 COMMISSIONER MacCALLUM: On the grounds of
10 irrelevance as far as this client' -- this
11 witness' interest is concerned.

12 MR. LOCKYER: And I'm saying, I'm
13 submitting it is not irrelevant at all to take
14 this witness' views on the matter, and then to
15 look at the views of adversaries in the system
16 who were still trying to sustain David Milgaard's
17 conviction and still weren't prepared to accept
18 his innocence in 1992, is a very telling
19 comparison.

20 COMMISSIONER MacCALLUM: It may be,
21 Mr. Lockyer, and that is no doubt something you
22 are going to tell me in argument, and no doubt
23 something you are going to canvass further with
24 witnesses who are better equipped to answer it,
25 i.e. the ones who were actively prosecuting and



1 dealing with the Section 690 applications.

2 MR. LOCKYER: Well, I certainly want to
3 canvass with him what Mr. Caldwell said here, as
4 to the impact this new information had on his way
5 of thinking about the case as opposed to theirs.

6 COMMISSIONER MacCALLUM: Well, you can do
7 that. He has answered that.

8 MR. LOCKYER: Get both sides, you see what
9 I'm --

10 COMMISSIONER MacCALLUM: He says he stands
11 by what he said yesterday.

12 MR. LOCKYER: Oh no, and I think he should,
13 I stand by it too.

14 COMMISSIONER MacCALLUM: Yes.

15 MR. LOCKYER: I agree with everything Mr.
16 Caldwell said in the passage I just read to him.

17 COMMISSIONER MacCALLUM: But I --

18 MR. LOCKYER: I'm not trying to be critical
19 of him at all at this point, not at all.

20 COMMISSIONER MacCALLUM: Oh no, I realize
21 that, and therefore his interest is not engaged
22 by what you've just been saying.

23 BY MR. LOCKYER:

24 Q Let me ask you this -- perhaps I'll move on, I
25 think the point is made both in questioning and in



1 argument, but let me just move on to this. Did
2 you communicate any opinion of your own that
3 perhaps Mr. Milgaard was wrongly convicted at the
4 time of the Supreme Court reference?

5 A Mr. Commissioner, did -- shall I answer that
6 question?

7 Q Did you communicate that to them?

8 COMMISSIONER MacCALLUM: Did you
9 communicate, at the time of the reference -- I
10 just want to make sure I got the question --

11 MR. LOCKYER: Yes, sir.

12 COMMISSIONER MacCALLUM: -- at the time of
13 the reference, that you thought he was wrongfully
14 convicted?

15 MR. LOCKYER: That he might be innocent,
16 that he might be wrongly convicted?

17 COMMISSIONER MacCALLUM: And now you are
18 asking me should you answer?

19 A Yes.

20 COMMISSIONER MacCALLUM: Why wouldn't you,
21 sir?

22 A Oh, I assume I should or would, yeah.

23 COMMISSIONER MacCALLUM: Okay.

24 A And --

25 BY MR. LOCKYER:



1 Q 'Did you' is the question?

2 A -- I don't know, sir, that I did. I have no
3 memory of doing it, period.

4 Q All right. Well if we take what you said --

5 A I'm sorry, I don't know why they would give me an
6 audience in that respect anyway.

7 Q Well you were at the Supreme Court of Canada --

8 A Yes, but I --

9 Q -- towards the end of the hearing; right?

10 A -- was there overnight and not interviewed or
11 called into the hearing at all.

12 Q But you see, when I look at what you said there
13 yesterday, sir, about the impact this new
14 information had on your way of thinking, why
15 didn't it have that impact long before the DNA
16 results, Mr. Caldwell, because you knew the
17 information long before the DNA results, why did
18 we have to wait for the DNA results before you
19 became shocked that David Milgaard was innocent?
20 Surely you should have expected it given that
21 answer that you gave yesterday before the DNA
22 results ever came in. See what I mean?

23 A I see what you mean, sir.

24 Q Yes.

25 A But I can't say that I totally agree with that.



1 Q Well, perhaps you can tell me why not. You said
2 yesterday that the information about Fisher you
3 saw as very important as being potentially
4 evidence of David's innocence, you used the word
5 innocent --

6 A Yeah.

7 Q -- in the passage I read.

8 A That's right.

9 Q And I'm wondering then, given that you got that
10 information long before 1997, why were you so
11 shocked in July, on July 16th of 1997?

12 A Because the end of that question is that that was
13 the time at which this DNA evidence came out as I
14 recall. Is that not right?

15 Q The statements you made yesterday weren't related
16 to the DNA evidence, they related to the knowledge
17 of the kind of crimes and the timing of the crimes
18 and the location of the crimes that you had found
19 out Mr. Fisher had been committing and how
20 important it would have been to turn that
21 information over to Mr. Tallis and how you would
22 have because it was evidence that might have
23 caused you to stop the prosecution in its tracks.

24 A That could be, sir.

25 Q So given that, if you meant what you said



1 yesterday, I don't understand why in July of 1997
2 you are shocked by the DNA results. I would have
3 thought that you would have expected them.

4 A I would not have expected them. I was still in
5 the understanding that there would be no such
6 finding with respect to Mr. Fisher and DNA and
7 that clothing, sir, I had no reason to think that
8 in the least, so I don't know why I wouldn't be
9 shocked.

10 Q Really, because of that answer you gave yesterday,
11 that you would have turned those documents over to
12 Mr. Tallis if you would have appreciated their
13 significance and had seen all of them, and I'm
14 sort of summarizing --

15 A Okay.

16 Q -- what you said, because it might have even
17 caused you to stop the prosecution.

18 A That's a possibility, sir.

19 Q Right. It might have also caused you to conclude
20 that he was innocent, but -- and you use the word
21 innocent, and I'm not quoting you directly, but I
22 do know you used the word innocent in there, but
23 I'm just saying given that you found out the
24 information in 1990 through Mr. Williams according
25 to your evidence, I don't understand why seven



1 long years passed before you actually put your
2 thoughts that you had into action, so to speak.

3 A Now, which information from Mr. Williams are you
4 talking about, sir?

5 Q About the Larry Fisher crimes.

6 A Mr. Williams simply asked me to search the
7 prosecution file for the name Larry Fisher and --

8 Q But you found out about the crimes back around
9 1990; did you not? I mean, you weren't in
10 ignorance thereafter, you found out about them?

11 A Somewhere along the line I did.

12 Q That's all I'm saying.

13 A I can't tell you now when that was.

14 Q I expect it was '90, we'll call it '91, even '92
15 if you like, certainly in '92 at the Supreme Court
16 reference, you certainly knew by then?

17 A No doubt.

18 Q Five long years as opposed to seven if you wish;
19 right? You see?

20 A But I can't assign those numbers to it, sir.

21 Q You were at the reference, sir, and you made a
22 comment in your evidence on October 26th that I
23 did not understand and Commission Counsel did not
24 follow up on it.

25 MS. KNOX: Mr. Commissioner, if I may, Mr.



1 Caldwell's evidence was not that he was at the
2 reference, he never attended at the Supreme Court
3 of Canada. He flew to Ottawa, he checked into a
4 hotel, he got a phone call telling him there
5 would be a change of plans and he would not be
6 called. He was never at the Supreme Court of
7 Canada. He didn't hear any of the evidence and I
8 don't know that he's been asked, perhaps he
9 should be --

10 BY MR. LOCKYER:

11 Q I thought that. I may be mistaken. Did you
12 actually go in and watch the reference?

13 A No, I didn't, sir.

14 Q All right, okay. Then you were in Ottawa?

15 A Yeah, but just if you will, sir, I would like to
16 point out, I flew down at the request of
17 Mr. Williams, got in the hotel. The one -- my
18 counsel said Mr. Williams phoned me, in fact I
19 phoned him, learned that I was not going to be
20 used. I also turned -- excuse me, spoke by phone
21 to Murray Brown and did not go at or near the
22 building and the next day I ended up leaving for
23 Montreal.

24 Q On October the 26th at the Commission, sir, 17278,
25 you said something that I just wanted to ask you



1 about.

2 A Okay.

3 Q You said:

4 "The -- the situation was that I felt
5 that the declaration by Nichol John in
6 the corridor, or the one we've been over
7 a number of times, all other things
8 being equal, could be evidence that was,
9 you know, of im -- incriminating
10 evidence against David Milgaard the way
11 it came out. Now, whatever else
12 happened with it, I spoke to Mr. Beresh
13 it seems to me. I hope I've got my
14 facts straight on this."

15 A Yeah, that was earlier, sir, but I did do that.

16 Q About what?

17 A About the existence of the Nichol John hallway
18 statement. At some point I looked him up and
19 advised him of it because I felt that it very well
20 may be important evidence with respect to Fisher,
21 not in the sense of guilt, but the possible
22 innocence of --

23 Q You were playing a little bit of a role there,
24 sir, you were providing evidence to Mr. Beresh to
25 buttress his claim that David Milgaard committed



1 the crime and not Larry Fisher, that's what you
2 were doing.

3 A I, sir --

4 Q You were taking sides?

5 A I thought he should know about it. I didn't know
6 any way of him finding out about it other than
7 myself. I did advise him of it.

8 Q You didn't tell Mr. Wolch did you?

9 A Pardon me?

10 Q You didn't tell Mr. Wolch?

11 A What?

12 Q That information you just told Mr. Beresh. I'm
13 very surprised to hear you say this, sir. You
14 communicated directly with counsel for Larry
15 Fisher to provide him with information that you
16 thought Mr. Beresh could use to demonstrate that
17 David Milgaard had in fact committed the crime,
18 that's effectively what you did?

19 A I thought it was evidence that he may not know of
20 and it could be important to him.

21 Q That was surely taking sides, wasn't it, Mr.
22 Caldwell?

23 A I don't think so.

24 Q You don't?

25 A No.



1 Q Why don't you just leave, assume the system would
2 do that? You knew Mr. Eugene Williams had the
3 information. Why wouldn't you just assume
4 Mr. Williams would do that for you? Not for you,
5 why wouldn't you just assume Mr. Williams would do
6 that if he thought it appropriate, or indeed Mr.
7 Neufeld for that matter?

8 A Well, they -- I can't answer you as to why I --

9 Q You -- sorry --

10 A I went to Ottawa, I was not called. It was
11 explained to me that if --

12 Q I'm talking about, speaking of Mr. Beresh is what
13 I'm focusing on now.

14 A The Beresh --

15 Q Where did you speak to Mr. Beresh, can I ask you
16 that?

17 A In Saskatoon, and it was before the Fisher trial
18 some long time.

19 Q Sorry, before the Fisher trial?

20 A The Fisher trial, yes.

21 Q Because this is said in the context of the Supreme
22 Court of Canada, how you are going to the Supreme
23 Court of Canada in regards to your declaration
24 regarding what Nichol John had said in the
25 corridor.



1 A Yeah.

2 Q So in this answer you suddenly skipped, have you,
3 to --

4 A No, no, sir.

5 Q -- the post Supreme Court of Canada and a
6 conversation you had with Mr. Beresh and then you
7 come straight back to the Supreme Court of Canada,
8 Mr. Williams asked me to attend to Ottawa and
9 issued me a voucher. Is that what you are saying?

10 A No, I -- Mr. Williams knew about this hallway
11 declaration. I went to Ottawa. At some point I
12 told Mr. Beresh about it and I was called, as you
13 know, at the Fisher trial as a defence witness.

14 Q When did you speak to Mr. Beresh about it, post
15 the Supreme Court of Canada or before?

16 A I can't recall, sir.

17 Q Okay. Just a moment ago you said it was after the
18 Supreme Court of Canada.

19 A Yeah.

20 Q That just doesn't seem to fit the way you referred
21 to it yesterday, but --

22 A Well, truthfully, Mr. Lockyer, I can't tell which
23 it was, but --

24 Q What was wrong, you were worried that the Crown
25 who was prosecuting Mr. Fisher hadn't provided



1 that information to Mr. Beresh?

2 A I didn't know if Mr. Beresh knew of it at all.

3 Q I don't understand why you took it on yourself,
4 sir, to make that disclosure which amounted to
5 evidence, certainly from your perspective, that
6 David Milgaard had committed the crime.

7 A Yeah, and I didn't see anything objectionable
8 about Mr. Beresh knowing about some evidence that
9 he may well not have known of.

10 Q And if you made it, sir, while Mr. Fisher was
11 facing charges, that's post DNA when you made it,
12 which would suggest that perhaps you are not
13 entirely comfortable with the DNA results after
14 all.

15 A Oh, I'm entirely comfortable with them, sir, I
16 hope I indicated that yesterday. It's just
17 difficult to nail down precise dates at this
18 juncture.

19 Q All right. So can we perhaps assume you spoke to
20 Mr. Beresh during the Supreme Court of Canada
21 hearing, is that the safest conclusion we draw,
22 sir?

23 A It happened in Saskatoon that I spoke to him, so
24 it wouldn't be literally during that.

25 Q You don't think it was taking sides, sir, to give



1 Mr. Beresh information to incriminate Mr. Milgaard
2 that was information not led at trial against him,
3 you didn't see that as taking sides?

4 A Mr. Beresh could very well decide that it was of
5 no use. I just wanted him to know about it. In
6 no shape or form was it taking sides in my
7 opinion, sir.

8 Q Also --

9 A Because he could make -- I'm sorry -- whatever use
10 he wanted of it, including none whatever. I
11 thought it was what could be, you know, a
12 significant piece of evidence.

13 Q A number of documents that you were questioned on,
14 sir, by Commission Counsel were documents that
15 came into existence as a result of Mr. Milgaard
16 and Joyce Milgaard's waiver of privilege; you
17 understood that did you?

18 A I assume so, yes.

19 Q So you were putting memos in files which aren't
20 necessarily quite so carefully drafted as they
21 might be containing various suggestions,
22 allegations, claims and so on and so forth; right?

23 A You mean --

24 Q By Mr. Hodson in your examination.

25 A Yeah, I was getting -- is this the various



1 accusations you are including against --

2 Q Some of them were simply internal file documents
3 that were revealed as a result -- that would never
4 normally have seen the light of day but for waiver
5 of privilege.

6 A Okay.

7 Q So it does cause me to ask, sir, have you been
8 asked to waive privilege with regard to your
9 dealings with counsel?

10 A In this --

11 Q Mr. Halyk in particular?

12 A I can't -- I can't recall that at this moment,
13 sir.

14 Q Is it true to say you haven't waived privilege
15 then?

16 A I don't know that.

17 Q You presumably would know if you had.

18 A Yes, but at some -- I don't know if that would
19 have happened --

20 Q Do you remember ever doing it? Only you can do
21 it. Do you remember ever doing it?

22 A I do not, sir.

23 Q Right, okay.

24 A But I would like to have help if someone knows
25 later on perhaps. Counsel may know that and I



1 don't.

2 Q Well, I think if you've waived privilege, sir, you
3 would kind of have to know it yourself.

4 A Okay.

5 Q Anyway, moving on. Then in 1991, sir, going
6 through this history of significant events, after
7 the Department of Justice has turned down the
8 first application, in 1991 (V4)---- (V4)---, who
9 had been buried in your files since 1969, her
10 statement came to light through pure good fortune,
11 you are aware of that are you?

12 A Remind me how that happened, sir?

13 Q She read the *Toronto Star* and saw a picture of
14 Larry Fisher in it and said my God, that's the man
15 who attacked me that morning.

16 A I did hear that in some --

17 Q She contacted a lawyer -- or she contacted the
18 Saskatoon police who didn't seem to be a lot of
19 help and then contacted a lawyer in Toronto and
20 ultimately got word through to Mr. Milgaard's
21 counsel.

22 A Okay.

23 MS. KNOX: Mr. Commissioner, for the
24 correctness of the record, if I may, there was a
25 letter put in, and Commission Counsel will have



1 to help me with the document number, there was a
2 letter put in that recorded materials that Mr.
3 Caldwell sent to Eugene Williams I believe in
4 1989 or early 1990 and listed statements he was
5 attaching and I remember a statement number 40 I
6 believe was a, he didn't put the name in, but one
7 of the attachments that went to justice early in
8 the 690 review was the statement of (V4)----
9 (V4)--- which was well in advance of her
10 contacting anybody as a result of the *Toronto*
11 *Star*, and in fairness to Mr. Lockyer, I brought
12 it to Mr. Hodson's attention last week when --

13 MR. LOCKYER: Mr. Who, sorry?

14 MS. KNOX: In fairness to you, I brought to
15 Mr. Lockyer's attention last week --

16 MR. LOCKYER: To my attention?

17 MS. KNOX: No, no, to Mr. Hodson.

18 MR. LOCKYER: I thought you said Lockyer,
19 sorry.

20 MR. KNOX: Now, in fairness to you, I
21 didn't bring it to everybody's attention, but
22 last week I referenced with Mr. Hodson that when
23 Mr. Caldwell was interviewed for a follow-up
24 interview -- sorry, by Sergeant Pearson in March
25 of 1991 I believe, Sergeant Pearson, and he



1 didn't seem to realize that one of the statements
2 he had given to Mr. Williams was in fact the
3 (V4)---- (V4)--- statement, but he had sent that
4 to the Department of Justice when he was first
5 asked to peruse the old closed file on the David
6 Milgaard prosecution.

7 MR. LOCKYER: I have to tell you, I didn't
8 know that, so it's interesting information.

9 MS. KNOX: I think Mr. Hodson will agree
10 with me.

11 MR. HODSON: If you like, the letter that I
12 put to Mr. Caldwell was 150975.

13 MR. LOCKYER: Sorry, 150 --

14 MR. HODSON: -- 975, if you can call that
15 up and go to page 978, and at the very bottom,
16 Mr. Lockyer, where it says number 21, if you can
17 call that out, statement number 40 is the (V4)---
18 statement, you'll see where he lists -- and this
19 is on other attacks, under D, other attacks on
20 nurses or other women by knife-wielding
21 assailants, and the (V4)--- statement is number
22 40. If you want to call up --

23 MR. LOCKYER: Leave that.

24 MR. HODSON: If you want to call up 006404.

25 BY MR. LOCKYER:



1 Q Thank you. So to rephrase the question, sir, in
2 1991 (V4)---- (V4)---, whose statement had
3 remained buried in your file until you've given it
4 to Mr. Eugene Williams in 1989 but had remained
5 unknown to Mr. Milgaard until 1991, she came
6 forward and her existence became known; right?

7 A Well, I assume, sir, that that's the right
8 chronology.

9 Q It is from what I've just heard, it is the right
10 chronology.

11 A But it did get forwarded according to what I've
12 just seen here.

13 Q That led, sir, to, I don't know where that led,
14 but it might be said that (V4)---- (V4)--- might
15 well have been the turning point in terms of the
16 minister finally granting Mr. Milgaard's second
17 application under Section 690 of the *Criminal*
18 *Code*. There's a primary difference or addition
19 from the first one to the second one.

20 A Mr. Lockyer, I have clearly no idea of that at
21 all.

22 Q And then in 1992, sir, all the Supreme Court of
23 Canada would say was there was a reasonable doubt
24 about David Milgaard's guilt; right? You know
25 that?



1 A Is this the --

2 Q The judgment.

3 A Is this the second reference, sir, are you
4 speaking of, or the appeal to the Court?

5 Q The 1992 Supreme Court of Canada decision allowing
6 the appeal and quashing the conviction and
7 ordering a new trial.

8 A Yeah, I'm sure it was quite --

9 COMMISSIONER MacCALLUM: They didn't say
10 there was a reasonable doubt, they said there was
11 evidence which might give rise to it.

12 MR. LOCKYER: Raise a reasonable doubt,
13 yes, fair enough. They didn't even go as far as
14 I suggested.

15 COMMISSIONER MacCALLUM: No, they didn't.

16 MS. KNOX: And, in fact, in fairness to
17 this witness, the Supreme Court went much further
18 than that and they said it was appropriate that
19 he had the benefit of a fair trial, that they
20 were not provided with any probative evidence
21 that the police acted improperly in the
22 investigation, robbery, sexual assault and murder
23 or in the interviews with any of the witnesses,
24 nor was there evidence -- nor has there been
25 evidence presented that there was inadequate



1 disclosure in accordance with the practice
2 prevailing at the time. Milgaard was represented
3 by able and experienced counsel. No error in law
4 or procedure has been established. At the end of
5 the trial there was ample evidence about which
6 the jury, which had been properly instructed,
7 could return a verdict of guilty. That's a
8 direct quote from the Supreme Court of Canada
9 judgment contained in the press release that
10 Mr. Lockyer has from July 21st, 1997.

11 BY MR. LOCKYER:

12 Q As a result of which, Mr. Caldwell, for the next
13 five years Mr. Milgaard lived with the shadow over
14 him that he had got off a murder he had committed;
15 right, as a result of that Supreme Court of Canada
16 judgment?

17 A He was free at that time I believe.

18 Q He was free with that cloud over his head which
19 caused your justice minister indeed to suggest in
20 the media in a *Globe and Mail* interview that he
21 had got off a crime he had probably committed;
22 right?

23 A Now, sir, in three or four stages here I would not
24 regard his situation after the Supreme Court had
25 done that as him having a cloud over his head.



1 Q You wouldn't?

2 A The justice minister I assume is the federal one?

3 Q No, no, no, no.

4 A All right.

5 Q Saskatchewan Justice, who Mr. Milgaard sued him
6 for liable as a consequence.

7 A Was equally not my justice minister at that time,
8 sir.

9 Q Bob Mitchell?

10 A Yeah.

11 Q Bob Mitchell. So when you look at it, Mr.
12 Caldwell, in this case, and you were the
13 prosecutor in 1969, I think it's fair to put this
14 to you, David Milgaard's experience for 28 years
15 provides us with a remarkable failing of the
16 justice system for 28 years doesn't it?

17 A That's arguably the case.

18 Q It's a failing which includes, from what your
19 counsel just read, the judgment of the Supreme
20 Court of Canada in 1992 doesn't it?

21 A A failing in what respect, sir?

22 Q It didn't clear him of a crime he hadn't
23 committed.

24 A By this time I take it the stay had not gone in to
25 cabinet at some point.



1 Q The stay happened a few days later and that didn't
2 clear him of the crime he hadn't committed either.

3 A No, just trying to get the chronology, sir. I
4 take it that hadn't happened then?

5 Q It happened the following Monday as I recall.

6 A Then it did happen then, and what happened after
7 that?

8 Q The DNA results five years later, sir.

9 A All right, sir.

10 Q So for 28 years the justice system at every level,
11 police level, prosecutorial level, judicial level,
12 right up to the Supreme Court of Canada, failed
13 David Milgaard time after time after time?

14 A Yeah.

15 Q And ultimately, thank God for the science result
16 on July 16th of 1997, because you, for example, if
17 you hadn't got there, would still believe that
18 David Milgaard with a certainty was the man who
19 killed Gail Miller?

20 A You are talking about in lieu -- with the absence
21 of DNA evidence I would have felt that way?

22 Q You got it.

23 A That's what brought the whole thing out and to a
24 proper conclusion, Mr. Lockyer.

25 Q It wasn't the justice system that sold his case



1 ultimately at all, it was a piece of science;
2 right? The justice system never did get it right
3 did it?

4 A In the sense that the DNA scientific evidence is
5 what evidently completely cleared him and
6 completely, if you will, identified Fisher.

7 Q And as I say, your belief now in 2005, absent the
8 DNA results in 1997, if you were up there and you
9 were being questioned by me now, you would say to
10 me -- are you certain that David Milgaard killed
11 Gail Miller? Your answer would be yes, wouldn't
12 it?

13 A Yes, that's correct, sir.

14 Q And if I asked you now in those circumstances are
15 you certain that Larry Fisher didn't kill Gail
16 Miller, and your answer would be yes?

17 A I wouldn't have any reason to think otherwise,
18 sir, based on what you --

19 Q Because David Milgaard did it, not Larry Fisher.

20 A Pardon me?

21 Q Because David Milgaard did it, not Larry Fisher.

22 A Well, the situation we had ended up with David
23 Milgaard being convicted in a conventional
24 fashion, although clearly wrongly at the end of
25 the day, and the situation we had to deal with,



1 until some time later there was, in effect, little
2 or no evidence against Fisher who clearly ended up
3 being the guilty party later.

4 Q So what I put to you, sir, is the -- what I've
5 suggested to you, and you dispute, is the tunnel
6 vision that led you to always be certain that
7 David Milgaard had committed the crime, could
8 equally well be phrased as being certain that
9 Larry Fisher did not; right?

10 A Well, I'm not sure I subscribe to the idea that I
11 had tunnel vision, but I clearly felt in the guilt
12 of Milgaard, I believed in that, and until there
13 was something developed with Fisher, I did not
14 believe he was the guilty party. Clearly he was.

15 COMMISSIONER MacCALLUM: Mr. Lockyer, you
16 didn't get an answer to your question which I
17 found intriguing. You began by asking the
18 witness to agree that Milgaard's experience was a
19 remarkable failure of the justice system for over
20 28 years and he said yes, he agreed with that,
21 and then you asked him to agree that that would
22 include the Supreme Court of Canada and somehow
23 or other we got onto DNA before he answered that.

24 MR. LOCKYER: All right.

25 COMMISSIONER MacCALLUM: Do you have any



1 answer to that, sir, did the Supreme Court make a
2 mistake in your view?

3 A Now we're talking --

4 COMMISSIONER MacCALLUM: That's not a fair
5 way to put it because Mr. Lockyer's question was
6 did -- was the Supreme Court of Canada a part of
7 the failure of the justice system?

8 A At which stage, sir?

9 COMMISSIONER MacCALLUM: When they heard
10 the reference. He said did he receive a fair
11 trial.

12 A I thought, Mr. Lockyer, that -- I can't see how
13 them coming to the conclusion they did could be,
14 you know, as itself viewed as a failure of the
15 justice system, I find that hard to -- I just am
16 not sure where we're going there, sir, or where
17 I'm going at any rate.

18 COMMISSIONER MacCALLUM: Apparently nowhere
19 because Mr. Lockyer is sitting down.

20 MR. HODSON: I take it that you are done?

21 MR. LOCKYER: Exhausted and I'll sit down.

22 MR. HODSON: I think the next counsel to
23 cross-examine I believe is Mr. Pringle and I
24 presume he would wish to start tomorrow?

25 MR. PRINGLE: Yes.



1 MR. HODSON: And if I might just clarify,
2 I'm going to provide to Mr. Caldwell tonight for
3 him to review, and I've talked to Mr. Lockyer and
4 Ms. Knox, none of us are to talk to him while
5 he's in cross, but I'm going to give him the
6 original Ronald Wilson statement, handwritten and
7 typed, the original David Milgaard statement --
8 the Ron Wilson statement dated March 3rd, the
9 David Milgaard statement dated March 3rd,
10 handwritten and typed, the Nichol John March
11 11th, '69 statement typed, and as well the April
12 18th, 1969 police report that Mr. Lockyer
13 referred to that had comments I think by Mr.
14 Karst about both Nichol John and David Milgaard,
15 and then as well Mr. Lockyer also put to Mr.
16 Caldwell the comments of Mr. Riddell about Ron
17 Wilson's statements and they are attached, so as
18 long as we're all on the same page, this is what
19 I'm going to give him to read.

20 MR. LOCKYER: Perhaps you could include Mr.
21 Milgaard's statement on arrest as well.

22 MR. HODSON: There was no statement on
23 arrest. There was an April 18th --

24 MR. LOCKYER: That's the one I mean.

25 MR. HODSON: It does not include the April



1 18th.

2 MR. LOCKYER: If you can put that one too.

3 MR. HODSON: Yes, I can, and that was the
4 statement given to --

5 MR. LOCKYER: It was a caution statement, I
6 remember that.

7 UNIDENTIFIED SPEAKER: Karst.

8 MR. HODSON: No, it wasn't Karst, it was
9 actually to --

10 MR. LOCKYER: I have a copy of it.

11 MR. HODSON: In any event --

12 (Discussion off the record)

13 MR. HODSON: In any event, I will add that
14 statement, the second statement of David Milgaard
15 and I'll provide those to Mr. Caldwell now for
16 him to read for tomorrow.

17 COMMISSIONER MacCALLUM: Yes, thank you.

18 A Mr. Hodson, I realize that you -- I'm going to be
19 comparing all these to others in a series, in
20 effect?

21 MR. HODSON: Well --

22 COMMISSIONER MacCALLUM: I just wanted him
23 to know what the contents of the statements were
24 because he said he couldn't answer Mr. Lockyer's
25 questions without having that context, that's



1 all.

2 MR. HODSON: Yeah. So I will provide them
3 for you to read, if we can get the April 18th.

4 COMMISSIONER MacCALLUM: Yes, Mr. Wolch?

5 MR. WOLCH: Yes, Mr. Commissioner, just for
6 the record, I anticipated going first actually
7 and I deferred to Mr. Lockyer because of his
8 plane connection. I anticipated going second and
9 now I've deferred to Mr. Pringle because of his
10 commitment. I have no problem with that, I'm
11 happy to do it, and I'm just wondering, on two
12 scores, if I can also know what I'm going to be
13 questioning about, I wouldn't mind getting a copy
14 exactly of what Mr. Caldwell will have read so I
15 can address it since I'm now the one who is going
16 to be questioning about that, and while I'm on my
17 feet, I might advise, Mr. Commissioner, that I
18 had a productive conversation with Ms. Knox
19 earlier and there is some material that I will
20 likely question Mr. Caldwell about and she
21 advised me he's seen it already, so that will
22 also make things go faster. That's some material
23 I got from Commission Counsel.

24 COMMISSIONER MacCALLUM: Can you get by
25 with the document IDs with your new found



1 expertise in --

2 MR. WOLCH: I'm trying.

3 COMMISSIONER MacCALLUM: -- technical
4 matters?

5 MR. WOLCH: I think I could, but I just
6 want to make sure I have exactly the same
7 documents.

8 MR. HODSON: I will talk to Mr. Wolch and
9 advise him what I've given to Mr. Caldwell.

10 MR. WOLCH: I wasn't reading Gomery, I was
11 paying attention, but --

12 MR. HODSON: I think that's it for the day
13 and, Mr. Caldwell, just wait and I'll hand you
14 the --

15 A Yeah, thank you.

16 MR. HODSON: Mr. Commissioner, we're
17 adjourned for the day though.

18 COMMISSIONER MacCALLUM: Thank you.

19 (Adjourned at 4:10 p.m.)
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22
23
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25



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Official Queen's Bench Court Reporter

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Donald G. Meyer, RPR, CSR

Official Queen's Bench Court Reporter



<p>'68 [2] - 17716:24, 17925:18</p> <p>'69 [18] - 17716:25, 17720:24, 17721:11, 17722:18, 17781:2, 17782:12, 17785:20, 17793:17, 17793:24, 17794:3, 17794:15, 17815:5, 17832:7, 17858:7, 17858:11, 17918:5, 17925:18, 17973:11</p> <p>'69-70 [1] - 17817:15</p> <p>'71 [1] - 17922:23</p> <p>'90 [1] - 17953:14</p> <p>'90s [3] - 17770:23, 17821:13, 17883:18</p> <p>'91 [6] - 17812:10, 17812:11, 17821:13, 17933:16, 17953:14</p> <p>'92 [4] - 17812:8, 17821:14, 17953:14, 17953:15</p> <p>'96 [3] - 17850:13, 17850:14, 17850:18</p> <p>'97 [5] - 17703:25, 17821:14, 17850:12, 17945:11, 17945:13</p> <p>'99 [1] - 17848:24</p> <p>'and [1] - 17797:1</p> <p>'any [1] - 17856:20</p> <p>'at [1] - 17741:8</p> <p>'comfortable' [2] - 17702:8, 17702:10</p> <p>'could [1] - 17800:14</p> <p>'did [4] - 17796:20, 17797:5, 17797:24, 17950:1</p> <p>'em [1] - 17749:8</p> <p>'factually [1] - 17837:7</p> <p>'fine' [1] - 17747:14</p> <p>'generally [1] - 17856:21</p> <p>'how [1] - 17749:23</p> <p>'i'm [1] - 17812:23</p> <p>'if [1] - 17798:16</p> <p>'improvement' [1] - 17836:21</p> <p>'judge [1] - 17883:14</p> <p>'kook [1] - 17813:18</p> <p>'kook' [1] - 17814:23</p> <p>'no [1] - 17797:25</p> <p>'no' [1] - 17797:6</p> <p>'noble [1] - 17837:3</p> <p>'not [1] - 17838:5</p> <p>'only [1] - 17838:1</p> <p>'paynter [1] - 17797:6</p>	<p>'quite [1] - 17702:8</p> <p>'round [1] - 17749:8</p> <p>'s [7] - 17709:16, 17711:3, 17711:14, 17711:17, 17714:6, 17715:10, 17762:3</p> <p>'sec [1] - 17816:9</p> <p>'she [1] - 17864:12</p> <p>'stacking [2] - 17749:23, 17750:21</p> <p>'staggering [1] - 17825:9</p> <p>'straightforward [1] - 17864:7</p> <p>'suggest [1] - 17856:17</p> <p>'surely [1] - 17932:22</p> <p>'that [2] - 17814:3, 17933:5</p> <p>'the [8] - 17705:17, 17753:17, 17813:3, 17813:24, 17837:15, 17838:4, 17856:3, 17921:25</p> <p>'the' [1] - 17853:10</p> <p>'well [2] - 17852:3, 17853:2</p> <p>'with [1] - 17796:24</p> <p>'would [1] - 17822:11</p> <p>'you're [1] - 17798:13</p>	<p>11:56 [1] - 17839:9</p> <p>11th [10] - 17858:7, 17858:25, 17877:22, 17915:4, 17915:7, 17915:9, 17915:10, 17918:5, 17919:19, 17973:11</p> <p>12 [1] - 17836:13</p> <p>13 [5] - 17935:3, 17936:14, 17936:15, 17936:16, 17937:4</p> <p>13th [1] - 17713:4</p> <p>14 [1] - 17936:13</p> <p>149733 [1] - 17796:14</p> <p>149792 [1] - 17796:15</p> <p>149981 [1] - 17851:20</p> <p>14th [4] - 17699:10, 17699:14, 17700:7, 17933:16</p> <p>15 [3] - 17715:7, 17715:8, 17919:24</p> <p>150 [1] - 17964:13</p> <p>150056 [1] - 17839:21</p> <p>150975 [1] - 17964:12</p> <p>15944 [1] - 17866:14</p> <p>15982 [2] - 17879:1, 17879:2</p> <p>15th [7] - 17713:14, 17713:19, 17713:22, 17734:21, 17746:16, 17747:21, 17761:11</p> <p>16 [2] - 17739:19, 17824:8</p> <p>16-year-old [3] - 17745:18, 17799:1, 17799:18</p> <p>16176 [1] - 17788:21</p> <p>16178 [2] - 17774:18, 17774:19</p> <p>16208 [1] - 17755:13</p> <p>16213 [1] - 17739:19</p> <p>16th [4] - 17725:3, 17831:20, 17951:11, 17969:16</p> <p>17037 [1] - 17761:23</p> <p>17278 [1] - 17954:24</p> <p>17503 [1] - 17880:7</p> <p>17610 [1] - 17938:10</p> <p>17699 [1] - 17698:4</p> <p>17702 [1] - 17698:5</p> <p>179 [1] - 17789:20</p> <p>17th [1] - 17831:19</p> <p>18th [6] - 17746:15, 17746:24, 17973:12, 17973:23, 17974:1, 17975:3</p> <p>19 [1] - 17731:21</p> <p>1900 [1] - 17754:2</p> <p>1955 [1] - 17742:17</p> <p>1968 [6] - 17712:24,</p>	<p>17713:4, 17713:12, 17731:11, 17781:13, 17784:11</p> <p>1968-69-70 [1] - 17928:15</p> <p>1969 [22] - 17700:15, 17708:10, 17712:14, 17713:14, 17714:9, 17716:4, 17717:22, 17723:19, 17730:24, 17742:20, 17752:15, 17756:5, 17768:10, 17769:1, 17786:13, 17789:12, 17812:15, 17863:7, 17904:24, 17962:9, 17968:13, 17973:12</p> <p>1969-70 [1] - 17817:2</p> <p>1969-1970 [3] - 17705:3, 17883:16, 17925:16</p> <p>1969-1970-71 [1] - 17935:25</p> <p>1970 [7] - 17776:11, 17814:12, 17921:21, 17922:13, 17922:23, 17934:12</p> <p>1970-71 [1] - 17925:12</p> <p>1971 [2] - 17922:14, 17934:12</p> <p>1972 [6] - 17699:10, 17699:14, 17700:5, 17700:7, 17823:5, 17823:6</p> <p>1980 [3] - 17934:16, 17935:9, 17937:16</p> <p>1983 [1] - 17840:3</p> <p>1986 [1] - 17837:12</p> <p>1989 [2] - 17963:4, 17965:4</p> <p>1990 [8] - 17733:18, 17938:2, 17942:5, 17942:6, 17942:21, 17952:24, 17953:9, 17963:4</p> <p>1991 [8] - 17709:21, 17733:18, 17816:1, 17962:5, 17962:8, 17963:25, 17965:2, 17965:5</p> <p>1992 [6] - 17836:14, 17943:9, 17947:18, 17965:22, 17966:5, 17968:20</p> <p>1993 [1] - 17933:22</p> <p>1995-96 [1] - 17855:9</p> <p>1996 [2] - 17835:21, 17835:25</p> <p>1997 [10] - 17702:23, 17756:13, 17761:11,</p>	<p>17831:20, 17951:10, 17951:11, 17952:1, 17967:10, 17969:16, 17970:8</p> <p>1:34 [1] - 17839:10</p> <p>1st [3] - 17695:21, 17812:11, 17910:8</p>
2				
<p>20 [9] - 17710:14, 17714:5, 17764:1, 17764:17, 17774:18, 17774:19, 17813:12, 17819:16, 17932:1</p> <p>2000 [1] - 17883:18</p> <p>2005 [3] - 17695:21, 17704:1, 17970:7</p> <p>205 [1] - 17798:13</p> <p>20th [1] - 17754:2</p> <p>21 [1] - 17964:16</p> <p>21st [8] - 17703:25, 17712:24, 17731:11, 17756:13, 17769:22, 17776:10, 17787:4, 17967:10</p> <p>22 [1] - 17812:16</p> <p>22nd [3] - 17713:19, 17715:8, 17746:17</p> <p>23 [1] - 17745:19</p> <p>241 [1] - 17852:12</p> <p>25 [3] - 17804:20, 17804:23, 17805:5</p> <p>252 [1] - 17794:20</p> <p>25th [1] - 17761:21</p> <p>26th [2] - 17953:22, 17954:24</p> <p>27 [1] - 17702:11</p> <p>27th [1] - 17880:6</p> <p>28 [8] - 17702:11, 17739:12, 17905:9, 17905:11, 17968:14, 17968:16, 17969:10, 17971:20</p> <p>29th [1] - 17713:12</p> <p>2:56 [1] - 17919:25</p> <p>2nd [1] - 17794:25</p>				
3				
<p>3 [1] - 17706:12</p> <p>30 [4] - 17702:11, 17740:13, 17933:4, 17934:4</p> <p>301002 [3] - 17724:15, 17731:17, 17889:21</p> <p>301016 [1] - 17731:18</p> <p>301019 [2] - 17724:15,</p>				



17889:21 31st [2] - 17714:3, 17938:9 325653 [1] - 17773:23 332039 [1] - 17702:20 332049 [1] - 17855:1 332055 [1] - 17699:22 3:00 [1] - 17930:3 3:13 [1] - 17920:1 3rd [11] - 17714:9, 17714:14, 17719:8, 17753:23, 17858:11, 17858:24, 17877:23, 17886:10, 17973:8, 17973:9	8 8 [1] - 17714:8 816 [1] - 17852:1 818 [2] - 17853:12, 17853:14 824 [1] - 17823:4 827 [1] - 17822:18 88 [1] - 17695:22 8:00 [1] - 17736:3 8:15 [1] - 17734:22 8th [1] - 17748:1	17773:25, 17802:24, 17803:1, 17864:22, 17875:19, 17907:17, 17947:17 accepting [1] - 17922:1 accident [1] - 17907:24 accord [1] - 17903:4 accordance [4] - 17727:23, 17744:9, 17744:20, 17967:1 according [4] - 17787:18, 17841:24, 17952:24, 17965:11 accosting [1] - 17764:16 account [9] - 17774:24, 17782:10, 17827:1, 17879:18, 17888:10, 17897:23, 17901:18, 17903:2, 17908:11 accounted [1] - 17903:14 accounts [1] - 17717:15 accuracy [1] - 17903:18 accurate [12] - 17714:25, 17727:19, 17799:14, 17829:12, 17854:10, 17879:17, 17898:19, 17899:10, 17900:8, 17907:5, 17907:10, 17917:21 accurately [1] - 17743:3 accusation [3] - 17711:24, 17712:3, 17712:4 accusations [2] - 17914:13, 17961:1 accused [6] - 17711:8, 17718:19, 17771:16, 17781:19, 17827:25, 17856:20 acknowledge [4] - 17715:13, 17848:14, 17869:9, 17945:12 acknowledged [4] - 17737:2, 17739:17, 17846:25, 17848:3 acknowledgement [1] - 17805:25 acknowledging [1] - 17741:10 acknowledgment [1] - 17806:11 acquired [1] - 17942:9 acquitted [2] - 17807:14, 17837:9 act [3] - 17761:1, 17844:14, 17942:14 acted [3] - 17738:14, 17738:16, 17966:21	action [2] - 17933:18, 17953:2 actively [1] - 17947:25 actual [2] - 17884:8, 17884:20 add [3] - 17701:3, 17931:14, 17974:13 added [2] - 17886:16, 17933:8 addition [2] - 17791:1, 17965:18 additional [1] - 17936:18 Additionally [1] - 17945:23 address [2] - 17830:20, 17975:15 adds [3] - 17884:12, 17886:15, 17887:25 adjacent [1] - 17896:16 adjourn [1] - 17701:16 adjourned [1] - 17976:17 Adjourned [5] - 17701:19, 17776:1, 17839:9, 17919:25, 17976:19 adjournment [2] - 17877:20, 17877:24 admissible [1] - 17943:14 admit [2] - 17730:23, 17731:2 admitted [1] - 17836:20 adopt [4] - 17817:23, 17818:9, 17853:20, 17898:16 adopted [2] - 17722:9, 17724:9 advance [3] - 17726:16, 17895:22, 17963:9 advanced [1] - 17804:14 advantage [1] - 17771:23 adversarial [1] - 17947:1 adversaries [1] - 17947:15 advise [3] - 17956:7, 17975:17, 17976:9 advised [4] - 17814:9, 17814:19, 17955:19, 17975:21 affect [6] - 17803:23, 17804:3, 17804:9, 17804:21, 17827:13, 17909:17 affected [1] - 17805:6 affects [1] - 17827:8	afraid [4] - 17851:15, 17893:20, 17917:16, 17917:17 ago [10] - 17707:25, 17756:9, 17787:19, 17813:12, 17832:9, 17834:23, 17852:22, 17854:9, 17907:11, 17958:17 agree [48] - 17702:13, 17717:19, 17725:22, 17734:25, 17737:25, 17742:25, 17746:5, 17750:9, 17761:9, 17766:6, 17769:8, 17778:24, 17786:22, 17793:25, 17794:13, 17802:15, 17803:19, 17804:10, 17804:13, 17812:19, 17814:16, 17814:20, 17825:17, 17827:11, 17829:5, 17829:19, 17831:22, 17833:8, 17833:13, 17834:1, 17835:16, 17843:17, 17845:3, 17864:2, 17885:23, 17887:4, 17887:7, 17887:23, 17908:9, 17922:10, 17937:3, 17944:13, 17944:15, 17948:15, 17950:25, 17964:9, 17971:18, 17971:21 agreed [9] - 17783:8, 17811:2, 17854:13, 17854:21, 17886:19, 17901:7, 17919:6, 17920:7, 17971:20 agreeing [4] - 17830:4, 17830:6, 17903:15, 17946:19 ahead [14] - 17742:4, 17752:22, 17756:10, 17759:1, 17778:2, 17780:6, 17808:14, 17811:9, 17818:21, 17820:8, 17822:19, 17909:23, 17917:22, 17940:12 aid [1] - 17907:9 ain't [1] - 17765:6 alarming [1] - 17722:14 albeit [1] - 17853:19 Albert [5] - 17777:3, 17780:1, 17861:23, 17893:23, 17894:5 alerted [2] - 17775:8, 17778:8 Alexander [1] -
4	9			
4 [1] - 17713:15 40 [5] - 17763:5, 17764:16, 17963:5, 17964:17, 17964:22 400 [1] - 17706:12 45 [2] - 17867:12, 17867:22 4:10 [1] - 17976:19 4th [5] - 17781:2, 17866:14, 17878:22, 17879:1, 17879:5	9(2) [1] - 17918:13 95 [5] - 17757:8, 17758:9, 17760:4, 17762:7, 17831:13 975 [1] - 17964:14 978 [1] - 17964:15 980 [2] - 17851:22, 17852:8 981 [1] - 17851:22 9:00 [1] - 17699:2 9:09 [1] - 17701:19 9:13 [1] - 17701:20			
5	A			
5 [1] - 17713:25 56 [1] - 17850:21 59 [1] - 17850:21 5th [11] - 17739:19, 17755:13, 17774:18, 17774:19, 17774:21, 17782:12, 17785:20, 17788:21, 17793:23, 17832:7, 17832:19	abandoned [2] - 17939:9, 17941:14 abilities [1] - 17835:8 ability [1] - 17977:7 able [7] - 17700:5, 17721:5, 17785:9, 17869:11, 17877:11, 17940:16, 17967:3 absence [2] - 17903:6, 17969:20 absent [1] - 17970:7 absolute [4] - 17720:19, 17721:2, 17721:9, 17831:19 Absolutely [3] - 17819:12, 17894:10, 17899:22 absolutely [9] - 17703:11, 17761:7, 17793:8, 17815:7, 17815:9, 17820:9, 17833:20, 17847:17, 17941:9 accept [14] - 17715:23, 17724:25, 17739:13, 17747:16, 17749:4, 17749:5, 17750:1,			
6				
6 [1] - 17714:2 655 [1] - 17773:23 690 [3] - 17948:1, 17963:8, 17965:17				
7				
7 [2] - 17714:5, 17731:23 7th [1] - 17794:15				



<p>17697:14 alibi [1] - 17767:11 allegation [5] - 17704:10, 17704:23, 17711:14, 17711:17, 17843:4 allegations [4] - 17704:6, 17844:2, 17851:5, 17960:22 alleged [3] - 17718:13, 17718:14, 17946:22 alley [3] - 17727:4, 17729:10, 17901:11 alleyway [2] - 17859:21, 17860:18 allow [3] - 17873:7, 17873:10, 17877:11 allowed [4] - 17784:21, 17837:25, 17872:12, 17875:11 allowing [1] - 17966:5 almost [10] - 17705:25, 17717:5, 17717:9, 17722:25, 17739:2, 17749:19, 17789:20, 17810:14, 17919:8, 17936:25 alone [4] - 17745:8, 17807:15, 17825:15, 17888:22 alternatively [1] - 17913:2 altogether [1] - 17759:8 amazing [1] - 17837:15 American [1] - 17814:5 amounted [1] - 17959:4 ample [1] - 17967:5 analysing [1] - 17866:6 analysis [1] - 17836:18 annotation [1] - 17737:6 answer [52] - 17706:9, 17726:25, 17728:24, 17729:1, 17740:20, 17740:23, 17740:25, 17775:3, 17790:17, 17790:20, 17790:21, 17791:2, 17791:10, 17791:24, 17792:3, 17792:7, 17793:21, 17797:20, 17797:22, 17797:24, 17798:25, 17799:7, 17799:8, 17799:10, 17799:14, 17799:17, 17801:1, 17801:13, 17801:14, 17830:23, 17846:1, 17850:24, 17852:1, 17853:1, 17853:8, 17873:13, 17877:18,</p>	<p>17925:11, 17942:18, 17947:24, 17949:5, 17949:18, 17950:21, 17952:10, 17957:8, 17958:2, 17970:11, 17970:16, 17971:16, 17972:1, 17974:24 Answer [4] - 17796:23, 17797:6, 17797:25, 17798:16 answered [5] - 17822:13, 17847:1, 17847:9, 17948:7, 17971:23 answering [3] - 17761:21, 17818:15, 17919:12 answers [5] - 17761:3, 17802:18, 17815:22, 17831:23, 17854:17 anticipated [2] - 17975:6, 17975:8 Anyway [2] - 17934:11, 17962:5 anyway [6] - 17736:23, 17845:5, 17845:7, 17888:10, 17910:1, 17950:6 ap [1] - 17918:1 apart [1] - 17910:21 apologize [2] - 17701:11, 17902:21 apparent [4] - 17719:4, 17788:24, 17865:19, 17898:2 appeal [2] - 17966:4, 17966:6 appeals [1] - 17821:22 appear [3] - 17800:1, 17892:11, 17941:16 Appearances [1] - 17697:1 appeared [3] - 17760:4, 17798:17, 17922:13 application [5] - 17813:22, 17828:23, 17943:12, 17962:8, 17965:17 applications [2] - 17821:22, 17948:1 applied [4] - 17772:5, 17800:13, 17914:18, 17931:2 apply [4] - 17767:23, 17771:14, 17828:23, 17930:7 applying [3] - 17718:12, 17718:15, 17718:16 appreciate [5] - 17745:14, 17768:8,</p>	<p>17803:12, 17818:17, 17857:14 appreciated [1] - 17952:12 appreciation [2] - 17743:15, 17839:14 apprehended [8] - 17922:24, 17924:8, 17925:4, 17925:15, 17929:15, 17930:18, 17933:2, 17935:19 apprehension [1] - 17930:22 approach [1] - 17872:4 approached [3] - 17714:15, 17725:12, 17726:4 appropriate [4] - 17925:21, 17926:7, 17957:6, 17966:18 appropriately [1] - 17800:20 approved [1] - 17743:17 approximation [1] - 17809:18 April [14] - 17731:23, 17794:14, 17794:25, 17832:7, 17909:9, 17909:13, 17910:5, 17910:7, 17920:10, 17921:2, 17973:11, 17973:23, 17973:25, 17975:3 archives [2] - 17700:3, 17700:21 area [2] - 17888:12, 17946:8 arguable [1] - 17898:9 Arguably [2] - 17910:9, 17910:25 arguably [1] - 17968:17 argued [1] - 17897:4 argument [5] - 17857:11, 17875:22, 17946:7, 17947:22, 17949:1 argumentative [1] - 17875:16 arguments [1] - 17836:19 arisen [1] - 17800:6 arising [1] - 17872:3 arranging [1] - 17907:8 arrest [7] - 17785:22, 17909:8, 17911:21, 17921:17, 17921:20, 17973:21, 17973:23 arrested [2] - 17777:1, 17779:23</p>	<p>artificial [1] - 17836:20 aside [5] - 17705:1, 17716:2, 17869:10, 17929:4, 17929:12 aspect [3] - 17741:21, 17763:12, 17891:16 aspects [1] - 17743:20 Asper [2] - 17704:11, 17711:12 Asper's [1] - 17711:25 assailant [1] - 17731:12 assailants [1] - 17964:21 assault [11] - 17714:6, 17736:6, 17737:7, 17737:14, 17748:16, 17755:8, 17762:23, 17776:9, 17781:12, 17854:2, 17966:22 assaulted [7] - 17712:24, 17713:11, 17753:22, 17758:5, 17763:8, 17764:8, 17832:4 assaults [21] - 17712:14, 17714:19, 17718:24, 17733:7, 17733:20, 17776:7, 17776:13, 17776:20, 17778:15, 17782:14, 17792:17, 17802:6, 17832:1, 17845:23, 17847:2, 17847:4, 17847:5, 17847:7, 17848:21, 17848:22, 17932:20 assembled [1] - 17820:5 assertion [1] - 17704:16 assess [1] - 17877:11 assessment [3] - 17702:7, 17879:13, 17904:23 assessments [1] - 17876:16 assign [1] - 17953:20 assigned [1] - 17718:18 assist [4] - 17822:8, 17822:22, 17823:9, 17823:22 assistance [1] - 17809:16 Assistant [2] - 17696:3, 17696:6 assume [41] - 17700:9, 17710:4, 17710:12, 17710:17, 17719:5, 17723:19, 17723:22, 17732:9, 17738:10,</p>	<p>17741:8, 17757:14, 17785:3, 17786:11, 17809:9, 17809:12, 17823:11, 17823:13, 17826:11, 17826:16, 17830:1, 17838:15, 17855:19, 17862:4, 17865:3, 17869:8, 17888:3, 17894:6, 17901:20, 17906:18, 17908:6, 17912:16, 17931:9, 17938:7, 17949:22, 17957:1, 17957:3, 17957:5, 17959:19, 17960:18, 17965:7, 17968:2 assumed [2] - 17735:21, 17906:2 assuming [5] - 17770:24, 17786:18, 17859:23, 17885:22, 17893:5 assumption [3] - 17757:13, 17757:21, 17827:20 assumptions [1] - 17909:20 attached [2] - 17783:18, 17973:17 attaching [1] - 17963:5 attachments [1] - 17963:7 attack [6] - 17736:19, 17766:11, 17782:1, 17784:19, 17934:15, 17934:21 attacked [25] - 17708:2, 17708:5, 17708:14, 17709:6, 17709:11, 17710:15, 17713:16, 17713:19, 17714:13, 17717:10, 17719:16, 17734:23, 17735:14, 17735:20, 17736:15, 17747:22, 17754:17, 17754:22, 17763:5, 17766:5, 17766:17, 17768:3, 17782:3, 17784:13, 17962:15 attacker [4] - 17713:12, 17732:1, 17784:18, 17784:21 attacks [9] - 17715:18, 17715:19, 17716:23, 17718:10, 17731:10, 17735:23, 17780:23, 17964:19 attempt [2] - 17907:5, 17945:10 attempted [7] -</p>
---	---	---	---	---



17732:14, 17756:23, 17765:20, 17835:9, 17935:6, 17938:23, 17943:6 attempting [3] - 17852:2, 17856:25, 17946:4 attend [1] - 17958:8 attendants [1] - 17904:4 attended [1] - 17954:2 attention [14] - 17753:18, 17762:22, 17785:7, 17790:2, 17840:10, 17894:2, 17899:16, 17927:19, 17940:7, 17963:12, 17963:15, 17963:16, 17963:21, 17976:11 attitude [3] - 17815:3, 17815:19, 17817:17 attitudes [5] - 17815:8, 17817:8, 17817:13, 17817:14, 17817:18 attorney [2] - 17814:19, 17930:15 attribute [2] - 17807:10, 17900:15 attributed [3] - 17841:19, 17894:16, 17899:12 audience [1] - 17950:6 Audio [1] - 17696:14 August [7] - 17761:11, 17865:4, 17865:8, 17936:4, 17937:14, 17937:16 author [2] - 17724:18, 17737:13 available [3] - 17703:14, 17822:11, 17938:4 Avenue [4] - 17727:5, 17896:9, 17896:10, 17896:19 avenues [1] - 17940:19 avoided [1] - 17786:13 avoiding [1] - 17801:2 aware [30] - 17708:7, 17708:8, 17708:10, 17709:15, 17709:16, 17709:21, 17709:23, 17719:2, 17732:17, 17742:10, 17770:11, 17778:22, 17778:23, 17815:20, 17843:23, 17844:1, 17851:1, 17851:5, 17891:12, 17893:22, 17915:1, 17924:9, 17924:10,	17924:13, 17924:15, 17924:18, 17924:24, 17932:25, 17937:18, 17962:11 awful [4] - 17820:23, 17909:15, 17922:19, 17930:18 awkwardly [1] - 17733:3 Aylesbury [1] - 17872:18 B backing [2] - 17898:12, 17913:1 bad [4] - 17850:2, 17853:5, 17884:2, 17917:16 badly [1] - 17769:8 ban [1] - 17701:24 based [11] - 17700:23, 17703:14, 17703:21, 17768:19, 17792:20, 17808:2, 17826:9, 17843:5, 17844:17, 17970:18 basement [1] - 17946:11 basis [3] - 17717:10, 17943:13, 17944:3 bathtub [6] - 17843:4, 17846:4, 17846:8, 17849:11, 17853:6, 17856:17 Battleford [3] - 17934:16, 17935:11, 17935:17 be [1] - 17800:14 bear [4] - 17737:3, 17874:5, 17881:19, 17938:13 bearing [1] - 17873:23 became [7] - 17708:7, 17708:8, 17708:9, 17740:18, 17933:16, 17950:19, 17965:6 become [5] - 17709:20, 17742:10, 17833:11, 17938:5, 17942:5 becomes [5] - 17730:9, 17752:4, 17834:4, 17866:5, 17938:4 began [2] - 17850:19, 17971:17 Began [2] - 17920:18, 17920:20 begin [2] - 17756:15, 17830:14	beginning [1] - 17856:16 begins [2] - 17838:7, 17891:24 behalf [1] - 17709:20 behind [12] - 17722:16, 17735:20, 17754:22, 17784:13, 17836:2, 17859:20, 17860:4, 17860:18, 17860:22, 17861:9, 17868:25, 17885:6 behold [2] - 17891:22, 17892:5 beings [1] - 17805:16 Beitel [1] - 17696:10 belief [9] - 17703:18, 17767:14, 17826:10, 17831:19, 17901:21, 17906:20, 17908:12, 17909:3, 17970:7 believes [2] - 17864:13, 17932:18 belong [1] - 17798:17 Bence's [3] - 17807:14, 17807:20, 17807:21 Bench [6] - 17912:11, 17912:15, 17977:1, 17977:3, 17977:14, 17977:18 benefit [5] - 17699:23, 17789:5, 17789:10, 17862:19, 17966:19 benefitted [1] - 17915:15 benign [1] - 17838:14 Beresh [18] - 17916:14, 17916:23, 17955:12, 17955:24, 17956:12, 17957:14, 17957:15, 17958:6, 17958:12, 17958:14, 17959:1, 17959:2, 17959:8, 17959:20, 17960:1, 17960:4 best [12] - 17724:17, 17729:13, 17747:15, 17757:25, 17798:25, 17801:5, 17801:8, 17829:12, 17835:8, 17873:9, 17913:8, 17977:6 better [5] - 17735:25, 17826:3, 17832:10, 17912:1, 17947:24 between [17] - 17738:1, 17746:21, 17747:18, 17782:14, 17792:16, 17800:18, 17829:1,	17859:14, 17865:13, 17877:4, 17900:11, 17921:2, 17921:4, 17921:20, 17922:13, 17922:23, 17936:9 beyond [1] - 17936:5 bi [1] - 17717:9 bi-weekly [1] - 17717:9 big [1] - 17797:2 bill [1] - 17827:4 bingo [2] - 17727:22, 17730:4 bit [15] - 17704:24, 17720:3, 17740:5, 17778:5, 17796:22, 17803:8, 17804:11, 17811:23, 17818:14, 17826:13, 17848:13, 17849:17, 17916:4, 17919:14, 17955:23 bits [1] - 17725:8 black [4] - 17785:17, 17789:11, 17789:13, 17791:18 blame [3] - 17739:10, 17894:11, 17937:21 blamed [1] - 17813:19 blaming [1] - 17944:6 block [8] - 17729:18, 17754:2, 17754:5, 17862:1, 17862:8, 17896:15, 17902:16, 17911:4 blocks [11] - 17710:15, 17735:14, 17735:15, 17736:3, 17754:6, 17754:8, 17754:10, 17763:7, 17764:18, 17766:12, 17911:5 blood [8] - 17731:12, 17731:13, 17731:24, 17795:1, 17844:24, 17893:23, 17903:22, 17904:14 bloody [2] - 17774:11, 17841:7 blow [1] - 17769:4 blown [2] - 17768:12, 17768:16 board [9] - 17699:10, 17699:13, 17700:1, 17700:21, 17761:12, 17809:21, 17810:9, 17822:7, 17825:20 boat [3] - 17738:23, 17769:8, 17786:13 Bob [2] - 17968:9, 17968:11 Bobs [1] - 17697:6 body [5] - 17801:17,	17816:12, 17833:18, 17884:22, 17889:13 bombings [1] - 17813:14 book [6] - 17700:13, 17835:19, 17836:2, 17836:4, 17836:8, 17836:13 booklet [2] - 17699:16, 17700:6 boom [6] - 17840:17, 17852:15 boss [3] - 17817:4, 17817:8, 17817:11 Boswell [1] - 17696:5 bother [2] - 17799:24, 17821:17 bothered [1] - 17760:11 bottom [7] - 17741:5, 17781:10, 17790:16, 17850:25, 17851:25, 17852:8, 17964:15 Boucher [2] - 17742:15, 17742:17 boxes [2] - 17946:10, 17946:11 boy [2] - 17799:1, 17799:19 Boychuk [1] - 17697:9 brackets [1] - 17823:24 branches [1] - 17815:13 breadth [1] - 17743:15 break [7] - 17770:6, 17775:23, 17806:19, 17839:7, 17872:18, 17872:23, 17919:23 break-in [1] - 17872:18 breakdown [4] - 17885:2, 17885:5, 17888:2, 17901:15 breaking [1] - 17754:25 brief [3] - 17701:22, 17861:5, 17872:12 briefing [1] - 17872:13 Briefing [1] - 17908:19 bring [14] - 17730:10, 17734:9, 17761:16, 17761:25, 17777:14, 17790:2, 17796:7, 17836:2, 17836:3, 17850:3, 17873:5, 17875:1, 17909:1, 17963:21 brings [2] - 17883:13, 17886:2 Britain [1] - 17813:12 British [1] - 17814:6 broad [7] - 17716:16, 17716:18, 17802:14,
---	---	---	---	---



17828:21, 17882:2, 17914:20 broadly [1] - 17705:4 broke [4] - 17862:1, 17868:25, 17896:24, 17901:7 broken [8] - 17869:2, 17884:25, 17885:6, 17901:1, 17901:25, 17902:7, 17902:13, 17902:19 broken-down [1] - 17885:6 brother [2] - 17767:4, 17767:5 brought [16] - 17754:14, 17754:19, 17840:21, 17841:4, 17841:19, 17845:21, 17846:5, 17848:3, 17857:3, 17890:13, 17908:8, 17908:24, 17946:1, 17963:11, 17963:14, 17969:23 Brown [1] - 17954:21 Bruce [1] - 17697:10 building [1] - 17954:22 builds [1] - 17750:11 built [1] - 17813:24 bunch [4] - 17708:4, 17839:16, 17921:4, 17927:13 bundle [6] - 17724:15, 17773:23, 17786:9, 17796:14, 17822:18, 17889:21 buried [2] - 17962:9, 17965:3 bus [4] - 17714:15, 17727:4, 17896:7, 17896:24 business [3] - 17842:17, 17857:3, 17930:11 buttness [1] - 17955:25	17701:4, 17702:3, 17711:7, 17716:3, 17716:22, 17717:18, 17723:18, 17728:8, 17729:2, 17732:10, 17733:6, 17736:9, 17740:7, 17745:7, 17745:21, 17746:12, 17762:16, 17769:23, 17776:4, 17786:20, 17791:25, 17799:9, 17803:8, 17810:18, 17818:12, 17819:24, 17820:2, 17835:7, 17839:12, 17842:19, 17843:17, 17847:23, 17850:2, 17857:7, 17873:1, 17877:9, 17877:17, 17877:21, 17883:10, 17920:5, 17921:11, 17925:10, 17925:13, 17925:14, 17925:24, 17925:25, 17938:16, 17941:13, 17944:17, 17945:13, 17945:18, 17946:19, 17948:3, 17948:16, 17950:16, 17956:22, 17963:3, 17963:23, 17964:12, 17967:12, 17968:12, 17973:2, 17973:16, 17974:15, 17975:14, 17975:20, 17976:9, 17976:13 Caldwells [1] - 17954:1 Calgary [13] - 17843:5, 17846:2, 17846:8, 17846:11, 17849:10, 17850:2, 17850:3, 17852:11, 17852:24, 17852:25, 17853:5, 17853:13, 17856:17 Calgary-based [1] - 17843:5 Calvin [1] - 17697:14 Campbell [1] - 17813:20 campers [1] - 17909:14 Canada [24] - 17697:13, 17744:2, 17745:3, 17812:7, 17943:24, 17946:12, 17950:7, 17954:3, 17954:7, 17957:22, 17957:23, 17958:5, 17958:7, 17958:15, 17958:18, 17959:20, 17965:23, 17966:5, 17967:8, 17967:15, 17968:20, 17969:12, 17971:22, 17972:6	canada's [2] - 17699:16, 17700:1 Canadian [1] - 17814:7 Candace [1] - 17696:4 cannot [1] - 17777:25 canvass [2] - 17947:23, 17948:3 capable [1] - 17915:21 car [21] - 17729:6, 17729:7, 17729:17, 17748:15, 17859:20, 17860:4, 17860:18, 17860:22, 17861:9, 17861:25, 17868:25, 17869:1, 17885:3, 17885:6, 17885:11, 17888:13, 17890:19, 17891:4, 17896:24, 17900:22, 17900:24 career [2] - 17927:13 careful [4] - 17740:17, 17771:20, 17771:22, 17783:11 carefully [9] - 17732:15, 17765:20, 17787:23, 17808:9, 17834:15, 17835:10, 17835:12, 17905:3, 17960:20 careless [2] - 17823:10, 17823:20 Carlyle [17] - 17770:22, 17773:12, 17775:11, 17801:23, 17806:24, 17840:2, 17842:17, 17843:19, 17845:20, 17846:3, 17847:3, 17848:2, 17848:18, 17849:11, 17849:25, 17850:5, 17857:1 Carlyle-gordge [17] - 17770:22, 17773:12, 17775:11, 17801:23, 17806:24, 17840:2, 17842:17, 17843:19, 17845:20, 17846:3, 17847:3, 17848:2, 17848:18, 17849:11, 17849:25, 17850:5, 17857:1 carried [4] - 17782:2, 17784:19, 17837:19, 17930:25 carries [1] - 17852:12 carry [3] - 17875:20, 17884:3, 17932:4 case [100] - 17702:12, 17715:9, 17735:6, 17738:20, 17740:17, 17742:8, 17742:10, 17743:14, 17743:17, 17750:5, 17750:11, 17752:15, 17752:18, 17757:3, 17767:23, 17768:12, 17768:15, 17769:4, 17770:8, 17772:13, 17773:6, 17773:7, 17773:9, 17773:12, 17773:13, 17773:18, 17773:21, 17774:8, 17774:11, 17775:4, 17775:14, 17778:18, 17786:10, 17795:15, 17797:10, 17798:1, 17798:2, 17799:18, 17800:17, 17802:1, 17803:5, 17805:11, 17806:4, 17806:5, 17806:21, 17807:9, 17807:12, 17810:18, 17811:3, 17812:6, 17812:17, 17818:1, 17820:4, 17820:24, 17821:3, 17821:6, 17821:8, 17821:15, 17825:6, 17826:21, 17828:22, 17830:2, 17830:7, 17832:2, 17833:16, 17834:18, 17835:9, 17835:11, 17838:8, 17845:16, 17854:12, 17857:15, 17858:6, 17858:9, 17859:17, 17863:14, 17864:15, 17872:7, 17879:14, 17883:20, 17887:21, 17901:9, 17909:14, 17909:16, 17910:1, 17910:4, 17913:20, 17913:24, 17914:6, 17923:9, 17929:22, 17930:5, 17932:18, 17936:5, 17940:16, 17941:12, 17948:5, 17968:12, 17968:17, 17969:25 cases [9] - 17708:11, 17745:24, 17779:22, 17784:9, 17784:12, 17784:20, 17815:17, 17836:10, 17899:7 Casevault [1] - 17699:24 cast [4] - 17711:12, 17740:12, 17788:3, 17788:4 catch [3] - 17784:2, 17833:20, 17896:7 categories [1] - 17804:13	category [3] - 17742:13, 17806:10, 17823:12 Catherine [1] - 17697:6 caused [7] - 17743:7, 17830:12, 17872:7, 17951:23, 17952:17, 17952:19, 17967:19 causes [1] - 17758:18 caution [1] - 17974:5 cautioning [1] - 17846:6 cautions [1] - 17842:12 Celine [1] - 17904:3 certain [9] - 17810:12, 17868:10, 17905:8, 17915:22, 17970:10, 17970:15, 17971:6, 17971:8 certainly [37] - 17700:17, 17707:10, 17722:9, 17740:10, 17750:19, 17780:7, 17789:6, 17803:7, 17810:7, 17810:21, 17817:25, 17825:1, 17845:15, 17852:3, 17853:2, 17853:8, 17866:1, 17866:19, 17868:8, 17893:11, 17895:2, 17897:3, 17904:8, 17907:9, 17909:17, 17911:20, 17912:21, 17931:12, 17932:2, 17936:11, 17937:7, 17940:4, 17946:23, 17948:2, 17953:15, 17953:16, 17959:5 Certainly [3] - 17763:11, 17934:8, 17937:21 certainty [8] - 17720:19, 17721:2, 17721:10, 17808:4, 17809:20, 17811:11, 17820:16, 17969:18 Certificate [1] - 17977:1 certify [1] - 17977:4 chain [3] - 17749:18, 17754:23, 17754:25 challenge [2] - 17888:8, 17915:12 challenging [1] - 17909:3 chance [10] - 17832:23, 17865:11, 17867:18, 17870:20, 17921:21, 17922:18, 17923:7, 17931:25, 17934:11, 17945:15
C			
cabinet [1] - 17968:25 Cadrain [7] - 17728:17, 17853:4, 17856:25, 17893:23, 17894:5, 17903:21, 17904:3 Cadrain' [1] - 17856:18 Cadrain's [2] - 17861:23, 17911:7 Caldwell [73] - 17697:6, 17698:3, 17699:5, 17699:7, 17700:6,			



<p>chances [1] - 17934:12 change [3] - 17811:2, 17829:1, 17954:5 changed [5] - 17756:4, 17816:2, 17870:3, 17918:9, 17939:14 changes [4] - 17808:1, 17808:2, 17884:12, 17887:25 chap [6] - 17785:19, 17819:13, 17925:25, 17926:14, 17926:17, 17926:20 charge [8] - 17807:14, 17807:21, 17807:22, 17807:25, 17819:13, 17830:21, 17940:12, 17942:15 charged [7] - 17776:6, 17776:23, 17777:7, 17777:22, 17799:1, 17839:17, 17918:24 charges [2] - 17778:13, 17959:11 chasing [1] - 17763:18 checked [2] - 17887:19, 17954:3 chief [8] - 17710:19, 17715:6, 17715:12, 17792:12, 17917:8, 17924:6, 17925:1, 17945:21 Chief [5] - 17806:15, 17807:13, 17807:20, 17830:20, 17836:15 Chris [1] - 17697:9 Christine [2] - 17767:4, 17767:5 chronological [2] - 17732:16, 17733:2 chronology [3] - 17965:8, 17965:10, 17969:3 circulated [1] - 17921:5 circumstances [10] - 17735:25, 17749:18, 17782:20, 17782:21, 17783:25, 17803:21, 17912:25, 17913:21, 17919:9, 17970:14 circumstantial [5] - 17749:17, 17750:10, 17751:7, 17751:10, 17754:24 cities [1] - 17815:13 citizen [1] - 17945:20 citizens [2] - 17821:2, 17930:16 City [1] - 17774:8 city [11] - 17716:13,</p>	<p>17716:15, 17730:11, 17748:5, 17802:11, 17911:3, 17925:2, 17928:15, 17928:17, 17930:6, 17930:17 civil [1] - 17933:18 civilians [1] - 17834:20 claim [9] - 17719:22, 17733:9, 17736:23, 17837:21, 17886:1, 17900:23, 17903:3, 17917:5, 17955:25 claiming [2] - 17752:11, 17893:23 claims [6] - 17703:9, 17752:5, 17811:12, 17813:13, 17917:11, 17960:22 clarification [1] - 17876:13 clarify [1] - 17973:1 classic [4] - 17887:9, 17906:15, 17906:25, 17908:10 clear [9] - 17740:18, 17779:21, 17782:15, 17842:22, 17845:19, 17847:10, 17847:12, 17968:22, 17969:2 cleared [1] - 17970:5 clearly [24] - 17705:8, 17705:9, 17738:7, 17757:7, 17764:7, 17766:18, 17767:16, 17773:19, 17781:18, 17815:18, 17826:4, 17828:6, 17848:3, 17849:13, 17881:4, 17899:11, 17903:11, 17906:23, 17926:10, 17928:22, 17965:20, 17970:24, 17971:2, 17971:11 Clearly [2] - 17884:25, 17971:14 Clerk [1] - 17696:10 client [4] - 17872:12, 17872:13, 17876:21, 17883:20 client' [1] - 17947:10 close [2] - 17754:4, 17809:17 closed [2] - 17812:17, 17964:5 closer [2] - 17729:9, 17910:22 closing [3] - 17785:10, 17830:20, 17915:5 clothes [1] - 17832:23 clothing [12] -</p>	<p>17731:25, 17784:20, 17784:22, 17830:13, 17830:18, 17831:2, 17834:24, 17903:5, 17903:7, 17903:12, 17905:18, 17952:7 cloud [2] - 17967:18, 17967:25 cluster [1] - 17776:13 coat [4] - 17784:23, 17785:14, 17831:6, 17831:7 Code [1] - 17965:18 coffee [1] - 17872:21 coffin [1] - 17824:23 coin [3] - 17895:24, 17903:21, 17903:24 coincide [1] - 17727:2 coincidentally [1] - 17714:16 coined [2] - 17836:9, 17837:3 collaborated [1] - 17837:23 Collapse [1] - 17835:24 college [1] - 17804:25 com [1] - 17806:4 combination [1] - 17922:14 combo [2] - 17749:7, 17749:10 comfortable [5] - 17702:5, 17738:19, 17738:22, 17959:13, 17959:15 comfortable' [1] - 17702:9 coming [7] - 17703:8, 17726:23, 17746:5, 17795:7, 17873:16, 17873:18, 17972:13 commencing [2] - 17716:24, 17719:7 commendable [1] - 17930:23 comment [8] - 17705:20, 17752:20, 17769:10, 17769:14, 17769:15, 17819:7, 17946:9, 17953:22 commentaries [1] - 17818:9 comments [10] - 17816:7, 17862:21, 17863:1, 17863:10, 17863:19, 17863:21, 17865:18, 17944:14, 17973:13, 17973:16 Commission [30] - 17695:2, 17695:14,</p>	<p>17696:1, 17696:2, 17696:3, 17696:10, 17699:8, 17704:4, 17707:24, 17710:7, 17720:15, 17754:10, 17759:19, 17783:5, 17787:22, 17789:24, 17792:10, 17836:1, 17839:18, 17855:7, 17870:25, 17880:16, 17920:9, 17920:24, 17938:15, 17953:23, 17954:24, 17960:14, 17962:25, 17975:23 commissioned [1] - 17772:14 Commissioner [134] - 17699:3, 17700:19, 17701:9, 17701:15, 17701:18, 17701:25, 17732:20, 17732:23, 17742:1, 17744:21, 17751:8, 17759:21, 17760:6, 17774:1, 17775:24, 17775:25, 17802:16, 17803:22, 17803:25, 17816:9, 17816:11, 17819:6, 17832:10, 17832:14, 17839:6, 17839:8, 17849:16, 17849:20, 17850:8, 17850:16, 17850:19, 17850:22, 17851:7, 17851:12, 17851:15, 17851:18, 17851:21, 17855:3, 17855:13, 17859:6, 17863:17, 17863:23, 17864:6, 17867:16, 17867:21, 17868:4, 17870:24, 17871:6, 17871:10, 17871:15, 17871:20, 17871:25, 17872:2, 17873:4, 17873:18, 17874:2, 17874:7, 17874:9, 17874:13, 17874:21, 17874:25, 17875:7, 17875:10, 17875:14, 17875:19, 17876:1, 17876:4, 17876:8, 17876:11, 17877:15, 17877:25, 17878:4, 17878:10, 17878:11, 17878:15, 17878:19, 17879:2, 17880:2, 17881:7, 17882:25, 17883:3, 17883:5, 17883:9, 17883:24, 17884:3, 17902:5, 17902:9, 17902:12,</p>	<p>17902:17, 17902:20, 17917:25, 17919:24, 17943:15, 17943:17, 17944:11, 17944:20, 17944:24, 17945:2, 17945:17, 17945:18, 17946:16, 17946:20, 17947:3, 17947:9, 17947:20, 17948:6, 17948:10, 17948:14, 17948:17, 17948:20, 17949:5, 17949:8, 17949:12, 17949:17, 17949:20, 17949:23, 17953:25, 17962:23, 17966:9, 17966:15, 17971:15, 17971:25, 17972:4, 17972:9, 17972:18, 17974:17, 17974:22, 17975:4, 17975:5, 17975:17, 17975:24, 17976:3, 17976:16, 17976:18 commit [4] - 17745:11, 17837:6, 17869:9, 17920:20 commitment [1] - 17975:10 committed [35] - 17733:21, 17733:23, 17767:15, 17770:14, 17777:16, 17778:8, 17820:10, 17829:18, 17830:25, 17831:20, 17833:4, 17838:20, 17838:21, 17839:16, 17849:2, 17849:7, 17906:21, 17908:12, 17908:14, 17910:16, 17920:8, 17920:17, 17928:11, 17928:14, 17931:21, 17936:24, 17939:8, 17955:25, 17956:17, 17959:6, 17967:14, 17967:21, 17968:23, 17969:2, 17971:7 committing [5] - 17719:6, 17897:25, 17925:15, 17930:17, 17951:19 common [2] - 17745:24, 17763:23 communicate [3] - 17949:2, 17949:7, 17949:9 communicated [1] - 17956:14 community [8] - 17813:25, 17822:8,</p>
--	---	--	--	--



<p>17822:12, 17822:21, 17823:9, 17823:14, 17823:21, 17932:25 compact [1] - 17885:18 compare [3] - 17859:3, 17867:13, 17946:24 compared [1] - 17905:3 compares [1] - 17712:11 comparing [2] - 17944:18, 17974:19 comparison [3] - 17766:24, 17861:1, 17947:19 comparisons [1] - 17859:14 compel [1] - 17769:11 complainants [1] - 17929:12 complaining [1] - 17845:21 complaint [1] - 17754:15 complaints [2] - 17784:11, 17859:25 complete [4] - 17767:11, 17835:12, 17837:16, 17878:1 completed [3] - 17899:7, 17934:23, 17935:1 Completely [1] - 17790:12 completely [13] - 17705:20, 17763:14, 17790:9, 17790:13, 17790:16, 17790:22, 17791:3, 17798:18, 17828:25, 17833:17, 17912:5, 17970:5, 17970:6 comprehensive [1] - 17745:6 compulsion [2] - 17809:10, 17809:13 compulsory [1] - 17837:11 compunction [1] - 17838:10 concern [1] - 17760:24 concerned [9] - 17711:15, 17751:9, 17760:12, 17812:23, 17812:25, 17825:24, 17894:13, 17913:10, 17947:11 conclude [2] - 17898:23, 17952:19 concluded [2] - 17866:18, 17939:5</p>	<p>conclusion [7] - 17749:2, 17764:14, 17905:19, 17920:5, 17959:21, 17969:24, 17972:13 conclusions [1] - 17749:19 concrete [3] - 17873:2, 17940:22, 17941:17 concurrent [5] - 17927:17, 17935:2, 17935:3, 17936:11, 17936:19 conference [2] - 17787:8, 17805:1 confess [1] - 17882:23 confessed [2] - 17777:7, 17922:24 confessions [1] - 17923:20 confront [1] - 17788:13 confronted [2] - 17864:24, 17917:24 Congram [1] - 17696:4 connected [3] - 17755:9, 17762:23, 17864:14 connection [7] - 17736:7, 17737:7, 17738:10, 17738:11, 17746:21, 17796:23, 17975:8 connived [1] - 17836:25 cons [1] - 17904:21 consequence [3] - 17818:15, 17934:13, 17968:6 consequences [2] - 17786:24, 17936:4 consider [8] - 17707:3, 17721:3, 17750:3, 17750:6, 17798:21, 17878:23, 17900:19, 17910:14 considerably [1] - 17915:16 consideration [7] - 17737:13, 17740:1, 17741:3, 17752:12, 17830:11, 17834:13, 17931:5 considerations [1] - 17827:12 considered [2] - 17822:4, 17898:10 considering [3] - 17750:4, 17901:17, 17932:19 considers [1] - 17718:17</p>	<p>consistency [1] - 17897:8 consistent [3] - 17775:10, 17897:18, 17897:19 Constabulary [1] - 17836:16 construct [1] - 17835:11 consult [2] - 17926:6, 17926:13 consultation [1] - 17756:22 consulted [5] - 17702:21, 17758:13, 17925:2, 17925:21, 17927:8 contacted [4] - 17940:5, 17962:17, 17962:19 contacting [1] - 17963:10 contain [3] - 17706:2, 17887:6, 17977:5 contained [3] - 17854:4, 17863:2, 17967:9 containing [1] - 17960:21 contemporaneous [1] - 17837:12 contents [9] - 17722:21, 17724:3, 17759:4, 17859:5, 17859:6, 17859:9, 17868:20, 17915:8, 17974:23 context [24] - 17751:3, 17755:16, 17755:20, 17762:2, 17769:25, 17788:21, 17790:6, 17792:7, 17793:2, 17796:22, 17818:1, 17830:7, 17830:9, 17832:13, 17836:9, 17851:11, 17857:21, 17861:18, 17878:23, 17894:14, 17901:6, 17910:3, 17957:21, 17974:25 continual [1] - 17883:20 continue [2] - 17703:10, 17878:5 Continued [1] - 17698:3 continued [1] - 17699:5 continuing [1] - 17942:15 contradiction [1] - 17888:23</p>	<p>contrary [5] - 17729:13, 17730:1, 17730:8, 17838:15, 17869:14 convenient [2] - 17718:1, 17918:20 conventional [1] - 17970:23 conversation [8] - 17840:2, 17843:19, 17845:20, 17847:3, 17880:13, 17880:18, 17958:6, 17975:18 conversations [1] - 17837:17 convey [1] - 17756:8 convict [1] - 17837:7 convicted [7] - 17810:2, 17813:14, 17922:11, 17949:3, 17949:14, 17949:16, 17970:23 Conviction [1] - 17695:4 conviction [9] - 17810:13, 17810:20, 17921:20, 17923:7, 17943:12, 17943:25, 17945:11, 17947:17, 17966:6 convictions [2] - 17826:6, 17836:5 convince [1] - 17810:15 convinced [3] - 17805:21, 17820:10, 17833:5 convincing [2] - 17864:12, 17868:12 cooperate [1] - 17899:13 copies [1] - 17877:21 Copies [1] - 17855:6 copy [3] - 17699:9, 17974:10, 17975:13 Corey [1] - 17924:21 corner [4] - 17736:6, 17737:6, 17762:23, 17788:12 corners [1] - 17756:1 Correct [7] - 17831:12, 17847:7, 17861:20, 17893:7, 17911:7, 17936:20, 17943:7 correct [50] - 17699:20, 17703:24, 17705:3, 17715:1, 17718:6, 17720:21, 17723:17, 17728:2, 17733:14, 17741:12, 17748:25, 17753:11, 17759:14, 17759:17, 17761:22, 17762:12, 17770:15,</p>	<p>17771:16, 17780:19, 17781:24, 17787:10, 17795:18, 17827:21, 17829:9, 17841:2, 17848:6, 17854:24, 17855:20, 17856:3, 17856:7, 17856:8, 17856:9, 17859:23, 17859:25, 17862:4, 17881:15, 17885:16, 17886:14, 17886:25, 17888:3, 17893:17, 17893:20, 17896:9, 17900:4, 17915:24, 17920:16, 17921:9, 17923:21, 17970:13, 17977:5 corrected [3] - 17737:10, 17920:24, 17935:8 correction [2] - 17802:24, 17803:1 correctness [1] - 17962:24 correlation [1] - 17738:1 corridor [4] - 17916:9, 17916:17, 17955:6, 17957:25 corroborating [1] - 17887:14 corrupt [1] - 17838:12 corruption [8] - 17838:11, 17857:19, 17906:16, 17907:1, 17908:10, 17908:13, 17908:18, 17908:25 corruption [1] - 17837:4 corruptly [1] - 17838:16 Cory [1] - 17804:4 Cotler [1] - 17697:13 Counsel [24] - 17696:2, 17696:3, 17699:4, 17704:4, 17707:24, 17710:7, 17720:15, 17754:10, 17783:5, 17787:22, 17789:24, 17792:10, 17836:1, 17839:18, 17855:7, 17870:25, 17920:9, 17920:24, 17938:15, 17953:23, 17960:14, 17961:25, 17962:25, 17975:23 counsel [28] - 17699:23, 17702:21, 17705:2, 17706:4, 17706:14, 17706:20, 17707:14, 17733:24,</p>
---	--	--	--	--



<p>17740:25, 17756:22, 17769:21, 17787:19, 17803:18, 17826:12, 17849:5, 17855:8, 17855:11, 17872:11, 17915:21, 17922:22, 17930:2, 17954:18, 17956:14, 17961:9, 17962:21, 17967:3, 17968:19, 17972:22 counted [1] - 17706:13 countenance [1] - 17906:11 countless [3] - 17871:24, 17874:12, 17884:10 counts [1] - 17780:2 couple [7] - 17701:17, 17702:4, 17770:16, 17798:11, 17899:11, 17923:10, 17938:11 course [36] - 17704:3, 17704:25, 17707:8, 17711:13, 17721:21, 17731:6, 17732:7, 17733:11, 17743:19, 17748:23, 17760:25, 17765:21, 17784:24, 17787:21, 17811:16, 17822:25, 17828:3, 17839:2, 17839:4, 17844:8, 17854:10, 17856:19, 17857:25, 17860:20, 17870:15, 17884:11, 17886:6, 17894:11, 17894:18, 17911:24, 17918:12, 17919:17, 17924:3, 17929:17, 17930:20, 17936:6 court [1] - 17720:5 Court[45] - 17696:11, 17720:7, 17743:18, 17743:21, 17744:2, 17744:8, 17745:3, 17801:17, 17801:18, 17801:19, 17812:7, 17821:9, 17823:1, 17898:18, 17929:25, 17943:24, 17946:12, 17949:4, 17950:7, 17953:15, 17954:2, 17954:6, 17957:22, 17957:23, 17958:5, 17958:7, 17958:15, 17958:18, 17959:20, 17965:22, 17966:4, 17966:5, 17966:17, 17967:8, 17967:15, 17967:24, 17968:20,</p>	<p>17969:12, 17971:22, 17972:1, 17972:6, 17977:1, 17977:3, 17977:14, 17977:18 courtesy [1] - 17757:1 courthouse [1] - 17802:20 courts [2] - 17837:13, 17837:25 covering [1] - 17783:14 create [6] - 17838:17, 17838:20, 17865:25, 17895:6, 17895:10 created [1] - 17906:12 creates [1] - 17908:13 creating [2] - 17895:7, 17908:19 credibility [5] - 17862:22, 17863:2, 17865:19, 17872:8, 17876:17 credible [1] - 17868:12 cried [1] - 17786:6 crime [40] - 17724:19, 17731:25, 17745:11, 17767:15, 17770:14, 17783:25, 17820:10, 17829:18, 17830:25, 17831:21, 17833:5, 17838:20, 17838:21, 17864:14, 17869:10, 17882:23, 17886:18, 17887:7, 17887:16, 17887:18, 17887:20, 17889:6, 17889:9, 17898:1, 17906:4, 17906:21, 17908:12, 17908:14, 17908:22, 17909:15, 17910:8, 17911:9, 17936:24, 17956:1, 17956:17, 17959:6, 17967:21, 17968:22, 17969:2, 17971:7 Crime[3] - 17782:13, 17783:15, 17788:19 crimes [20] - 17719:6, 17719:7, 17779:3, 17839:15, 17839:16, 17849:7, 17910:16, 17922:24, 17928:11, 17930:18, 17931:6, 17931:16, 17931:22, 17933:1, 17942:12, 17951:17, 17951:18, 17953:5, 17953:8 criminal [6] - 17749:16, 17807:19, 17836:19, 17836:23, 17853:11, 17856:20</p>	<p>Criminal[2] - 17835:24, 17965:17 crisply [1] - 17841:16 critical [2] - 17904:23, 17948:18 criticised [1] - 17876:6 criticism [5] - 17873:16, 17873:19, 17874:18, 17875:20, 17930:1 criticized [1] - 17875:10 Cross[1] - 17795:1 cross [27] - 17702:1, 17752:5, 17788:5, 17828:5, 17875:3, 17875:6, 17875:16, 17875:21, 17875:23, 17876:1, 17877:9, 17878:2, 17915:6, 17915:17, 17917:4, 17917:8, 17917:10, 17917:23, 17917:25, 17918:3, 17918:17, 17919:4, 17919:5, 17919:8, 17919:18, 17972:23, 17973:5 cross-examination [14] - 17702:1, 17788:5, 17828:5, 17875:3, 17875:16, 17875:21, 17875:23, 17876:1, 17877:9, 17878:2, 17915:6, 17915:17, 17917:25, 17919:5 cross-examinations [1] - 17875:6 cross-examine [7] - 17752:5, 17917:4, 17917:8, 17917:10, 17918:3, 17919:8, 17972:23 cross-examiner [2] - 17917:23, 17918:17 cross-examining [1] - 17919:18 crown [1] - 17807:21 Crown[16] - 17750:8, 17772:17, 17774:7, 17774:8, 17800:7, 17800:8, 17814:19, 17827:22, 17828:2, 17861:4, 17913:24, 17914:10, 17914:14, 17930:15, 17943:23, 17958:24 Crown's [3] - 17750:4, 17750:5, 17820:24 Crowns[1] - 17882:21 crucial [4] - 17752:18, 17773:4, 17916:6 Csr[8] - 17696:11,</p>	<p>17696:12, 17977:2, 17977:12, 17977:13, 17977:16, 17977:17 culminated [1] - 17921:16 culminating [1] - 17717:11 culpability [1] - 17944:4 culprit [3] - 17718:14, 17833:21, 17910:22 cumulatively [1] - 17786:8 curious [1] - 17776:16 current [3] - 17826:3, 17939:17, 17939:24</p>	<p>D</p> <p>Danchuk [1] - 17861:3 Danchuks [10] - 17860:3, 17860:5, 17860:11, 17860:21, 17860:22, 17861:12, 17861:18, 17885:7, 17903:25, 17904:6 Danchuks' [1] - 17860:13 danger [3] - 17826:19, 17826:24, 17834:6 dangerous [3] - 17760:14, 17811:4, 17826:1 dangers [1] - 17919:17 date [15] - 17700:12, 17700:15, 17700:17, 17713:17, 17747:21, 17812:8, 17812:9, 17823:4, 17850:10, 17857:7, 17861:4, 17914:11, 17933:13, 17938:7 dated [2] - 17973:8, 17973:9 dates [4] - 17715:2, 17724:25, 17858:22, 17959:17 dating [1] - 17784:10 David [120] - 17695:4, 17697:2, 17697:12, 17698:3, 17699:5, 17703:13, 17712:2, 17724:8, 17730:2, 17731:13, 17733:24, 17739:7, 17745:10, 17756:16, 17761:13, 17766:5, 17766:11, 17766:17, 17768:3, 17768:13, 17768:15, 17769:4, 17770:8,</p>	<p>17785:21, 17786:14, 17801:7, 17805:21, 17808:5, 17811:12, 17812:5, 17814:22, 17818:1, 17818:23, 17819:11, 17820:16, 17825:13, 17827:5, 17828:14, 17829:17, 17830:10, 17830:15, 17830:25, 17831:20, 17833:4, 17835:23, 17838:18, 17838:19, 17840:23, 17845:12, 17849:1, 17849:5, 17849:8, 17857:25, 17858:9, 17858:14, 17861:25, 17862:6, 17862:11, 17862:16, 17862:22, 17862:23, 17864:13, 17864:15, 17864:17, 17869:9, 17870:6, 17870:12, 17880:4, 17882:7, 17884:13, 17885:10, 17885:14, 17885:18, 17886:1, 17887:1, 17888:21, 17888:22, 17890:4, 17890:15, 17893:20, 17894:13, 17896:25, 17897:19, 17897:24, 17901:19, 17902:16, 17906:20, 17909:8, 17911:1, 17911:19, 17916:13, 17916:21, 17920:8, 17922:11, 17923:6, 17936:5, 17938:5, 17942:9, 17943:1, 17944:4, 17947:16, 17950:19, 17955:10, 17955:25, 17956:17, 17959:6, 17964:5, 17965:24, 17968:14, 17969:13, 17969:18, 17970:10, 17970:19, 17970:21, 17970:22, 17971:7, 17973:7, 17973:9, 17973:14, 17974:14 David's [4] - 17827:18, 17893:24, 17903:22, 17951:4 Davidson [1] - 17872:21 daylight [2] - 17782:15, 17848:10 days [9] - 17714:8, 17724:11, 17753:23, 17753:25, 17837:18, 17855:21, 17886:12, 17929:3, 17969:1</p>
---	---	--	---	--	--



<p>daze [1] - 17732:11</p> <p>deal [15] - 17712:7, 17751:8, 17756:20, 17756:24, 17769:16, 17769:19, 17806:8, 17830:22, 17852:2, 17867:9, 17874:20, 17878:14, 17891:17, 17892:9, 17970:25</p> <p>dealing [6] - 17811:16, 17811:18, 17821:8, 17840:6, 17845:15, 17948:1</p> <p>dealings [2] - 17909:5, 17961:9</p> <p>deals [1] - 17844:4</p> <p>dealt [5] - 17769:21, 17811:19, 17815:17, 17909:19, 17933:2</p> <p>death [1] - 17724:20</p> <p>debate [1] - 17876:14</p> <p>decades [1] - 17836:25</p> <p>deceased [2] - 17728:16, 17767:5</p> <p>December [1] - 17812:11</p> <p>decide [4] - 17768:18, 17768:19, 17795:4, 17960:4</p> <p>decided [17] - 17749:14, 17753:15, 17756:5, 17765:6, 17768:6, 17795:17, 17827:3, 17827:17, 17827:19, 17828:11, 17828:14, 17838:19, 17848:18, 17849:1, 17866:7, 17870:6, 17870:7</p> <p>deciding [2] - 17750:16, 17897:23</p> <p>decision [5] - 17699:20, 17755:10, 17768:23, 17901:19, 17966:5</p> <p>decision-making [1] - 17755:10</p> <p>decisions [9] - 17751:16, 17758:12, 17758:23, 17786:17, 17786:20, 17787:1, 17826:10, 17826:15, 17838:14</p> <p>declaration [5] - 17916:9, 17916:17, 17955:5, 17957:23, 17958:11</p> <p>defence [22] - 17706:4, 17706:13, 17706:20, 17707:1, 17707:4, 17707:6, 17707:14,</p>	<p>17733:10, 17742:11, 17803:18, 17807:21, 17826:12, 17826:13, 17834:7, 17835:6, 17914:25, 17915:2, 17915:20, 17915:21, 17938:6, 17942:10, 17958:13</p> <p>defer [3] - 17754:11, 17834:11, 17834:12</p> <p>deferred [2] - 17975:7, 17975:9</p> <p>deferring [1] - 17834:17</p> <p>degree [2] - 17734:9, 17860:7</p> <p>degrees [2] - 17763:5, 17764:17</p> <p>Del [1] - 17926:20</p> <p>delayed [1] - 17935:15</p> <p>delegated [1] - 17737:12</p> <p>demonstrate [2] - 17829:24, 17956:16</p> <p>demonstrates [1] - 17906:20</p> <p>denied [3] - 17777:11, 17821:10, 17897:25</p> <p>Denning [1] - 17813:11</p> <p>denom [1] - 17887:9</p> <p>denominator [1] - 17887:10</p> <p>Department [4] - 17784:9, 17945:21, 17962:7, 17964:4</p> <p>department [2] - 17815:12, 17932:23</p> <p>Deputy [1] - 17806:14</p> <p>deputy [1] - 17772:6</p> <p>derived [1] - 17836:22</p> <p>describe [2] - 17746:15, 17817:22</p> <p>described [7] - 17724:17, 17773:12, 17806:4, 17837:15, 17864:6, 17865:14, 17903:13</p> <p>describing [1] - 17832:1</p> <p>Description [1] - 17698:2</p> <p>description [2] - 17806:17, 17832:4</p> <p>desire [1] - 17838:6</p> <p>despite [8] - 17703:4, 17737:24, 17749:1, 17757:21, 17770:10, 17801:15, 17805:25, 17943:1</p> <p>detail [3] - 17808:16, 17860:7, 17896:2</p>	<p>details [2] - 17879:15, 17881:11</p> <p>Detective [3] - 17757:2, 17797:12, 17907:11</p> <p>determination [1] - 17703:20</p> <p>determine [1] - 17876:23</p> <p>determined [3] - 17774:21, 17833:20, 17872:23</p> <p>determining [3] - 17787:25, 17900:19, 17901:16</p> <p>developed [4] - 17743:14, 17860:8, 17939:3, 17971:13</p> <p>dictates [1] - 17717:20</p> <p>dies [1] - 17824:9</p> <p>Diewold [1] - 17727:3</p> <p>difference [5] - 17740:13, 17794:5, 17794:7, 17838:24, 17965:18</p> <p>different [12] - 17745:16, 17759:8, 17787:18, 17794:2, 17797:2, 17798:18, 17808:20, 17872:4, 17878:5, 17885:12, 17919:14, 17939:5</p> <p>difficult [4] - 17752:4, 17787:15, 17874:20, 17959:17</p> <p>difficulty [10] - 17732:16, 17732:18, 17732:25, 17752:14, 17818:14, 17857:13, 17871:16, 17875:11, 17875:12, 17877:7</p> <p>direct [4] - 17780:3, 17840:10, 17888:23, 17967:8</p> <p>direction [1] - 17910:15</p> <p>directions [3] - 17725:13, 17726:5, 17885:12</p> <p>directly [3] - 17896:6, 17952:21, 17956:14</p> <p>director [1] - 17816:21</p> <p>Director [5] - 17696:4, 17816:3, 17816:7, 17817:5, 17817:7</p> <p>disagreement [1] - 17901:14</p> <p>disappeared [2] - 17767:8, 17767:10</p> <p>disbelieve [5] - 17895:25, 17897:7, 17897:10, 17897:14,</p>	<p>17897:16</p> <p>disbelieving [1] - 17904:18</p> <p>disclose [40] - 17704:20, 17705:14, 17705:16, 17705:19, 17710:21, 17710:23, 17711:3, 17711:10, 17712:3, 17734:5, 17735:25, 17738:21, 17743:7, 17745:10, 17745:13, 17749:5, 17749:15, 17756:6, 17759:4, 17762:9, 17762:21, 17763:15, 17764:4, 17764:10, 17764:13, 17766:19, 17767:3, 17767:15, 17767:22, 17768:5, 17768:9, 17774:22, 17782:4, 17794:9, 17795:5, 17795:17, 17827:2, 17827:9, 17827:10</p> <p>discloseable [2] - 17749:13, 17751:5</p> <p>disclosed [34] - 17704:12, 17704:15, 17705:1, 17705:2, 17705:9, 17705:23, 17709:24, 17732:7, 17733:10, 17733:23, 17738:24, 17740:3, 17740:17, 17740:19, 17740:21, 17741:11, 17741:16, 17742:7, 17742:12, 17745:15, 17746:3, 17749:3, 17753:15, 17769:1, 17786:7, 17786:14, 17793:5, 17793:12, 17793:13, 17793:18, 17793:22, 17794:9, 17794:10</p> <p>disclosing [4] - 17707:3, 17711:9, 17785:25, 17795:12</p> <p>disclosure [10] - 17742:8, 17742:14, 17743:15, 17743:18, 17743:22, 17744:9, 17744:20, 17786:10, 17959:4, 17967:1</p> <p>discovery [16] - 17796:11, 17839:19, 17839:23, 17846:10, 17846:14, 17846:22, 17847:14, 17847:25, 17849:15, 17850:7, 17850:9, 17851:19,</p>	<p>17854:11, 17854:18, 17855:10, 17855:23</p> <p>discretion [3] - 17790:23, 17790:25, 17827:22</p> <p>discuss [1] - 17850:4</p> <p>discussed [1] - 17798:1</p> <p>discussed' [1] - 17797:21</p> <p>discussing [1] - 17935:13</p> <p>Discussion [1] - 17974:12</p> <p>discussion [3] - 17722:25, 17797:15, 17894:1</p> <p>dislike [1] - 17899:14</p> <p>dismissively [1] - 17789:20</p> <p>dispute [1] - 17971:5</p> <p>distance [2] - 17748:2, 17748:9</p> <p>distinctly [1] - 17775:17</p> <p>disturbed [1] - 17833:6</p> <p>division [1] - 17829:21</p> <p>Dna [22] - 17703:6, 17805:24, 17819:19, 17820:20, 17820:24, 17821:3, 17821:7, 17950:15, 17950:17, 17950:18, 17950:21, 17951:13, 17951:16, 17952:2, 17952:6, 17959:11, 17959:13, 17969:8, 17969:21, 17970:4, 17970:8, 17971:23</p> <p>Document [3] - 17696:5, 17696:6, 17795:9</p> <p>document [74] - 17699:19, 17699:23, 17700:4, 17700:22, 17701:4, 17719:23, 17720:1, 17720:3, 17721:16, 17722:14, 17722:17, 17722:22, 17722:23, 17723:10, 17723:13, 17725:24, 17726:12, 17726:19, 17729:4, 17730:7, 17730:14, 17730:24, 17737:15, 17738:20, 17739:1, 17745:8, 17745:13, 17763:10, 17768:9, 17783:12, 17783:18, 17783:21, 17788:18, 17788:22, 17788:25, 17789:3, 17790:7, 17793:4,</p>
---	---	---	--	--



17793:10, 17793:11, 17793:13, 17793:14, 17793:23, 17794:2, 17794:3, 17794:19, 17794:20, 17794:23, 17795:10, 17795:18, 17796:5, 17796:10, 17796:16, 17797:1, 17832:7, 17832:18, 17832:25, 17842:23, 17843:2, 17843:14, 17854:25, 17856:2, 17869:25, 17883:17, 17890:7, 17892:4, 17906:18, 17909:1, 17911:14, 17940:8, 17963:1, 17975:25 document' [1] - 17796:25 documents [27] - 17705:8, 17721:3, 17721:6, 17721:20, 17723:4, 17734:9, 17757:8, 17786:8, 17786:15, 17787:17, 17787:23, 17788:13, 17795:20, 17796:14, 17797:13, 17799:20, 17827:3, 17831:12, 17831:14, 17832:17, 17855:6, 17855:11, 17952:11, 17960:13, 17960:14, 17961:2, 17976:7 Doell [1] - 17727:4 dominate [1] - 17836:19 Don [1] - 17696:12 Donald [2] - 17977:2, 17977:17 Done [1] - 17731:23 done [28] - 17732:14, 17734:1, 17734:12, 17740:13, 17740:14, 17740:15, 17746:6, 17750:14, 17757:10, 17758:18, 17767:25, 17782:8, 17793:8, 17821:5, 17821:11, 17840:16, 17854:14, 17872:23, 17910:13, 17914:14, 17928:22, 17929:1, 17931:10, 17932:21, 17939:13, 17940:15, 17967:25, 17972:20 double [1] - 17930:11 double-edged [1] - 17930:11 doubt [19] - 17758:7,	17772:17, 17792:19, 17805:14, 17813:15, 17821:16, 17867:4, 17870:6, 17888:19, 17894:18, 17895:2, 17921:25, 17934:10, 17947:21, 17947:22, 17953:17, 17965:23, 17966:10, 17966:12 doubts [5] - 17771:15, 17772:16, 17772:20, 17773:6, 17797:9 Douglas [1] - 17696:2 down [39] - 17729:10, 17732:3, 17775:1, 17791:17, 17794:19, 17798:11, 17813:1, 17813:17, 17815:15, 17824:17, 17831:6, 17851:24, 17854:13, 17868:25, 17869:2, 17885:6, 17891:9, 17895:20, 17896:14, 17896:24, 17901:1, 17901:5, 17901:7, 17901:25, 17902:7, 17902:13, 17902:19, 17923:15, 17923:17, 17930:3, 17938:15, 17942:22, 17942:25, 17943:8, 17954:16, 17959:17, 17962:7, 17972:19, 17972:21 downsides [1] - 17919:17 drafted [4] - 17920:15, 17920:25, 17921:3, 17960:20 drafting [2] - 17892:4, 17898:7 dramatically [1] - 17805:20 draw [4] - 17753:18, 17762:21, 17876:1, 17959:21 drawn [1] - 17876:14 dress [2] - 17785:15, 17831:6 dressed [1] - 17784:1 drive [1] - 17729:9 driven [4] - 17881:10, 17902:16, 17911:3, 17911:4 driver [1] - 17729:6 drove [3] - 17729:17, 17861:25, 17862:8 due [1] - 17760:25 during [15] - 17702:1, 17704:3, 17758:1, 17772:23, 17787:20,	17792:12, 17808:25, 17814:10, 17839:19, 17854:11, 17855:10, 17888:12, 17920:10, 17959:20, 17959:24 duty [1] - 17932:3 E Eamon [1] - 17697:11 early [11] - 17716:25, 17717:22, 17760:3, 17773:18, 17836:17, 17861:4, 17883:18, 17911:2, 17935:20, 17963:4, 17963:7 ears [2] - 17775:8, 17795:8 earth [2] - 17711:15, 17923:25 east [1] - 17858:16 easy [4] - 17831:5, 17833:12, 17833:23, 17930:1 eat [1] - 17881:22 eccentricities [1] - 17838:3 Eddie [1] - 17697:9 edged [1] - 17930:11 editorial [1] - 17752:20 editorialise [1] - 17730:16 Edward [1] - 17695:7 effect [16] - 17699:18, 17806:18, 17817:3, 17824:24, 17854:12, 17857:2, 17869:19, 17869:25, 17883:15, 17918:25, 17930:2, 17935:16, 17936:17, 17937:18, 17971:1, 17974:20 effectively [2] - 17945:14, 17956:18 efforts [1] - 17699:9 egomaniacal [1] - 17774:10 eight [6] - 17714:18, 17714:19, 17733:6, 17776:14, 17778:15, 17779:3 either [21] - 17713:19, 17713:23, 17749:9, 17780:1, 17781:21, 17781:23, 17782:11, 17783:10, 17788:7, 17813:7, 17816:24, 17849:22, 17890:4, 17895:7, 17897:2,	17898:21, 17913:1, 17926:15, 17935:15, 17946:5, 17969:2 elevators [1] - 17872:18 eliminate [1] - 17779:7 eliminated [1] - 17790:5 elsewhere [2] - 17815:20, 17876:7 Elson [1] - 17697:8 Email [2] - 17700:20, 17700:25 emphasis [1] - 17742:6 emphatic [1] - 17810:4 emphatically [3] - 17923:14, 17923:22, 17924:1 employers [1] - 17823:17 en [1] - 17885:21 enable [1] - 17766:11 encounter [1] - 17725:19 encountered [2] - 17896:1, 17896:5 encouraged [1] - 17810:8 end [18] - 17714:24, 17730:5, 17789:25, 17790:17, 17799:25, 17808:1, 17814:18, 17854:18, 17896:15, 17910:5, 17910:7, 17911:25, 17912:3, 17912:4, 17950:9, 17951:12, 17967:4, 17970:24 ended [9] - 17777:4, 17779:25, 17828:10, 17830:18, 17835:14, 17903:12, 17954:22, 17970:22, 17971:2 endorsement [1] - 17762:22 engaged [2] - 17766:20, 17948:21 enlarge [1] - 17811:23 enormous [1] - 17824:2 ensuing [2] - 17739:12, 17876:19 ensure [3] - 17929:11, 17930:21, 17931:5 enter [2] - 17872:23, 17928:16 entered [1] - 17928:20 entire [1] - 17707:2 entirely [7] - 17847:10, 17847:12, 17912:6, 17919:9, 17944:15, 17959:13, 17959:15 entitled [1] - 17699:16	episode [6] - 17846:2, 17846:8, 17849:11, 17852:11, 17853:6, 17901:3 equal [3] - 17916:11, 17916:19, 17955:8 equally [5] - 17798:22, 17894:8, 17901:4, 17968:7, 17971:8 equation [3] - 17779:8, 17904:17, 17911:1 equipped [1] - 17947:24 error [1] - 17967:3 escalation [2] - 17719:5, 17719:7 Escalation [1] - 17719:11 escape [1] - 17735:22 especially [1] - 17834:24 Esq [5] - 17696:3, 17697:3, 17697:8, 17697:9, 17697:11 essence [4] - 17736:17, 17737:12, 17769:22, 17795:8 essential [1] - 17838:2 essentially [12] - 17705:24, 17733:8, 17737:24, 17738:12, 17739:23, 17748:12, 17757:11, 17824:10, 17844:10, 17903:3, 17906:12, 17912:18 Essentially [2] - 17794:4, 17821:24 Esson [1] - 17696:13 established [2] - 17876:20, 17967:4 etcetera [11] - 17725:23, 17814:20, 17821:22, 17834:20, 17851:10, 17852:19, 17872:24, 17887:20, 17891:1, 17925:7 ethical [1] - 17820:6 Eugene [3] - 17957:2, 17963:3, 17965:4 evening [2] - 17714:13, 17784:14 event [12] - 17721:20, 17722:3, 17724:6, 17746:15, 17762:20, 17823:13, 17828:11, 17837:18, 17844:9, 17922:3, 17974:11, 17974:13 events [7] - 17741:18, 17779:20, 17780:19,
---	--	---	--	---



17825:25, 17865:15, 17940:24, 17962:6 eventually [4] - 17708:7, 17708:9, 17861:7, 17924:11 evidence [86] - 17699:18, 17702:5, 17702:6, 17703:14, 17703:21, 17707:25, 17736:8, 17737:8, 17737:22, 17739:16, 17749:18, 17750:11, 17751:7, 17751:10, 17754:24, 17755:12, 17759:22, 17761:19, 17768:20, 17774:17, 17777:9, 17802:19, 17802:22, 17806:23, 17820:20, 17826:23, 17827:13, 17828:17, 17830:24, 17834:19, 17835:11, 17835:14, 17836:21, 17837:6, 17837:25, 17838:17, 17838:20, 17839:2, 17839:19, 17840:15, 17841:25, 17844:10, 17847:15, 17852:15, 17853:24, 17876:19, 17879:21, 17881:13, 17902:13, 17903:9, 17916:11, 17916:12, 17916:19, 17916:20, 17921:1, 17939:2, 17943:13, 17944:3, 17945:7, 17945:9, 17945:15, 17945:24, 17951:4, 17951:13, 17951:16, 17951:22, 17952:25, 17953:22, 17954:1, 17954:7, 17955:8, 17955:10, 17955:20, 17955:24, 17956:19, 17959:5, 17959:8, 17960:12, 17966:11, 17966:20, 17966:24, 17966:25, 17967:5, 17969:21, 17970:4, 17971:2 evidence [1] - 17856:22 Evidently [2] - 17786:17, 17795:13 evidently [5] - 17743:8, 17743:16, 17758:12, 17901:3, 17970:5 Ex [1] - 17816:21 Ex-director [1] - 17816:21 exactly [2] - 17975:14,	17976:6 Exactly [2] - 17743:5, 17936:3 exaggeration [1] - 17916:4 exam [1] - 17854:11 examination [27] - 17702:1, 17710:19, 17715:6, 17715:12, 17784:6, 17788:5, 17792:12, 17828:5, 17839:23, 17846:22, 17853:20, 17854:17, 17855:10, 17855:23, 17871:8, 17875:3, 17875:16, 17875:21, 17875:23, 17876:1, 17877:9, 17878:2, 17915:6, 17915:17, 17917:25, 17919:5, 17960:24 examination-in-chief [4] - 17710:19, 17715:6, 17715:12, 17792:12 examinations [1] - 17875:6 examine [8] - 17752:5, 17834:9, 17917:4, 17917:8, 17917:10, 17918:3, 17919:8, 17972:23 examined [3] - 17783:5, 17870:25, 17917:7 examiner [2] - 17917:23, 17918:17 examining [3] - 17701:8, 17787:17, 17919:18 example [25] - 17704:10, 17708:20, 17719:2, 17792:14, 17793:23, 17797:6, 17808:11, 17808:15, 17809:10, 17814:23, 17826:20, 17827:16, 17830:2, 17830:10, 17837:10, 17864:5, 17871:4, 17872:10, 17872:17, 17906:9, 17906:15, 17906:25, 17908:10, 17918:4, 17969:16 examples [2] - 17883:8, 17941:17 except [5] - 17717:4, 17720:21, 17724:3, 17733:11, 17823:24 Except [1] - 17720:21 exceptions [1] - 17720:22	excerpts [1] - 17883:7 exculpatory [1] - 17912:5 excuse [2] - 17903:13, 17954:20 Excuse [2] - 17759:19, 17855:3 Executive [1] - 17696:4 exercise [4] - 17736:11, 17764:4, 17765:16, 17879:22 Exhausted [1] - 17972:21 exhaustive [1] - 17902:25 Exhibit [1] - 17843:18 exhibits [1] - 17894:4 exist [1] - 17844:12 existed [1] - 17700:5 existence [5] - 17709:16, 17765:10, 17955:17, 17960:15, 17965:6 existing [1] - 17834:6 exists [2] - 17750:1, 17897:3 exit [1] - 17748:12 expand [2] - 17718:21, 17720:2 expect [13] - 17704:16, 17737:7, 17737:16, 17798:19, 17875:24, 17875:25, 17896:8, 17896:10, 17896:13, 17915:23, 17926:6, 17946:17, 17953:14 expected [10] - 17798:2, 17798:14, 17799:15, 17869:16, 17869:22, 17926:5, 17945:3, 17950:20, 17952:3, 17952:4 experience [5] - 17735:2, 17754:11, 17934:4, 17968:14, 17971:18 experienced [1] - 17967:3 expertise [1] - 17976:1 explain [11] - 17721:11, 17785:9, 17785:11, 17785:12, 17785:25, 17786:3, 17799:5, 17830:14, 17831:4, 17931:13, 17931:17 explained [6] - 17767:3, 17830:17, 17861:11, 17862:5, 17900:7, 17957:11 explanation [13] -	17750:7, 17765:13, 17773:11, 17785:8, 17785:18, 17785:23, 17790:14, 17832:21, 17907:12, 17907:17, 17907:19, 17907:21, 17908:1 exploits [1] - 17938:5 explore [2] - 17882:4, 17913:9 exposed [2] - 17938:2, 17942:5 express [1] - 17720:18 expressed [2] - 17704:5, 17945:6 Expressing [1] - 17932:12 expression [4] - 17749:25, 17804:4, 17825:9, 17927:10 extent [3] - 17789:23, 17840:13, 17852:13 extraneous [1] - 17798:17 extraordinary [1] - 17934:5 extremely [2] - 17932:19, 17933:5 eye [1] - 17903:3	17966:16 factor [2] - 17895:2, 17895:3 factors [2] - 17700:24, 17738:5 facts [25] - 17747:16, 17749:6, 17866:11, 17866:22, 17867:5, 17869:13, 17869:15, 17869:16, 17869:24, 17870:9, 17870:16, 17872:5, 17872:16, 17872:25, 17873:24, 17876:21, 17876:23, 17876:25, 17877:3, 17887:19, 17894:25, 17907:23, 17916:15, 17916:23, 17955:14 factual [3] - 17925:5, 17926:4, 17928:5 fail [1] - 17745:13 failed [7] - 17711:3, 17827:6, 17829:3, 17921:24, 17922:9, 17922:19, 17969:12 failing [4] - 17937:22, 17968:15, 17968:18, 17968:21 failure [8] - 17808:15, 17828:24, 17918:20, 17918:21, 17923:3, 17971:19, 17972:7, 17972:14 fair [33] - 17702:6, 17702:17, 17705:20, 17711:2, 17711:20, 17748:9, 17750:24, 17752:19, 17757:13, 17760:21, 17769:14, 17769:15, 17770:1, 17770:2, 17809:22, 17818:19, 17828:18, 17829:25, 17830:15, 17865:11, 17865:17, 17873:4, 17881:22, 17895:17, 17897:9, 17915:25, 17920:6, 17925:18, 17966:13, 17966:19, 17968:13, 17972:4, 17972:10 fairly [4] - 17745:5, 17817:14, 17817:17, 17877:17 fairness [5] - 17805:10, 17963:11, 17963:14, 17963:20, 17966:16 fall [1] - 17833:25 false [8] - 17712:3, 17712:4, 17880:25, 17881:2, 17881:5,
---	--	---	--	--

F

fabricate [1] - 17837:6
face [4] - 17735:22,
17811:16, 17811:17,
17877:13
facetious [1] - 17743:12
facing [1] - 17959:11
fact [43] - 17700:6,
17702:19, 17703:6,
17704:3, 17707:11,
17711:10, 17718:18,
17718:23, 17720:11,
17721:23, 17740:11,
17744:8, 17757:16,
17770:10, 17775:13,
17777:10, 17778:11,
17800:4, 17804:15,
17809:25, 17832:2,
17832:20, 17839:16,
17850:4, 17853:21,
17855:9, 17870:12,
17870:17, 17875:15,
17887:1, 17891:9,
17897:22, 17898:4,
17903:1, 17909:8,
17911:13, 17942:14,
17945:8, 17954:18,
17956:17, 17964:2,



<p>17881:25, 17882:2, 17887:12 False^[1] - 17828:8 familiar^[4] - 17716:14, 17748:4, 17749:17, 17749:24 family^[3] - 17823:25, 17936:8 famous^[1] - 17853:6 far^[14] - 17711:15, 17712:11, 17748:1, 17750:13, 17754:3, 17780:4, 17868:9, 17879:13, 17883:10, 17926:15, 17931:10, 17940:15, 17947:10, 17966:13 fashion^[2] - 17820:6, 17970:24 faster^[1] - 17975:22 father^[1] - 17823:25 fatigue^[1] - 17846:21 fatigued^[1] - 17854:20 fault^[3] - 17790:15, 17833:22, 17910:10 favourable^[7] - 17862:21, 17863:1, 17863:10, 17863:19, 17863:21, 17864:19, 17868:15 fax^[1] - 17699:25 fear^[1] - 17899:18 feat^[1] - 17837:15 feature^[1] - 17745:24 features^[1] - 17760:17 February^[21] - 17713:21, 17714:9, 17714:13, 17714:14, 17717:22, 17719:8, 17746:14, 17746:23, 17753:23, 17776:10, 17780:14, 17780:16, 17781:2, 17782:12, 17785:20, 17793:23, 17794:3, 17832:7, 17832:19, 17886:10, 17910:8 federal^[2] - 17943:8, 17968:2 feet^[1] - 17975:17 fellow^[1] - 17798:3 felt^[20] - 17702:14, 17742:8, 17745:5, 17760:25, 17773:8, 17803:3, 17809:15, 17809:17, 17809:19, 17825:19, 17828:6, 17829:8, 17829:9, 17907:9, 17916:8, 17916:16, 17955:4,</p>	<p>17955:19, 17969:21, 17971:11 few^[8] - 17707:25, 17724:11, 17725:8, 17756:8, 17796:4, 17892:15, 17938:14, 17969:1 field^[2] - 17790:10, 17791:4 figure^[3] - 17831:3, 17831:5, 17881:14 file^[69] - 17700:19, 17700:25, 17705:5, 17705:7, 17706:16, 17706:22, 17707:2, 17707:4, 17707:10, 17708:11, 17708:21, 17709:7, 17709:14, 17715:5, 17715:18, 17716:2, 17720:12, 17721:7, 17723:5, 17734:3, 17734:14, 17734:16, 17734:18, 17736:25, 17737:21, 17745:9, 17746:12, 17747:5, 17749:4, 17750:12, 17751:1, 17753:15, 17758:3, 17759:3, 17759:25, 17762:4, 17762:7, 17762:21, 17768:12, 17780:21, 17781:1, 17782:18, 17782:24, 17786:2, 17786:6, 17795:8, 17795:9, 17797:2, 17797:13, 17798:9, 17798:17, 17799:3, 17801:16, 17802:7, 17832:3, 17832:18, 17835:2, 17845:13, 17845:25, 17846:12, 17854:4, 17856:7, 17865:1, 17872:17, 17926:9, 17953:7, 17961:2, 17964:5, 17965:3 files^[6] - 17721:21, 17847:5, 17847:17, 17848:6, 17960:19, 17962:9 finally^[3] - 17846:24, 17945:19, 17965:16 Fine^[2] - 17874:2, 17892:16 fine^[25] - 17720:25, 17730:19, 17731:16, 17742:18, 17746:10, 17747:7, 17747:13, 17753:19, 17755:24, 17759:9, 17762:1,</p>	<p>17783:24, 17797:23, 17805:14, 17812:3, 17818:13, 17852:7, 17858:23, 17874:14, 17878:20, 17888:7, 17904:13, 17937:6, 17937:15, 17944:20 finish^[7] - 17729:22, 17732:20, 17755:23, 17790:21, 17843:9, 17863:5, 17883:25 finished^[2] - 17732:24, 17742:2 First^[3] - 17857:23, 17892:23, 17895:25 first^[47] - 17699:13, 17699:14, 17701:8, 17703:7, 17707:25, 17719:24, 17727:8, 17727:17, 17728:18, 17731:9, 17731:17, 17731:18, 17731:19, 17734:13, 17757:22, 17770:10, 17783:21, 17806:9, 17806:10, 17808:7, 17823:4, 17826:9, 17828:9, 17840:10, 17858:6, 17860:6, 17863:25, 17870:17, 17872:19, 17880:21, 17884:12, 17885:17, 17885:22, 17887:18, 17902:10, 17905:12, 17908:25, 17912:5, 17913:16, 17923:13, 17939:18, 17940:2, 17943:6, 17962:8, 17964:4, 17965:19, 17975:6 Fisher^[46] - 17697:11, 17714:15, 17733:21, 17733:23, 17776:6, 17776:24, 17778:25, 17779:22, 17839:15, 17841:12, 17849:9, 17894:9, 17922:12, 17922:23, 17924:10, 17926:25, 17928:14, 17931:6, 17931:14, 17934:14, 17937:16, 17938:2, 17943:13, 17944:3, 17951:2, 17951:19, 17952:6, 17953:5, 17953:7, 17955:20, 17956:1, 17956:15, 17957:17, 17957:19, 17957:20, 17958:13, 17958:25, 17959:10, 17962:14, 17970:6, 17970:15,</p>	<p>17970:19, 17970:21, 17971:2, 17971:9, 17971:13 Fishers^[3] - 17923:20, 17932:19, 17942:12 fit^[7] - 17742:13, 17826:13, 17827:4, 17830:22, 17830:24, 17860:2, 17958:20 Fitzpatrick^[1] - 17696:14 five^[12] - 17714:21, 17715:19, 17719:14, 17719:15, 17722:22, 17723:10, 17754:10, 17758:13, 17780:5, 17884:15, 17967:13, 17969:8 Five^[3] - 17754:6, 17754:8, 17953:18 fixed^[1] - 17725:2 flashlight^[1] - 17872:24 flaws^[1] - 17900:21 flew^[2] - 17954:3, 17954:16 Flicker^[3] - 17722:6, 17880:9, 17880:13 floored^[2] - 17703:6, 17819:19 flying^[1] - 17877:25 focus^[5] - 17706:17, 17708:24, 17729:12, 17744:5, 17892:15 focused^[7] - 17743:5, 17779:6, 17850:6, 17850:18, 17890:24, 17892:4, 17892:14 focusing^[2] - 17826:14, 17957:13 follow^[12] - 17724:24, 17732:15, 17735:10, 17775:5, 17826:18, 17854:6, 17867:24, 17878:8, 17887:13, 17919:10, 17953:24, 17963:23 follow-up^[2] - 17775:5, 17963:23 followed^[1] - 17908:13 following^[7] - 17700:24, 17732:13, 17767:8, 17780:17, 17836:14, 17938:18, 17969:5 forbidden^[1] - 17784:18 force^[7] - 17770:13, 17771:19, 17772:14, 17914:10, 17924:7,</p>	<p>17925:14, 17931:1 forced^[2] - 17764:14, 17784:14 forces^[1] - 17729:10 forcing^[1] - 17813:19 foregoing^[1] - 17977:4 forensic^[3] - 17795:20, 17797:1, 17799:20 forerunning^[1] - 17722:15 forever^[1] - 17734:13 foreword^[2] - 17700:14, 17700:15 forget^[3] - 17777:19, 17823:3, 17865:6 forgetting^[1] - 17718:2 forgotten^[2] - 17708:11, 17920:11 form^[4] - 17722:21, 17838:12, 17838:14, 17960:6 former^[1] - 17812:4 forth^[4] - 17782:22, 17784:2, 17877:3, 17960:22 fortune^[1] - 17962:10 forum^[1] - 17883:14 forward^[8] - 17701:10, 17746:14, 17746:23, 17746:25, 17750:7, 17825:21, 17945:9, 17965:6 forwarded^[1] - 17965:11 Four^[2] - 17777:5, 17777:6 four^[30] - 17708:18, 17714:20, 17715:18, 17719:14, 17756:1, 17758:12, 17777:7, 17777:22, 17778:3, 17779:6, 17779:10, 17780:2, 17780:5, 17804:13, 17842:23, 17843:14, 17843:21, 17846:2, 17846:7, 17847:21, 17852:9, 17868:15, 17868:16, 17926:1, 17926:8, 17927:17, 17935:2, 17935:3, 17935:8, 17967:23 four-page^[3] - 17842:23, 17843:14, 17843:21 fourth^[2] - 17760:8, 17894:3 frankly^[1] - 17778:23 Frankly^[1] - 17861:6 Frayer^[1] - 17697:12</p>
---	---	---	---	--



<div>free [5] - 17765:1, 17934:18, 17936:1, 17967:17, 17967:18</div> <div>freedom [2] - 17799:18, 17824:19</div> <div>frequency [2] - 17719:9, 17719:11</div> <div>frequently [1] - 17800:6</div> <div>friend [1] - 17943:18</div> <div>Friend[4] - 17734:6, 17862:20, 17877:10, 17946:4</div> <div>friends [1] - 17823:17</div> <div>fringes [4] - 17772:12, 17791:7, 17791:16, 17791:18</div> <div>front [11] - 17721:6, 17734:3, 17768:10, 17784:8, 17789:11, 17791:21, 17794:11, 17807:4, 17869:2, 17874:16, 17932:3</div> <div>full [1] - 17945:25</div> <div>funeral [8] - 17727:1, 17727:12, 17727:21, 17728:3, 17888:4, 17888:11, 17889:7, 17889:9</div> <div>funny [1] - 17711:25</div> <div>furious [1] - 17812:5</div> <div>future [1] - 17913:15</div>	<div>17779:4, 17779:8, 17781:6, 17781:17, 17781:21, 17782:3, 17782:19, 17782:20, 17783:22, 17784:6, 17784:25, 17792:18, 17794:18, 17805:22, 17820:17, 17830:12, 17833:16, 17870:7, 17870:13, 17870:17, 17884:22, 17885:15, 17886:2, 17887:1, 17890:5, 17895:13, 17896:1, 17896:5, 17896:22, 17901:21, 17903:4, 17903:11, 17910:16, 17911:5, 17934:19, 17935:20, 17938:24, 17969:19, 17970:11, 17970:15</div> <div>gain [1] - 17838:6</div> <div>gaining [1] - 17824:19</div> <div>game' [1] - 17838:2</div> <div>garbage [13] - 17886:7, 17889:1, 17889:14, 17889:15, 17889:18, 17890:1, 17890:9, 17890:17, 17891:11, 17891:20, 17892:5, 17895:11, 17906:8</div> <div>garden [1] - 17895:20</div> <div>garment [1] - 17784:23</div> <div>Garrett[1] - 17697:7</div> <div>gas [1] - 17904:4</div> <div>gatekeeper [4] - 17736:9, 17800:8, 17800:17, 17921:22</div> <div>gatekeeper'[1] - 17922:1</div> <div>general [6] - 17815:16, 17830:3, 17830:4, 17844:25, 17860:11, 17899:13</div> <div>generalities [1] - 17943:19</div> <div>generalizations [1] - 17882:3</div> <div>Generally[1] - 17842:4</div> <div>generally [5] - 17706:8, 17706:10, 17710:11, 17734:24, 17939:10</div> <div>generic [1] - 17922:16</div> <div>gentleman [2] - 17728:15, 17904:9</div> <div>genuinely [1] - 17730:14</div> <div>genuineness [1] - 17909:3</div> <div>George[1] - 17847:19</div> <div>get-away [1] - 17901:24</div>	<div>ghastly [2] - 17786:20, 17833:16</div> <div>Gibson[1] - 17697:10</div> <div>girls [1] - 17856:18</div> <div>given [37] - 17702:4, 17702:6, 17723:25, 17728:1, 17729:14, 17736:24, 17737:1, 17757:11, 17757:22, 17818:1, 17819:18, 17829:6, 17832:21, 17832:23, 17855:1, 17855:11, 17866:19, 17869:8, 17869:17, 17877:21, 17880:22, 17905:5, 17905:13, 17905:14, 17905:16, 17913:1, 17913:5, 17918:11, 17931:5, 17950:20, 17951:9, 17951:25, 17952:23, 17964:2, 17965:3, 17974:4, 17976:9</div> <div>Glad[1] - 17815:11</div> <div>glance [3] - 17700:10, 17853:6, 17892:10</div> <div>Globe[1] - 17967:20</div> <div>God[6] - 17734:22, 17735:3, 17735:25, 17746:2, 17962:14, 17969:15</div> <div>goings [2] - 17852:24, 17853:5</div> <div>goings-on [2] - 17852:24, 17853:5</div> <div>Gomery[2] - 17701:25, 17976:10</div> <div>gordge [17] - 17770:22, 17773:12, 17775:11, 17801:23, 17806:24, 17840:2, 17842:17, 17843:19, 17845:20, 17846:3, 17847:3, 17848:2, 17848:18, 17849:11, 17849:25, 17850:5, 17857:1</div> <div>Gordge[5] - 17771:4, 17771:18, 17771:21, 17840:8, 17841:5</div> <div>Government[2] - 17697:5, 17943:10</div> <div>government [1] - 17816:17</div> <div>grabbed [1] - 17897:1</div> <div>granted [1] - 17943:9</div> <div>granting [1] - 17965:16</div> <div>grave [1] - 17824:10</div> <div>gravely [1] - 17822:3</div> <div>gravity [1] - 17914:3</div> <div>great [5] - 17712:7, 17756:20, 17771:22, 17840:15, 17914:23</div> <div>grounds [3] - 17947:6, 17947:8, 17947:9</div> <div>group [4] - 17731:24, 17771:9, 17884:15, 17911:3</div> <div>Group[1] - 17732:2</div> <div>grouped [1] - 17795:1</div> <div>guess [16] - 17708:13, 17769:11, 17773:14, 17773:15, 17815:2, 17842:13, 17852:23, 17863:18, 17895:6, 17912:1, 17921:21, 17925:13, 17925:14, 17925:18, 17932:1, 17934:13</div> <div>guilt [12] - 17703:21, 17808:5, 17809:20, 17812:24, 17826:10, 17826:17, 17829:25, 17830:15, 17941:19, 17955:21, 17965:24, 17971:11</div> <div>guilty [14] - 17777:4, 17779:14, 17779:24, 17780:2, 17827:21, 17828:14, 17841:13, 17922:25, 17923:20, 17930:5, 17940:20, 17967:7, 17971:3, 17971:14</div> <div>guilty' [1] - 17837:8</div> <div>guise [1] - 17875:23</div> <div>Guy[4] - 17767:2, 17767:11, 17767:14, 17882:20</div>	<div>17849:23, 17849:24, 17973:6, 17973:10</div> <div>hang [2] - 17739:4, 17872:11</div> <div>hanging [2] - 17868:4, 17868:6</div> <div>happier [1] - 17936:2</div> <div>happily [1] - 17884:7</div> <div>happy [3] - 17818:12, 17909:13, 17975:11</div> <div>hard [9] - 17778:14, 17886:21, 17887:2, 17907:20, 17908:7, 17917:3, 17917:10, 17925:1, 17972:15</div> <div>Hardy[1] - 17696:3</div> <div>head [4] - 17812:4, 17815:14, 17967:18, 17967:25</div> <div>heading [3] - 17706:1, 17844:13, 17846:2</div> <div>headings [2] - 17822:10, 17846:7</div> <div>hear [12] - 17798:7, 17800:4, 17815:11, 17856:9, 17859:25, 17867:21, 17892:6, 17937:20, 17947:7, 17954:7, 17956:13, 17962:16</div> <div>heard [19] - 17710:18, 17712:11, 17715:12, 17743:14, 17778:16, 17800:12, 17802:3, 17804:19, 17807:1, 17821:21, 17834:21, 17882:23, 17915:8, 17915:16, 17918:12, 17927:14, 17930:4, 17965:9, 17972:9</div> <div>hearing [11</div>
--	---	--	---



17914:2, 17943:20, 17943:21 helps [2] - 17700:13, 17827:1 hereby [1] - 17977:4 herein [1] - 17977:6 herself [1] - 17747:17 Hersh [1] - 17697:2 hidden [1] - 17801:24 hide' [1] - 17864:8 highlight [1] - 17868:9 highlighted [1] - 17868:20 highly [3] - 17706:3, 17761:2, 17761:6 Highly [1] - 17761:6 himself [3] - 17730:3, 17862:22, 17862:23 hindsight [4] - 17789:5, 17789:10, 17789:12, 17789:14 Hindsight [1] - 17789:18 Hinz [3] - 17696:11, 17977:2, 17977:13 history [2] - 17778:19, 17962:6 hit [1] - 17735:21 hitting [1] - 17735:22 Hmm [1] - 17882:20 Hodson [50] - 17696:2, 17698:4, 17699:6, 17700:9, 17734:6, 17739:16, 17739:21, 17751:24, 17754:6, 17755:12, 17774:20, 17775:2, 17788:18, 17788:22, 17792:12, 17792:22, 17793:16, 17839:24, 17850:13, 17851:20, 17851:22, 17851:24, 17866:23, 17916:1, 17917:3, 17919:6, 17923:12, 17941:15, 17960:24, 17963:17, 17963:22, 17964:9, 17964:11, 17964:14, 17964:24, 17972:20, 17972:22, 17973:1, 17973:22, 17973:25, 17974:3, 17974:8, 17974:11, 17974:13, 17974:18, 17974:21, 17975:2, 17976:8, 17976:12, 17976:16 Hodson's [2] - 17761:21, 17963:12 holds [1] - 17778:21 holy [2] - 17722:20,	17736:15 home [20] - 17727:1, 17727:13, 17727:21, 17728:3, 17735:9, 17735:18, 17754:15, 17840:21, 17841:4, 17841:19, 17844:6, 17846:5, 17857:4, 17861:23, 17888:4, 17888:11, 17889:7, 17889:9, 17896:7, 17911:4 homicide [4] - 17784:25, 17799:1, 17799:18, 17903:4 Hon [1] - 17697:13 honest [2] - 17792:3, 17792:6 honestly [1] - 17756:21 Honourable [1] - 17695:6 hope [12] - 17736:12, 17736:13, 17740:10, 17744:10, 17749:22, 17896:12, 17916:15, 17916:23, 17921:13, 17936:21, 17955:13, 17959:16 hopefully [2] - 17789:7, 17812:19 Hospital [1] - 17754:17 hospital [4] - 17735:18, 17735:20, 17754:16, 17754:20 Hotel [1] - 17695:16 hotel [2] - 17954:4, 17954:17 hour [3] - 17734:23, 17736:17, 17832:8 hours [1] - 17837:18 house [5] - 17720:5, 17861:8, 17869:5, 17894:5, 17896:16 Huge [1] - 17895:3 huge [2] - 17748:2, 17818:22 Hugh [1] - 17696:13 human [5] - 17805:16, 17821:25, 17833:21, 17833:23, 17833:25 humour [1] - 17918:2 hypothesis [3] - 17891:15, 17891:16, 17901:20 hypothetical [3] - 17726:7, 17793:1, 17793:17 hypotheticals [2] - 17792:11, 17792:22	I idea [19] - 17728:7, 17746:7, 17772:25, 17780:5, 17815:4, 17828:23, 17837:4, 17853:21, 17855:19, 17885:17, 17906:11, 17913:15, 17913:22, 17913:23, 17914:8, 17929:5, 17931:2, 17965:20, 17971:10 ideal [2] - 17914:22, 17946:21 identical [4] - 17739:2, 17837:22, 17884:21, 17893:9 identification [2] - 17785:5, 17886:19 identified [5] - 17721:19, 17781:19, 17835:18, 17888:12, 17970:6 identifies [1] - 17888:2 identify [2] - 17884:14, 17886:21 Ids [1] - 17975:25 ignorance [4] - 17719:19, 17719:22, 17733:9, 17953:10 ignore [1] - 17829:23 ignored [1] - 17830:11 illustration [2] - 17873:3, 17873:5 imagine [7] - 17717:12, 17736:14, 17869:8, 17907:19, 17910:4, 17917:24, 17918:2 immediately [3] - 17722:19, 17754:14, 17778:4 impact [7] - 17805:9, 17826:22, 17946:24, 17946:25, 17948:4, 17950:13, 17950:15 implication [1] - 17862:11 implications [3] - 17722:16, 17731:1, 17942:4 implies [1] - 17771:9 important [15] - 17705:23, 17784:25, 17814:1, 17814:4, 17819:10, 17834:4, 17834:6, 17891:16, 17904:6, 17904:7, 17940:10, 17951:3, 17951:20, 17955:20,	17956:20 impossible [4] - 17717:5, 17738:1, 17917:4, 17919:8 impression [5] - 17722:7, 17807:13, 17831:24, 17850:24, 17867:17 impressions [1] - 17879:10 improbable [2] - 17761:2, 17761:6 improper [2] - 17751:15, 17883:22 improperly [1] - 17966:21 improprieties [1] - 17703:18 improve [2] - 17743:20, 17789:17 improvement [1] - 17839:2 inability [1] - 17715:24 inadequate [1] - 17966:25 incident [4] - 17713:10, 17713:14, 17713:24, 17843:4 Incident [3] - 17714:2, 17714:5, 17714:8 incidentally [1] - 17917:13 incidents [4] - 17718:2, 17739:6, 17795:10, 17854:2 include [5] - 17779:4, 17908:20, 17971:22, 17973:20, 17973:25 included [1] - 17894:25 includes [2] - 17895:11, 17968:18 including [4] - 17714:23, 17726:14, 17960:10, 17961:1 inconceivable [1] - 17718:8 inconsequential [1] - 17937:2 incorporated [1] - 17888:15 incorrect [3] - 17736:8, 17806:17, 17905:13 incriminate [2] - 17890:4, 17960:1 incriminating [7] - 17809:5, 17894:8, 17894:12, 17912:6, 17916:12, 17916:20, 17955:9 indecent [5] - 17736:6,	17737:7, 17737:14, 17755:8, 17762:22 indeed [22] - 17706:4, 17717:20, 17726:14, 17730:2, 17778:12, 17785:5, 17807:12, 17816:23, 17817:1, 17821:14, 17829:17, 17849:6, 17860:21, 17860:25, 17862:16, 17884:20, 17885:10, 17904:4, 17907:19, 17912:4, 17957:6, 17967:19 indefinitely [1] - 17875:22 independent [1] - 17736:11 independently [2] - 17895:5, 17895:10 Index [4] - 17698:1, 17782:13, 17783:15, 17788:19 indicate [3] - 17842:24, 17843:15, 17899:7 indicated [3] - 17705:24, 17711:19, 17959:16 indicating [1] - 17844:21 indication [2] - 17871:1, 17876:24 indictment [1] - 17780:3 indignation [5] - 17704:5, 17711:8, 17711:18, 17711:24 indignities [1] - 17713:4 individual [5] - 17707:11, 17760:15, 17814:2, 17814:4, 17824:19 individually [3] - 17715:17, 17786:7, 17868:17 indulgence [2] - 17701:12, 17701:22 inevitable [1] - 17749:19 infect [7] - 17803:12, 17803:16, 17803:18, 17803:20, 17803:23, 17804:11, 17828:16 Infect [4] - 17803:14, 17803:24, 17803:25, 17804:2 infect"/"affect [1] - 17804:11 infected [3] - 17805:10,
---	--	---	--	--



17831:18, 17833:11 infects [4] - 17804:7, 17826:10, 17826:15, 17838:14 inflammatory [1] - 17875:17 influenced [1] - 17699:19 informants [1] - 17882:22 information [36] - 17700:3, 17706:3, 17715:25, 17725:16, 17790:3, 17804:17, 17825:21, 17826:3, 17883:13, 17887:16, 17906:5, 17906:6, 17907:14, 17908:2, 17908:20, 17922:22, 17939:11, 17939:13, 17939:15, 17941:8, 17943:2, 17948:4, 17950:14, 17950:17, 17951:2, 17951:10, 17951:21, 17952:24, 17953:3, 17956:12, 17956:15, 17957:3, 17959:1, 17960:1, 17960:2, 17964:8 informed [1] - 17925:2 inherent [3] - 17863:20, 17897:2, 17900:21 initial [1] - 17877:5 Inland [1] - 17696:14 innocence [10] - 17811:13, 17812:24, 17829:24, 17941:18, 17941:22, 17943:5, 17945:13, 17947:18, 17951:4, 17955:22 innocent [11] - 17812:15, 17829:15, 17923:6, 17935:24, 17944:23, 17949:15, 17950:19, 17951:5, 17952:20, 17952:21, 17952:22 inquire [4] - 17790:19, 17791:10, 17791:17, 17791:20 inquiries [2] - 17798:23, 17803:2 Inquiries [1] - 17800:5 inquiry [4] - 17774:16, 17825:8, 17857:15, 17877:6 Inquiry [15] - 17695:2, 17695:23, 17732:13, 17741:22, 17742:5, 17767:2, 17770:4,	17774:18, 17806:23, 17857:8, 17866:8, 17867:3, 17871:24, 17882:21, 17884:11 insertion [1] - 17835:4 inside [1] - 17810:1 insisted [1] - 17836:24 insofar [4] - 17868:9, 17889:5, 17894:12, 17914:24 Inspector [10] - 17705:22, 17728:1, 17728:6, 17728:15, 17795:3, 17797:9, 17797:15, 17836:15, 17858:3, 17880:22 instance [5] - 17815:15, 17881:9, 17913:11, 17914:15, 17931:1 instinct [3] - 17833:21, 17833:24, 17833:25 instructed [1] - 17967:6 insure [1] - 17932:24 intended [1] - 17783:12 intent [2] - 17890:16, 17891:1 intentions [1] - 17838:7 intercourse [1] - 17784:16 interest [16] - 17714:11, 17928:11, 17928:16, 17928:25, 17929:2, 17929:6, 17929:10, 17930:12, 17930:21, 17931:4, 17931:13, 17931:18, 17931:21, 17932:21, 17947:11, 17948:21 interested [4] - 17774:19, 17779:16, 17796:10, 17891:7 interesting [9] - 17714:10, 17719:4, 17770:17, 17771:24, 17778:3, 17811:20, 17848:15, 17889:17, 17964:8 intermission [1] - 17787:20 internal [1] - 17961:2 interrogations [1] - 17837:19 interrupt [1] - 17709:18 interrupted [1] - 17748:15 interrupting [1] - 17808:13 interruption [1] - 17850:1 interview [6] - 17722:6,	17840:8, 17849:25, 17880:9, 17963:24, 17967:20 interviewed [10] - 17771:21, 17779:24, 17844:22, 17898:22, 17899:8, 17915:10, 17939:18, 17939:25, 17950:10, 17963:23 interviews [3] - 17898:20, 17913:25, 17966:23 intriguing [1] - 17971:17 introduced [3] - 17719:25, 17885:23, 17888:15 introduces [4] - 17885:2, 17885:9, 17885:17, 17886:1 introduction [2] - 17788:5, 17837:11 investigated [2] - 17872:7, 17872:22 investigation [13] - 17705:7, 17720:10, 17723:1, 17724:4, 17773:3, 17803:12, 17803:14, 17834:9, 17840:16, 17881:3, 17909:6, 17921:23, 17966:22 investigations [1] - 17844:24 investigator [2] - 17791:5, 17798:3 investigators [4] - 17803:6, 17869:18, 17870:3, 17914:16 invitation [1] - 17825:19 involve [1] - 17784:11 involved [8] - 17773:3, 17779:21, 17801:20, 17928:1, 17929:9, 17946:6, 17946:9, 17946:14 involving [2] - 17825:25, 17943:13 Ira [1] - 17813:14 Irene [1] - 17696:10 ironic [1] - 17810:22 irony [1] - 17810:17 irrelevance [2] - 17947:6, 17947:10 irrelevant [6] - 17755:4, 17768:4, 17781:16, 17799:23, 17944:4, 17947:13 Irwin [1] - 17697:13	Isabelle [1] - 17696:6 issue [3] - 17759:8, 17759:10, 17813:4 issued [3] - 17702:21, 17756:12, 17958:9 issues [1] - 17800:5 items [5] - 17886:16, 17886:17, 17890:24, 17892:9, 17892:11 itself [9] - 17721:22, 17737:16, 17742:20, 17742:22, 17743:1, 17743:2, 17842:21, 17880:18, 17972:14 ivory [2] - 17716:14, 17717:8	17862:15, 17862:24, 17864:11, 17866:20, 17877:21, 17880:25, 17882:7, 17884:7, 17887:24, 17889:22, 17889:25, 17890:19, 17891:4, 17891:18, 17892:7, 17892:21, 17893:19, 17894:24, 17898:12, 17901:6, 17901:11, 17902:11, 17903:9, 17903:25, 17904:22, 17905:12, 17905:17, 17906:4, 17906:24, 17907:6, 17907:14, 17907:22, 17908:19, 17911:15, 17911:17, 17912:25, 17913:7, 17913:10, 17914:19, 17915:6, 17916:9, 17916:17, 17917:23, 17955:5, 17955:17, 17957:24, 17973:10, 17973:14 Johrl [1] - 17705:18 Johrls [7] - 17711:6, 17903:2, 17911:23, 17915:4, 17915:16, 17916:2, 17939:4 Jordan [1] - 17696:3 Joyce [2] - 17697:4, 17960:16 judge [9] - 17786:25, 17787:12, 17787:13, 17788:14, 17805:10, 17807:15, 17826:14, 17881:13 judged [4] - 17787:3, 17787:5, 17787:7 judgement [3] - 17736:11, 17751:15, 17919:2 judges [3] - 17699:17, 17700:2, 17805:6 judgment [6] - 17788:3, 17788:4, 17966:2, 17967:9, 17967:16, 17968:19 judicial [3] - 17813:3, 17838:3, 17969:11 judiciary [2] - 17803:20, 17804:21 July [11] - 17703:25, 17756:13, 17769:22, 17787:4, 17831:19, 17865:9, 17951:11, 17952:1, 17967:10, 17969:16 junction [1] - 17959:18 June [5] - 17699:10,
J				
jail [3] - 17780:1, 17858:13, 17927:18 jailhouse [1] - 17882:22 James [1] - 17697:3 January [17] - 17713:14, 17713:19, 17713:22, 17714:3, 17715:7, 17715:8, 17717:21, 17719:7, 17734:21, 17746:17, 17747:21, 17780:13, 17814:12, 17921:21 jeans [2] - 17893:24, 17903:22 Jessop [2] - 17767:16, 17767:17 Jessops [2] - 17767:4, 17767:5 jibe [2] - 17766:1, 17766:9 jive [1] - 17766:3 Joanne [1] - 17697:3 job [2] - 17702:15, 17757:10 John [79] - 17704:13, 17705:22, 17711:2, 17724:10, 17724:22, 17725:4, 17726:1, 17726:13, 17727:3, 17727:7, 17727:12, 17727:25, 17728:17, 17728:19, 17729:14, 17730:2, 17730:11, 17751:24, 17766:2, 17772:8, 17808:19, 17828:25, 17836:15, 17837:2, 17838:5, 17839:5, 17857:22, 17857:24, 17858:6, 17862:5, 17862:10,				



17699:13, 17700:7, 17823:6, 17921:17 jurisdiction [1] - 17801:14 jurors [1] - 17703:20 jury [8] - 17750:2, 17785:10, 17801:24, 17915:5, 17915:8, 17915:15, 17918:12, 17967:6 justice [17] - 17813:24, 17836:20, 17836:24, 17932:21, 17932:23, 17942:22, 17963:7, 17967:19, 17968:2, 17968:7, 17968:16, 17969:10, 17969:25, 17970:2, 17971:19, 17972:7, 17972:15 Justice [26] - 17695:6, 17697:12, 17697:14, 17742:17, 17804:4, 17804:19, 17805:4, 17807:13, 17807:20, 17813:19, 17817:15, 17818:22, 17819:3, 17819:11, 17825:10, 17830:20, 17835:24, 17922:15, 17937:22, 17942:25, 17945:21, 17946:1, 17962:7, 17964:4, 17968:5 justification [2] - 17764:25, 17765:5	killed [14] - 17748:23, 17757:19, 17820:16, 17831:8, 17870:7, 17870:12, 17870:17, 17885:15, 17901:21, 17910:15, 17936:25, 17938:24, 17969:19, 17970:10 killer [2] - 17889:15, 17895:13 kills [1] - 17935:9 Kim [1] - 17813:20 kind [23] - 17712:1, 17712:8, 17722:20, 17734:12, 17746:2, 17751:25, 17797:8, 17805:9, 17813:16, 17815:3, 17817:14, 17819:13, 17835:17, 17875:12, 17882:2, 17887:9, 17887:10, 17905:1, 17917:5, 17919:6, 17940:24, 17951:17, 17962:3 kinds [6] - 17723:4, 17774:14, 17816:6, 17817:13, 17818:20, 17913:21 Kingdom [2] - 17835:21, 17836:6 knife [13] - 17784:15, 17785:14, 17862:16, 17884:13, 17884:14, 17884:21, 17886:19, 17886:21, 17888:18, 17889:11, 17964:20 knife-wielding [1] - 17964:20 knowing [2] - 17881:21, 17959:8 knowledge [18] - 17711:13, 17717:9, 17726:16, 17728:18, 17733:15, 17770:20, 17777:25, 17839:14, 17845:1, 17887:6, 17915:12, 17921:8, 17931:11, 17942:9, 17945:25, 17946:10, 17951:16, 17977:6 known [39] - 17703:15, 17709:20, 17710:14, 17716:23, 17716:25, 17717:13, 17717:21, 17765:21, 17765:25, 17776:17, 17832:5, 17860:13, 17866:11, 17866:22, 17867:5, 17869:12, 17869:14, 17869:16, 17869:24,	17870:9, 17870:16, 17872:5, 17872:25, 17873:24, 17876:21, 17876:23, 17876:25, 17878:3, 17887:19, 17890:21, 17895:1, 17907:23, 17908:21, 17928:12, 17933:7, 17938:5, 17959:9, 17965:6 knows [8] - 17735:3, 17842:10, 17882:17, 17882:19, 17918:23, 17946:22, 17961:24 Knox [32] - 17697:6, 17701:11, 17701:17, 17701:21, 17759:21, 17802:18, 17816:12, 17816:16, 17831:23, 17849:22, 17850:12, 17855:5, 17855:18, 17855:22, 17872:2, 17872:13, 17872:16, 17876:12, 17883:5, 17883:10, 17933:22, 17945:17, 17945:18, 17953:25, 17962:23, 17963:14, 17963:17, 17963:20, 17964:9, 17966:16, 17973:4, 17975:18 Krogan [3] - 17697:5, 17943:15, 17943:18 Kujawa [11] - 17697:7, 17756:23, 17769:23, 17811:20, 17812:18, 17813:18, 17814:10, 17814:19, 17815:4, 17815:16, 17817:13 Kujawa's [2] - 17703:8, 17815:24	large [1] - 17836:4 largely [1] - 17751:22 Larry [23] - 17697:11, 17714:15, 17733:21, 17733:23, 17778:25, 17841:12, 17849:8, 17894:8, 17922:12, 17928:14, 17931:13, 17942:12, 17943:13, 17944:3, 17953:5, 17953:7, 17956:1, 17956:14, 17962:14, 17970:15, 17970:19, 17970:21, 17971:9 last [16] - 17702:3, 17755:9, 17774:23, 17804:15, 17804:16, 17814:13, 17852:23, 17880:6, 17904:5, 17934:21, 17940:8, 17963:12, 17963:15, 17963:22 Last [2] - 17699:7, 17926:20 late [7] - 17716:24, 17784:14, 17805:24, 17865:9, 17883:18, 17920:10, 17921:2 latter [1] - 17947:4 launch [1] - 17798:22 law [3] - 17804:25, 17933:4, 17967:3 Law [2] - 17835:22, 17835:23 lawyer [12] - 17749:16, 17787:5, 17787:7, 17932:5, 17932:15, 17932:17, 17933:10, 17933:12, 17933:17, 17933:25, 17962:17, 17962:19 Lawyers [1] - 17821:2 lawyers [2] - 17807:20, 17813:1 lead [7] - 17827:17, 17827:25, 17828:2, 17828:11, 17828:13, 17895:20 leading [3] - 17749:18, 17894:5, 17910:14 leap [1] - 17860:9 learn [1] - 17841:24 Learned [2] - 17877:10, 17946:4 learned [12] - 17732:17, 17733:3, 17741:22, 17741:24, 17756:9, 17770:3, 17787:16, 17792:20, 17822:2, 17893:25, 17938:1,	17954:19 least [16] - 17716:10, 17734:17, 17737:25, 17739:9, 17739:16, 17763:2, 17778:16, 17785:2, 17831:20, 17840:18, 17887:21, 17898:6, 17898:23, 17931:13, 17932:17, 17952:8 Leave [1] - 17964:23 leave [12] - 17700:25, 17729:7, 17746:8, 17792:2, 17821:10, 17825:15, 17867:16, 17873:9, 17873:19, 17881:1, 17929:11, 17957:1 leaving [4] - 17705:1, 17716:2, 17869:10, 17954:22 led [6] - 17827:14, 17900:13, 17960:2, 17965:13, 17971:6 Left [1] - 17776:22 left [13] - 17736:6, 17737:6, 17762:23, 17776:20, 17779:7, 17779:10, 17780:12, 17836:2, 17839:12, 17857:18, 17868:4, 17868:5, 17885:21 legion [2] - 17704:25, 17705:6 legitimate [3] - 17766:15, 17825:21, 17929:24 legitimately [3] - 17752:11, 17889:6, 17927:8 length [1] - 17844:18 lengthy [1] - 17846:22 less [8] - 17713:5, 17714:22, 17725:3, 17731:18, 17838:9, 17838:13, 17937:13, 17944:1 letter [20] - 17699:11, 17699:13, 17700:8, 17710:3, 17761:12, 17777:13, 17777:15, 17777:19, 17782:12, 17783:14, 17783:15, 17791:15, 17792:8, 17824:2, 17824:5, 17824:14, 17924:21, 17962:25, 17963:2, 17964:11 letters [8] - 17723:6, 17809:21, 17809:25,
K				
Kara [1] - 17696:6 Karen [3] - 17696:11, 17977:2, 17977:13 Karst [7] - 17697:9, 17864:11, 17864:16, 17907:11, 17973:14, 17974:7, 17974:8 Karst [1] - 17923:19 Kaufman [1] - 17825:10 Keep [1] - 17779:18 keep [5] - 17754:25, 17758:4, 17801:24, 17825:15, 17834:11 keeping [6] - 17732:16, 17732:17, 17733:1, 17733:2, 17752:14, 17890:16 Ken [2] - 17767:16 kept [2] - 17792:11, 17834:17 keys [1] - 17781:7 kill [1] - 17970:15				
		L		
		lab [2] - 17798:3, 17877:3 laboratory [1] - 17732:1 ladies [3] - 17708:2, 17708:14, 17926:1 lady [10] - 17709:11, 17712:5, 17741:15, 17746:14, 17747:17, 17747:21, 17747:22, 17763:4, 17936:2, 17936:25 laid [1] - 17789:13 Lana [1] - 17697:5 lane [1] - 17784:14 lapse [1] - 17751:25		



<p>17810:6, 17810:8, 17810:11, 17822:6, 17825:23 level [7] - 17807:25, 17922:16, 17937:23, 17969:10, 17969:11 liable [1] - 17968:6 lied [4] - 17838:8, 17882:8, 17918:15, 17918:23 lieu [1] - 17969:20 Lieutenant [1] - 17802:19 life [2] - 17818:23, 17819:11 light [4] - 17751:17, 17945:3, 17961:4, 17962:10 lights [1] - 17727:3 likely [4] - 17700:4, 17725:2, 17939:18, 17975:20 limit [1] - 17833:13 limited [2] - 17753:12, 17778:16 Linda [1] - 17937:16 line [11] - 17731:18, 17734:11, 17741:5, 17766:20, 17774:19, 17790:16, 17834:7, 17835:6, 17883:22, 17896:12, 17953:11 lined [1] - 17715:22 lines [3] - 17731:8, 17852:9, 17891:9 lingo [1] - 17807:19 link [9] - 17747:2, 17747:18, 17782:14, 17784:7, 17785:4, 17792:16, 17846:25, 17847:4, 17849:4 linkage [4] - 17794:17, 17831:17, 17832:8, 17832:21 linkages [1] - 17795:7 linking [1] - 17731:12 links [1] - 17922:21 list [4] - 17712:14, 17712:18, 17856:17, 17903:1 listed [2] - 17856:6, 17963:4 listen [2] - 17875:22, 17875:25 lists [1] - 17964:18 literally [2] - 17717:8, 17959:24 literature [2] - 17826:6, 17835:18 lived [1] - 17967:13</p>	<p>lives [1] - 17739:7 living [2] - 17716:13, 17717:8 local [2] - 17716:19, 17719:1 location [3] - 17901:7, 17903:5, 17951:18 lock [1] - 17911:8 Lockyer [204] - 17697:3, 17698:5, 17701:8, 17701:13, 17701:24, 17702:2, 17709:14, 17717:1, 17720:2, 17721:13, 17724:2, 17726:18, 17732:14, 17732:25, 17733:4, 17742:3, 17742:5, 17743:12, 17744:18, 17744:23, 17754:7, 17756:7, 17759:10, 17760:7, 17760:22, 17769:17, 17771:21, 17773:17, 17774:4, 17775:12, 17775:23, 17776:3, 17778:12, 17781:20, 17787:15, 17801:12, 17802:23, 17803:24, 17804:1, 17805:19, 17806:9, 17806:25, 17807:23, 17811:6, 17811:25, 17815:9, 17816:15, 17816:18, 17816:20, 17817:23, 17819:9, 17820:1, 17821:18, 17829:5, 17830:23, 17832:6, 17832:12, 17832:16, 17835:15, 17838:25, 17839:11, 17849:18, 17850:6, 17850:10, 17850:14, 17850:18, 17850:21, 17850:24, 17851:6, 17851:9, 17851:13, 17851:14, 17851:17, 17851:23, 17852:1, 17852:5, 17852:21, 17855:4, 17855:14, 17855:19, 17855:24, 17855:25, 17859:8, 17859:12, 17861:2, 17863:21, 17863:24, 17864:2, 17864:4, 17867:20, 17868:1, 17868:7, 17871:5, 17871:9, 17871:13, 17871:18, 17871:23, 17872:1, 17872:11, 17872:15, 17873:9, 17873:14, 17873:21,</p>	<p>17874:3, 17874:10, 17874:11, 17874:17, 17874:23, 17875:4, 17875:9, 17875:18, 17875:25, 17876:6, 17876:9, 17876:10, 17876:15, 17877:25, 17878:7, 17878:12, 17878:21, 17879:4, 17880:4, 17880:5, 17882:15, 17883:2, 17883:4, 17883:7, 17884:2, 17884:5, 17884:25, 17885:22, 17888:5, 17891:5, 17893:5, 17901:9, 17902:8, 17902:10, 17902:15, 17902:19, 17902:21, 17902:23, 17902:24, 17909:16, 17915:11, 17915:19, 17919:1, 17920:2, 17920:16, 17927:19, 17930:23, 17933:23, 17937:24, 17943:22, 17944:13, 17944:17, 17944:21, 17944:25, 17945:1, 17945:5, 17946:16, 17946:17, 17947:7, 17947:12, 17947:21, 17948:2, 17948:8, 17948:12, 17948:15, 17948:18, 17948:23, 17949:11, 17949:15, 17949:25, 17954:10, 17958:22, 17963:11, 17963:13, 17963:16, 17963:18, 17964:7, 17964:13, 17964:16, 17964:23, 17964:25, 17965:20, 17966:12, 17967:10, 17967:11, 17969:24, 17971:15, 17971:24, 17972:12, 17972:19, 17972:21, 17973:3, 17973:12, 17973:15, 17973:20, 17973:24, 17974:2, 17974:5, 17974:10, 17975:7 Lockyers [3] - 17963:15, 17972:5, 17974:24 logic [2] - 17717:20, 17763:23 logical [1] - 17758:17 longtime [1] - 17932:17 Look [3] - 17729:4, 17922:6, 17932:15 look [46] - 17702:19,</p>	<p>17718:23, 17724:13, 17725:8, 17730:4, 17738:20, 17750:25, 17755:3, 17782:19, 17782:23, 17789:21, 17793:10, 17813:17, 17820:4, 17834:15, 17856:1, 17857:21, 17864:24, 17864:25, 17867:18, 17867:23, 17873:10, 17877:12, 17878:24, 17881:19, 17882:10, 17882:15, 17886:15, 17887:11, 17889:3, 17889:4, 17889:23, 17890:7, 17890:10, 17893:14, 17895:4, 17895:23, 17897:17, 17903:19, 17909:4, 17920:7, 17937:2, 17942:20, 17947:15, 17950:12, 17968:11 looked [10] - 17737:8, 17810:11, 17854:25, 17857:16, 17884:10, 17891:6, 17893:16, 17905:3, 17926:20, 17955:18 looking [10] - 17703:3, 17747:1, 17750:25, 17753:17, 17788:24, 17823:12, 17852:12, 17867:7, 17925:11, 17934:7 lookit [2] - 17938:18, 17940:6 looks [5] - 17779:2, 17823:5, 17890:18, 17891:3, 17910:15 Lord [1] - 17813:11 lost [4] - 17728:10, 17763:13, 17922:18, 17923:8 loud [1] - 17812:2 love [1] - 17710:13 loved [6] - 17706:5, 17706:21, 17707:1, 17707:14, 17707:18, 17709:2 low [2] - 17891:22, 17892:5 luck [1] - 17738:11 lunch [1] - 17857:18 lurking [1] - 17754:12</p>	<p>ma'am [2] - 17849:21, 17876:11 Maccallum [108] - 17695:7, 17699:3, 17701:9, 17701:15, 17701:18, 17732:20, 17732:23, 17742:1, 17744:21, 17759:19, 17760:6, 17774:1, 17775:25, 17802:16, 17803:22, 17803:25, 17816:9, 17816:11, 17819:6, 17832:10, 17832:14, 17839:8, 17849:16, 17849:20, 17850:8, 17850:16, 17850:19, 17850:22, 17851:7, 17851:12, 17851:15, 17851:18, 17851:21, 17855:3, 17855:13, 17859:6, 17863:17, 17863:23, 17867:16, 17870:24, 17871:6, 17871:10, 17871:15, 17871:20, 17871:25, 17873:4, 17873:18, 17874:2, 17874:9, 17874:13, 17874:21, 17874:25, 17875:7, 17875:14, 17875:19, 17876:4, 17876:8, 17876:11, 17877:15, 17878:4, 17878:10, 17878:15, 17878:19, 17879:2, 17880:2, 17882:25, 17883:3, 17883:9, 17883:24, 17902:5, 17902:9, 17902:12, 17902:17, 17902:20, 17919:24, 17943:17, 17944:11, 17944:20, 17944:24, 17945:2, 17945:17, 17946:16, 17947:3, 17947:9, 17947:20, 17948:6, 17948:10, 17948:14, 17948:17, 17948:20, 17949:8, 17949:12, 17949:17, 17949:20, 17949:23, 17966:9, 17966:15, 17971:15, 17971:25, 17972:4, 17972:9, 17972:18, 17974:17, 17974:22, 17975:4, 17975:24, 17976:3, 17976:18 Mackie [19] - 17724:18, 17726:14, 17726:15, 17727:19, 17729:24, 17781:2, 17794:14,</p>
				M
				M'h [1] - 17844:23



17801:22, 17802:22, 17835:3, 17888:13, 17891:17, 17892:3, 17899:14, 17899:19, 17899:25, 17900:4, 17900:6, 17900:10 Mackie's [1] - 17721:19 magistrate's [1] - 17699:17 magistrates [1] - 17700:2 Mail [1] - 17967:20 main [1] - 17705:10 maintain [3] - 17703:10, 17703:11, 17703:17 maintaining [1] - 17837:22 malfeasance [1] - 17788:7 malice [1] - 17838:5 maligned [1] - 17838:13 malpractice [1] - 17838:4 man [17] - 17718:19, 17735:22, 17747:25, 17748:15, 17754:12, 17757:3, 17803:5, 17810:2, 17824:6, 17829:15, 17835:23, 17925:15, 17931:21, 17934:4, 17936:1, 17962:14, 17969:18 managed [2] - 17713:11, 17923:17 Manager [1] - 17696:5 manages [1] - 17735:22 Manitoba [7] - 17779:9, 17779:11, 17779:13, 17779:14, 17779:18, 17779:23, 17936:21 manner [3] - 17741:7, 17875:21, 17882:10 March [38] - 17792:16, 17829:1, 17829:7, 17829:9, 17829:13, 17858:2, 17858:7, 17858:10, 17858:22, 17858:24, 17877:22, 17877:23, 17882:8, 17888:23, 17890:2, 17890:3, 17892:24, 17893:16, 17897:9, 17897:18, 17898:6, 17909:9, 17911:2, 17915:4, 17915:7, 17915:9, 17915:10, 17915:18, 17918:4, 17919:19, 17933:22, 17934:16, 17935:9, 17963:24, 17973:8,	17973:9, 17973:10 mark [1] - 17797:3 marked [2] - 17843:21, 17866:17 marks [1] - 17917:1 maroon [2] - 17888:18, 17889:11 maroon-handled [2] - 17888:18, 17889:11 massive [1] - 17705:8 match [1] - 17869:12 matched [3] - 17835:13, 17866:3, 17868:23 matches [1] - 17860:20 material [6] - 17704:25, 17706:3, 17898:2, 17946:11, 17975:19, 17975:22 materials [3] - 17910:6, 17920:6, 17963:2 matter [34] - 17717:3, 17717:16, 17725:3, 17735:2, 17740:16, 17756:10, 17763:22, 17763:23, 17767:21, 17768:21, 17776:19, 17805:16, 17807:11, 17812:14, 17817:20, 17832:20, 17833:21, 17839:12, 17853:13, 17854:12, 17873:12, 17875:15, 17877:5, 17877:16, 17890:5, 17901:25, 17914:3, 17929:23, 17935:7, 17940:21, 17946:3, 17946:7, 17947:14, 17957:7 matters [6] - 17779:13, 17779:14, 17787:16, 17811:5, 17847:11, 17976:4 Mccorriston [2] - 17886:9, 17886:12 Mclean [1] - 17697:3 mean [46] - 17708:9, 17708:15, 17718:15, 17719:9, 17736:13, 17737:25, 17743:19, 17753:20, 17759:13, 17759:15, 17763:24, 17771:6, 17774:10, 17795:7, 17810:17, 17817:18, 17818:2, 17818:11, 17819:18, 17821:13, 17822:5, 17822:15, 17825:2, 17830:14, 17833:15, 17842:9, 17858:1, 17869:11, 17869:12,	17871:25, 17873:14, 17893:1, 17895:5, 17899:3, 17899:5, 17899:6, 17903:7, 17909:4, 17913:11, 17932:5, 17950:22, 17950:23, 17953:9, 17960:23, 17973:24 meaning [3] - 17796:25, 17832:18, 17879:12 Meaning [1] - 17837:2 meaningful [3] - 17925:10, 17936:12, 17937:12 means [4] - 17745:3, 17763:16, 17814:15, 17833:4 meant [11] - 17771:13, 17807:2, 17820:11, 17836:2, 17847:18, 17848:1, 17848:4, 17874:1, 17909:18, 17912:14, 17951:25 meantime [2] - 17792:21, 17938:1 mechanically [2] - 17902:7, 17902:13 media [10] - 17704:11, 17802:10, 17811:21, 17812:25, 17813:19, 17821:2, 17929:18, 17929:25, 17932:10, 17967:20 meeting [1] - 17921:3 member [3] - 17771:17, 17803:20, 17816:16 members [1] - 17804:21 memorable [1] - 17837:3 memory [29] - 17707:9, 17717:2, 17717:15, 17717:19, 17718:1, 17751:19, 17751:25, 17752:6, 17752:19, 17753:2, 17753:4, 17795:18, 17802:19, 17817:3, 17842:8, 17874:14, 17880:23, 17880:25, 17882:2, 17891:5, 17896:9, 17898:14, 17899:8, 17900:4, 17918:19, 17918:20, 17950:3 memory [1] - 17837:16 memos [1] - 17960:19 mention [1] - 17849:17 mentioned [14] - 17699:8, 17717:1, 17736:7, 17770:16,	17770:17, 17770:18, 17797:16, 17797:19, 17803:4, 17839:1, 17845:8, 17871:1, 17902:2, 17941:10 met [1] - 17724:20 Meyer [3] - 17696:12, 17977:2, 17977:17 mid [5] - 17719:7, 17920:11, 17921:1, 17921:2, 17921:3 mid-may [4] - 17920:11, 17921:1, 17921:2, 17921:3 middle [5] - 17713:21, 17714:23, 17715:20, 17794:22, 17901:12 midst [2] - 17839:22, 17935:10 might [64] - 17700:19, 17711:19, 17712:8, 17713:21, 17723:25, 17733:5, 17733:22, 17735:13, 17735:21, 17739:9, 17739:22, 17740:11, 17745:10, 17748:17, 17764:22, 17771:8, 17776:9, 17778:7, 17785:7, 17789:8, 17807:14, 17815:16, 17817:25, 17867:15, 17867:24, 17869:16, 17869:22, 17882:16, 17892:18, 17892:22, 17892:23, 17893:15, 17895:24, 17897:22, 17898:10, 17900:19, 17901:18, 17904:20, 17905:5, 17910:13, 17910:16, 17913:8, 17913:15, 17913:23, 17915:15, 17916:6, 17931:12, 17931:18, 17931:20, 17943:15, 17943:19, 17943:20, 17943:21, 17949:15, 17949:16, 17951:22, 17952:16, 17952:19, 17960:21, 17965:14, 17966:11, 17973:1, 17975:17 Milgaard [133] - 17695:4, 17697:2, 17697:4, 17702:15, 17703:13, 17706:4, 17709:21, 17712:2, 17724:9, 17724:21, 17729:7, 17729:15, 17730:2, 17731:13, 17731:22, 17732:4,	17739:7, 17744:9, 17745:11, 17756:16, 17761:13, 17766:6, 17766:11, 17766:17, 17768:3, 17768:13, 17768:16, 17769:4, 17770:8, 17775:4, 17786:14, 17796:25, 17801:7, 17805:22, 17812:6, 17812:14, 17813:18, 17814:22, 17820:16, 17828:14, 17829:17, 17830:3, 17830:25, 17833:4, 17838:18, 17838:19, 17840:23, 17843:25, 17844:4, 17845:13, 17846:4, 17849:2, 17849:8, 17849:10, 17851:3, 17855:8, 17855:12, 17856:16, 17857:2, 17857:25, 17858:10, 17862:23, 17864:14, 17864:15, 17866:20, 17870:7, 17870:12, 17877:22, 17880:24, 17882:7, 17884:13, 17885:10, 17885:14, 17885:18, 17886:1, 17888:21, 17888:22, 17890:15, 17891:12, 17893:20, 17894:13, 17894:17, 17897:19, 17897:24, 17901:19, 17906:20, 17909:8, 17911:1, 17911:19, 17914:25, 17915:2, 17916:13, 17916:21, 17920:8, 17922:11, 17922:18, 17923:6, 17936:5, 17938:5, 17938:19, 17939:2, 17940:13, 17940:17, 17941:21, 17942:9, 17943:25, 17944:23, 17947:2, 17949:3, 17950:19, 17955:10, 17955:25, 17956:17, 17959:6, 17960:1, 17960:15, 17964:6, 17965:5, 17967:2, 17967:13, 17968:5, 17969:13, 17969:18, 17970:10, 17970:19, 17970:21, 17970:23, 17971:7, 17971:12, 17973:7, 17973:9, 17973:14, 17974:14 Milgaard's [34] - 17705:2, 17733:10,
--	---	---	---	---



17733:24, 17785:22, 17808:5, 17811:12, 17814:10, 17818:1, 17818:23, 17819:11, 17825:13, 17827:5, 17830:10, 17830:15, 17849:5, 17864:18, 17879:7, 17879:12, 17880:4, 17921:16, 17922:22, 17943:1, 17943:11, 17944:4, 17945:10, 17947:16, 17960:16, 17962:20, 17965:16, 17965:24, 17968:14, 17971:18, 17973:21 Milgaards [1] - 17825:25 Miller [71] - 17705:7, 17708:3, 17709:12, 17710:15, 17713:8, 17713:24, 17714:3, 17714:25, 17715:8, 17717:3, 17720:9, 17724:8, 17724:20, 17725:11, 17725:19, 17726:3, 17727:4, 17729:8, 17735:13, 17735:15, 17735:21, 17736:4, 17737:10, 17738:3, 17741:19, 17746:22, 17747:20, 17748:3, 17748:23, 17754:19, 17757:19, 17758:1, 17758:6, 17763:7, 17763:13, 17764:9, 17778:5, 17778:9, 17779:4, 17779:8, 17782:3, 17782:19, 17782:20, 17783:22, 17784:6, 17784:25, 17792:18, 17794:18, 17796:24, 17805:22, 17820:17, 17870:7, 17870:13, 17870:17, 17885:15, 17886:2, 17890:5, 17891:13, 17896:1, 17896:5, 17896:23, 17901:22, 17910:16, 17911:5, 17934:19, 17935:21, 17936:8, 17938:24, 17969:19, 17970:11, 17970:16 Miller's [26] - 17708:6, 17712:17, 17713:13, 17713:18, 17715:19, 17718:11, 17718:14, 17718:20, 17733:11, 17753:24, 17754:3, 17757:12, 17760:12,	17760:14, 17764:1, 17776:15, 17781:6, 17781:17, 17781:21, 17830:12, 17833:16, 17884:22, 17887:2, 17895:13, 17903:5, 17903:11 mind [26] - 17703:8, 17711:12, 17715:25, 17738:12, 17740:12, 17754:14, 17754:19, 17765:5, 17765:22, 17765:24, 17776:5, 17778:6, 17828:24, 17831:17, 17860:2, 17860:10, 17866:6, 17873:23, 17874:5, 17881:19, 17882:1, 17891:19, 17904:24, 17906:2, 17921:11, 17975:13 mine [2] - 17790:15, 17932:3 minimum [3] - 17716:19, 17769:9, 17919:20 minister [6] - 17942:22, 17943:8, 17965:16, 17967:19, 17968:2, 17968:7 Minister [4] - 17697:12, 17813:20, 17942:25, 17946:1 minus [2] - 17763:5, 17764:16 minute [11] - 17701:12, 17708:25, 17723:22, 17724:13, 17742:1, 17759:19, 17790:12, 17790:21, 17802:16, 17854:9, 17863:12 minutely [1] - 17834:10 minutes [16] - 17701:16, 17701:17, 17709:11, 17710:14, 17714:5, 17729:16, 17756:9, 17764:1, 17764:18, 17804:20, 17804:23, 17805:5, 17862:7, 17867:12, 17867:22, 17919:24 misconduct [1] - 17702:16 misquoting [1] - 17744:11 miss [1] - 17738:23 Miss [16] - 17713:3, 17713:10, 17713:15, 17713:18, 17715:6, 17715:7, 17776:8,	17776:20, 17776:21, 17931:7, 17931:8 missed [5] - 17769:8, 17786:12, 17793:16, 17934:11, 17934:12 mistake [3] - 17731:19, 17858:15, 17972:2 mistaken [4] - 17779:15, 17839:1, 17954:11 misunderstand [1] - 17944:7 misunderstood [2] - 17820:7, 17863:17 Mitchell [2] - 17968:9, 17968:11 Mla [2] - 17812:18, 17816:13 modify [1] - 17826:13 moment [18] - 17708:1, 17710:4, 17710:11, 17710:12, 17716:3, 17719:5, 17754:4, 17768:22, 17786:4, 17787:19, 17811:5, 17834:23, 17852:22, 17855:5, 17875:8, 17901:20, 17958:17, 17961:12 Monday [1] - 17969:5 money [3] - 17890:18, 17891:3, 17891:6 month [2] - 17733:8, 17779:5 months [12] - 17713:5, 17713:6, 17713:7, 17713:13, 17714:20, 17776:14, 17813:21, 17876:19, 17907:11, 17910:4, 17935:7 Montreal [1] - 17954:23 Morin [11] - 17767:2, 17767:11, 17767:14, 17767:20, 17825:8, 17882:21, 17882:23, 17883:8, 17883:11, 17883:12, 17883:17 morning [21] - 17699:3, 17699:4, 17714:14, 17734:24, 17736:3, 17736:16, 17763:18, 17766:12, 17776:11, 17787:18, 17787:24, 17806:7, 17839:13, 17862:17, 17865:16, 17871:3, 17883:7, 17885:11, 17896:7, 17917:14, 17962:15 most [3] - 17825:5, 17906:9, 17922:15	motel [1] - 17904:9 mother [1] - 17823:25 motherhood [1] - 17856:23 motive [1] - 17725:18 move [8] - 17713:3, 17729:2, 17746:9, 17762:3, 17830:3, 17857:18, 17948:24, 17949:1 moved [4] - 17739:6, 17843:1, 17853:14, 17853:16 moving [3] - 17884:9, 17937:14, 17962:5 multiple [2] - 17927:12, 17930:6 murder [48] - 17705:7, 17708:3, 17708:6, 17712:6, 17712:17, 17713:7, 17713:13, 17713:18, 17713:24, 17714:2, 17714:25, 17717:4, 17717:12, 17718:11, 17718:14, 17718:20, 17720:9, 17733:11, 17734:22, 17737:10, 17753:24, 17754:3, 17757:12, 17760:12, 17760:14, 17763:12, 17764:1, 17776:15, 17778:5, 17778:9, 17778:10, 17778:11, 17781:6, 17781:17, 17781:21, 17782:20, 17782:21, 17792:17, 17794:18, 17812:15, 17833:16, 17844:11, 17886:12, 17890:5, 17935:20, 17939:8, 17966:22, 17967:14 murdered [12] - 17709:12, 17710:16, 17712:5, 17724:8, 17735:15, 17736:4, 17748:3, 17763:8, 17764:9, 17805:22, 17911:6, 17934:19 Murray [1] - 17954:21 must [24] - 17716:25, 17717:21, 17721:1, 17721:7, 17732:10, 17758:18, 17763:15, 17763:19, 17763:22, 17764:10, 17764:15, 17764:21, 17767:7, 17767:14, 17767:24, 17768:2, 17826:17, 17831:5, 17838:16,	17838:19, 17849:2, 17850:23, 17874:6, 17908:7 N nail [1] - 17959:17 name [8] - 17709:17, 17770:18, 17845:3, 17861:13, 17938:4, 17953:7, 17963:6 Name [2] - 17835:22, 17835:23 Namely [1] - 17740:3 namely [1] - 17838:18 names [3] - 17770:16, 17845:12, 17860:14 Narrow [1] - 17790:10 narrow [3] - 17791:4, 17841:21, 17844:13 nary [1] - 17802:12 nature [3] - 17726:19, 17729:4, 17730:4 Nb [2] - 17856:13, 17856:23 Ndp [2] - 17812:18, 17816:13 near [2] - 17889:9, 17954:21 necessarily [7] - 17773:11, 17841:21, 17882:13, 17910:10, 17913:13, 17919:10, 17960:20 necessary [3] - 17796:9, 17842:19, 17922:22 necessitate [1] - 17887:17 need [12] - 17701:12, 17783:22, 17789:10, 17789:12, 17791:16, 17791:20, 17803:3, 17821:19, 17859:22, 17873:12, 17882:15, 17909:24 negligence [2] - 17702:17, 17788:8 net [1] - 17937:17 Neufeld [5] - 17943:23, 17943:24, 17946:2, 17946:6, 17957:7 Never [2] - 17899:18, 17931:10 never [43] - 17706:12, 17713:22, 17720:18, 17720:20, 17721:11, 17721:15, 17721:20, 17723:2, 17729:15,
--	---	---	---	--



<p>17732:7, 17753:10, 17761:13, 17776:16, 17785:9, 17793:15, 17801:16, 17802:3, 17808:20, 17809:7, 17809:8, 17809:10, 17811:18, 17824:6, 17830:16, 17839:17, 17840:21, 17841:4, 17846:4, 17846:5, 17862:6, 17866:1, 17901:1, 17901:4, 17915:8, 17921:11, 17921:12, 17927:16, 17954:2, 17954:6, 17961:3, 17970:2 new [16] - 17699:22, 17772:9, 17813:22, 17814:18, 17855:11, 17884:11, 17887:24, 17892:18, 17893:4, 17896:22, 17911:15, 17922:1, 17948:4, 17950:13, 17966:7, 17975:25 newspaper [2] - 17719:1 newspapers [1] - 17718:25 next [20] - 17700:14, 17713:14, 17726:22, 17729:2, 17729:5, 17745:19, 17746:11, 17753:14, 17753:17, 17771:20, 17794:20, 17798:18, 17851:24, 17853:11, 17884:6, 17905:9, 17905:16, 17954:22, 17967:12, 17972:22 Next [2] - 17850:22, 17850:23 next' [1] - 17753:17 nicer [1] - 17739:22 Nichol [54] - 17704:13, 17705:18, 17705:21, 17711:2, 17724:10, 17724:22, 17727:3, 17727:7, 17727:12, 17727:25, 17728:19, 17751:24, 17766:2, 17772:8, 17828:25, 17839:5, 17857:22, 17857:24, 17862:5, 17862:10, 17862:15, 17862:23, 17864:11, 17882:7, 17887:24, 17890:19, 17891:4, 17892:7, 17893:19, 17898:12, 17903:2,</p>	<p>17903:9, 17903:14, 17903:24, 17905:16, 17906:4, 17911:23, 17912:25, 17913:7, 17913:9, 17914:19, 17915:3, 17915:6, 17915:16, 17916:2, 17916:9, 17916:17, 17917:23, 17939:4, 17955:5, 17955:17, 17957:24, 17973:10, 17973:14 night [3] - 17734:25, 17735:5, 17735:19 night-time [1] - 17735:5 nine [1] - 17813:21 ninth [1] - 17776:9 noble [5] - 17857:19, 17906:16, 17907:1, 17908:10, 17908:25 non [1] - 17704:10 none [6] - 17758:24, 17844:5, 17856:19, 17862:16, 17960:10, 17973:4 nonsense [1] - 17728:12 normally [1] - 17961:4 North [3] - 17934:15, 17935:10, 17935:17 notable [1] - 17838:11 note [7] - 17736:5, 17738:14, 17738:17, 17755:7, 17755:8, 17762:13, 17837:12 note-taking [1] - 17837:12 noted [2] - 17859:13, 17859:17 notes [6] - 17842:23, 17843:14, 17843:20, 17843:21, 17869:19, 17977:6 nothing [26] - 17727:12, 17728:3, 17737:19, 17756:18, 17761:20, 17769:23, 17781:16, 17787:9, 17788:7, 17789:18, 17793:9, 17846:10, 17847:17, 17860:23, 17864:7, 17868:18, 17876:9, 17883:19, 17890:3, 17913:18, 17913:25, 17918:20, 17926:14, 17926:24, 17936:17, 17941:19 Nothing [1] - 17756:4 notice [5] - 17755:19, 17783:11, 17816:23,</p>	<p>17892:8, 17892:9 noticed [1] - 17869:23 notified [1] - 17930:22 notion [4] - 17749:17, 17838:11, 17857:19, 17908:25 November [8] - 17695:21, 17704:1, 17713:4, 17713:12, 17780:12, 17781:12, 17784:10 nowhere [1] - 17972:18 number [21] - 17713:15, 17713:25, 17714:2, 17714:5, 17714:8, 17723:4, 17759:23, 17760:3, 17836:4, 17859:13, 17886:16, 17905:10, 17916:10, 17916:18, 17955:7, 17960:13, 17963:1, 17963:5, 17964:16, 17964:17, 17964:21 numbers [2] - 17779:12, 17953:20 nurse [6] - 17725:11, 17726:3, 17735:17, 17736:3, 17736:19, 17754:19 Nurse's [1] - 17754:13 nurse's [1] - 17754:16 nurses [1] - 17964:20</p>	<p>17841:24, 17898:24 occur [1] - 17900:9 occurred [3] - 17761:1, 17832:2, 17899:18 Occurrence [1] - 17723:8 occurrence [1] - 17739:2 October [19] - 17712:23, 17731:11, 17739:19, 17755:13, 17761:21, 17774:18, 17774:19, 17774:21, 17780:12, 17784:10, 17788:20, 17866:14, 17878:22, 17879:1, 17879:5, 17880:6, 17938:9, 17953:22, 17954:24 odd [2] - 17779:5, 17780:9 offence [2] - 17726:8, 17763:25 offences [8] - 17717:3, 17717:16, 17780:5, 17841:12, 17856:6, 17935:2, 17935:12, 17936:16 offender [2] - 17718:13, 17811:5 offhand [1] - 17901:10 office [15] - 17716:9, 17720:8, 17721:18, 17772:21, 17779:21, 17780:7, 17793:15, 17797:16, 17801:18, 17815:14, 17815:19, 17899:12, 17900:2, 17914:10, 17926:14 Officer [1] - 17696:13 officer [8] - 17771:12, 17772:14, 17773:2, 17785:5, 17826:11, 17836:10, 17838:8, 17838:19 officers [20] - 17771:10, 17778:17, 17801:19, 17833:10, 17833:17, 17834:12, 17834:18, 17837:5, 17837:13, 17837:20, 17838:1, 17863:24, 17865:19, 17913:17, 17914:9, 17921:4, 17921:5, 17927:14, 17938:17 offices [1] - 17817:16 Official [5] - 17696:11, 17977:1, 17977:3, 17977:14, 17977:18 old [2] - 17824:8, 17964:5</p>	<p>omit [6] - 17795:23, 17795:25, 17796:16, 17842:24, 17843:15, 17856:17 Omit [2] - 17796:1, 17796:2 Once [4] - 17762:6, 17794:17, 17838:7, 17876:12 once [16] - 17704:11, 17720:5, 17754:23, 17755:25, 17762:12, 17794:15, 17795:3, 17797:21, 17798:1, 17822:2, 17829:10, 17892:23, 17899:10, 17902:14, 17922:12, 17945:15 One [5] - 17734:24, 17872:20, 17889:17, 17915:25, 17942:25 one [178] - 17699:7, 17700:10, 17700:11, 17701:5, 17702:23, 17703:7, 17704:22, 17706:1, 17708:18, 17708:24, 17709:5, 17712:19, 17713:21, 17713:23, 17715:7, 17715:8, 17718:17, 17719:5, 17719:14, 17720:4, 17723:3, 17725:21, 17726:12, 17727:9, 17728:6, 17728:19, 17729:16, 17731:14, 17733:5, 17733:9, 17733:10, 17733:20, 17733:22, 17734:13, 17735:8, 17735:20, 17736:5, 17740:9, 17740:21, 17743:19, 17748:18, 17750:7, 17750:14, 17751:3, 17751:4, 17752:18, 17753:25, 17755:9, 17756:9, 17758:22, 17760:10, 17760:17, 17760:18, 17761:12, 17762:7, 17765:8, 17765:10, 17771:3, 17771:8, 17771:12, 17772:2, 17774:23, 17776:4, 17776:10, 17776:15, 17780:16, 17781:11, 17781:18, 17786:5, 17790:18, 17791:8, 17795:15, 17795:23, 17795:25, 17796:16, 17800:5, 17802:3,</p>
O				
<p>O'keefe [1] - 17697:11 oath [1] - 17828:4 objected [1] - 17877:17 objection [3] - 17884:2, 17946:17, 17947:5 objectionable [1] - 17959:7 obligation [1] - 17734:8 obtain [1] - 17699:9 obtained [1] - 17809:16 obvious [3] - 17719:6, 17873:7, 17896:20 obviously [14] - 17715:9, 17777:16, 17799:23, 17822:3, 17833:22, 17838:12, 17841:16, 17846:5, 17857:23, 17872:1, 17890:2, 17917:1, 17934:5, 17934:21 Obviously [4] - 17720:23, 17749:16, 17841:18, 17914:4 occasion [2] -</p>				



17802:4, 17806:9, 17813:4, 17814:3, 17822:5, 17822:6, 17822:7, 17822:10, 17822:21, 17823:8, 17823:21, 17827:17, 17828:1, 17828:6, 17828:9, 17831:12, 17831:19, 17832:17, 17833:7, 17834:16, 17835:4, 17838:8, 17839:12, 17840:6, 17840:19, 17842:12, 17845:16, 17846:7, 17855:5, 17858:20, 17858:22, 17858:24, 17859:3, 17859:9, 17859:11, 17862:7, 17863:25, 17864:13, 17865:20, 17867:13, 17871:1, 17871:16, 17872:10, 17873:2, 17873:15, 17884:21, 17884:23, 17884:25, 17886:18, 17887:13, 17890:24, 17892:18, 17893:14, 17895:18, 17896:8, 17896:13, 17898:23, 17899:6, 17900:21, 17901:15, 17901:21, 17903:21, 17904:5, 17905:4, 17905:5, 17906:7, 17916:10, 17916:18, 17919:11, 17919:13, 17922:2, 17925:12, 17925:20, 17925:24, 17926:3, 17926:11, 17927:2, 17928:19, 17929:20, 17930:11, 17930:21, 17931:12, 17932:17, 17934:19, 17935:19, 17937:21, 17939:1, 17942:21, 17954:17, 17955:6, 17963:6, 17964:1, 17965:19, 17968:2, 17973:24, 17974:2, 17975:15 ones [15] - 17709:6, 17777:23, 17778:4, 17778:9, 17780:13, 17790:19, 17791:9, 17829:7, 17829:9, 17829:13, 17829:16, 17845:24, 17903:1, 17935:13, 17947:25 Ontario [1] - 17883:19 onus [2] - 17798:14, 17828:2 open [1] - 17866:6	opened [1] - 17940:18 opening [2] - 17731:8, 17785:10 operator [2] - 17905:14, 17907:6 opinion [5] - 17822:15, 17926:7, 17945:5, 17949:2, 17960:7 opinions [4] - 17723:6, 17810:9, 17868:16, 17915:20 opportunity [8] - 17699:15, 17734:4, 17768:9, 17921:25, 17922:4, 17922:5, 17923:5, 17934:15 opposed [6] - 17800:7, 17823:16, 17824:18, 17896:15, 17948:5, 17953:18 opposite [1] - 17944:21 option [1] - 17895:7 order [5] - 17732:17, 17733:2, 17734:14, 17813:20, 17837:7 ordered [1] - 17812:12 ordering [1] - 17966:7 orig [1] - 17882:1 original [16] - 17704:12, 17705:17, 17705:21, 17711:1, 17711:9, 17712:4, 17725:18, 17821:9, 17829:6, 17857:23, 17880:9, 17880:17, 17897:8, 17898:5, 17973:6, 17973:7 originally [1] - 17898:13 otherwise [4] - 17787:1, 17810:10, 17837:8, 17970:17 Ottawa [5] - 17954:3, 17954:14, 17957:10, 17958:8, 17958:11 outdoors [1] - 17761:1 outer [1] - 17784:22 outline [3] - 17699:16, 17700:1, 17795:2 outraged [1] - 17833:19 outrageous [1] - 17817:19 outrageously [1] - 17821:12 outset [2] - 17703:4, 17774:12 overall [2] - 17720:9, 17872:8 overnight [8] - 17867:14, 17867:24,	17870:21, 17873:10, 17878:24, 17879:23, 17881:20, 17950:10 overturn [1] - 17943:12 own [16] - 17715:25, 17733:15, 17738:19, 17777:25, 17790:23, 17790:24, 17790:25, 17810:9, 17828:24, 17904:24, 17906:1, 17915:11, 17932:5, 17933:10, 17933:25, 17949:2 P P-10 [1] - 17843:18 P-9 [1] - 17843:22 Page [1] - 17698:2 page [33] - 17700:14, 17703:7, 17722:23, 17723:11, 17724:16, 17731:14, 17731:17, 17731:19, 17755:13, 17761:23, 17783:21, 17784:4, 17794:21, 17822:18, 17823:4, 17824:17, 17836:13, 17839:21, 17840:6, 17840:11, 17842:23, 17843:14, 17843:21, 17850:22, 17850:23, 17851:24, 17852:10, 17852:23, 17866:14, 17889:21, 17964:15, 17973:18 pages [3] - 17706:12, 17938:11, 17977:4 painful [1] - 17844:18 pamphlet [1] - 17699:10 paper [1] - 17716:19 paragraph [9] - 17699:14, 17726:22, 17727:24, 17729:2, 17729:5, 17814:14, 17814:18, 17822:14, 17891:24 paragraphs [2] - 17814:17, 17817:24 parallel [2] - 17721:15, 17738:5 paralleling [1] - 17761:20 parallels [1] - 17738:7 Pardon [8] - 17710:22, 17787:6, 17816:5, 17841:1, 17920:19, 17924:14, 17956:9,	17970:20 pardon [4] - 17721:17, 17797:20, 17810:8, 17857:1 parents [4] - 17822:25, 17823:11, 17823:16, 17913:12 parole [16] - 17699:9, 17699:13, 17699:16, 17699:25, 17700:1, 17700:4, 17700:21, 17761:12, 17809:21, 17810:9, 17822:5, 17822:7, 17822:8, 17822:23, 17823:23, 17825:20 part [28] - 17702:17, 17703:12, 17703:19, 17720:9, 17724:17, 17727:6, 17755:10, 17770:4, 17776:13, 17781:20, 17787:24, 17794:20, 17800:16, 17815:3, 17818:22, 17819:10, 17823:20, 17838:1, 17861:4, 17880:8, 17880:12, 17914:15, 17914:16, 17941:19, 17941:20, 17942:18, 17947:4, 17972:6 particular [13] - 17718:17, 17723:9, 17724:16, 17747:22, 17781:6, 17805:11, 17826:21, 17876:14, 17903:2, 17926:4, 17928:5, 17943:10, 17961:11 particularly [15] - 17718:12, 17718:16, 17719:4, 17760:14, 17785:7, 17833:10, 17833:15, 17860:23, 17877:8, 17886:17, 17887:22, 17889:17, 17893:19, 17904:6, 17913:7 parties [1] - 17946:13 parts [2] - 17827:10, 17868:10 party [3] - 17725:23, 17971:3, 17971:14 passage [8] - 17835:19, 17836:11, 17843:9, 17853:19, 17854:23, 17856:1, 17948:16, 17951:7 passages [1] - 17874:4 passed [1] - 17953:1	passing [1] - 17896:4 past [4] - 17866:8, 17910:5, 17913:2, 17913:5 path [1] - 17895:20 pathological [1] - 17784:5 Paul [4] - 17767:2, 17767:11, 17767:14, 17882:20 Paul's [4] - 17735:19, 17754:13, 17754:16 paying [1] - 17976:11 Paynter [2] - 17797:21, 17797:24 Paynter's [1] - 17795:21 Pearson [2] - 17963:24, 17963:25 penitentiary [1] - 17780:1 Penkala [22] - 17782:13, 17782:18, 17783:15, 17784:24, 17785:19, 17788:19, 17789:3, 17789:12, 17790:6, 17791:15, 17791:17, 17792:8, 17793:10, 17793:13, 17793:23, 17794:3, 17794:9, 17832:6, 17832:15, 17832:18, 17834:22 people [22] - 17700:4, 17707:16, 17746:25, 17763:16, 17764:16, 17778:8, 17813:13, 17817:10, 17820:23, 17821:2, 17821:3, 17821:6, 17880:22, 17896:19, 17900:23, 17901:2, 17904:13, 17907:24, 17929:8, 17929:11, 17929:14, 17946:25 perfectly [2] - 17818:19, 17845:19 performed [1] - 17837:14 Perhaps [4] - 17765:15, 17832:10, 17867:13, 17973:20 perhaps [34] - 17700:19, 17712:1, 17730:22, 17739:9, 17739:17, 17739:21, 17740:5, 17747:14, 17757:24, 17765:15, 17780:9, 17789:22, 17804:20, 17815:4, 17839:6, 17844:18,
--	---	--	--	---



<p>17867:23, 17878:8, 17883:25, 17893:12, 17894:22, 17901:17, 17906:1, 17911:9, 17914:8, 17914:9, 17915:15, 17948:24, 17949:3, 17951:1, 17954:8, 17959:12, 17959:19, 17961:25 period [18] - 17712:16, 17715:20, 17731:5, 17733:8, 17778:16, 17779:5, 17819:25, 17820:3, 17842:9, 17875:6, 17880:25, 17885:9, 17888:22, 17921:20, 17922:23, 17923:11, 17935:25, 17950:3 perjury [3] - 17837:7, 17839:1, 17918:25 permeate [1] - 17817:10 permissible [1] - 17837:5 permission [1] - 17787:8 perpetrator [5] - 17760:11, 17760:13, 17897:25, 17931:6, 17938:22 Perras [2] - 17926:20, 17926:24 person [21] - 17718:18, 17719:6, 17764:8, 17766:4, 17771:8, 17782:2, 17811:19, 17813:5, 17849:6, 17849:8, 17861:9, 17861:12, 17885:14, 17917:7, 17919:2, 17930:17, 17932:25, 17938:24, 17939:6 personal [2] - 17797:15, 17838:6 personnel [1] - 17811:18 persons [3] - 17826:1, 17828:1, 17901:5 perspective [3] - 17750:4, 17750:5, 17959:5 pertain [1] - 17845:18 pertinent [1] - 17945:7 peruse [1] - 17964:5 ph [1] - 17729:24 phone [12] - 17757:24, 17771:23, 17798:3, 17798:15, 17798:19, 17799:24, 17834:21,</p>	<p>17835:1, 17835:3, 17924:20, 17954:4, 17954:20 phoned [2] - 17954:18, 17954:19 phrase [3] - 17803:9, 17836:8, 17837:3 phrased [2] - 17832:12, 17971:8 pick [2] - 17757:24, 17799:24 picked [5] - 17714:12, 17731:22, 17775:6, 17935:23, 17935:25 picking [3] - 17834:21, 17835:1, 17835:3 picks [1] - 17884:20 picture [2] - 17770:23, 17962:13 piece [2] - 17960:12, 17970:1 pieces [1] - 17876:19 place [21] - 17708:12, 17733:7, 17743:16, 17757:22, 17780:22, 17780:24, 17795:9, 17836:5, 17840:19, 17865:15, 17866:23, 17870:18, 17887:18, 17889:6, 17909:1, 17911:18, 17911:22, 17928:17, 17929:20, 17932:13 places [2] - 17735:8, 17753:12 plain [1] - 17848:10 plane [1] - 17975:8 plans [1] - 17954:5 play [2] - 17800:8, 17800:17 played [4] - 17801:6, 17801:10, 17880:13, 17914:11 playing [3] - 17835:6, 17947:1, 17955:23 plea [3] - 17924:18, 17926:25, 17928:16 plead [2] - 17719:18, 17930:5 pleaded [1] - 17922:25 pleading [1] - 17777:4 pleas [1] - 17923:20 pled [4] - 17779:14, 17779:23, 17780:2, 17841:13 Pm [4] - 17839:10, 17919:25, 17920:1, 17976:19 point [62] - 17700:20, 17704:22, 17707:19,</p>	<p>17709:13, 17711:21, 17714:11, 17719:9, 17721:17, 17722:25, 17725:17, 17726:11, 17730:6, 17730:12, 17733:25, 17746:23, 17746:25, 17754:24, 17766:22, 17768:6, 17770:24, 17772:22, 17781:20, 17782:5, 17788:17, 17793:16, 17794:6, 17798:12, 17809:2, 17822:5, 17824:16, 17826:17, 17841:15, 17842:22, 17846:24, 17847:23, 17855:15, 17862:1, 17868:5, 17870:9, 17870:18, 17872:3, 17874:7, 17892:3, 17908:15, 17908:23, 17910:19, 17917:1, 17938:14, 17939:3, 17941:18, 17945:1, 17945:4, 17945:16, 17946:3, 17948:19, 17948:25, 17954:16, 17955:18, 17958:11, 17965:15, 17968:25 pointed [6] - 17726:2, 17753:22, 17787:22, 17917:3, 17920:9, 17943:4 pointing [3] - 17768:25, 17871:11, 17873:21 points [1] - 17875:1 police [133] - 17699:17, 17700:2, 17705:12, 17705:19, 17706:2, 17706:21, 17707:2, 17707:3, 17714:16, 17719:24, 17720:8, 17723:1, 17723:5, 17723:13, 17725:17, 17726:13, 17729:15, 17730:3, 17730:9, 17730:10, 17736:10, 17746:24, 17766:3, 17766:4, 17770:13, 17771:19, 17773:2, 17774:24, 17776:19, 17778:17, 17779:6, 17790:1, 17790:13, 17790:18, 17790:23, 17791:9, 17798:15, 17800:7, 17800:18, 17803:12, 17803:14, 17806:2, 17809:10, 17809:13, 17826:11, 17826:15, 17827:18, 17833:10, 17833:17,</p>	<p>17834:9, 17834:12, 17834:18, 17834:19, 17836:10, 17836:19, 17837:6, 17837:13, 17838:19, 17840:13, 17842:1, 17842:3, 17844:17, 17844:21, 17845:1, 17845:8, 17845:14, 17846:12, 17852:14, 17852:18, 17853:24, 17856:22, 17863:2, 17863:8, 17863:22, 17864:1, 17865:22, 17865:23, 17869:16, 17870:1, 17872:17, 17876:17, 17877:2, 17882:8, 17884:16, 17886:11, 17890:2, 17890:3, 17890:23, 17893:2, 17893:3, 17898:4, 17899:4, 17901:4, 17906:7, 17906:10, 17906:12, 17907:13, 17907:17, 17908:2, 17908:6, 17909:13, 17910:5, 17913:2, 17913:17, 17914:9, 17915:17, 17918:7, 17918:16, 17918:23, 17919:21, 17920:8, 17921:22, 17922:14, 17924:7, 17924:10, 17925:3, 17925:13, 17927:13, 17931:1, 17932:23, 17937:17, 17937:23, 17938:17, 17939:12, 17939:20, 17940:2, 17941:13, 17962:18, 17966:21, 17969:11, 17973:12 Police [2] - 17697:8, 17863:23 policeman [2] - 17863:12, 17868:15 policemen [2] - 17779:25, 17914:14 policy [1] - 17706:23 polygraph [6] - 17728:20, 17809:17, 17905:14, 17905:17, 17905:21, 17907:4 portfolio [1] - 17787:25 portions [1] - 17871:11 posed [1] - 17792:25 posing [1] - 17792:22 position [13] - 17703:25, 17718:3, 17756:11, 17788:6, 17788:9, 17788:10,</p>	<p>17815:24, 17818:12, 17882:21, 17912:17, 17913:8, 17945:21, 17946:21 positive [1] - 17900:5 possession [5] - 17706:5, 17745:8, 17872:6, 17873:1, 17939:16 possibilities [2] - 17919:1, 17919:11 possibility [5] - 17766:15, 17778:8, 17870:5, 17897:21, 17952:18 possible [4] - 17724:3, 17766:20, 17792:15, 17955:21 Possibly [1] - 17769:6 possibly [6] - 17722:18, 17777:10, 17792:1, 17806:16, 17846:20, 17908:21 post [3] - 17958:5, 17958:14, 17959:11 potential [4] - 17746:21, 17747:18, 17769:2, 17839:14 potentially [8] - 17725:18, 17748:20, 17748:22, 17768:13, 17771:7, 17827:13, 17906:16, 17951:3 practice [3] - 17744:10, 17837:1, 17967:1 practicing [1] - 17933:3 pre-'97 [1] - 17814:22 preceding [1] - 17776:14 precise [2] - 17736:17, 17959:17 precisely [1] - 17947:4 predate [1] - 17933:19 predicated [1] - 17827:20 predicted [1] - 17726:15 predicting [1] - 17890:24 prediction [2] - 17727:19, 17727:23 prefer [2] - 17719:12, 17867:22 prelim [2] - 17770:25, 17912:17 preliminary [10] - 17774:15, 17835:13, 17865:6, 17865:7, 17865:8, 17877:6, 17898:16, 17912:3,</p>
--	---	---	--	---



<p>17912:15, 17912:22 premonitting [2] - 17729:24, 17730:1 prep [2] - 17757:3, 17803:5 prepared [6] - 17779:19, 17822:22, 17823:22, 17906:11, 17945:12, 17947:17 preparing [1] - 17720:6 presence [1] - 17903:6 present [5] - 17718:3, 17773:3, 17837:20, 17899:24, 17900:1 presented [2] - 17703:21, 17966:25 press [10] - 17702:19, 17702:22, 17756:12, 17756:17, 17756:21, 17769:22, 17787:4, 17787:8, 17842:6, 17967:9 Presumably [5] - 17716:1, 17771:5, 17778:21, 17800:15, 17926:13 presumably [13] - 17702:20, 17716:14, 17739:6, 17757:9, 17801:18, 17803:11, 17860:2, 17881:20, 17907:23, 17926:24, 17927:2, 17936:1, 17961:17 presume [5] - 17757:10, 17764:12, 17783:8, 17853:9, 17972:24 presupposed [1] - 17928:23 presupposes [1] - 17870:16 pretence [2] - 17725:12, 17726:4 pretty [1] - 17775:10 prevailing [2] - 17815:19, 17967:2 prevented [1] - 17935:15 previous [8] - 17728:1, 17728:4, 17731:14, 17792:17, 17886:8, 17910:17, 17913:17, 17941:1 previously [1] - 17797:19 primarily [1] - 17812:23 primary [1] - 17965:18 Prince [2] - 17777:3, 17779:25</p>	<p>principle [3] - 17835:16, 17930:7, 17930:24 Pringle [5] - 17697:14, 17701:13, 17972:23, 17972:25, 17975:9 print [2] - 17846:6, 17849:12 prison [3] - 17745:19, 17812:16, 17824:9 private [1] - 17945:20 privilege [5] - 17960:16, 17961:5, 17961:8, 17961:14, 17962:2 pro [4] - 17807:21, 17905:21, 17905:23 pro-crown [1] - 17807:21 pro-defence [1] - 17807:21 probative [1] - 17966:20 problem [7] - 17830:12, 17830:13, 17875:3, 17896:21, 17897:2, 17920:22, 17975:10 problems [1] - 17774:15 procedural [1] - 17927:25 procedure [1] - 17967:4 proceed [1] - 17701:23 proceeding [1] - 17846:15 proceedings [2] - 17839:20, 17943:14 Proceedings [4] - 17695:12, 17695:23, 17698:1, 17699:1 process [6] - 17703:19, 17755:11, 17846:21, 17857:10, 17905:19, 17918:13 processes [1] - 17821:21 produce [1] - 17809:18 produced [3] - 17771:24, 17837:21, 17924:21 productive [1] - 17975:18 pronouncement [1] - 17745:6 proper [5] - 17742:9, 17810:10, 17922:2, 17946:14, 17969:24 properly [3] - 17872:16, 17946:7, 17967:6 propose [2] - 17761:16, 17761:25</p>	<p>proposition [2] - 17830:3, 17833:12 propositions [2] - 17830:5, 17830:6 pros [1] - 17904:21 prosecute [2] - 17718:19, 17834:13 prosecuted [4] - 17808:8, 17808:9, 17820:5, 17911:18 prosecuting [5] - 17718:13, 17829:15, 17913:24, 17947:25, 17958:25 prosecution [21] - 17703:13, 17705:5, 17706:16, 17747:5, 17758:1, 17777:9, 17800:9, 17800:18, 17801:7, 17803:16, 17827:5, 17830:10, 17843:24, 17845:13, 17851:2, 17905:6, 17914:11, 17951:23, 17952:17, 17953:7, 17964:6 prosecutions [3] - 17721:16, 17812:4, 17815:5 Prosecutions [4] - 17816:3, 17816:7, 17816:21, 17817:7 prosecutor [35] - 17716:5, 17716:12, 17716:13, 17717:7, 17717:13, 17718:8, 17718:12, 17718:16, 17718:19, 17735:3, 17767:2, 17800:17, 17802:12, 17826:12, 17826:15, 17826:20, 17827:8, 17828:17, 17828:18, 17829:23, 17831:25, 17834:5, 17834:15, 17872:6, 17924:6, 17925:1, 17925:22, 17927:3, 17928:2, 17945:16, 17945:19, 17945:22, 17946:21, 17968:13 prosecutor's [1] - 17774:7 prosecutorial [1] - 17969:11 prosecutors [4] - 17720:6, 17776:19, 17800:13, 17815:21 protest [1] - 17875:12 prove [4] - 17830:25, 17838:21, 17844:11,</p>	<p>17908:14 proven [2] - 17751:16, 17849:13 proves [1] - 17918:1 provide [6] - 17836:1, 17922:21, 17956:15, 17973:2, 17974:15, 17975:2 provided [7] - 17855:7, 17855:8, 17907:13, 17907:18, 17908:2, 17958:25, 17966:20 provides [2] - 17712:1, 17968:15 providing [3] - 17887:15, 17906:6, 17955:24 Province [1] - 17977:3 province [5] - 17815:14, 17815:20, 17914:15, 17914:17, 17944:10 provincial [1] - 17944:5 psychiatric [1] - 17810:10 public [16] - 17783:11, 17821:2, 17836:17, 17928:10, 17928:16, 17928:25, 17929:2, 17929:6, 17929:10, 17930:12, 17930:20, 17931:4, 17931:13, 17931:18, 17931:20, 17932:20 Public [5] - 17816:3, 17816:7, 17816:21, 17817:5, 17817:7 publicized [1] - 17929:8 published [1] - 17835:25 pulled [1] - 17831:6 puncture [1] - 17903:6 purchased [1] - 17884:23 pure [1] - 17962:10 purporting [1] - 17916:3 purports [1] - 17884:14 purpose [3] - 17764:3, 17883:22, 17909:20 purposes [1] - 17718:3 purse [20] - 17725:14, 17726:6, 17729:8, 17886:3, 17886:6, 17887:2, 17888:25, 17889:14, 17889:15, 17889:18, 17890:1, 17890:8, 17890:17, 17891:6, 17891:10, 17891:20, 17892:5,</p>	<p>17895:11, 17895:13, 17906:8 pursue [3] - 17773:9, 17798:8, 17938:20 pursued [4] - 17707:11, 17789:8, 17911:12, 17938:25 push [2] - 17900:22, 17900:23 put [55] - 17699:24, 17712:19, 17721:6, 17733:3, 17737:21, 17739:21, 17748:13, 17750:7, 17751:24, 17765:22, 17765:24, 17776:5, 17786:8, 17788:12, 17796:22, 17797:2, 17798:20, 17806:19, 17814:21, 17822:11, 17823:24, 17824:9, 17826:4, 17828:2, 17833:2, 17833:7, 17835:2, 17855:16, 17866:7, 17866:8, 17872:16, 17875:23, 17876:16, 17883:6, 17886:3, 17887:1, 17887:6, 17890:17, 17918:4, 17918:9, 17919:19, 17920:20, 17922:15, 17924:1, 17946:15, 17953:1, 17962:25, 17963:2, 17963:6, 17964:12, 17968:13, 17971:4, 17972:5, 17973:15, 17974:2 puts [1] - 17891:11 putting [10] - 17739:23, 17758:16, 17797:13, 17818:11, 17891:25, 17895:11, 17910:1, 17912:1, 17929:4, 17960:19</p>
Q				
<p>Qb [1] - 17696:11 Qc [4] - 17697:2, 17697:7, 17697:12, 17697:14 qualified [1] - 17730:16 quash [1] - 17945:10 quashing [1] - 17966:6 Queen's [6] - 17912:11, 17912:15, 17977:1, 17977:3, 17977:14, 17977:18 questioned [8] -</p>				



<p>17808:20, 17809:7, 17809:8, 17828:18, 17839:18, 17923:12, 17960:13, 17970:9 questioning [9] - 17704:4, 17720:15, 17862:20, 17883:22, 17916:1, 17917:6, 17948:25, 17975:13, 17975:16 questions [12] - 17701:7, 17761:21, 17775:9, 17798:12, 17799:3, 17818:15, 17818:20, 17847:1, 17878:8, 17909:21, 17974:25 quick [4] - 17701:12, 17782:23, 17920:3, 17920:4 quickly [4] - 17767:1, 17881:14, 17911:8, 17919:7 Quinn [1] - 17720:8 quite [24] - 17702:5, 17723:16, 17749:8, 17752:16, 17762:14, 17770:21, 17771:24, 17775:2, 17776:17, 17801:25, 17802:14, 17810:1, 17810:3, 17816:18, 17817:19, 17833:24, 17842:22, 17845:19, 17848:3, 17848:25, 17914:14, 17927:7, 17960:20, 17966:8 quotation [1] - 17917:1 quote [7] - 17773:24, 17774:2, 17775:8, 17807:4, 17852:13, 17883:7, 17967:8 quoted [1] - 17932:5 quoting [3] - 17720:17, 17819:8, 17952:21</p>	<p>17784:11, 17935:6, 17938:23 rape/murder [2] - 17760:21, 17799:2 raped [4] - 17712:5, 17712:25, 17832:24, 17926:1 rapes [31] - 17734:24, 17735:5, 17780:22, 17840:20, 17841:10, 17841:18, 17841:23, 17842:7, 17843:24, 17844:1, 17844:2, 17844:11, 17845:21, 17848:2, 17848:20, 17848:21, 17851:1, 17851:4, 17851:5, 17851:10, 17852:19, 17856:4, 17856:13, 17856:24, 17925:16, 17930:6, 17935:4, 17935:6, 17938:23, 17939:9, 17941:3 raping [3] - 17891:12, 17926:7, 17935:10 rapist [8] - 17778:18, 17778:22, 17779:3, 17923:1, 17924:8, 17925:3, 17927:12, 17929:15 Rasmussen [1] - 17904:8 rate [3] - 17873:6, 17875:8, 17972:17 rather [7] - 17711:19, 17834:11, 17838:16, 17869:13, 17880:17, 17898:13, 17901:18 Ray [1] - 17721:19 Rcmp [8] - 17697:10, 17728:15, 17783:12, 17792:19, 17793:4, 17798:15, 17941:1 re [1] - 17856:17 react [1] - 17805:18 reacted [2] - 17945:8, 17945:9 reaction [6] - 17722:20, 17792:9, 17811:11, 17819:19, 17942:20, 17942:21 read [88] - 17699:15, 17703:9, 17706:22, 17707:15, 17710:18, 17716:19, 17716:21, 17727:24, 17734:16, 17734:17, 17734:20, 17735:23, 17736:1, 17736:13, 17737:16, 17738:14, 17741:17,</p>	<p>17742:20, 17742:22, 17745:13, 17747:20, 17749:5, 17749:7, 17749:8, 17749:10, 17753:3, 17755:7, 17756:5, 17762:4, 17762:25, 17763:4, 17763:9, 17765:22, 17781:25, 17782:6, 17782:7, 17783:23, 17785:2, 17786:3, 17791:2, 17791:21, 17797:22, 17801:15, 17802:7, 17811:24, 17811:25, 17812:2, 17814:13, 17816:19, 17835:19, 17836:11, 17839:24, 17842:1, 17842:2, 17844:3, 17845:18, 17849:3, 17851:7, 17852:3, 17852:6, 17853:1, 17853:2, 17853:8, 17853:18, 17853:19, 17854:24, 17855:2, 17860:3, 17860:16, 17863:3, 17863:11, 17865:11, 17883:11, 17891:9, 17892:8, 17898:23, 17938:10, 17948:16, 17951:7, 17962:13, 17968:19, 17973:19, 17974:16, 17975:3, 17975:14 reading [13] - 17736:14, 17737:25, 17749:1, 17750:13, 17758:4, 17765:25, 17785:21, 17843:9, 17848:23, 17852:8, 17856:3, 17892:1, 17976:10 reads [1] - 17756:4 ready [1] - 17701:23 real [4] - 17774:5, 17774:6, 17774:11, 17834:14 reality [1] - 17794:12 realize [8] - 17733:19, 17772:19, 17801:25, 17818:11, 17897:5, 17948:20, 17964:1, 17974:18 realized [2] - 17731:1, 17833:3 Really [1] - 17952:10 really [40] - 17702:5, 17702:16, 17711:18, 17712:15, 17714:10, 17720:19, 17734:23, 17735:12, 17745:21,</p>	<p>17755:1, 17760:10, 17760:12, 17765:17, 17768:2, 17769:25, 17771:24, 17776:17, 17790:16, 17794:7, 17794:8, 17798:25, 17810:1, 17810:17, 17817:19, 17824:22, 17825:12, 17845:17, 17848:16, 17862:11, 17865:14, 17865:24, 17887:17, 17894:25, 17895:19, 17905:5, 17910:3, 17913:9, 17917:21, 17925:1, 17945:11 reappearing [1] - 17795:3 reason [38] - 17700:11, 17730:23, 17736:5, 17760:1, 17767:3, 17768:23, 17792:25, 17811:2, 17828:3, 17828:13, 17828:15, 17829:13, 17893:12, 17893:18, 17893:22, 17894:3, 17894:23, 17895:16, 17895:18, 17895:19, 17895:21, 17895:22, 17897:7, 17897:15, 17899:21, 17899:22, 17902:25, 17903:17, 17903:19, 17903:20, 17906:1, 17914:18, 17923:18, 17923:25, 17927:25, 17928:3, 17952:7, 17970:17 reasonable [6] - 17750:6, 17907:19, 17907:21, 17965:23, 17966:10, 17966:12 reasonably [1] - 17739:10 reasoning [1] - 17767:19 reasons [7] - 17751:15, 17761:13, 17829:15, 17873:7, 17897:12, 17897:14, 17935:24 reassess [2] - 17821:15, 17821:19 reassurance [1] - 17821:11 recant [1] - 17912:2 recanted [2] - 17911:24, 17911:25 recanting [3] - 17913:3, 17914:19, 17914:20 receive [1] - 17972:10</p>	<p>received [6] - 17699:11, 17699:25, 17700:20, 17725:16, 17931:14, 17940:25 recently [1] - 17699:15 recess [1] - 17920:10 recite [4] - 17733:14, 17765:11, 17765:13, 17767:1 recognize [1] - 17721:10 recognized [1] - 17741:6 recollection [1] - 17772:22 reconciled [9] - 17866:10, 17866:21, 17867:6, 17869:14, 17869:15, 17869:24, 17870:8, 17870:15, 17873:24 Reconvened [5] - 17699:2, 17701:20, 17776:2, 17839:10, 17920:1 record [7] - 17792:19, 17837:22, 17853:11, 17855:6, 17962:24, 17974:12, 17975:6 recorded [2] - 17718:25, 17963:2 recording [3] - 17837:16, 17849:25, 17869:18 records [1] - 17856:21 Red [1] - 17795:1 redress [1] - 17832:24 refer [9] - 17705:6, 17724:16, 17731:9, 17732:5, 17773:18, 17774:25, 17846:3, 17852:13, 17852:24 reference [26] - 17704:14, 17781:5, 17781:11, 17793:2, 17794:22, 17796:15, 17812:12, 17851:16, 17872:21, 17877:19, 17880:9, 17915:3, 17915:7, 17942:23, 17943:1, 17943:9, 17946:11, 17949:4, 17949:9, 17949:13, 17953:16, 17953:21, 17954:2, 17954:12, 17966:3, 17972:10 referenced [3] - 17855:9, 17855:22, 17963:22 references [6] -</p>
R				
<p>Radisson [1] - 17695:16 Raise [1] - 17966:12 raise [1] - 17799:3 raised [1] - 17917:13 raising [1] - 17760:24 rambling [1] - 17828:10 ran [1] - 17854:13 Rand [1] - 17742:17 rank [1] - 17772:6 rape [6] - 17712:5, 17731:9, 17731:10,</p>				



<p>17859:18, 17876:15, 17884:8, 17888:8, 17940:22, 17943:6 referencing [1] - 17883:21 referred [15] - 17699:10, 17700:7, 17704:22, 17719:23, 17761:10, 17761:11, 17761:19, 17776:11, 17792:15, 17825:8, 17847:2, 17852:11, 17886:9, 17958:20, 17973:13 Referring [1] - 17942:8 referring [9] - 17701:25, 17720:23, 17795:10, 17841:11, 17842:16, 17845:22, 17853:21, 17856:5, 17898:17 refers [4] - 17741:21, 17814:9, 17853:13, 17880:3 reflect [2] - 17817:14, 17817:17 reflected [3] - 17808:7, 17809:20, 17811:11 reflecting [1] - 17913:7 reflection [2] - 17792:6, 17809:25 reflects [1] - 17836:4 refresh [1] - 17898:14 refusal [1] - 17899:13 refused [1] - 17813:21 regard [9] - 17721:2, 17725:17, 17811:21, 17839:5, 17879:23, 17904:7, 17921:24, 17961:8, 17967:24 regarded [1] - 17806:15 regarding [2] - 17847:2, 17957:24 regards [3] - 17756:1, 17887:22, 17957:23 Regina [17] - 17720:5, 17720:6, 17728:15, 17739:8, 17748:12, 17777:4, 17780:2, 17815:14, 17880:23, 17924:18, 17925:7, 17926:25, 17928:22, 17929:23, 17935:4, 17936:11, 17936:18 regretted [1] - 17822:3 regularly [1] - 17914:14 reject [1] - 17854:16 rejected [2] - 17811:13, 17833:7 rejecting [2] - 17751:4, 17757:16</p>	<p>related [3] - 17737:9, 17951:15, 17951:16 relates [3] - 17843:3, 17843:4, 17843:8 relating [1] - 17846:13 release [8] - 17702:19, 17702:22, 17756:12, 17756:17, 17756:21, 17769:22, 17787:4, 17967:9 released [5] - 17761:14, 17822:23, 17823:23, 17824:6, 17826:2 relevance [3] - 17766:18, 17884:1, 17944:12 relevant [7] - 17750:16, 17757:12, 17757:17, 17760:4, 17826:22, 17827:4, 17827:9 reliability [1] - 17872:8 reliable [1] - 17898:6 reliance [2] - 17911:18, 17911:22 relied [1] - 17790:15 rely [3] - 17790:18, 17790:22, 17791:8 relying [2] - 17790:1, 17790:13 remain [2] - 17733:22, 17812:17 remained [2] - 17965:3, 17965:4 remark [1] - 17852:16 remarkable [7] - 17868:18, 17901:19, 17927:6, 17927:20, 17927:22, 17968:15, 17971:19 remarks [5] - 17771:25, 17811:20, 17813:16, 17819:14, 17933:25 Remember [3] - 17708:4, 17897:11, 17941:24 remember [55] - 17704:14, 17721:4, 17721:8, 17724:7, 17731:6, 17731:7, 17751:25, 17752:2, 17753:10, 17761:10, 17773:5, 17773:13, 17774:13, 17775:15, 17775:17, 17775:20, 17781:6, 17781:7, 17791:12, 17792:14, 17792:18, 17793:1, 17793:3, 17793:6, 17795:23, 17796:3, 17796:4, 17801:22,</p>	<p>17822:6, 17822:9, 17848:20, 17848:24, 17848:25, 17859:2, 17867:3, 17868:21, 17870:24, 17881:11, 17888:11, 17888:13, 17912:7, 17912:10, 17912:13, 17916:3, 17916:5, 17916:25, 17917:5, 17917:11, 17917:14, 17917:15, 17961:20, 17961:21, 17963:5, 17974:6 remembered [1] - 17848:22 remembering [1] - 17912:1 remembers [1] - 17777:15 Remind [1] - 17962:12 remind [1] - 17941:6 reminds [1] - 17882:20 reminiscent [1] - 17813:10 removed [2] - 17831:6, 17832:23 rephrase [2] - 17832:11, 17965:1 replace [1] - 17784:21 report [22] - 17702:1, 17713:20, 17737:13, 17781:2, 17781:5, 17792:14, 17794:14, 17799:20, 17845:8, 17864:9, 17864:16, 17872:18, 17877:2, 17883:8, 17883:11, 17883:12, 17883:17, 17898:23, 17899:7, 17941:1, 17941:2, 17973:12 reported [1] - 17856:18 Reporter [2] - 17977:14, 17977:18 Reporters [2] - 17696:11, 17977:3 Reporters [1] - 17977:1 reporting [1] - 17853:4 reports [31] - 17705:12, 17705:19, 17706:2, 17706:21, 17723:8, 17774:25, 17835:5, 17840:14, 17842:2, 17842:3, 17842:6, 17844:17, 17845:2, 17845:14, 17846:12, 17847:21, 17852:14, 17852:18, 17853:24, 17856:22, 17863:2, 17863:8, 17863:22,</p>	<p>17863:23, 17865:22, 17865:23, 17870:1, 17877:3, 17886:11, 17941:3 represent [1] - 17930:13 represented [3] - 17879:17, 17943:23, 17967:2 request [6] - 17745:9, 17746:24, 17750:17, 17751:3, 17760:1, 17954:16 requested [1] - 17759:24 requests [1] - 17808:3 rereading [1] - 17707:12 resembled [1] - 17884:25 Residence [1] - 17754:13 resist [2] - 17791:6, 17943:11 resistance [1] - 17944:22 resisting [1] - 17945:10 resort [2] - 17744:2, 17745:2 resorted [1] - 17907:4 respect [17] - 17703:12, 17719:22, 17729:1, 17751:13, 17761:22, 17771:17, 17791:25, 17817:16, 17875:5, 17875:8, 17923:11, 17932:11, 17946:2, 17950:6, 17952:6, 17955:20, 17968:21 responded [1] - 17793:6 response [1] - 17746:24 responsibility [6] - 17745:21, 17745:25, 17756:15, 17769:7, 17821:25, 17824:3 responsible [1] - 17933:1 rest [5] - 17791:2, 17836:23, 17842:14, 17881:3, 17943:21 rested [1] - 17905:6 restricting [1] - 17849:10 result [11] - 17702:16, 17759:25, 17809:9, 17809:12, 17838:4, 17960:15, 17961:3, 17963:10, 17967:12,</p>	<p>17967:15, 17969:15 resulted [1] - 17940:11 results [14] - 17703:6, 17819:19, 17820:3, 17820:24, 17821:7, 17937:17, 17950:16, 17950:17, 17950:18, 17950:22, 17952:2, 17959:13, 17969:8, 17970:8 retain [1] - 17773:2 Retired [1] - 17697:15 retired [2] - 17816:14, 17945:20 return [3] - 17873:11, 17877:24, 17967:7 returns [2] - 17890:19, 17891:4 revealed [3] - 17731:25, 17757:1, 17961:3 revelation [1] - 17805:24 review [4] - 17813:21, 17921:22, 17963:8, 17973:3 reviewed [1] - 17812:6 Rick [1] - 17697:8 Riddell [16] - 17705:22, 17728:1, 17728:6, 17728:15, 17792:14, 17793:11, 17793:14, 17794:1, 17794:10, 17795:3, 17809:1, 17858:3, 17864:6, 17864:8, 17880:23, 17973:16 rights [4] - 17813:25, 17814:1, 17814:3, 17814:5 rigour [1] - 17931:3 rise [2] - 17943:16, 17966:11 river [1] - 17813:2 road [2] - 17901:12 roaming [1] - 17763:17 robbery [1] - 17966:22 Roberts [2] - 17698:3, 17699:5 Rochelle [1] - 17697:10 Rodin [11] - 17796:11, 17840:5, 17841:9, 17842:13, 17846:23, 17849:1, 17852:12, 17852:17, 17854:24, 17855:9, 17856:2 Rodirs [1] - 17847:1 role [11] - 17800:7, 17800:8, 17800:16, 17801:6, 17801:10, 17834:4, 17834:14,</p>
--	---	---	--	---



17835:6, 17914:11, 17947:1, 17955:23 Ron ^[6] - 17711:1, 17772:8, 17828:25, 17939:3, 17973:8, 17973:16 Ronald ^[17] - 17704:13, 17724:10, 17724:22, 17766:2, 17839:6, 17857:22, 17857:24, 17858:9, 17862:5, 17862:10, 17862:15, 17862:23, 17882:7, 17888:20, 17892:7, 17906:5, 17973:6 room ^[1] - 17804:19 Rose ^[1] - 17835:23 roughly ^[1] - 17754:3 round ^[2] - 17880:21, 17930:2 route ^[1] - 17885:21 routinely ^[1] - 17837:20 Rpr ^[4] - 17696:12, 17977:2, 17977:16, 17977:17 run ^[6] - 17791:6, 17846:21, 17875:2, 17915:20, 17919:11, 17934:22 running ^[2] - 17791:15, 17899:12	17779:2, 17779:16, 17779:22, 17779:24, 17781:1, 17841:11, 17859:20, 17871:3, 17871:14, 17871:19, 17874:8, 17881:10, 17885:21, 17910:17, 17922:24, 17922:25, 17923:1, 17924:6, 17924:8, 17925:3, 17926:8, 17927:2, 17927:12, 17928:2, 17929:1, 17929:11, 17929:14, 17929:24, 17930:15, 17931:20, 17932:17, 17935:4, 17945:22, 17957:17, 17959:23, 17962:18 sat ^[2] - 17739:4, 17765:12 satisfactory ^[3] - 17791:24, 17792:7, 17799:8 satisfied ^[2] - 17700:12, 17723:17 satisfy ^[1] - 17876:25 saw ^[24] - 17701:5, 17716:2, 17720:4, 17720:11, 17721:5, 17730:23, 17746:20, 17753:10, 17753:12, 17753:14, 17777:13, 17796:25, 17820:23, 17821:3, 17830:13, 17830:22, 17849:18, 17855:16, 17903:10, 17903:14, 17903:22, 17907:6, 17951:3, 17962:13 scenario ^[1] - 17730:8 scene ^[11] - 17833:18, 17886:18, 17887:6, 17887:16, 17887:18, 17887:20, 17889:6, 17895:1, 17906:4, 17907:24, 17908:22 school ^[5] - 17771:6, 17771:9, 17771:13, 17772:4, 17806:16 schools ^[6] - 17770:12, 17771:19, 17772:2, 17806:1, 17806:11, 17806:13 science ^[2] - 17969:15, 17970:1 scientific ^[1] - 17970:4 scoffed ^[1] - 17934:4 scores ^[1] - 17975:12 scrawl ^[1] - 17738:9 screen ^[2] - 17753:6,	17892:10 screwed ^[2] - 17746:2, 17746:3 script ^[20] - 17719:25, 17720:3, 17721:9, 17721:23, 17721:25, 17722:14, 17731:8, 17731:19, 17753:10, 17889:20, 17898:8, 17906:18, 17906:23, 17908:11, 17909:1, 17911:14, 17920:13, 17920:14, 17921:6 scroll ^[1] - 17850:17 scrutiny ^[1] - 17905:11 search ^[1] - 17953:6 searched ^[1] - 17775:21 sec' ^[1] - 17739:4 second ^[20] - 17724:21, 17725:4, 17728:19, 17806:18, 17834:7, 17835:6, 17835:17, 17885:2, 17885:5, 17888:2, 17891:14, 17903:9, 17911:24, 17912:6, 17921:21, 17965:16, 17965:19, 17966:3, 17974:14, 17975:8 second-guess ^[1] - 17921:21 Secretor ^[1] - 17732:2 Section ^[2] - 17948:1, 17965:17 section ^[3] - 17782:13, 17783:16, 17788:19 Security ^[1] - 17696:13 See ^[1] - 17950:22 see ^[97] - 17700:12, 17701:15, 17710:1, 17717:6, 17719:3, 17721:4, 17723:14, 17723:16, 17724:1, 17724:6, 17725:10, 17726:9, 17726:15, 17726:19, 17730:6, 17730:11, 17731:20, 17738:1, 17739:9, 17739:25, 17740:6, 17740:7, 17741:1, 17741:17, 17746:22, 17746:25, 17750:10, 17764:2, 17767:19, 17767:20, 17774:2, 17784:5, 17784:18, 17785:23, 17785:24, 17786:12, 17788:18, 17791:23, 17794:23, 17796:7, 17796:23, 17797:14, 17799:24,	17801:24, 17818:25, 17819:15, 17822:19, 17824:21, 17824:25, 17831:1, 17834:5, 17834:10, 17834:11, 17842:6, 17848:12, 17853:12, 17853:15, 17854:19, 17865:12, 17870:18, 17870:21, 17877:16, 17879:20, 17882:20, 17890:9, 17890:21, 17890:22, 17890:25, 17891:20, 17891:21, 17904:12, 17904:14, 17908:15, 17908:16, 17909:2, 17910:5, 17911:8, 17921:12, 17923:18, 17923:25, 17933:9, 17939:23, 17942:19, 17945:1, 17945:15, 17945:19, 17946:23, 17948:8, 17950:12, 17950:23, 17953:19, 17959:7, 17960:3, 17964:18, 17972:12 seeing ^[13] - 17721:8, 17725:11, 17726:3, 17727:3, 17738:12, 17753:5, 17765:6, 17842:8, 17854:15, 17904:1, 17904:4, 17904:5, 17932:21 seek ^[1] - 17810:9 seeking ^[1] - 17701:24 seem ^[18] - 17726:7, 17746:20, 17760:9, 17771:7, 17777:9, 17865:24, 17876:23, 17886:17, 17887:5, 17887:17, 17889:5, 17902:3, 17908:9, 17910:21, 17912:20, 17958:20, 17962:18, 17964:1 seeming ^[1] - 17834:11 seemingly ^[1] - 17785:8 seemly ^[1] - 17915:19 selected ^[1] - 17780:11 selective ^[4] - 17874:19, 17874:22, 17874:23, 17875:5 selectivity ^[1] - 17871:8 Selectivity ^[1] - 17871:10 sell ^[1] - 17857:11 selling ^[1] - 17813:1 send ^[2] - 17747:11, 17753:4 senior ^[13] - 17716:5,	17716:12, 17717:7, 17717:13, 17718:8, 17718:19, 17773:2, 17778:17, 17802:11, 17921:4, 17925:22, 17928:2, 17930:15 sense ^[45] - 17705:10, 17707:12, 17711:24, 17716:18, 17718:4, 17719:20, 17722:10, 17739:15, 17746:5, 17758:22, 17763:23, 17772:4, 17775:18, 17776:22, 17801:5, 17807:19, 17825:25, 17828:5, 17828:21, 17841:20, 17861:17, 17865:24, 17866:22, 17877:13, 17890:23, 17892:24, 17896:6, 17896:8, 17898:5, 17900:12, 17902:3, 17904:19, 17908:3, 17912:9, 17917:7, 17922:20, 17923:4, 17923:5, 17927:22, 17929:7, 17934:14, 17937:12, 17942:2, 17955:21, 17970:4 sent ^[9] - 17757:3, 17758:21, 17759:23, 17760:3, 17788:19, 17798:4, 17798:5, 17963:3, 17964:3 sentence ^[24] - 17726:2, 17819:1, 17819:2, 17819:4, 17822:14, 17822:20, 17834:16, 17850:1, 17925:21, 17926:1, 17926:7, 17931:14, 17931:15, 17934:22, 17934:23, 17935:1, 17935:14, 17936:9, 17936:12, 17936:23, 17937:2, 17937:5, 17937:8, 17937:12 sentenced ^[2] - 17933:2, 17935:12 sentences ^[1] - 17936:11 sentencing ^[1] - 17925:6 sentiment ^[2] - 17812:20, 17814:20 sentiments ^[1] - 17813:7 separate ^[2] - 17764:16, 17888:21 separated ^[1] -
S				
safest ^[1] - 17959:21 sake ^[2] - 17884:9, 17894:1 Sandra ^[1] - 17696:5 Saskatchewan ^[18] - 17695:17, 17697:5, 17812:5, 17815:5, 17817:15, 17818:22, 17819:3, 17819:11, 17871:3, 17872:19, 17922:14, 17924:12, 17924:16, 17936:22, 17937:21, 17943:10, 17968:5, 17977:4 Saskatoon ^[56] - 17695:17, 17697:8, 17705:25, 17708:5, 17713:1, 17713:17, 17716:5, 17716:24, 17717:7, 17717:11, 17718:9, 17719:16, 17720:8, 17725:23, 17731:10, 17733:7, 17748:4, 17763:18, 17764:17, 17778:19,				



<p>17885:10 separately [1] - 17719:16 September [3] - 17836:14, 17865:3, 17933:16 sequence [3] - 17779:20, 17779:22, 17780:19 Serge [2] - 17697:7, 17812:17 Sergeant [4] - 17721:19, 17803:5, 17963:24, 17963:25 serial [5] - 17778:18, 17778:22, 17779:3, 17925:3, 17927:9 series [10] - 17718:24, 17724:3, 17731:10, 17778:15, 17841:11, 17846:11, 17865:13, 17865:15, 17877:2, 17974:19 serious [7] - 17704:23, 17721:16, 17722:16, 17765:17, 17765:18, 17914:6, 17937:22 seriously [1] - 17911:12 seriousness [1] - 17719:10 serve [1] - 17931:22 Service [1] - 17697:8 serving [1] - 17931:15 set [5] - 17705:8, 17724:7, 17743:3, 17818:8, 17911:16 sets [1] - 17730:7 setting [1] - 17724:18 seven [7] - 17710:15, 17763:7, 17764:18, 17766:12, 17779:4, 17952:25, 17953:18 several [4] - 17803:4, 17804:19, 17815:13, 17836:16 severe [2] - 17936:23, 17937:8 sex [1] - 17729:9 sexual [19] - 17712:14, 17714:18, 17718:24, 17733:20, 17748:16, 17776:7, 17776:9, 17776:13, 17778:15, 17780:23, 17781:12, 17792:17, 17802:6, 17811:5, 17848:20, 17848:22, 17854:2, 17932:20, 17966:22 sexually [2] - 17758:5, 17763:8</p>	<p>shadow [1] - 17967:13 shake [1] - 17864:17 shaky [5] - 17773:13, 17773:17, 17773:21, 17774:5, 17774:11 shall [3] - 17723:19, 17909:13, 17949:5 shape [1] - 17960:6 share [1] - 17813:7 shared [1] - 17941:7 shed [1] - 17945:3 shepherding [1] - 17802:21 shift [1] - 17735:19 shivers [2] - 17723:25, 17724:5 shock [1] - 17703:5 shocked [5] - 17819:20, 17950:19, 17951:11, 17952:2, 17952:9 shoplifter [1] - 17914:4 shore [1] - 17838:2 Short [2] - 17772:15, 17802:20 short [3] - 17708:2, 17712:16, 17938:20 shorthand [1] - 17977:5 shortly [1] - 17715:17 show [6] - 17706:6, 17731:15, 17745:10, 17807:2, 17859:22, 17871:22 showed [2] - 17788:18, 17845:12 showing [2] - 17871:12, 17875:2 shown [6] - 17731:21, 17836:1, 17857:16, 17884:15, 17905:18, 17907:7 side [6] - 17748:5, 17833:7, 17895:24, 17903:21, 17903:24, 17904:17 sides [6] - 17948:8, 17956:4, 17956:21, 17959:25, 17960:3, 17960:6 sight [2] - 17729:16, 17862:6 sign [1] - 17917:16 signals [1] - 17780:21 signed [1] - 17784:24 significance [5] - 17798:5, 17839:15, 17929:2, 17945:6, 17952:13 significant [3] - 17945:14, 17960:12, 17962:6</p>	<p>Silas [1] - 17933:3 similar [11] - 17721:20, 17741:17, 17755:9, 17777:10, 17777:17, 17844:13, 17892:25, 17893:2, 17893:6, 17893:9, 17893:11 similarities [2] - 17865:13, 17869:7 simply [12] - 17718:1, 17718:7, 17755:25, 17766:1, 17773:8, 17798:7, 17829:10, 17875:17, 17877:18, 17881:2, 17953:6, 17961:2 sincere [1] - 17934:10 sincerely [2] - 17752:17, 17756:22 single [1] - 17931:15 singly [1] - 17750:20 sinister [8] - 17726:9, 17726:11, 17726:12, 17726:19, 17729:4, 17730:4, 17730:6, 17730:14 sit [5] - 17867:12, 17867:21, 17875:22, 17907:20, 17972:21 sitting [5] - 17695:15, 17732:11, 17786:6, 17801:17, 17972:19 situation [17] - 17751:17, 17756:24, 17831:2, 17834:24, 17838:17, 17914:22, 17916:2, 17916:8, 17916:16, 17922:19, 17925:5, 17926:4, 17928:5, 17955:4, 17967:24, 17970:22, 17970:25 six [1] - 17722:22 sketches [1] - 17828:10 skill [1] - 17977:6 skim [2] - 17782:23, 17784:2 skin [1] - 17738:19 skip [1] - 17798:11 skipped [1] - 17958:2 slander [1] - 17857:2 slandorous [1] - 17841:8 slightly [2] - 17739:22, 17872:3 slip [1] - 17807:9 slits [1] - 17785:14 small [2] - 17716:9, 17811:24 smithereens [3] -</p>	<p>17768:13, 17768:16, 17769:5 smoke [1] - 17722:20 smokes [1] - 17736:15 so-called [1] - 17727:8 sold [1] - 17969:25 solid [1] - 17773:9 solution [2] - 17909:15, 17911:9 solving [1] - 17910:8 some' [1] - 17856:21 someone [25] - 17734:22, 17736:15, 17737:14, 17738:8, 17738:9, 17739:5, 17752:5, 17766:12, 17772:11, 17772:12, 17798:14, 17798:19, 17868:3, 17887:15, 17900:7, 17913:12, 17913:13, 17917:4, 17917:8, 17919:8, 17924:7, 17928:11, 17930:5, 17941:20, 17961:24 sometime [3] - 17785:21, 17920:9, 17921:2 sometimes [1] - 17778:6 somewhat [1] - 17915:14 Somewhere [1] - 17953:11 somewhere [2] - 17842:15, 17872:19 soon [2] - 17874:15, 17924:12 Sophonow [1] - 17804:5 sorry [49] - 17702:11, 17709:15, 17713:6, 17714:21, 17732:22, 17741:1, 17746:3, 17758:25, 17775:1, 17789:24, 17794:20, 17804:9, 17805:3, 17811:9, 17816:10, 17816:24, 17817:6, 17819:8, 17823:3, 17846:7, 17847:22, 17852:17, 17855:14, 17858:19, 17858:20, 17863:18, 17867:20, 17871:13, 17873:14, 17874:20, 17875:9, 17875:14, 17876:2, 17878:14, 17886:3, 17899:2, 17902:21, 17910:24, 17920:14,</p>	<p>17934:24, 17937:14, 17940:1, 17950:5, 17957:9, 17960:9, 17963:13, 17963:19, 17963:24 Sorry [12] - 17731:18, 17774:5, 17778:3, 17779:10, 17796:22, 17816:15, 17816:18, 17855:4, 17860:10, 17891:23, 17957:19, 17964:13 sort [32] - 17704:5, 17711:12, 17711:25, 17712:19, 17713:5, 17720:14, 17722:15, 17722:19, 17734:7, 17745:7, 17746:1, 17750:2, 17750:11, 17751:23, 17788:12, 17793:9, 17804:7, 17815:19, 17817:10, 17827:10, 17835:10, 17881:21, 17896:23, 17899:13, 17905:1, 17908:24, 17911:25, 17914:12, 17917:23, 17920:4, 17922:5, 17952:14 sorting [1] - 17752:15 sorts [2] - 17821:2, 17821:6 sought [1] - 17943:24 sound [3] - 17738:4, 17774:10, 17868:12 sounds [3] - 17736:20, 17872:15, 17899:9 source [1] - 17906:7 sources [1] - 17810:10 space [3] - 17714:20, 17714:22, 17719:15 Speaker [1] - 17974:7 speaking [13] - 17705:4, 17706:7, 17720:4, 17759:21, 17842:4, 17853:4, 17870:19, 17870:22, 17902:5, 17908:18, 17941:21, 17957:12, 17966:4 speaks [3] - 17742:22, 17743:1, 17943:18 Speaks [1] - 17743:2 specific [7] - 17750:17, 17760:3, 17788:13, 17815:17, 17830:6, 17857:16, 17943:20 specifically [5] - 17804:23, 17850:5, 17854:16, 17862:12,</p>
---	--	---	---	--



<p>17862:13 spectacular [1] - 17860:24 speed [1] - 17798:12 spend [1] - 17897:1 spent [2] - 17745:18, 17812:16 spoken [4] - 17787:20, 17790:11, 17791:5, 17918:16 spot [1] - 17896:5 spread [1] - 17731:21 St [4] - 17735:19, 17754:12, 17754:16 stabbed [1] - 17886:2 stabbing [1] - 17903:10 stack [1] - 17749:24 Staff [2] - 17696:1, 17696:9 stage [1] - 17972:8 stages [3] - 17773:18, 17836:16, 17967:23 stake [1] - 17799:19 stand [4] - 17737:10, 17883:15, 17935:8, 17948:13 Stand [1] - 17942:1 standards [4] - 17742:9, 17742:14, 17744:21, 17937:10 stands [1] - 17948:10 Star [2] - 17962:13, 17963:11 start [8] - 17712:23, 17734:5, 17839:22, 17847:23, 17865:8, 17890:8, 17892:22, 17972:24 started [3] - 17722:4, 17722:7, 17726:9 starts [2] - 17701:13, 17850:1 state [4] - 17747:16, 17782:21, 17830:12, 17903:4 statement [116] - 17708:21, 17710:18, 17711:2, 17711:4, 17715:9, 17715:10, 17715:11, 17727:17, 17728:1, 17728:5, 17728:18, 17729:12, 17734:14, 17735:18, 17736:25, 17737:16, 17739:20, 17741:17, 17742:19, 17743:23, 17744:25, 17746:11, 17747:4, 17753:14, 17753:16, 17755:8, 17755:15, 17755:20,</p>	<p>17756:2, 17760:8, 17762:3, 17762:6, 17765:23, 17767:4, 17767:16, 17767:17, 17770:1, 17770:2, 17773:19, 17774:23, 17774:24, 17795:16, 17795:18, 17828:4, 17836:17, 17856:23, 17858:7, 17858:21, 17860:10, 17860:12, 17862:9, 17871:11, 17871:13, 17875:1, 17875:2, 17877:12, 17877:22, 17879:8, 17879:10, 17879:12, 17880:2, 17880:4, 17881:19, 17884:11, 17887:12, 17887:15, 17887:25, 17888:1, 17888:16, 17888:23, 17889:4, 17889:5, 17898:19, 17900:13, 17900:20, 17903:10, 17903:18, 17905:12, 17905:16, 17905:20, 17907:5, 17911:24, 17912:5, 17912:6, 17912:7, 17913:1, 17913:3, 17913:17, 17915:4, 17915:7, 17916:25, 17918:11, 17918:13, 17919:20, 17939:4, 17955:18, 17962:10, 17963:5, 17963:8, 17964:3, 17964:17, 17964:18, 17964:21, 17965:2, 17973:6, 17973:7, 17973:8, 17973:9, 17973:11, 17973:21, 17973:22, 17974:4, 17974:5, 17974:14 statements [137] - 17704:12, 17705:18, 17705:21, 17707:13, 17707:15, 17707:20, 17708:10, 17711:1, 17711:6, 17711:9, 17712:4, 17715:6, 17724:22, 17725:4, 17727:2, 17727:8, 17728:16, 17729:13, 17730:8, 17730:10, 17734:3, 17750:13, 17751:1, 17751:14, 17752:23, 17753:2, 17756:19, 17756:25, 17757:16, 17758:3, 17758:4, 17758:10, 17759:23, 17759:25,</p>	<p>17760:2, 17766:10, 17776:7, 17777:2, 17808:20, 17809:1, 17809:3, 17809:5, 17827:18, 17827:25, 17828:6, 17829:1, 17829:6, 17829:8, 17829:11, 17832:1, 17832:3, 17839:5, 17847:21, 17857:22, 17857:24, 17858:2, 17858:10, 17859:3, 17859:7, 17859:9, 17860:3, 17860:7, 17861:3, 17862:3, 17863:20, 17865:12, 17866:6, 17866:10, 17866:19, 17867:5, 17867:8, 17867:19, 17867:23, 17868:10, 17868:20, 17869:17, 17869:23, 17870:8, 17871:2, 17871:17, 17871:18, 17871:21, 17872:9, 17872:20, 17872:22, 17873:1, 17873:11, 17874:15, 17876:15, 17876:22, 17877:2, 17877:5, 17877:19, 17877:23, 17878:18, 17878:24, 17880:21, 17881:20, 17881:24, 17882:1, 17882:8, 17884:10, 17890:25, 17892:12, 17892:19, 17893:4, 17893:6, 17893:16, 17894:15, 17894:24, 17897:8, 17897:11, 17897:12, 17897:16, 17897:18, 17897:24, 17898:5, 17898:11, 17901:16, 17904:18, 17904:21, 17904:25, 17905:7, 17906:2, 17906:13, 17907:10, 17908:14, 17908:19, 17911:15, 17911:17, 17911:22, 17913:18, 17951:15, 17963:4, 17964:1, 17973:17, 17974:23 states [1] - 17816:12 station [2] - 17904:4, 17937:17 status [1] - 17847:20 stay [4] - 17847:23, 17847:24, 17968:24, 17969:1 stealing [2] - 17725:13,</p>	<p>17726:5 step [2] - 17704:23, 17944:22 stick [2] - 17721:22, 17721:24 still [17] - 17717:2, 17733:19, 17738:18, 17842:14, 17848:20, 17848:22, 17851:8, 17881:24, 17882:22, 17903:25, 17930:24, 17939:23, 17947:1, 17947:16, 17947:17, 17952:4, 17969:17 stolen [2] - 17804:7, 17872:24 stop [4] - 17714:15, 17790:12, 17951:23, 17952:17 stopped [3] - 17869:1, 17885:6, 17942:15 stopping [2] - 17872:21, 17885:5 stories [3] - 17866:1, 17866:3, 17893:3 story [14] - 17799:25, 17816:13, 17856:19, 17864:13, 17864:18, 17884:6, 17895:6, 17895:7, 17895:11, 17896:21, 17896:22, 17899:10, 17919:14, 17933:14 straight [5] - 17896:14, 17916:15, 17916:24, 17955:14, 17958:7 stranger [7] - 17712:24, 17712:25, 17714:19, 17717:11, 17718:10, 17736:19, 17763:9 strangers [4] - 17712:15, 17714:19, 17718:10, 17735:7 Street [2] - 17748:1, 17754:2 streets [7] - 17708:5, 17712:25, 17713:16, 17717:11, 17719:16, 17763:17, 17764:17 strength [1] - 17866:24 strictly [2] - 17844:4, 17851:8 striking [3] - 17712:21, 17872:10, 17906:9 strong [8] - 17770:7, 17775:4, 17775:14, 17786:9, 17807:3, 17807:8, 17807:12, 17940:19 stronger [1] - 17804:12</p>	<p>struck [3] - 17720:11, 17720:17, 17722:19 structured [1] - 17899:9 stuck [13] - 17859:20, 17859:21, 17860:4, 17860:18, 17860:21, 17860:22, 17861:9, 17902:6, 17902:11, 17902:17, 17902:18, 17902:22 Stuck [1] - 17902:8 stuff [1] - 17757:11 stupid [1] - 17847:24 style [1] - 17876:3 subject [6] - 17828:4, 17847:22, 17873:12, 17873:20, 17878:5, 17878:16 submit [2] - 17784:16, 17883:21 submitting [1] - 17947:13 subscribe [1] - 17971:10 subsequent [1] - 17876:18 subsequently [3] - 17722:15, 17724:9, 17877:6 substantive [1] - 17910:14 substitute [2] - 17705:17, 17710:25 substituting [1] - 17711:6 successfully [1] - 17801:10 suddenly [9] - 17717:10, 17725:25, 17763:13, 17766:11, 17785:22, 17788:14, 17794:21, 17843:1, 17958:2 sued [1] - 17968:5 suffered [1] - 17713:3 Suggest [3] - 17842:24, 17843:15, 17843:23 suggest [38] - 17705:5, 17711:23, 17712:20, 17717:25, 17718:7, 17756:20, 17758:18, 17775:12, 17775:13, 17782:16, 17793:8, 17808:1, 17808:4, 17811:10, 17825:3, 17826:25, 17828:12, 17828:22, 17830:9, 17843:8, 17869:13, 17876:21, 17886:17, 17892:18, 17894:22,</p>
---	---	---	---	--



17905:25, 17917:20, 17918:15, 17918:19, 17921:19, 17921:23, 17922:12, 17924:25, 17940:19, 17945:25, 17946:3, 17959:12, 17967:19 suggested [8] - 17822:6, 17856:18, 17866:1, 17873:15, 17873:16, 17893:15, 17966:14, 17971:5 suggesting [19] - 17706:16, 17750:22, 17767:24, 17768:22, 17785:20, 17793:21, 17799:16, 17814:25, 17831:18, 17833:1, 17833:2, 17844:7, 17844:16, 17848:17, 17860:23, 17893:5, 17897:15, 17937:4, 17937:7 suggestion [6] - 17726:8, 17831:24, 17834:17, 17865:23, 17877:10, 17905:15 suggestions [1] - 17960:21 suggests [1] - 17754:10 sum [1] - 17712:12 summarize [1] - 17734:10 summarizing [1] - 17952:14 summary [1] - 17920:4 Superintendent [3] - 17720:8, 17772:5, 17772:7 Support [1] - 17696:9 support [1] - 17744:3 supporting [1] - 17881:12 suppose [6] - 17714:24, 17727:6, 17800:20, 17826:14, 17909:12, 17925:17 supposed [2] - 17875:21, 17897:25 supposedly [1] - 17896:25 suppressed [2] - 17751:11, 17751:14 Supreme [33] - 17720:7, 17743:17, 17743:21, 17744:2, 17744:8, 17745:3, 17812:7, 17821:9, 17943:24, 17946:12, 17949:4, 17950:7, 17953:15,	17954:2, 17954:6, 17957:21, 17957:22, 17958:5, 17958:7, 17958:15, 17958:18, 17959:20, 17965:22, 17966:5, 17966:17, 17967:8, 17967:15, 17967:24, 17968:19, 17969:12, 17971:22, 17972:1, 17972:6 Surely [2] - 17706:9, 17950:20 surely [7] - 17708:15, 17716:12, 17716:22, 17743:6, 17768:8, 17779:2, 17956:21 surface [1] - 17721:21 surfeit [2] - 17716:23, 17718:9 surprise [5] - 17915:14, 17925:12, 17925:17, 17925:20, 17932:12 surprised [3] - 17870:2, 17911:11, 17956:13 surprises [1] - 17745:7 surrounded [1] - 17778:4 surrounding [2] - 17712:16, 17776:15 suspect [12] - 17772:21, 17837:17, 17840:21, 17840:24, 17841:17, 17852:19, 17856:24, 17899:16, 17901:13, 17909:11, 17933:15, 17938:19 suspect' [3] - 17856:4, 17856:14, 17856:24 suspects [2] - 17790:4, 17837:8 suspicious [1] - 17778:6 sustain [2] - 17943:25, 17947:16 sweater [3] - 17747:25, 17748:17, 17748:20 synopses [1] - 17723:5 System [1] - 17835:24 system [21] - 17699:17, 17700:2, 17744:3, 17813:3, 17813:24, 17836:24, 17913:14, 17914:17, 17932:24, 17942:20, 17942:21, 17945:8, 17947:15, 17957:1, 17968:16, 17969:10, 17969:25, 17970:2, 17971:19, 17972:7, 17972:15 system's [1] - 17838:3	systemic [1] - 17913:6 systemically [1] - 17910:3 T table [1] - 17731:21 talks [5] - 17795:21, 17852:16, 17888:18, 17888:20, 17888:25 Tallis [42] - 17697:14, 17706:3, 17707:9, 17709:2, 17709:8, 17710:3, 17710:13, 17732:8, 17738:11, 17739:3, 17745:9, 17747:11, 17751:12, 17755:6, 17759:5, 17760:1, 17762:11, 17764:4, 17764:11, 17764:14, 17765:6, 17765:16, 17766:19, 17768:5, 17769:1, 17782:4, 17786:1, 17786:7, 17786:10, 17788:1, 17790:10, 17791:4, 17793:5, 17793:18, 17795:5, 17808:3, 17827:2, 17915:1, 17940:5, 17941:8, 17951:21, 17952:12 Tallis [3] - 17750:17, 17751:3, 17914:24 tangent [1] - 17847:24 taped [1] - 17771:23 Tdr [1] - 17697:6 team [1] - 17938:6 technical [1] - 17976:3 Technician [1] - 17696:14 telephoned [2] - 17759:13, 17759:16 temperature [3] - 17760:20, 17760:22, 17761:1 temptations [1] - 17791:6 tend [2] - 17745:10, 17829:24 term [9] - 17719:24, 17722:7, 17750:20, 17771:14, 17773:20, 17778:23, 17800:12, 17914:20, 17922:1 terminology [4] - 17773:14, 17773:16, 17789:16, 17814:24 terms [13] - 17702:10,	17739:22, 17743:18, 17769:16, 17769:19, 17769:21, 17820:9, 17822:4, 17894:4, 17914:3, 17936:22, 17936:23, 17965:15 terrible [2] - 17820:4, 17825:5 testified [3] - 17752:1, 17783:4, 17786:3 testify [1] - 17918:25 Testimony [1] - 17695:14 tests [1] - 17844:24 that' [1] - 17883:15 theirs [1] - 17948:5 themselves [6] - 17861:15, 17869:18, 17869:22, 17920:8, 17920:17, 17920:20 theories [2] - 17790:3, 17829:24 theory [6] - 17833:6, 17920:9, 17938:21, 17938:25, 17939:9, 17941:14 there'd [1] - 17941:11 thereafter [4] - 17733:19, 17815:6, 17913:19, 17953:10 therefore [4] - 17729:7, 17768:4, 17782:3, 17948:21 thesis [2] - 17724:7, 17724:19 they've [1] - 17910:13 thick [2] - 17772:8, 17772:12 thinking [6] - 17766:20, 17878:17, 17894:13, 17946:24, 17948:5, 17950:14 thinks [2] - 17734:24, 17757:11 third [5] - 17713:10, 17893:22, 17897:15, 17912:7, 17912:9 Thomas [2] - 17698:3, 17699:5 thoroughly [1] - 17808:10 thoughts [1] - 17953:2 threat [1] - 17784:15 threatened [1] - 17784:17 three [55] - 17713:5, 17713:6, 17714:8, 17714:20, 17714:22, 17714:23, 17719:14, 17728:17, 17732:5,	17733:8, 17753:23, 17753:25, 17754:5, 17776:14, 17779:5, 17779:7, 17780:11, 17804:13, 17814:17, 17815:2, 17825:23, 17828:1, 17854:12, 17858:4, 17858:19, 17858:21, 17859:9, 17859:17, 17859:19, 17860:17, 17861:8, 17861:22, 17862:22, 17865:12, 17865:14, 17865:25, 17868:15, 17868:16, 17868:23, 17876:22, 17878:18, 17880:24, 17886:12, 17891:25, 17897:9, 17898:22, 17899:8, 17910:4, 17911:3, 17912:22, 17912:23, 17935:6, 17935:7, 17967:23 three-day [1] - 17854:12 threw [2] - 17885:18, 17889:15 throughout [2] - 17801:17, 17823:1 throw [1] - 17918:1 thrown [1] - 17855:15 Thursday [2] - 17880:7, 17880:14 tie [1] - 17748:22 time' [1] - 17741:8 timing [2] - 17896:21, 17951:17 tired [1] - 17857:9 title [1] - 17817:4 titles [1] - 17816:2 today [9] - 17699:24, 17719:20, 17742:23, 17797:8, 17848:23, 17849:14, 17878:2, 17881:21, 17882:6 today's [1] - 17751:17 together [8] - 17712:19, 17750:19, 17750:23, 17786:9, 17833:3, 17843:20, 17846:21, 17865:25 toleration [1] - 17837:24 tomorrow [5] - 17867:25, 17873:12, 17873:25, 17972:24, 17974:16 tongue [1] - 17807:9 tonight [3] - 17876:22, 17878:1, 17973:2
--	---	---	--	--



<p>Tony^[1] - 17696:14 took^[19] - 17727:4, 17728:16, 17733:7, 17734:6, 17804:9, 17844:24, 17864:2, 17877:5, 17882:21, 17900:1, 17900:7, 17902:23, 17911:11, 17911:14, 17912:17, 17913:17, 17928:17, 17959:3 top^[5] - 17782:19, 17784:5, 17812:9, 17823:5, 17852:22 topic^[2] - 17804:24, 17822:10 tormenter^[1] - 17825:13 Toronto^[3] - 17962:13, 17962:19, 17963:10 total^[1] - 17912:23 totality^[1] - 17883:12 totally^[1] - 17950:25 tow^[2] - 17861:11, 17869:2 towards^[4] - 17714:24, 17748:12, 17894:5, 17950:9 tower^[2] - 17716:14, 17717:8 town^[2] - 17926:2, 17928:14 track^[2] - 17733:2, 17901:5 tracks^[1] - 17951:23 Transcript^[2] - 17695:12, 17699:1 transcript^[16] - 17775:21, 17789:21, 17807:1, 17840:7, 17842:21, 17843:18, 17849:23, 17849:24, 17850:4, 17851:23, 17879:3, 17880:8, 17880:12, 17880:16, 17880:17, 17938:9 transcription^[1] - 17977:5 transcripts^[1] - 17851:19 transmission^[2] - 17862:1, 17902:15 transpire^[1] - 17722:16 trap^[1] - 17833:25 trash^[2] - 17886:4, 17887:2 treat^[1] - 17835:9 trees^[1] - 17754:13 trial^[34] - 17703:19, 17733:24, 17744:9,</p>	<p>17770:25, 17772:23, 17801:18, 17805:10, 17807:15, 17808:22, 17808:25, 17813:22, 17814:10, 17821:9, 17823:1, 17826:14, 17827:14, 17827:18, 17835:14, 17852:4, 17853:3, 17853:9, 17877:6, 17912:4, 17912:18, 17957:17, 17957:19, 17957:20, 17958:13, 17960:2, 17966:7, 17966:19, 17967:5, 17972:11 trickle^[1] - 17815:15 trickle-down^[1] - 17815:15 tried^[7] - 17723:15, 17740:16, 17747:25, 17779:20, 17844:9, 17868:9, 17912:20 trifle^[1] - 17796:19 trip^[3] - 17888:12, 17923:19, 17924:9 trouble^[1] - 17817:21 troubled^[1] - 17711:7 troubling^[1] - 17815:8 truck^[2] - 17861:11, 17869:2 true^[24] - 17727:25, 17825:2, 17827:19, 17829:10, 17829:13, 17829:14, 17829:16, 17829:17, 17867:1, 17869:8, 17869:23, 17887:12, 17887:21, 17896:22, 17898:11, 17899:17, 17900:14, 17901:3, 17901:17, 17905:8, 17906:3, 17961:14, 17977:5 trusting^[3] - 17762:14, 17762:19, 17921:10 truth^[4] - 17809:18, 17856:11, 17895:8, 17913:9 truthful^[4] - 17829:12, 17854:10, 17905:16, 17905:20 truthfully^[2] - 17854:14, 17958:22 truthfulness^[3] - 17887:14, 17903:17, 17905:7 try^[12] - 17712:12, 17717:18, 17729:12, 17737:4, 17798:8, 17801:1, 17818:21, 17833:20, 17909:22,</p>	<p>17909:23, 17917:24, 17925:10 Try^[1] - 17909:25 trying^[16] - 17704:21, 17710:11, 17723:23, 17756:8, 17800:24, 17801:23, 17810:15, 17849:5, 17855:14, 17895:20, 17900:18, 17937:11, 17947:16, 17948:18, 17969:3, 17976:2 Tuesday^[1] - 17695:21 tunnel^[23] - 17803:9, 17804:20, 17805:6, 17818:2, 17825:2, 17825:5, 17825:9, 17826:7, 17826:21, 17828:19, 17829:3, 17829:22, 17833:11, 17833:25, 17835:17, 17836:9, 17838:12, 17848:19, 17870:9, 17871:7, 17874:18, 17971:5, 17971:11 turn^[6] - 17744:11, 17784:4, 17849:17, 17852:9, 17922:7, 17951:20 turned^[9] - 17810:19, 17825:12, 17826:1, 17942:22, 17942:25, 17943:8, 17952:11, 17954:20, 17962:7 turning^[1] - 17965:15 turns^[2] - 17747:2, 17777:3 twice^[4] - 17720:4, 17734:17, 17763:2, 17785:2 Two^[1] - 17858:24 two^[81] - 17701:16, 17704:15, 17708:3, 17708:6, 17712:4, 17713:6, 17713:7, 17713:13, 17713:17, 17713:23, 17716:7, 17719:14, 17719:15, 17719:18, 17720:22, 17727:7, 17729:16, 17734:21, 17735:14, 17735:15, 17736:2, 17736:3, 17736:16, 17739:2, 17741:18, 17741:19, 17750:14, 17752:23, 17753:12, 17753:24, 17753:25, 17754:5, 17763:16, 17764:15, 17770:12, 17771:19, 17772:2,</p>	<p>17773:4, 17777:7, 17777:10, 17777:16, 17778:10, 17778:17, 17779:14, 17779:24, 17784:9, 17806:1, 17806:8, 17806:11, 17806:13, 17811:4, 17814:16, 17826:7, 17827:10, 17827:12, 17828:1, 17829:6, 17833:2, 17837:19, 17846:20, 17858:19, 17858:20, 17858:21, 17862:7, 17886:16, 17887:5, 17887:22, 17890:25, 17891:9, 17891:25, 17895:5, 17899:1, 17900:23, 17911:5, 17924:9, 17926:11, 17936:16, 17975:11 type^[7] - 17731:12, 17731:13, 17778:25, 17790:2, 17826:9, 17939:10 typed^[3] - 17973:7, 17973:10, 17973:11 types^[2] - 17800:5, 17826:7 typewritten^[1] - 17849:23</p>	<p>17824:18 unaware^[1] - 17720:1 unbeknownst^[1] - 17894:7 uncomfortable^[1] - 17762:18 under^[13] - 17735:24, 17748:17, 17748:20, 17784:15, 17803:21, 17828:4, 17846:6, 17877:9, 17884:22, 17889:13, 17905:11, 17964:19, 17965:17 understandable^[2] - 17833:17, 17833:24 understood^[3] - 17832:19, 17886:3, 17960:17 undoubtedly^[3] - 17755:7, 17755:10, 17820:20 undress^[2] - 17782:22, 17784:16 undressed^[1] - 17784:1 unfair^[1] - 17909:12 unfolding^[1] - 17876:18 unfortunate^[1] - 17773:17 unfortunately^[1] - 17836:3 unhappy^[1] - 17704:16 Unidentified^[1] - 17974:7 unique^[5] - 17761:8, 17763:12, 17763:16, 17763:17, 17810:21 uniqueness^[1] - 17763:13 United^[2] - 17835:21, 17836:6 unjustified^[1] - 17867:17 unknown^[2] - 17737:13, 17965:5 unless^[4] - 17811:4, 17844:12, 17887:3, 17926:9 unlike^[1] - 17755:15 unsatisfactory^[1] - 17799:17 unsolved^[2] - 17733:22, 17784:9 unusual^[5] - 17734:23, 17761:6, 17831:2, 17932:19, 17933:6 unwise^[1] - 17751:16 unzip^[1] - 17747:25 Up^[1] - 17814:16</p>
--	--	---	--	---

U

Ullrich^[14] - 17757:2, 17757:10, 17757:25, 17758:13, 17758:16, 17758:21, 17759:12, 17759:24, 17760:3, 17797:12, 17797:19, 17801:16, 17803:5, 17835:2
ultimate^[2] - 17745:2, 17810:17
ultimately^[9] - 17776:6, 17779:6, 17785:11, 17790:14, 17841:12, 17894:7, 17962:20, 17969:15, 17970:1
Umm^[12] - 17704:15, 17719:22, 17733:16, 17766:7, 17795:24, 17803:21, 17806:3, 17806:8, 17812:21, 17886:20, 17918:10, 17938:3
umm^[2] - 17920:13, 17925:6
unalterably^[1] -



<p>up [80] - 17699:12, 17699:22, 17699:24, 17702:20, 17703:25, 17712:12, 17714:12, 17715:22, 17721:17, 17730:5, 17734:9, 17744:25, 17746:2, 17746:3, 17750:11, 17757:24, 17761:16, 17761:25, 17775:5, 17775:6, 17777:4, 17777:14, 17779:25, 17781:5, 17786:25, 17796:7, 17796:18, 17796:22, 17798:3, 17798:12, 17798:19, 17799:24, 17800:3, 17805:23, 17821:14, 17828:10, 17830:18, 17834:16, 17834:21, 17835:1, 17835:3, 17835:14, 17838:2, 17845:12, 17845:22, 17848:3, 17849:17, 17850:3, 17854:18, 17866:17, 17867:24, 17869:1, 17873:5, 17878:8, 17883:15, 17890:13, 17896:15, 17903:12, 17907:12, 17907:16, 17907:22, 17911:25, 17912:4, 17930:2, 17935:23, 17935:25, 17940:18, 17945:7, 17953:24, 17954:22, 17955:18, 17963:23, 17964:15, 17964:22, 17964:24, 17969:12, 17970:8, 17970:22, 17971:2</p> <p>up' [3] - 17749:23, 17749:24, 17750:21</p> <p>upper [3] - 17736:6, 17737:6, 17762:23</p> <p>useful [2] - 17742:11, 17803:7</p> <p>utter [1] - 17899:22</p> <p>utterly [1] - 17847:15</p>	<p>17844:22, 17845:4, 17845:23, 17847:6, 17847:16, 17848:4, 17851:10, 17856:5</p> <p>V10 [6] - 17934:15, 17935:10, 17936:2</p> <p>V2 [32] - 17713:3, 17774:25, 17776:8, 17781:11, 17782:1, 17782:15, 17785:19, 17794:22, 17794:25, 17795:2, 17795:15, 17831:14, 17831:25, 17832:22, 17834:24, 17835:4, 17844:22, 17845:4, 17845:23, 17847:6, 17847:16, 17848:5, 17851:10, 17856:5</p> <p>V3 [2] - 17713:11, 17776:8</p> <p>V4 [51] - 17707:17, 17708:15, 17709:16, 17709:24, 17709:25, 17710:25, 17711:3, 17711:14, 17711:17, 17714:6, 17715:10, 17762:3, 17764:9, 17765:22, 17766:5, 17766:17, 17766:18, 17768:4, 17776:21, 17777:23, 17845:4, 17845:23, 17847:16, 17848:5, 17931:7, 17962:8, 17963:8, 17963:9, 17964:3, 17964:17, 17964:21, 17965:2, 17965:14</p> <p>V5 [2] - 17776:10</p> <p>V6 [19] - 17707:16, 17707:22, 17707:23, 17713:18, 17715:7, 17746:11, 17747:2, 17748:16, 17752:25, 17776:21, 17777:23, 17931:7</p> <p>V6)-s [1] - 17707:20</p> <p>V9 [39] - 17713:15, 17713:16, 17715:7, 17734:5, 17734:6, 17734:15, 17734:20, 17734:21, 17738:2, 17739:20, 17739:21, 17741:18, 17741:19, 17741:24, 17742:19, 17743:23, 17747:23, 17749:10, 17749:11, 17752:25, 17754:15, 17755:16, 17776:20,</p>	<p>17777:23, 17845:4, 17845:23, 17847:6, 17847:16, 17848:4, 17931:7</p> <p>validity [1] - 17810:13</p> <p>Vancouver [2] - 17858:14, 17858:15</p> <p>various [16] - 17756:19, 17815:13, 17834:19, 17856:6, 17863:12, 17864:25, 17870:3, 17876:18, 17883:6, 17892:9, 17894:3, 17904:13, 17907:7, 17927:7, 17960:21, 17960:25</p> <p>vehicle [2] - 17901:24, 17902:6</p> <p>venture [1] - 17843:5</p> <p>verb [1] - 17803:22</p> <p>verbatim [1] - 17837:17</p> <p>verdict [1] - 17967:7</p> <p>version [1] - 17849:23</p> <p>versions [1] - 17772:9</p> <p>versus [1] - 17879:20</p> <p>vicious [2] - 17799:2, 17932:20</p> <p>victim [2] - 17784:12, 17923:7</p> <p>victim's [1] - 17784:20</p> <p>victims [10] - 17781:12, 17784:17, 17784:21, 17845:5, 17845:7, 17846:13, 17848:5, 17848:6, 17930:22, 17940:23</p> <p>view [23] - 17725:13, 17726:5, 17750:22, 17756:18, 17770:2, 17787:10, 17789:19, 17792:1, 17792:2, 17806:14, 17824:16, 17825:19, 17829:11, 17866:18, 17870:4, 17903:13, 17905:24, 17908:23, 17910:19, 17939:17, 17939:23, 17940:16, 17972:2</p> <p>viewed [4] - 17750:18, 17750:19, 17806:21, 17972:14</p> <p>views [8] - 17806:17, 17807:11, 17821:6, 17826:11, 17826:16, 17838:15, 17947:14, 17947:15</p> <p>Vintage [1] - 17835:25</p> <p>virtually [1] - 17835:13</p> <p>vision [22] - 17803:9, 17804:21, 17805:6,</p>	<p>17818:3, 17825:2, 17825:5, 17826:7, 17826:21, 17828:19, 17829:4, 17829:22, 17833:11, 17833:25, 17835:17, 17836:10, 17838:13, 17848:19, 17870:10, 17871:7, 17874:19, 17971:6, 17971:11</p> <p>vision' [1] - 17825:9</p> <p>visualize [1] - 17750:12</p> <p>Volume [1] - 17695:22</p> <p>voluminous [1] - 17946:13</p> <p>voucher [1] - 17958:9</p>	<p>weeks [19] - 17702:4, 17707:25, 17708:3, 17708:6, 17713:17, 17713:23, 17714:22, 17714:23, 17719:15, 17719:18, 17734:21, 17736:2, 17736:16, 17739:2, 17741:18, 17741:19, 17753:25, 17778:10, 17907:11</p> <p>Weir [3] - 17770:18, 17770:20, 17770:22</p> <p>Wempe [1] - 17697:10</p> <p>west [1] - 17858:14</p> <p>whatsoever [1] - 17796:24</p> <p>whilst [1] - 17903:20</p> <p>white [4] - 17785:17, 17789:11, 17789:13, 17791:18</p> <p>Whoa [1] - 17816:4</p> <p>whoa [1] - 17816:6</p> <p>whole [12] - 17717:16, 17738:25, 17740:16, 17795:2, 17813:3, 17813:24, 17843:3, 17850:17, 17851:11, 17868:5, 17877:2, 17969:23</p> <p>wider [1] - 17743:14</p> <p>widespread [1] - 17836:22</p> <p>wielding [1] - 17964:20</p> <p>Williams [13] - 17952:24, 17953:3, 17953:6, 17954:17, 17954:18, 17957:2, 17957:4, 17957:5, 17958:8, 17958:10, 17963:3, 17964:2, 17965:4</p> <p>Wilson [69] - 17697:7, 17704:13, 17705:18, 17705:21, 17711:1, 17711:6, 17724:10, 17724:22, 17725:5, 17725:22, 17726:1, 17726:13, 17728:17, 17729:6, 17729:14, 17730:2, 17730:11, 17766:2, 17772:8, 17808:19, 17828:25, 17839:6, 17857:22, 17857:24, 17858:9, 17858:13, 17862:5, 17862:10, 17862:15, 17862:23, 17864:6, 17866:19, 17877:23, 17880:24, 17882:7, 17884:6, 17886:15,</p>
V			W	
<p>Vi [29] - 17712:23, 17731:11, 17731:21, 17731:24, 17731:25, 17732:5, 17774:24, 17774:25, 17776:8, 17782:15, 17785:19, 17795:21, 17797:1, 17831:15, 17831:25, 17832:22, 17834:23,</p>			<p>wait [2] - 17950:18, 17976:13</p> <p>waiting [1] - 17891:11</p> <p>waive [1] - 17961:8</p> <p>waived [2] - 17961:14, 17962:2</p> <p>waiver [2] - 17960:16, 17961:4</p> <p>walk [2] - 17735:9</p> <p>walked [1] - 17896:13</p> <p>walking [3] - 17735:18, 17754:15, 17784:13</p> <p>walks [1] - 17937:16</p> <p>wants [3] - 17859:18, 17884:8, 17888:8</p> <p>warning [1] - 17718:25</p> <p>watch [1] - 17954:12</p> <p>watched [1] - 17702:3</p> <p>Watt [2] - 17804:20, 17805:4</p> <p>ways [3] - 17724:3, 17724:10, 17888:21</p> <p>weak [3] - 17806:5, 17806:21, 17807:1</p> <p>weapon [2] - 17748:18, 17748:24</p> <p>week [27] - 17699:8, 17699:25, 17707:25, 17713:23, 17725:3, 17725:4, 17725:25, 17726:12, 17727:21, 17730:5, 17730:10, 17765:12, 17804:15, 17804:16, 17890:7, 17891:18, 17891:23, 17892:6, 17906:19, 17906:25, 17909:2, 17911:14, 17963:12, 17963:15, 17963:22</p> <p>weekly [1] - 17717:9</p>	



<p>17887:21, 17888:2, 17888:20, 17889:23, 17889:25, 17890:18, 17891:3, 17891:6, 17891:10, 17891:18, 17892:7, 17892:21, 17894:24, 17901:6, 17901:11, 17902:11, 17903:22, 17904:22, 17905:13, 17906:5, 17906:25, 17907:6, 17907:14, 17907:22, 17908:20, 17911:15, 17911:17, 17939:4, 17973:6, 17973:8 Wilson's [2] - 17884:11, 17973:17 window [3] - 17712:1, 17712:8, 17885:19 Winnipeg [17] - 17776:7, 17777:1, 17805:1, 17805:2, 17858:15, 17858:18, 17922:13, 17923:19, 17924:10, 17934:23, 17934:24, 17935:1, 17935:3, 17936:10, 17936:16, 17936:24 wish [5] - 17746:2, 17753:9, 17921:14, 17953:18, 17972:24 wished [1] - 17935:19 withdraw [1] - 17884:4 witness [30] - 17707:13, 17759:15, 17759:22, 17759:24, 17760:5, 17770:25, 17772:17, 17784:25, 17802:18, 17831:23, 17871:12, 17873:10, 17876:16, 17878:9, 17883:23, 17903:3, 17912:25, 17913:18, 17914:1, 17914:19, 17914:20, 17916:2, 17919:12, 17943:20, 17945:3, 17946:8, 17946:15, 17958:13, 17966:17, 17971:18 witness' [2] - 17947:11, 17947:14 witnesses [10] - 17758:24, 17773:5, 17802:21, 17856:20, 17868:16, 17869:21, 17870:4, 17946:5, 17947:24, 17966:23 Wolch [12] - 17697:2, 17867:15, 17867:24, 17878:7, 17956:8,</p>	<p>17956:10, 17975:4, 17975:5, 17976:2, 17976:5, 17976:8, 17976:10 woman [2] - 17710:14, 17926:17 women [16] - 17708:4, 17714:20, 17715:19, 17716:24, 17717:10, 17718:10, 17719:1, 17719:15, 17731:10, 17733:7, 17758:4, 17763:19, 17764:16, 17780:23, 17926:8, 17964:20 wonder [4] - 17705:10, 17738:18, 17776:5, 17933:6 wondered [2] - 17720:14, 17777:21 wondering [7] - 17721:5, 17778:7, 17810:14, 17893:10, 17905:5, 17951:9, 17975:11 Wood [8] - 17770:18, 17771:4, 17771:6, 17772:5, 17772:7, 17797:9, 17797:15, 17806:15 Woodcock [4] - 17836:15, 17837:2, 17837:14, 17837:23 word [26] - 17704:6, 17719:11, 17719:12, 17726:21, 17729:25, 17730:18, 17730:20, 17747:15, 17780:20, 17801:5, 17802:12, 17804:8, 17815:2, 17817:21, 17817:22, 17828:8, 17887:10, 17912:2, 17920:13, 17920:14, 17937:11, 17951:4, 17952:20, 17952:22, 17962:20 wording [1] - 17756:17 words [17] - 17722:14, 17770:12, 17771:18, 17794:21, 17796:4, 17811:17, 17815:2, 17823:10, 17823:20, 17826:13, 17845:10, 17849:4, 17859:5, 17860:8, 17881:22, 17914:21, 17924:19 workings [1] - 17836:23 works [1] - 17718:2 worried [2] - 17867:10, 17958:24</p>	<p>worse [1] - 17818:7 worst [1] - 17818:3 worth [4] - 17744:15, 17780:8, 17813:4, 17904:3 wounds [1] - 17903:6 wrap [1] - 17834:16 write [2] - 17699:20, 17823:8 writing [2] - 17823:3, 17856:20 written [9] - 17723:13, 17737:14, 17738:9, 17791:17, 17835:21, 17877:21, 17890:7, 17906:19, 17909:2 wrongful [4] - 17810:19, 17826:6, 17836:5, 17923:7 Wrongful [1] - 17695:3 wrongfully [1] - 17949:13 wrongly [4] - 17813:13, 17949:3, 17949:16, 17970:24 wrote [12] - 17699:19, 17777:19, 17791:21, 17795:23, 17795:25, 17796:4, 17796:16, 17797:2, 17810:12, 17811:3, 17811:6, 17923:14</p>	<p>17720:16, 17792:18, 17793:1, 17805:21, 17839:18, 17844:19, 17845:11, 17854:25, 17855:1, 17855:7, 17855:11, 17855:16, 17938:9, 17938:11, 17941:24, 17944:14, 17944:18, 17945:6, 17945:14, 17948:11, 17950:13, 17950:21, 17951:2, 17951:15, 17952:1, 17952:10, 17958:21, 17959:16 you' [1] - 17950:1 young [1] - 17856:18 yourself [43] - 17722:17, 17735:24, 17736:2, 17736:14, 17736:22, 17738:6, 17738:23, 17739:10, 17744:6, 17757:7, 17757:9, 17763:15, 17763:20, 17764:3, 17764:7, 17764:15, 17764:21, 17764:25, 17766:14, 17766:16, 17781:25, 17787:12, 17787:13, 17787:14, 17788:4, 17788:14, 17808:23, 17809:8, 17809:11, 17810:2, 17810:15, 17819:18, 17819:22, 17820:13, 17820:19, 17821:5, 17860:17, 17873:8, 17883:14, 17898:11, 17959:3, 17962:3</p>
Y			
<p>yards [1] - 17901:25 year [5] - 17780:17, 17836:14, 17850:14, 17942:21, 17942:25 years [35] - 17702:11, 17704:7, 17712:3, 17735:3, 17739:12, 17740:13, 17745:19, 17753:8, 17805:24, 17812:16, 17813:12, 17819:16, 17820:14, 17824:8, 17905:9, 17905:11, 17920:4, 17927:17, 17932:1, 17933:4, 17934:4, 17935:2, 17935:3, 17936:13, 17937:4, 17937:13, 17953:1, 17953:18, 17967:13, 17968:14, 17968:16, 17969:8, 17969:10, 17971:20 yesterday [30] - 17702:20, 17720:15,</p>			
Z			
<p>zero [1] - 17937:18</p>			

