Commission of Inquiry

Into the Wrongful

Conviction of David Milgaard

before

THE HONOURABLE MR. JUSTICE

EDWARD P. MacCALLUM

****

Transcript of Proceedings

and

Testimony before the Commission

sitting at the

Radisson Hotel at

Saskatoon, Saskatchewan

****

On Monday, November 7th, 2005

Volume 91

Inquiry Proceedings

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Appearances:

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

Ms. Joanne McLean,   **for** Ms. Joyce Milgaard

Ms. Lana Krogan,   **for** Government of Saskatchewan

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

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

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

Mr. Chris Boychuk, Esq.,   **for** Mr. Eddie Karst

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

RCMP

Mr. David Frayer, Q.C.,   **for** Minister of Justice

(Canada), The Hon. Irwin Cotler

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

(Retired)

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1   *Transcript of Proceedings*

2   *(Reconvened at 1:33 p.m.)*

3   COMMISSIONER MacCALLUM: Good afternoon.

4   ALL COUNSEL: Good afternoon.

5   MR. HODSON: Just a couple of housekeeping

6   matters, Mr. Commissioner. Last week when I was

7   examining Mr. Caldwell, I think it was last week,

8   we saw a letter that he wrote to Mr. Williams

9   while Mr. Caldwell was with Federal Justice in

10   1989 and it referred to a file number 89-S dash

11   four numbers, and it became apparent that there

12   might be a file that Mr. Caldwell had while he

13   was with Federal Justice. I made a request of

14   Mr. Frayer and we in turn have located a couple

15   of folders of documents relating to the 1988 to

16   1991 time period while Mr. Caldwell was at

17   Federal Justice. Those documents are being

18   reviewed and at the end of the day today Mr.

19   Frayer and I will be discussing the matters with

20   Mr. Caldwell's counsel with the expectation that

21   it may be tomorrow some of these documents, which

22   are relevant, may be put to Mr. Caldwell and made

23   available to the parties, so I thought I would

24   just bring that to your attention.

25   Secondly, the order of cross,

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1   the order of examination today I think is as

2   follows, that Mr. Gibson on behalf of the RCMP

3   will be first, followed by Mr. Boychuk on behalf

4   of Mr. Karst, Mr. Elson on behalf of the

5   Saskatoon City Police and then Mr. Wilson on

6   behalf of Serge Kujawa and then Lana Krogan on

7   behalf of the Government of Saskatchewan and then

8   Ms. Knox on behalf of Mr. Caldwell.

9   With that, I think Mr. Gibson

10   is ready.

11   ***THOMAS DAVID ROBERTS CALDWELL, continued***:

12   **BY MR. GIBSON**:

13 Q   Mr. Caldwell, you and I of course had the

14   opportunity to work together in 1990?

15 A   That's right, sir.

16 Q   And if I recall correctly, for the first few

17   months that I was there you were under the

18   impression I was the photocopier repair person; is

19   that not correct?

20 A   That was exactly my estimate, sir. I think it's a

21   little late to alter it now.

22 Q   We were able to straighten that out eventually. I

23   have a few questions for you relating to some RCMP

24   documentation that was put to you by Mr. Hodson,

25   and I don't think it's necessary to put all of the

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1   documents up, but for the record, it was 065399

2   was a March 20th, 1969 report by Mr. Riddell,

3   Inspector Riddell, also a document 052961, a May

4   21st, 1969 report by Inspector Riddell, and then a

5   document that maybe we could put up, 250597, which

6   is a May 7th, '69 report of Mr. Rasmussen, and

7   those were three documents that were generated

8   back in 1969 by the RCMP.

9 A   All right, sir.

10 Q   And if I recall your evidence correctly, you said

11   that you never became aware of those documents

12   until the Inquiry?

13 A   That is right, Mr. Gibson.

14 Q   Okay. And if we could just go, on the document

15   that's up, to go to page 603, just to the bottom

16   of page 603 there, if we could call that portion

17   up, please?

18   COMMISSIONER MacCALLUM: What's the date of

19   this, Mr. Gibson? I was too slow.

20   MR. GIBSON: That's all right. It's May

21   7th of 1969, a document by Corporal Rasmussen.

22   COMMISSIONER MacCALLUM: Okay.

23   BY MR. GIBSON:

24 Q   And in that report it says, this is an RCMP

25   report:

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1   "It is mentioned that during the late

2   fall of 1968 the local police department

3   --"

4   And that would be referencing the Saskatoon

5   police,

6   "-- had reports of two rapes and one

7   attempted rape. These investigations

8   were conducted by the City Police with

9   negative results. Persons involved were

10   as follows:"

11   Next page please, and just the top paragraphs,

12   they reference Miss (V1)--- (V1)-, Miss (V2)

13   (V2)- (V2)-----, (V3)-- (V3)------, and then the

14   paragraph along the side there that I've

15   highlighted, in says:

16   "In these three instances the M.O. was

17   similar to that the male approached his

18   victim from the rear, covered their

19   mouth with his hand and pointed a knife

20   into their back, forcing them down the

21   lane. The descriptions of the assailant

22   given by all three were very similar and

23   it appeared that the same person was

24   involved. The assailant would force his

25   victim to undress at knife point and

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1   always managed to stay in the shadows or

2   behind them in order that his identity

3   would not be detected. He would then

4   have the victim lie on her coat at which

5   time intercourse would take place. In

6   the (V3)------ case, the assailant was

7   scared away as a result of lights of a

8   vehicle approaching down the lane."

9   Now, obviously there's a good deal of detail in

10   this report, Mr. Caldwell, you'll agree,

11   referencing those particular files dealing with

12   (V1)-, (V2)----- and (V3)------?

13 A   That's right, sir.

14 Q   And you would agree with me that any

15   investigations that would be carried out in

16   relation to those files would be carried out by

17   the Saskatoon Police Service?

18 A   Well, in the sense, Mr. Gibson, they were all

19   Saskatoon, City of Saskatoon offences, it would be

20   the city police responsibility. Here it appears

21   that the RCMP attempted to be helpful, if you

22   will, but it would certainly be a city police

23   responsibility. They would be turning to the RCMP

24   to assist as I think we've seen earlier.

25 Q   Right. And the evidence to date so far has been

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1   that the RCMP assisted on the Miller murder

2   investigation?

3   A   Uh-huh.

4   Q   That there may have been some review of some

5   earlier instances, but the actual initial

6   complaint and investigation relating to those

7   files that I've referenced under the jurisdiction

8   of police within the province would rest with the

9   Saskatoon police?

10   A   Yes, they certainly would, sir.

11   Q   Okay. And obviously those reports there

12   referenced a possible connection later on to the

13   Miller file, if we go to the next paragraph, at

14   paragraph 20, there is drawn a possible connection

15   to the Miller murder that they may be tied in, and

16   again I don't want to belabour this point, I think

17   we've gone through that a lot.

18   A   Yeah, that's correct, Mr. Gibson, as I read this.

19   Q   And I believe your evidence was that you never had

20   a copy of this document on your file?

21   A   I did not see it, sir, much to my, I guess, shock

22   until into this hearing when it came up on all the

23   screens and I drew it to the attention of my

24   counsel, so clearly I was amazed at that, but I

25   did not have a copy, period.

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1   Q   And the information that you were getting in order

2   to prosecute the case against Mr. Milgaard was all

3   channeled through the Saskatoon Police Service;

4   was it not?

5   A   That's right, sir.

6   Q   And you were not looking to the RCMP to gain any

7   documents or -- again, anything that would be

8   channeled your way would be channeled through the

9   Saskatoon Police Service?

10   A   That would have been my expectation, Mr. Gibson.

11   I didn't try to go outside that framework, if you

12   will.

13   Q   Okay. So, for example, if the Saskatoon Police

14   Service requested that the RCMP lab undertake

15   certain tests, the response to those tests

16   wouldn't come directly back to you, but to the

17   police service and then over to you?

18   A   That's the way it actually happened, Mr. Gibson,

19   it should have been, and that's how it did happen.

20   Q   And again, your evidence a number of times has

21   been that you never received the entire Saskatoon

22   Police Service file?

23   A   No, quite so, sir.

24   Q   Okay. And were you here when former Chief Penkala

25   testified?

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1   *A*   Yes, I was, sir.

2   **Q**   Okay. And do you recall him indicating that he

3   reviewed this particular document, 250597, and

4   that he felt that the Saskatoon Police Service

5   were aware of all of the circumstances that were

6   raised in this RCMP document?

7   *A*   I don't doubt, sir, that that's what he said and I

8   was here and heard his evidence.

9   **Q**   Okay. But again, the connection, if I can put it

10   that way, was not drawn in a Saskatoon Police

11   Service report and that connection was then not

12   forwarded onto you; is that fair to say?

13 *A*   That's how I understand it, Mr. Gibson.

14 **Q**   Okay. And if I could, just for the record, Mr.

15   Commissioner, the evidence of Chief Penkala's that

16   I was referring to is at pages 9394 and 9395 of

17   the transcript.

18   COMMISSIONER MacCALLUM: Okay.

19   BY MR. GIBSON:

20 **Q**   And again those three documents that I referenced

21   that were drafted by the RCMP in 1969, and it's

22   not necessary to put them up, but you'll recall

23   that your attention was drawn to the front page of

24   those documents where there was a stamp

25   designating that it had been forwarded to the

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1   Attorney General's office?

2   A   In Regina.

3   Q   In Regina?

4   A   Yeah, that caught my eye for sure.

5   Q   And again, your evidence was that that report from

6   within your department was never forwarded on to

7   you?

8   A   Absolutely not.

9   Q   Okay, thank you very much.

10   A   Mr. Gibson --

11   Q   Yes.

12   A   -- just one thing. Do you have the, readily

13   available the dates when the chief testified at

14   the, at this, because as I stop and think a

15   minute, I may indeed have been away. Is that in

16   front of you, sir?

17   Q   I'm sorry that it is not.

18   A   I think I was away for the, essentially the month

19   of May. I think the Commission was shut down for

20   part if not all of that, so I may in fact not have

21   heard all of his evidence, but I have no doubt

22   that what you are saying is, you know, is correct,

23   sir.

24   Q   Okay. Thank you.

25   A   Thanks very much, sir.

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1   COMMISSIONER MacCALLUM: Mr. Boychuk?

2   **BY MR. BOYCHUK:**

3   Q   Thank you, Mr. Commissioner. Good afternoon, Mr.

4   Caldwell.

5   A   Afternoon, sir.

6   Q   We know each other of course, but for the record,

7   my name is Chris Boychuk and I represent Eddie

8   Karst.

9   A   Thank you.

10   Q   Just by way of review, Mr. Caldwell, in 1969-'70,

11   you had had over 10 years' experience as a

12   prosecutor at that time?

13   A   Yes.

14   Q   I think 1958 you started; is that right?

15   A   That's right, sir.

16   Q   And during that period of time you would have run

17   numerous trials and preliminary inquiries?

18   A   That's correct, sir.

19   Q   And in preparation for running those trials and

20   those preliminary inquiries would have conducted a

21   large number of witness interviews?

22   A   That's right, sir.

23   Q   Including interviews with young people, say, in

24   their mid to late teens; is that right?

25   A   I would have.

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1   Q   So you would have experience with those types of

2   people, whether they were sometimes possibly the

3   accused or witnesses giving evidence against an

4   accused at a trial?

5   A   That's right, sir.

6   Q   And I also heard you tell Mr. Wolch that you

7   viewed your role as independent of the police

8   services; is that correct?

9   A   Yeah, that's -- that -- I would see it that way.

10 Q   Right. And in terms of preparing for those

11   witness interviews, you would review in detail any

12   statements that those witnesses had given?

13 A   That's for certain.

14 Q   And part of the purpose of conducting a witness

15   interview as a prosecutor would be to do your own

16   individual assessment of the witness?

17 A   That is part of it, sir, and to know what their

18   view was at the time they gave the statement and

19   go on from there, if you will.

20 Q   Correct. To look at what evidence they can

21   actually give at trial?

22 A   Yes, sir.

23 Q   And to do your own assessment as to their

24   credibility and truthfulness and reliability as

25   witnesses?

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1 *A*   Yeah. I think, Mr. Boychuk, that was an essential

2   thing to do.

3 **Q**   For you to do, and you would make your own

4   assessment, you wouldn't rely on the assessment

5   of, say, the officer who took the statement to --

6 *A*   No, that would be something I would want to be

7   satisfied when it got to me that it either was the

8   way it looked or if different I should act based

9   on the, if you will, different version or

10   whatever.

11 **Q**   Okay, thank you for that. And with respect to --

12   I'm interested, and I know Mr. Hodson questioned

13   you on your impression of certain of the

14   witnesses, and the ones I'm particularly

15   interested in are of course Albert Cadrain, Ron

16   Wilson and Nichol John, and one of the questions I

17   wanted to ask you is -- and I understand you met

18   with these individuals both before the prelim and

19   the trial; is that right?

20 *A*   That's right, sir.

21 **Q**   And at any course -- at any time during the course

22   of those interviews did either of those three

23   individuals make any complaint to you regarding

24   any mistreatment by, say, Detective Karst or any

25   other member of the Saskatoon Police Service?

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1   *A*   You are referring to Cadrain, John and also --

2   **Q**   Wilson.

3   *A*   -- Wilson are you, sir?

4   **Q**   Yes.

5   *A*   No, I did not receive any complaints from any of

6   them to that effect.

7   **Q**   Did they ever give you an indication that any of

8   their evidence was either in any way coerced or

9   planted by Mr. Karst or any member of the police

10   service?

11   *A*   No, sir, I didn't get that complaint, and I

12   certainly didn't get that impression based on my

13   own instincts, if you will.

14   **Q**   So either they didn't directly make any kinds of

15   assertions of those sort and you didn't form any

16   impression --

17   *A*   No.

18   **Q**   -- just from observing them?

19   *A*   No, that's right, sir. That's how I would sum it

20   up, just as you have, sir.

21   **Q**   And I know we heard from you in your examination

22   with Mr. Hodson that often these interviews would

23   take place in the presence of police officers?

24   *A*   Yeah, that was -- happened. I would say with any

25   witness for whom there was any sort of degree of

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1   question of will he show up, what shape will he

2   be, but it would also happen, sir, with what I

3   would call conventional witnesses, young and old,

4   who I had essentially no reason to worry about, it

5   was always handy to have an officer there for all

6   kinds of reasons.

7   Q   Okay. And did you, in observing Mr. Cadrain,

8   Mr. Wilson, for example, did you form any

9   impression that they felt intimidated at all by

10   the presence of a police officer?

11   A   No, I didn't. Mr. Cadrain at that point I felt

12   was a person who wasn't in any way rattled or

13   shaken by the fact that there was some police

14   officer involved, and of course he had been

15   interviewed quite extensively, once or more times.

16   Mr. Wilson was, who had had some legal

17   involvements, and I guess it's fair to say some of

18   his evidence as we saw here changed from time to

19   time, but he didn't give me any impression that it

20   was caused by police officers, and he particularly

21   related well with the Regina investigator on the

22   case who we had as a witness here.

23   Q   And in particular Mr. Wilson, any complaints

24   regarding Detective Karst?

25   A   Absolutely not, sir.

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1   Q   Okay. And can you tell us if you would have

2   formed an impression or made an allegation that in

3   any way any of their evidence was either tainted

4   by coercion or intimidation, what you would have

5   done in those circumstances?

6   A   I would think I would have had to pursue it, Mr.

7   Boychuk, and make a note of what they said, turn

8   to some person likely in the Saskatoon police

9   force, but possibly best not one of the

10   investigators simply to keep the matter in

11   different channels, if you will, would have been

12   how I would have reacted to that had it happened,

13   sir.

14   Q   Okay. Thank you, Mr. Caldwell, those are my

15   questions.

16   A   Okay, thank you, sir.

17   MR. BOYCHUK: Thank you, Mr. Commissioner.

18   BY MR. ELSON:

19   Q   Mr. Caldwell, you know me, I'm Richard Elson, and

20   I represent Saskatoon Police Chief Russel Sabo and

21   the Saskatoon Police Service.

22   A   Thank you, sir.

23   Q   I wanted to ask you -- first of all, to some

24   extent some of my questions are going to tread on

25   ground that's already been covered by

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1   Mr. Boychuk --

2   A   Very good.

3   Q   -- but I wanted to ask you, first of all, about

4   the letter you received from Deputy Chief Forbes

5   in 1969, which is document 007061, and

6   specifically I wanted to go to the third page

7   which has already been flagged on the screen.

8   This, you'll recall, was the letter you received

9   from Deputy Chief Forbes basically advising you of

10   the charge, and in the last paragraph of the

11   letter there is what would be perceived as a

12   request:

13   "May we ...",

14   receive:

15   "... your services, please, in

16   conducting this prosecution."

17   Now I believe that, when you were answering

18   questions of Mr. Hodson in reference to this

19   letter, you indicated that this letter was really

20   unnecessary; is that -- do you recall having

21   answered Mr. Hodson's question to that effect?

22   A   Mr. Elson, is this what one would call the

23   covering letter, it has a couple of previous

24   pages?

25   Q   That is correct. If we could perhaps scroll back

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1   to the previous, to the first page, --

2   A   Okay.

3   Q   -- this is the letter dated July 8th of 1969 --

4   A   Okay, sir.

5   Q   -- in which you were advised formally of the

6   charge.

7   A   Yeah.

8   Q   And again, to go back to the last paragraph of the

9   third paragraph of the letter, where there is the

10   reference to:

11   "May we have your services, please, in

12   conducting this prosecution.",

13   do you recall answering Commission Counsel's

14   question about this letter with the answer that

15   this letter really was, to use your words, 'not

16   necessary'?

17   A   Well the -- I would think, sir, that that last

18   one-sentence paragraph was not necessary in the

19   sense that it's a standard covering letter, longer

20   than usual because of the case, the -- I guess one

21   could say they are gonna get my services, it's a

22   nice thing to use that terminology but I'm sure,

23   Mr. Elson, that from time -- day-to-day I

24   essentially never wrote or phoned back and said

25   "yes, you may have my services", because it either

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1   went to me or one of my colleagues. So that was

2   just, to me, a nice closing if you will.

3 Q Quite frankly this, your instruction to prosecute

4   David Milgaard, would come from your superiors in

5   Regina in the department, or in the Attorney

6   General's office as it was then known at that

7   time; is that correct?

8 A Yeah. We would have, I'm sure, briefly discussed

9   how -- who is going to prosecute the case and, in

10   reasonably short order, I'm sure it was decided to

11   be me.

12 Q So, notwithstanding the last sentence in that

13   letter, you would agree with me that it was

14   understood by you, by the people in the Attorney

15   General's office in Saskatchewan at that time, and

16   also generally speaking by the police, that your

17   role as the prosecutor of an accused person was

18   not done at the behest of the police, it was done

19   at the behest of the Crown?

20 A That's my understanding exactly, Mr. Elson.

21 Q And in determining how you would act and what you

22   would do you would agree with me that your

23   discretion was pretty much independent, you were

24   not taking instructions from the 'police service',

25   as it was known at that time?

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1   *A*   No I, I was not, sir.

2   **Q**   And in that respect Mr. Lockyer, when he was

3   cross-examining you, made a reference to the rules

4   of disclosure as being set out in the *Boucher*

5   decision, the decision of Mr. Justice Rand, and I

6   take it you are aware of Mr. Justice Rand, in that

7   decision, setting out basically the role of a

8   Crown prosecutor --

9   *A*   Yeah.

10   **Q**   -- in 1955; do you -- are you familiar with that

11   case?

12   *A*   Mr. Elson, I can't say I am in a broad sense, but

13   was it a 1955 or earlier case, sir?

14   **Q**   That's correct.

15   Mr. Commissioner, I asked

16   counsel -- or Commission's staff to include in

17   CaseVault the decision of the Supreme Court of

18   Canada in the *Queen vs Stinchcombe*, and in that

19   particular -- and that has now been included as

20   document number 332085. If I could ask that that

21   document be brought forward, and specifically to

22   page 090, and paragraph 11.

23   Mr. Caldwell, in paragraph 11

24   Mr. Justice Sopinka, in the *Stinchcombe* decision,

25   refers to the role of Crown counsel, and

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1   specifically to the duty of Crown counsel, and in

2   doing so makes reference to the comments of Mr.

3   Justice Rand, to which I believe Mr. Lockyer was

4   referring when he referred to the *Boucher*

5   decision. And the quotation that Mr. Justice

6   Sopinka draws from Justice Rand's decision is as

7   follows:

8   "It cannot be over-emphasized that the

9   purpose of a criminal prosecution is not

10   to obtain a conviction, it is to lay

11   before a jury what the Crown considers

12   to be credible evidence relevant to what

13   is alleged to be a crime. Counsel have

14   a duty to see that all available legal

15   proof of the facts is presented; it

16   should be done firmly and pressed to its

17   legitimate strength but it must also be

18   done fairly. The role of prosecutor

19   excludes any notion of winning or

20   losing; his function is a matter of

21   public duty than which in civil life

22   there can be none charged with greater

23   personal responsibility. It is to be

24   efficiently performed with an ingrained

25   sense of the dignity, the seriousness

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1   and the justness of judicial

2   proceedings."

3   It's my understanding, Mr. Caldwell -- you can

4   correct me if I'm wrong -- that most prosecutors,

5   when they began their practice, if they began

6   their practice at any time after Justice Rand

7   made that comment, that most prosecutors were

8   generally aware of that admonition in the *Boucher*

9   decision?

10 A I would think so, Mr. Elson. It was timely, if

11   you will, in the sense of 1955, it was an

12   authoritative decision, and it was certainly

13   understandable and -- as I see it here, and I

14   believe we got into it slightly the other day but

15   I'm happy to pursue it if you would like to, sir.

16 Q No, that's fine.

17 A Yeah.

18 Q But would you agree with me that you were

19   generally aware of this comment and this

20   admonition to Crown counsel at the time David

21   Milgaard was prosecuted in 1969 and 1970?

22 A Yeah, I would be, Mr. Elson.

23 Q So in that respect you also, and following along

24   the same lines of having an independent discretion

25   and not being the counsel for the police, you had

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1   indicated, in answering Mr. Hodson's questions,

2   that sometimes there would be a difference between

3   the police theory of a case and the Crown theory

4   of a case; --

5 A   Uh-huh.

6 Q   -- do you recall giving that evidence to

7   Commission Counsel?

8 A   Yeah, I am -- I did, and I'm sure that's the case

9   from time to time with various cases, sir.

10 Q   And it would not be uncommon, during the period of

11   time that you were working in the Attorney

12   General's office, for you to be presented, in a

13   given prosecution, with what would be described as

14   a police theory, and you would review the

15   circumstances of the case and believe that "no,

16   that police theory is not the one to be followed",

17   and would establish your own theory?

18 A   Yeah, or suggest other avenues that looked more

19   promising toward a, if you will, a just solution

20   to the cases. That happened from time to time,

21   sir.

22 Q   Now Mr. Lockyer, when he cross-examined you,

23   suggested to you that the standard of disclosure

24   as it existed in 1969 was the *Boucher* standard of

25   disclosure, and the *Boucher* decision will speak

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1   for itself, but it's my understanding that really

2   the *Boucher* decision didn't say much, if anything,

3   about disclosure, and that the law with respect to

4   what a Crown prosecutor was obliged to disclose in

5   1969 and in 1970 was very unsettled?

6   A   I think that that's right, Mr. Elson, and at the

7   risk of being facetious I still have not been able

8   to uncover the term "disclosure" at that time for

9   what we were, you know, quite, I would think quite

10   carefully and thoroughly doing at that time, and I

11   hope this case would be an example of that, sir.

12   Q   Now in your evidence, throughout the questions

13   that have been asked of you by various counsel,

14   you have made reference to the Crown policy of

15   disclosure as it existed --

16   A   Uh-huh.

17   Q   -- at that time. Do you know whether or not you

18   would have had occasion to discuss how that policy

19   was implemented with police officers such as Elmer

20   Ullrich?

21   A   I don't ever recall discussing what lay behind the

22   policy and how it got the way it was on -- at a

23   given time. I would think Mr. Ullrich, as a very,

24   very painstaking and thorough-going person, seemed

25   to cover things almost to a fault, and very seldom

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1   one would have to go back and say "what about X,

2   Y, or Z", which is one of the reasons why his

3   appointment was such a boon to the department, the

4   police department, and of course to our office.

5   Q   This was not, 1969, the *Milgaard* case was not the

6   first occasion that you had to work with Elmer

7   Ullrich; is that correct?

8   A   No. That position was formed in 1965, he was the

9   original person in it, there was usually a junior

10   constable assisting him. So it had been in effect

11   in a plus or minus four years at that time on,

12   certainly, major cases, my memory would be most of

13   the cases that came our way, Mr. Elson.

14   Q   Right. So in that sense, during that 4,

15   4 1/2-year period of time between 1965 and

16   January of 1970, --

17   A   Yeah.

18   Q   -- when the Milgaard trial took place, it would be

19   fair to say that Elmer Ullrich was with you in the

20   prosecution of some notable cases?

21   A   He was. This was an exceptional case in that he

22   physically sat in Court and took notes because it

23   was so, if you will, long, complicated, and

24   difficult, but he -- we would see him, he would

25   deliver these covering letters and files on a

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1   daily or every two-or-three-day-basis, come to our

2   office, so we -- we had a good deal of contact

3   with him back and forth, and I'm sure, through

4   that, he was, you know, very familiar with what we

5   would be looking for. We, of course, felt free to

6   ask for more things, and he as well.

7   Q In the sense -- and in that context not only would

8   he be familiar with what you were looking for,

9   would you agree with me that Mr. Ullrich, prior to

10   1969, would also be generally familiar with the

11   disclosure policy, perhaps not having discussed it

12   with you, but having seen it operate?

13   A Yeah, that would be my feeling, sir, exactly.

14   Q So he would have known, if you would have had

15   communication with him during preliminary

16   inquiries, for example, communication with him

17   during the conduct of a trial, he would, through

18   that communication, be aware of the type of

19   material that would have been disclosed to defence

20   counsel in those other cases?

21   A He would, and this of course would assist him and

22   his office with ongoing cases, where he'd have a

23   much better idea of what was required or wanted by

24   our office and, for that matter, the courts.

25   Q Now so this policy that was being implemented, of

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1   providing statements, other physical evidence,

2   laboratory reports but not police reports; you

3   would be surprised if Mr. Ullrich was not

4   generally aware of how that policy worked in 1969

5   and 1970?

6   A   I would suppose he was, Mr. Elson, possibly not in

7   -- written to the letter of the law, but in a

8   practical working way, I'm sure he would be.

9   Q   Now I had put to you the comment that the law was

10   generally unsettled until the *Stinchcombe*

11   decision. If I could again refer to the

12   *Stinchcombe* decision, document 332085, and

13   specifically zero in on the comment made by

14   Justice Sopinka at paragraph 9. Now the

15   *Stinchcombe* decision, as I recall, would have come

16   down right around the time you were leaving the

17   Department of Justice; is that correct?

18   A   Umm, the --

19   Q   I believe it's a 1991 decision of the Supreme

20   Court of Canada.

21   A   Yeah. The federal department, sir, I left in '91,

22   and I -- that is the date of the judgement, as I

23   see.

24   Q   In that comment Justice Sopinka says:

25   "The circumstances which give rise to

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1   this case are testimony to the fact that

2   the law with respect to the duty of the

3   Crown to disclose is not settled. A

4   number of cases have addressed some

5   aspects of the subject: see, for

6   example ...",

7   and Justice Sopinka refers to some decisions.

8   A   Uh-huh.

9   Q   I note that one of the decisions that is referred

10   to is the *Bourget* decision of the Saskatchewan

11   Court of Appeal decision which, notably, is a

12   decision of Mr. Justice Tallis.

13   Justice Sopinka goes on to say,

14   after referring to those cases, and I quote:

15   "No case in this court has made a

16   comprehensive examination of the

17   subject. The Law Reform Commission of

18   Canada, in a 1974 working paper titled

19   *Criminal Procedure: Discovery* (the "1974

20   working paper"), and a 1984 report

21   titled *Disclosure By the Prosecution*

22   (the "1984 report"), recommended

23   comprehensive schemes regulating

24   disclosure by the Crown but no

25   legislative action has been taken

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1   implementing the proposals. Apart from

2   the limited legislative response

3   contained in s. 603 of the *Criminal Code*

4   ... enacted in the 1953-54 overhaul of

5   the *Criminal Code* (which itself

6   condensed pre-existing provisions),

7   legislators have been content to leave

8   the development of the law in this area

9   to the courts."

10   If you go back to the period of time when you

11   were working as prosecutor both with the

12   Provincial Attorney General's office and the

13   Federal Department of Justice would you agree

14   that Justice Sopinka's description of the law, as

15   in that paragraph I just put to you, is indeed a

16   correct description?

17   *A*   The -- it was, Mr. Elson. As I see it, it was the

18   description, as I see it, sir.

19   Q   Now Mr. Justice Rand, in his admonition, makes

20   reference to the fact that it is the role of the

21   prosecutor to present credible evidence.

22   *A*   Uh-huh.

23   Q   Would you agree with me -- and to some extent

24   you've already touched upon this in answering

25   Mr. Boychuk's questions -- would you agree with me

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1   that the assessment as to whether or not a

2   witness, a Crown witness was credible and should

3   be put on the stand, was your call and your call

4   alone as prosecutor, and that although you might

5   receive advice from the police officer, you

6   certainly were not taking instructions from the

7   police officers?

8   A   That would be an accurate way of putting it. A

9   person should be credible, I -- is presumably

10   advanced by the police to the prosecutor as

11   credible, at that point I think there is a whole

12   separate stage where the prosecutor must look at

13   it and say "is this person credible". He may very

14   well make that decision on a sound and ethical

15   basis and occasionally, of course, despite all of

16   the above, the witness turns out to be not

17   credible, but that's, if you will, another story,

18   sir, but I -- of course that does happen.

19   Q   And that would indeed have occurred in the course

20   of your career prior to the Milgaard prosecution?

21   A   Absolutely, sir.

22   Q   Now in assessing -- I believe Mr. Lockyer -- and I

23   keep seeming to refer to his cross-examination --

24   Mr. Lockyer, I believe, might have used the

25   description of you as a "gatekeeper"; do you

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1   recall that description being presented of your

2   role as a Crown prosecutor?

3 A Yes, sir.

4 Q And you would agree with me, then, that one of

5   your roles as a gatekeeper, consistent with the

6   propositions Mr. Lockyer was putting to you, is

7   that you would make those credibility assessments

8   of Crown witnesses; correct?

9 A Yup. It wasn't a term I had heard much of before

10   this hearing, sir, but that would be one of the

11   things that would legitimately spring out of you

12   viewing yourself as a gatekeeper, would be to sort

13   out those very things as they are -- in effect as

14   they arrived at your office, I would say.

15 Q In that sense, Mr. Lockyer's description and use

16   of the word "gatekeeper" was not inappropriate?

17 A No, that's correct, sir.

18 Q Could you comment on what your role as gatekeeper

19   would be in assessing whether or not a Crown

20   witness had been promised any favours by the

21   police, or had been intimidated or bullied by the

22   police --

23 A Uh-huh.

24 Q -- into giving a statement; what would your role

25   be with respect to the assessment of a witness in

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1   terms of making that assessment, that call, that

2   decision?

3   A   Well with the hypothetical witness I suppose there

4   would be no presumption that a given witness had

5   been promised favours, if you will, with respect

6   to his evidence, and as you, you interviewed that

7   witness and went on, I think you'd ordinarily be

8   reassured as to what he had said. If it cropped

9   up, during that, that there were suspicions along

10   the lines you've mentioned I would follow that up

11   with the witness and then, I think, with a sound,

12   good, sound, investigator if one were available

13   with respect to that case, and see what he thought

14   of it, and then I would have to make a call, one

15   way or the other, that we either proceed with this

16   fellow because he looks all right, to put it very

17   awkwardly, or if there did seem something wrong

18   there I could of course, I could of course not

19   call him as a witness.

20   Q   And if I could sort of summarize it -- and if I'm

21   not summarizing correctly please tell me -- you

22   would make an assessment, if it came to your

23   attention that a witness had been promised a

24   favour for giving a statement that supported the

25   Crown's case and as a consequence of that you had

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1   doubts, perhaps, about this witness' real

2   credibility, --

3   *A*   Uh-huh.

4   *Q*   -- or if you perceived that a witness had been

5   bullied in order to give a statement that

6   supported the Crown's case and as a result you

7   suspected the witness' credibility, you would not

8   think twice in rethinking whether or not that

9   witness should testify?

10   *A*   Certainly not on the rethinking. And I, Mr.

11   Elson, I did lose track of the bullied aspect,

12   which I think would be something that would be

13   relatively easy to detect and would really, you

14   know, get your attention and cause me at any rate

15   to immediately look into whether this seemed

16   legitimate, go to a good, senior, serious

17   investigator and pursue it that way, or to

18   parents, or to other witnesses. And of course, if

19   I thought that were the case, I could simply not

20   call the witness.

21   *Q*   Okay. Let's go the next step. Would you not

22   agree that it is your duty, as Crown prosecutor,

23   to assess a possible Crown witness to determine

24   whether or not they have been provided or promised

25   favours to give a given statement --

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1   *A*   Yeah.

2   **Q**   -- or bullied into giving a statement; isn't that

3   one of your responsibilities to make that

4   assessment?

5   *A*   I expect so, Mr. Elson. In truth I would not,

6   with a conventional witness I -- I don't think I'd

7   lead off with the "did someone promise you

8   favours", and when we get by that, "did someone

9   bully you". I certainly, for one, didn't do that

10   as an opening statement. If there's any reason to

11   think that I would have pursued either branch of

12   that, of course.

13   **Q**   Right.

14   *A*   And even a reason, let's say from another witness

15   who suggested to me "this is what's going on", or

16   for that matter from defence counsel or the

17   accused, any, you know, legitimate suggestion to

18   that effect, then I would feel obliged to pursue

19   it whatever the outcome was.

20   **Q**   And that was the next question I was going to put

21   to you, is that you wouldn't put that question

22   deliberately, it would rather be dealt with

23   subtly, --

24   *A*   Yeah.

25   **Q**   -- and you would making an assessment of the

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1   witness as you are questioning that witness?

2   *A*   Yeah. I would not start a witness interview with

3   "(a) have you been promised favours, (b) have you

4   been bullied", never did that, but any sign that

5   we have been talking about, sir, would certainly

6   trigger me into following it up in any of that

7   range of ways, sir.

8   **Q**   Is that particularly a concern when you are

9   dealing with young witnesses, say for example

10   witnesses of the age of Ron Wilson and Nichol John

11   who may be impressionable, somewhat pliable; are

12   there any greater concerns that you, as a Crown

13   prosecutor, have in presenting important

14   witnesses or important, important evidence from

15   witnesses of that age?

16   *A*   Well the, these would be older witnesses we're

17   talking about, but the routine that has to be gone

18   through with very young witnesses, in the way they

19   are and aren't sworn, I have seen judges do that

20   hundreds of times. Interestingly enough, in

21   almost all those instances, the judge decided the

22   witness was suitable to either be sworn or go

23   ahead and give his evidence anyway.

24   Now with younger witnesses I

25   might be, for the reasons that you have mentioned,

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1   such as impressionability or lack of maturity, I

2   would likely be more cautious, and certainly there

3   is a good share of so-called mature witnesses who

4   set out to fool you as well.

5   Q   In the case, and I believe you've already touched

6   upon this with Mr. Boychuk, but in the case of Mr.

7   Wilson and Ms. John you did not, in interviewing

8   them and in interacting with those two witnesses,

9   you did not come to the conclusion that (a) they'd

10   been promised any favours to give their statements

11   in May of 1969, and you also had concluded (b)

12   that they had not been bullied into giving their

13   statements in May of 1969; is that correct?

14   A   That's correct, Mr. Elson, they -- each one of

15   them presented, I would say, their own set of

16   difficulties to any prosecutor, but as I went

17   through that, I think we've heard that I

18   interviewed Ms. John on three occasions, and I

19   never came out of it with either of those

20   conclusions about those two. I was, I felt,

21   content to call them as witnesses with what I knew

22   of their evidence and then, of course, see what,

23   what transpired in the actual case as well, sir.

24   Q   And having said that, at the time that you

25   interviewed Nichol John on any one of those three

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1   occasions in the course of the prelim, preparing

2   for the preliminary inquiry and then of course

3   preparing for the trial, I take it that you were

4   aware that Nichol John had spent a period of time

5   in May of 1969 in cells --

6   A   Yeah.

7   Q   -- at the Saskatoon Police Department; is that

8   correct?

9   A   I was, sir, and I -- I don't know if I'm allowed

10   to suggest the circumstances of that which became

11   known to me. These were young people from Regina,

12   certainly her and -- Nichol John and Wilson. As I

13   recall that incident she, in effect, wanted to be

14   in, if you will -- pardon me -- broadly called a

15   safe setting. She was in the female cells and by

16   her own request ended up in what I believe was a

17   matron's office, if I recall the evidence, but the

18   genesis of all that was her desire to be in what

19   one might call a controlled or more or less safe

20   setting.

21   Q   Knowing that she was in the cells in the Saskatoon

22   Police Service at that time, around the time of

23   the statement, shortly before the statement that

24   she gave to Inspector Roberts, --

25   A   Yeah.

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1   Q   -- were you satisfied that that was not done to

2   intimidate her or to bully her; had you come to an

3   assessment as to --

4   A   Yes, sir, I'm sure it wasn't. And it was one or

5   more of the senior investigators I think she'd

6   been dealing with and had conveyed that, it might

7   have been Lieutenant Short, it may have been Karst

8   or Ray Mackie. But that was her idea, as I

9   recall, and it was carried out to, in effect,

10   reassure her, even though she ended up in the

11   cells for I think one or, if not, two evenings,

12   and I'm sure I knew that, sir, at the time.

13   Q   Now you also testified, in answering Mr. Hodson's

14   questions and the questions of others, that you

15   would typically have a police officer present with

16   you when you interviewed Crown witnesses, and you

17   indicated your reasons for that. If you had the

18   sense that the presence of a police officer was

19   intimidating to that witness, and that as a result

20   of the presence of that police officer you might

21   not be getting the true information, what steps,

22   if any, would you take to deal with that?

23   A   I -- unless the witness was someone who, you know,

24   showed the potential for blowing up in some

25   fashion, physical or otherwise, I would -- I'd

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1   have no difficulty with asking the police officer

2   to wait down the hall or in my office, or "look me

3   up in an hour" or something like that, because in

4   truth you could not have an officer in on -- with

5   the interview of each and every witness, Mr. --

6   sir; nor was it, you know, needed in my

7   estimation.

8   Q Now, in the case of Nichol John, you had indicated

9   that she and Officer Mackie, Ray Mackie, did not

10   particularly get along well; do you recall whether

11   or not Mackie was in the room at any time when you

12   interviewed Nichol John?

13 A I don't think so. I think this was reported to me

14   as a -- at the time when she bolted from my office

15   in the courthouse out the back door and onto the

16   parking lot and toward, I think, her father's

17   truck, that's when I learned that, and I

18   presumably said "how -- what's going on here", and

19   for rightly or wrongly, that was the reason that

20   was advanced.

21 Q Do you have a recollection as to which police

22   officer was with you at the time Nichol John

23   bolted from your office?

24 A I think that's in print, and I believe Sergeant

25   Ullrich was there and it may have been one of the

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1   investigators as well, Mr. Elson.

2 Q   Now just a final series of questions, Mr.

3   Caldwell. We have heard evidence as to the

4   material you did not receive, we've heard evidence

5   with respect to the material that you did receive

6   from the Saskatoon Police Service, --

7 A   Uh-huh, uh-huh.

8 Q   -- and I understand from your evidence that you

9   did not receive the document which has been

10   loosely referred to as "the script" --

11 A   That's correct, sir.

12 Q   -- which I believe is 06799; that is the document,

13   I believe, prepared by Mackie that you did not

14   receive?

15 A   That's correct, Mr. Elson.

16 Q   The next document I understand you did not

17   receive, or one of the next documents -- sorry --

18   one of the document you did not receive is Index

19   of Statements, which I believe is 0063 -- I'm

20   sorry, I believe you did have that, let's just

21   identify that, 006301; sorry, I believe you did

22   have this?

23 A   I think you're right, Mr. Elson, that I --

24 Q   And I believe you testified to the effect that you

25   did have it?

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1   A   I'm sure that's right.

2   Q   Mr. Gibson has already dealt with the RCMP reports

3   that you did not have and just, if we can identify

4   those, I believe there is the statement prepared

5   by Riddell, which is 065399, and that is the

6   report prepared -- I'm sorry, I'm referring to

7   them by their surnames, I've forgotten his rank?

8   A   Oh, I believe it is superintendent, but I know the

9   investigator you mean, sir, who -- I think that's

10   several pages, that document?

11   Q   Inspector Riddell?

12   A   Yeah, Inspector Riddell, yes.

13   Q   Now --

14   A   I'm sorry, sir, that I did not receive.

15   Q   You did not receive that?

16   A   Yeah.

17   Q   And also you did not receive the report prepared

18   by Corporal Rasmussen which is 250097. It's

19   supposed to be 97. All right. I obviously had it

20   wrong.

21   A   Yeah, I think that's incorrect, sir.

22   Q   If someone could help me, it's the police report

23   of Corporal Rasmussen.

24   COMMISSIONER MacCALLUM: 250597.

25   MR. ELSON: All right, 597, that's correct.

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1   I've got one too many zeros.

2   A   This, sir, appears to be 098 we're looking at, or

3   598, excuse me.

4   BY MR. ELSON:

5   Q   598, and I'm sorry, I've misdescribed it. You

6   agree with me, as Mr. Gibson pointed out, the RCMP

7   reports, you did not receive any of the RCMP

8   investigation reports; is that correct?

9   A   That's correct.

10   Q   And in fairness to you and in fairness to

11   Mr. Gibson, he did identify that in one of the

12   RCMP reports there is a description of the theory

13   that the person who committed the 1968 assaults

14   may very well have been the killer of Gail Miller?

15   A   Yes, sir, we did look at that.

16   Q   And you've been here at the Commission for most of

17   the proceedings, you are now aware, primarily

18   through Mr. Ullrich's testimony, that not only did

19   you not have that RCMP report, those two RCMP

20   reports were not filed with the City of Saskatoon

21   police either?

22   A   I'm sure that's the correct evidence. He, as we

23   know, had to testify via videotape, but it's I

24   guess shocking that not only did I not have them,

25   which was, you know, I think awful, but the fact

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1   that they didn't get to the police department

2   proper, Mr. Elson, would prevent them ever

3   following it up and saying let's go and see if the

4   prosecutor got them. Evidently they didn't. For

5   sure they didn't hit me and, from what you've

6   said, sir, Sergeant Ullrich's evidence was that

7   they did not get to the police file either, which

8   is --

9   Q   My understanding is that it was common practice

10   that whenever the RCMP were asked to assist any

11   municipal police force in Saskatchewan, whether it

12   be Saskatoon, Regina, Prince Albert, that the RCMP

13   would prepare their own investigation reports and

14   that it was typical practice not to provide a copy

15   of the investigation report to the municipal

16   police service. Are you aware from your

17   experience other than in this case as to whether

18   you were aware, number 1, that the RCMP were

19   helping an investigation, and number 2, that the

20   investigation reports were or were not maintained

21   on that municipal police department's file?

22   A   Well, Mr. Elson, there's two or three parts, and I

23   hope I don't miss any, I looked at the very

24   comprehensive project Flicker matter in the wake

25   of realizing I didn't get these things. Volume 1,

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1   page 45 of that document says major investigations

2   reported through channels to division headquarters

3   Regina and then to the department of the Attorney

4   General, there's a file 92-8277F attached to that,

5   and that is, you know, absolutely shocks me that

6   good, legitimate investigations were done by them

7   which went up the channels in their force and

8   then, if I can put it, cross country to the

9   department of the Attorney General in Regina and

10   clearly never, from that department, back down to

11   my office or other ones, Crown prosecutors in the

12   province.

13   Mr. Elson, you asked me one

14   other thing and I --

15   Q   No, I believe that was it.

16   A   Oh.

17   Q   I was asking whether or not -- more to the point,

18   if you could talk about examples, are you aware of

19   any case where the RCMP, to your knowledge, were

20   assisting a municipal police force such as the

21   Saskatoon Police Service and at the same time

22   there were RCMP investigation reports on that

23   municipal police department's file?

24   A   Well, I'm not, but in this context I wouldn't

25   expect to be unless I was, you know, very deeply

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1   involved in that particular case, whatever it was.

2   That way -- one would hope to learn that almost

3   even by accident, there's an RCMP name in that,

4   how come I haven't heard about the investigation.

5   I don't know if that answers you, Mr. Elson.

6 Q   I think it does. In terms of dealing with

7   recommendations, and I'm not sure exactly what the

8   practice is today, but I think that in some

9   respects it is still the same as it was in 1970.

10   Would you agree that it would be appropriate for

11   all police forces to share the investigation

12   reports in those investigations that they are

13   working on co-operatively?

14 A   Yeah, I certainly would. I had many cases which

15   were solely investigated by RCMP members, and

16   complicated and difficult cases in which the city

17   police were not called in, others in which they

18   were. It's inconceivable to me that the

19   knowledge, you know, in any one of those cases

20   wouldn't find its way into the files or minds of

21   the, you know, co-operating investigators from the

22   other force. I just don't see how it could be

23   otherwise. Regrettably, Mr. Elson, in this case

24   it wasn't that way.

25 Q   I believe, and you've already touched upon this a

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1   little bit in answering Mr. Boychuk's questions, I

2   believe you were here for at least a portion of

3   former Chief Penkala's testimony before the

4   Commission; is that correct?

5   A I have a memory that I was, sir.

6   Q And I take it that you are aware through your

7   counsel and through the disclosure of the material

8   on CaseVault and also through former Chief

9   Penkala's testimony that for these many years, to

10   the surprise of a number of people, he kept his

11   own file with respect to this case?

12 A Yes, sir.

13 Q And you are also aware that the file he kept in

14   regard to this case contained documents which were

15   not on the file or within the records of the

16   Saskatoon City Police?

17 A I believe that's so, sir.

18 Q And have you had occasion with your counsel to

19   review the records that were disclosed through

20   Commission Counsel by former Chief Penkala?

21 A At the moment I can't say it. Possibly in

22   re-examination, sir, that could be covered. I

23   looked at an awful lot of documents and I think

24   I'm going to say that I did because there was very

25   thorough disclosure which took a long time to go

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1   through. Maybe my counsel will bail me out now.

2   MR. ELSON: That's fine.

3   MS. KNOX: It's not bailing him out, it's

4   bailing me out. I appreciate his saying that he

5   got very thorough preparation, but in fact I did

6   not specifically review the folder of Penkala

7   documents with him, so his knowledge base would

8   be from in the hearing room and hopefully Mr.

9   Elson can identify for him to that which he

10   refers. I just didn't do it.

11   MR. ELSON: I will do that,

12   Mr. Commissioner. I had indicated to Ms. Knox

13   that I did plan to ask Mr. Caldwell questions

14   with respect to this and she did ask me that if

15   he did so that I should refer to those documents

16   and have them identified before I did and I'm

17   certainly prepared to do that.

18   There are a number of

19   documents, I won't refer to all of them, because

20   I don't think that all of them carrying the kind

21   of significance that perhaps others do.

22   A   Okay, sir.

23   BY MR. ELSON:

24   Q   The first document is document 324671 which is a

25   letter from then Lieutenant Penkala to Officer

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1   Kerr at the RCMP Crime Detection Laboratory. This

2   is a document, a letter dated March 18, 1969, this

3   document would have existed after David Milgaard

4   had been brought to the attention of the Saskatoon

5   police by Albert Cadrain, and although the two

6   file numbers -- if we could actually look at the

7   two file numbers at the top of the page, the two

8   file numbers refer to the (V1)- and (V2)-----

9   cases as I recall it, that in fact Mr. Penkala

10   maintained this document on his folder related to

11   the Gail Miller case and that he was specifically

12   asking for laboratory information from Officer

13   Kerr. As I understand his evidence, specifically

14   to examine Exhibit A -- if we look at the purpose

15   for him sending this material, it says to examine

16   Exhibit A, the slide, B, ladies panties, and C,

17   ladies jacket for presence of human semen, and if

18   present to establish ABO agglutogens. You did not

19   see this document?

20   A   Absolutely not, sir.

21   Q   And indeed if it had the file reference in the

22   upper right-hand corner as it did, 10173/68 and

23   10910/68, you would have probably believed that it

24   related not to the Gail Miller case, but related

25   to some other cases having occurred in 1968?

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1   *A*   Without knowing anything, I would assume it would

2   refer to the two females in the reference line,

3   Mr. Elson, but that may not be the case, that's

4   what I would assume, and I don't know if your

5   information is similar to that or not, but in any

6   event, I don't know.

7   *Q*   If we would also look at the next document,

8   324672, which is a two page document, a laboratory

9   report from the Royal Canadian Mounted Police,

10   look at the date, April 1, 1969, the lab file

11   number 286-69, and I believe, if I'm not mistaken,

12   that this was a laboratory report you did see but

13   believed it did not pertain to your file?

14   *A*   I can't say that, Mr. Elson. The one -- the only

15   document that we've seen many times where I wrote

16   not related, omit or something is not this

17   document.

18   *Q*   Not this document?

19   *A*   Yeah.

20   *Q*   I'm sorry, and I stand corrected.

21   *A*   No, that's fine, sir, but just so you know it's a

22   different one.

23   *Q*   So you did not see this document either?

24   *A*   No reason to think I would have.

25   *Q*   The next document is 324683, a letter again from

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1   Lieutenant Penkala to Officer Kerr at the RCMP

2   Crime Detection Laboratory dated April 21, 1969,

3   you did not see this document either. Do you have

4   any recollection of seeing it?

5   A   Absolutely not, sir.

6   Q   The next document is a letter, 324695, from

7   Dr. Emson to Lieutenant Penkala dated June 2nd,

8   1969 which specifically refers to the A antigens.

9   Do you recall having seen this letter?

10   A   I do not, Mr. Elson.

11   Q   And this letter was not included in the police

12   material that was provided to you?

13   A   I'm sure it was not.

14   Q   And based on the information you've received in

15   this case, this letter wasn't even contained in

16   the police records?

17   A   Well, that I can -- I can accept that, sir, based

18   on what some investigation has revealed is the

19   case.

20   Q   And in follow-up to that letter there's also the

21   letter from Lieutenant Penkala to Officer Kerr at

22   the RCMP Crime Detection Laboratory which is

23   324697. Sorry, I should give the number first.

24   And did you not see, in light of the fact that you

25   did not see Dr. Emson's letter, I take it you did

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1   not see the letter from Lieutenant Penkala to

2   Officer Kerr?

3   A   No, sir.

4   Q   I'll skip the subpoena. There's also a daily

5   journal. You typically -- I'll just maybe refer

6   to the document, it's 325044. That's actually the

7   first page of the journal. The cover page is

8   325043 and the first page of the journal is

9   325044. It was not common practice for you to

10   receive journals that would be maintained by

11   police officers such as Lieutenant Penkala in

12   identification; is that correct?

13   A   That's exactly so, sir.

14   Q   And you would also typically not receive police

15   officers' notes or excerpts, or photocopies of a

16   police officer's notebook with respect to a

17   certain investigation?

18   A   That is correct as well, sir.

19   Q   Do you recall ever having made a request for a

20   police officer's notebook or for a journal in the

21   conduct of this particular investigation?

22   A   Oh, not in this one, sir, I do not.

23   Q   I won't put the notebook to you. The next

24   document I would like to put to you from the

25   Penkala folder is 324806 which is a document that

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1   describes the circumstances of the offences

2   related to the victims (V1)-, (V2)----- and

3   (V3)------, and I believe it was former Chief

4   Penkala's evidence that this was not in his

5   handwriting and he couldn't recall who had

6   prepared it?

7   *A*   Yeah.

8   **Q**   But it was on his file relative to the Milgaard

9   investigation. You would agree with me that that

10   document was not included in the police records,

11   nor was it included in any of the material that

12   was forwarded to you?

13   *A*   No, sir, and nor was it my handwriting I'm pleased

14   to say.

15   **Q**   And the final documents that I wanted to refer to

16   are a series of photographs, they begin with a

17   photograph 324845, and that is the first

18   photograph in a series of photographs of Gail

19   Miller's funeral, and I take it you had not been

20   provided with photographs of Gail Miller's funeral

21   that had been taken by officers of the Saskatoon

22   Police Service?

23   *A*   No. There was a report somewhere that photos were

24   made. This is the first I've seen of them, if

25   this is what they are.

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1   **Q**   There was a reference, I believe there were police

2   officers who had attended at the funeral who had

3   taken photographs for the purposes of trying to

4   identify possible suspects.

5   *A*   That would be my understanding.

6   **Q**   And you recall having read that in a police

7   report?

8   *A*   I did, Mr. Elson.

9   **Q**   But you were not -- but the photographs were not

10   produced to you?

11   *A*   They were not.

12   **Q**   And were you aware that these photographs were on

13   the police file or were you aware that they had

14   been maintained by former Chief Penkala for these

15   number of years?

16   *A*   No, I wasn't. I was sure they had been taken

17   based on that police report and I would assume

18   they still existed somewhere, but this is the

19   first I've seen of them, sir.

20   **Q**   Now, this is a bit of a convoluted question, but

21   it has to be asked. When we look at the material

22   that we acknowledge you did not see, notably the

23   script prepared by Mackie, Detective Mackie, the

24   RCMP reports of Inspector Riddell and Corporal

25   Rasmussen and the Penkala folder, the salient

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1   documents of which I've just gone through with

2   you --

3   A   Yes, sir.

4   Q   -- if we set those documents aside for a moment,

5   is there any document that existed, that you now

6   know existed in 1969 or 1970 that you did not

7   receive that in your opinion would have made a

8   difference in the way you conducted the

9   prosecution of David Milgaard?

10   A   Mr. Elson, I do not know of any whatsoever.

11   Q   Thank you, Mr. Caldwell. I have no further

12   questions.

13   A   Thank you, sir.

14   BY MR. WILSON:

15   Q   For the record, my name is Garrett Wilson and I

16   represent Serge Kujawa, but you and I don't need

17   any introduction, Mr. Caldwell?

18   A   I'm afraid that's right, sir.

19   Q   In fact, we were together in the prosecution

20   business more years ago than we would care to

21   remember.

22   A   That's so, sir, in Regina initially.

23   Q   Yes. And you carried on and joined the department

24   of the Attorney General and I went to the other

25   side and I think you told us that you joined the

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1   department in the fall of 1958?

2   *A*   That's right, Mr. Wilson.

3   *Q*   And four years later in 1962 you came up to

4   Saskatoon?

5   *A*   Correct.

6   *Q*   And headed the Saskatoon prosecution unit?

7   *A*   That's right.

8   *Q*   And you remained in that position until 1987,

9   almost 30 years you were with the department?

10   *A*   That's right, sir.

11   *Q*   All on the prosecution side?

12   *A*   That's correct.

13   *Q*   And the office in Saskatoon I take it grew

14   somewhat in scope and numbers of bodies and

15   responsibilities?

16   *A*   From one until I believe 11 bodies when my

17   position was abolished, Mr. Wilson; that is,

18   prosecutors.

19   *Q*   Yes.

20   *A*   Yeah.

21   *Q*   So your responsibilities increased materially over

22   the years?

23   *A*   That's right, sir.

24   *Q*   You told us also I think that Mr. Kujawa followed

25   you into the department of the Attorney General

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1   not far behind you?

2   *A*   That's correct. Mr. Kujawa was a classmate of

3   mine at law class of 1957 and around 1960 I

4   learned that he was, he had articled with C.

5   Roberts Davidson, Q.C. of Regina, an eminent

6   barrister, and I learned Mr. Kujawa was thinking

7   of moving I believe to Rosetown to practice, and I

8   put him in touch with our Deputy Attorney General

9   Roy S. Meldrum of that day and they had an

10   interview which eventually led, I believe, to Mr.

11   Kujawa being employed by our department.

12   Q   Uh-huh. And the rest, as they say, is history.

13   *A*   Yes, sir.

14   Q   Mr. Kujawa, while you were in Saskatoon and

15   growing with the unit here, his position changed

16   and evolved and his responsibilities also grew;

17   did they not?

18   *A*   That's right. He would have been -- would have

19   been, in effect, doing day-to-day prosecutions

20   initially and the department was reorganized two

21   or three times and he received different titles as

22   that went on, but he stayed in Regina throughout

23   the period in terms of his base.

24   Q   Yes. He received position titles such as

25   associate deputy minister, assistant deputy

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1   minister, that sort of thing?

2   A   Yes, sir.

3   Q   But essentially remained on the prosecution side?

4   A   That's right, Mr. Wilson.

5   Q   Yeah. Now, you told us a few minutes ago that

6   there might have been some discussion in your

7   office in 1969 as to what prosecutor would

8   undertake the responsibility for the Milgaard

9   prosecution and the decision was that you would

10   take it on?

11 A   That's the -- that's right.

12 Q   And that might have been, might have involved head

13   office in Regina to a certain extent?

14 A   It could well have. I was the, if you will,

15   senior in our office of two people and I think it

16   was pretty well a foregone conclusion that I would

17   be taking it, but I suspect that I talked to Serge

18   and not likely our deputy, but Serge would be head

19   of the prosecutions, whatever title he had at that

20   time I think, Mr. Wilson.

21 Q   Okay. But once the decision was made that it was

22   your file?

23 A   Uh-huh.

24 Q   It was your baby from then on; was it not?

25 A   Oh, that's correct, yeah.

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1   Q   There would be no advice, direction given to you

2   in the handling of that prosecution by head office

3   in Regina?

4   A   Only when I requested it, Mr. Wilson.

5   Q   I see. In fact, for a prosecutor to receive any

6   interference from above, his superior in the

7   conduct of a case, would be bordering on the

8   improper; would it not?

9   A   Yeah, interference for sure. Solicited advice of

10   course, you know, would be quite proper, as we all

11   know, so I wouldn't regard anything that came to

12   me from our Regina office as interference by any

13   stretch of the term, Mr. Wilson, in this respect.

14   Q   So to borrow some phrases that I've seen in the

15   material around this Inquiry, would it be fair for

16   me to say that at no time did Mr. Kujawa direct

17   you in the conduct of the prosecution?

18   A   He did not in the best sense of that word,

19   whatever. If I asked to discuss things, we would

20   discuss it in very, in some instances involving

21   Mr. Perras my colleague, in some instances Mr.

22   Kujawa, but I think it was pretty limited. Of

23   course they had a very busy office going on in

24   Regina, wouldn't be anxious to, you know, spend

25   more time than necessary with me, if you will.

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1   Q   And you did tell us earlier that the only time

2   that you might have discussed the case with Mr.

3   Kujawa was with respect to section 9(2) of the

4   Evidence Act?

5   A   Yeah, that is so, and that's in one of my reports,

6   Mr. Wilson.

7   Q   When you left the department in 1987, Mr. Kujawa

8   was still with it?

9   A   Yes, he was, in Regina.

10 Q   He was approaching retirement though; was he not?

11 A   Yeah. He was a few years, three, four, five years

12   older than me. He had come into law school at a

13   later stage than most of our classmates.

14 Q   A bit of a mature student?

15 A   Yeah, and certainly a very, very bright student as

16   well.

17 Q   You worked with him in the department from 1960

18   until 1987, 27 years?

19 A   That's right. In '58 -- that's correct, that's

20   when he came in, Mr. Wilson, that's right exactly.

21 Q   So you had a rather extensive opportunity to

22   observe Mr. Kujawa and his professional competence

23   and integrity?

24 A   I did.

25 Q   How would you rate, in particular, the integrity?

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1   A   He was -- he had, you know, an extremely proper,

2   if you will, degree of integrity, if that's how

3   you measure those things. He was a person with,

4   I'm sure, very firm views of right and wrong and a

5   person who would I think come to those views quite

6   rapidly and, all things being equal, would stick

7   with them. He was certainly a bright person in

8   terms of law school and certainly an excellent, in

9   my view, day-to-day prosecutor, as well as a

10   person who was very useful for advising more

11   junior people, etcetera, who might want to, you

12   know -- one of the advantages of being in Regina,

13   I had mentioned earlier that our Court of Appeal

14   only heard criminal cases in Regina and Serge took

15   a goodly portion of those, and various other of

16   the solicitors later did, but he would be in a

17   position of knowing from week to week what the

18   view of our Saskatchewan Court of Appeal was on

19   some criminal or procedural issue.

20   Q   You were aware, Mr. Caldwell, that some years ago,

21   arising out of these multiplicity of Milgaard

22   proceedings, if I may say that, that Mr. Kujawa

23   wound up accused of a cover-up of the Milgaard

24   prosecution?

25   A   Yeah.

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1   **Q**   How does that conduct square with your opinion of

2   his professional integrity?

3   *A*   Well, that was absolutely out of the question. I

4   think, Mr. Wilson, that that was an ill-founded

5   accusation, but at least limited to Regina. I

6   think the accused were -- our Attorney General

7   Mr. Romanow, Mr. Kujawa, whatever his title was, I

8   believe our Deputy Attorney General Ken Lysyk, who

9   was another classmate of ours, were alleged to

10   have got the Milgaard and Wilson (sic) files

11   together and cooked up some method of keeping them

12   separate or hiding them or something of that

13   description.

14   **Q**   I wanted to ask you about Mr. Romanow.

15   *A*   Absolutely.

16   **Q**   And Mr. Lysyk. Mr. Romanow served as Attorney

17   General of Saskatchewan from 1971 to 1982; did he

18   not?

19   *A*   That would -- I'm sure your dates are right, sir.

20   **Q**   He was a member of the Law Society of

21   Saskatchewan?

22   *A*   Yes.

23   **Q**   And he returned to public office in Saskatchewan

24   as premier in 1991 and served as such all through

25   the 1990s?

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1   A   That -- I'm sure your dates are correct,

2   Mr. Wilson. I can't give you a different opinion

3   on that. I'm sure you are right.

4   Q   Yeah. Would you like to comment on his standards

5   of professional integrity?

6   A   Yeah, they were -- they were totally aboveboard,

7   and one of the things Mr. Romanow practiced

8   diligently was that he would not let any issue,

9   for instance, about the whole prosecutions end of

10   the department get to the point where he was

11   trying to influence it. I think -- not him

12   necessarily, but some of the elected officials

13   early on, there had been attempts made to suggest

14   what about this and that, and he was one of the

15   ones who learned, I think, and specifically

16   practiced that, don't come near me with those

17   issues about what should happen to file X when he

18   was Attorney General, which of course worked out,

19   you know, extremely well for everyone when that

20   was the case.

21 Q   Mr. Romanow represented a Saskatoon constituency;

22   did he not?

23 A   That's right, sir.

24 Q   And you were heading the prosecution unit in the

25   City of Saskatoon?

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1   A   Yeah, that's correct.

2   Q   Was there ever an occasion during those years,

3   1971 to 1982, when Mr. Romanow or anyone on his

4   behalf interfered in any degree with any of your

5   files?

6   A   Absolutely not, anything resembling that, sir.

7   Q   Now, you mentioned Mr. Lysyk. A classmate of

8   yours?

9   A   That's correct.

10   Q   An unusual man, would you say, a very outstanding

11   legal scholar?

12   A   Absolutely.

13   Q   Top of a graduating class of two in the Town of

14   Khedive, Saskatchewan?

15   A   I believe so, sir, but he did better than that

16   later on.

17   Q   Yes, he did. And Mr. Romanow recruited him from

18   the faculty of the University of British Columbia

19   to be the Deputy Attorney General in 1971; is that

20   not correct?

21   A   That's right, sir.

22   Q   And there he served until 1976?

23   A   That would be -- I'm sure your dates are correct,

24   sir. When the government changed and Mr. Romanow

25   became Attorney General, there was a very sweeping

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1   reorganization of the department of the Attorney

2   General put into effect and Mr. Lysyk was the

3   deputy in that scheme of affairs, and it seemed to

4   be a very, very worthwhile reorganization as far

5   as I could see, from the safe distance of

6   Saskatoon shall we say.

7 Q So you went through three years of law school with

8   Mr. Lysyk?

9 A That's right, sir.

10 Q And then you worked in the same department with

11   him for five years?

12 A Yeah, in the sense that he was in -- but he was

13   our deputy and I saw him from time to time in that

14   respect.

15 Q Yeah. And what would you tell us about his

16   standards of professional integrity?

17 A Well, Mr. Lysyk was a very bright gentleman who

18   graduated from our college of law I'm sure with

19   some special honours, went on I think to a

20   university in England, I can't recite names and so

21   on, came back -- could have been Oxford or

22   something -- came back to U.B.C. on the faculty.

23   I think, Mr. Wilson, he was dean at one point out

24   there.

25 Q I'm going to suggest to you that when he left

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1   Saskatchewan in 1976 he returned to the University

2   of British Columbia as dean of the law department.

3   A   Okay, that was the sequence then.

4   Q   Okay. Now, during the five years that you worked

5   with him in the department, did you see his

6   professional integrity --

7   A   Yeah.

8   Q   -- at play?

9   A   Yeah. He was an absolutely straight-shooting

10   gentleman who didn't brook anything resembling

11   political input into, among other things,

12   prosecutions for certain, and I don't suggest he

13   did in any other realm either, sir.

14   Q   And I believe Mr. Lysyk left the position as Dean

15   of the U.B.C. Law School and went on to the

16   Supreme Court of British Columbia as a member of

17   that Court?

18   A   That's right, the, I think the trial division,

19   Mr. Wilson, I -- and possibly the appeal division.

20   I stand to be corrected because I know you've been

21   nearer those things than I have, sir.

22   Q   Now you alluded earlier to an accusation of

23   improper conduct on the part of those three men.

24   I suggest that you learned of it probably in the

25   fall of 1992 when Mr. Wolch and Mrs. Milgaard and

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1   David Milgaard publicly accused then-Premier

2   Romanow, then Mr. Justice Lysyk, and Mr. Kujawa of

3   having conspired together to obstruct the course

4   of justice in the Milgaard prosecution file?

5 A That was my -- the publicity that I recall from

6   the time, sir.

7   MR. WOLCH: Mr. Commissioner, I don't mean

8   to interrupt unduly, but if My Friend wishes to

9   put before the Commission where I accused

10   somebody I'd like him to put it -- point it out

11   other than verbally.

12   MR. WILSON: Well Mr. Commissioner, I don't

13   propose to take the Inquiry's time this afternoon

14   to go through chapter and verse of Mr. Wolch's

15   participation in the press conference in Winnipeg

16   in September of 1992 and what he said on that

17   occasion and what he said to the press on later

18   occasions, all of which will come before this

19   Inquiry in the utmost detail later.

20   MR. WOLCH: I look forward to that.

21   MR. WILSON: But if Mr. Wolch would like to

22   refresh himself by reviewing the transcript of

23   the press conference at 004204 --

24   MR. WOLCH: Please.

25   MR. WILSON: -- Mr. Wolch participated with

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1   Mrs. Milgaard and David at that press conference.

2   MR. WOLCH: Well, My Friend has said I said

3   something, so put up what I said.

4   MR. WILSON: I'm getting there. I'm only

5   going to make the one reference at this time, Mr.

6   Commissioner, and as far as I'm concerned

7   Mr. Wolch's protestation can stand until it is

8   dealt with in more detail later. But he does

9   state, as a matter of fact, that there was a

10   cover-up in the Department of Justice if we look

11   at document 004208, at the top of the page:

12   "It's simply more evidence of what we

13   know to be a fact."

14   Third paragraph:

15   "... the cover-up was there, the

16   question was who covered it up is more

17   important to be found out."

18   And you'll see that Mrs. Milgaard, at page

19   004210, --

20   MR. WOLCH: Mr. Commissioner, --

21   COMMISSIONER MacCALLUM: Now --

22   MR. WOLCH: -- I'm sorry, the reference is

23   to me --

24   COMMISSIONER MacCALLUM: Yes.

25   MR. WOLCH: -- and My Friend says I accused

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1   the Premier and a gentleman named Lysyk of a

2   cover-up, that's what I heard him to say, and

3   I've asked him to show me where I said that?

4   MR. WILSON: Mr. Commissioner, I said that

5   those three gentlemen were accused by these three

6   individuals I named, and it's a joint accusation,

7   if Mr. Wolch wants to exempt himself from any

8   culpability with respect to that let him do so as

9   we go along and we'll just leave it stand as it

10   is for now.

11   MR. WOLCH: I'm not asking for culpability,

12   I'm asking for accuracy, the same accuracy that's

13   been asked of any questioning being done of other

14   witnesses. If that amounts, by My Friend's

15   reasoning, to me personally attacking or accusing

16   Romanow or Lysyk, I think the name is, of some

17   cover-up, then I'd like to see it? All I'm --

18   COMMISSIONER MacCALLUM: He referred to the

19   page --

20   MR. WOLCH: Yes, "time will tell", time

21   will tell as to who is responsible for a

22   cover-up.

23   COMMISSIONER MacCALLUM: "... the cover-up

24   was there, the question was who covered

25   it up ..."

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1   MR. WOLCH: Oh, I haven't changed that

2   opinion, but the question is the point was made

3   that I accused the Premier. And the question

4   before that:

5   "What about the involvement of ...

6   Romanow?",

7   I said:

8   "Time will tell ..."

9   MR. WILSON: Let us look at 004210.

10   MR. WOLCH: That's not --

11   COMMISSIONER MacCALLUM: Just a minute.

12   MR. WOLCH: Yeah. That's not even me

13   speaking.

14   MR. WILSON: We see Mrs. Milgaard --

15   MR. WOLCH: Well --

16   MR. WILSON: Let's be fair, Mr.

17   Commissioner, Mr. Wolch is standing -- or seated

18   at Mrs. Milgaard elbow as she says:

19   "All I know is that Roy Romanow, Serge

20   Kujawa, and other senior officials met

21   with those two files."

22   MR. WOLCH: Yes.

23   MR. WILSON: If you read the transcript of

24   that entire conversation you will find that the

25   accusation I made is entirely borne out and is

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1   supported, will be fully supported by further

2   material which will come before this Commission

3   in due course, if Mr. Wolch wants to plead not

4   guilty today I'll accept that until we do better

5   because we will.

6   MR. WOLCH: Mr. Commissioner, I resent the

7   reference to plead not guilty. All I'm asking

8   for is accuracy. My Friend has chosen to put

9   before this witness material that, really, he

10   can't really comment upon, and then he puts it

11   before him by not correctly stating the evidence,

12   and then hides that behind this sort of "plead

13   not guilty" or whatever. All I'm saying is I ask

14   for some accuracy, that's all.

15   COMMISSIONER MacCALLUM: Yes, I take your

16   objection, but as Mr. Wilson says, whether or not

17   you were one of the accusers of these three

18   people depends upon a closer reading of the

19   document by me, so I understand what you are

20   saying.

21   MR. WILSON: Okay, that's fine, that's good

22   enough for me for now, sir.

23   BY MR. WILSON:

24   Q   Nonetheless, I'll proceed, Mr. Caldwell.

25   A   Yes, sir.

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1   **Q**   You learned that this allegation and this

2   accusation of a criminal conspiracy to obstruct

3   the course of justice was made against former

4   Attorney General Roy Romanow, former Deputy

5   Attorney General Ken Lysyk, and Associate Deputy

6   Minister Serge Kujawa in the fall of 1992?

7   *A*   Yes sir.

8   **Q**   What was your reaction to it?

9   *A*   Well the way I learned about it is that it was in

10   the press in Saskatoon in such a fashion that you

11   virtually couldn't escape it, I was not in Regina

12   when that thing happened but it seemed, Mr.

13   Wilson, not to matter because you -- you were -- I

14   remember it -- being absolutely bowled over by

15   that suggestion and thinking, you know, how in the

16   world could that be the case. Of course, in

17   fairly short order I believe it proved not to be

18   the case or anything similar to it, but I

19   absolutely -- I thought 'how in the world could

20   that be, that been going on in our department in

21   Regina, or' -- it was a very shocking accusation

22   even though I wasn't one of the proposed

23   cover-up'ees, or whatever they are.

24   **Q**   But let me stop you there. It cut very close to

25   you; did it not?

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1   A   Yeah, oh --

2   Q   Because, if such a monstrous allegation should be

3   borne out to be true, you have been employed by a

4   corrupt administration?

5   A   Yeah.

6   Q   Working as part of that?

7   A   Yeah, absolutely, and, you know, the -- the --

8   that's right, I would agree with that, that's what

9   I had been doing for a long time at that point,

10   sir.

11 Q   When you were concluded with the Milgaard

12   prosecution you made the report to head office

13   that you have shown us, and when the matter went

14   to the Court of Appeal you've told us, again, you

15   had no input on that process?

16 A   No, I didn't attend physically, I may well have

17   discussed with Serge Kujawa the, again the 9(2)

18   matter, but that would be if --

19 Q   The 9(2) element being a large element of the

20   appeal?

21 A   Oh, of course. But if I did that, Mr. Wilson, I'm

22   sure that was all I did, and that may not have

23   happened either.

24 Q   Thank you, Mr. Caldwell.

25 A   Thank you, sir.

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1   MR. HODSON: I think Ms. Krogan is next,

2   but it is just after 3:00, I'm not sure if that

3   is --

4   COMMISSIONER MacCALLUM: That would be a

5   good time for a break.

6   MS. KROGAN: Sure.

7   COMMISSIONER MacCALLUM: 15 minutes.

8   *(Adjourned at 3:04 p.m.)*

9   *(Reconvened at 3:21 p.m.)*

10   **BY MS. KROGAN:**

11 **Q**   Mr. Caldwell, given that we have met, I state for

12   the record that my name is Lana Krogan and I

13   represent the Province of Saskatchewan here at the

14   Inquiry?

15 *A*   Thank you very much.

16 **Q**   I will be very brief, Mr. Caldwell, and I would

17   just like to revisit some issues starting with one

18   issue that was raised by Mr. Lockyer last week.

19   And he put to you, Mr. Caldwell, the suggestion

20   that no one had consulted with you regarding, with

21   you or another Saskatoon prosecutor, regarding the

22   sentencing issues as they related to Larry Fisher.

23   This would be, of course, prior to his sentencing;

24   do you recall that, sir?

25 *A*   I'm re -- I assume that he put that to me last

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1   week in his questioning, ma'am; is that what you

2   were saying?

3 Q He did, Mr. Caldwell, --

4 A Yeah, I accept that.

5 Q -- and wanted your response on it. And I think

6   your response to him was to the effect that you

7   thought perhaps that contact should have been made

8   with you. Now Mr. Caldwell, if I could just put

9   to you some known details, if I could call them

10   that, --

11 A Okay.

12 Q -- one of which is you never did have a Larry

13   Fisher file; is that correct?

14 A That -- that is correct, ma'am, and I'm pleased

15   that you are -- we can go through that, because I

16   couldn't accept the final thing that you quote as

17   Mr. Lockyer saying a moment ago, that's just not

18   the case, but -- so I'd be happy to go through

19   them in the way you are now.

20 Q There are just a few and they're --

21 A Yeah, that's fine.

22 Q Thank you, sir.

23 A Yeah.

24 Q You didn't have a file, and in fact as I

25   understand it the only contact you had with the

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1   file, if I can put it that way, was the request by

2   Mr. MacKay that you contact police to get him the

3   information; is that right?

4   A   Yeah. We didn't have a file in our office because

5   we did not have any Larry Fisher prosecution in

6   our office. The only way we would have had a file

7   would be because the police department or -- sent

8   us one saying "here, away you go and prosecute

9   Fisher", that didn't happen for sure, so in that

10   sense of course we didn't -- never did have a file

11   on the Fisher matter.

12   Q   Right.

13   A   Yeah.

14   Q   You didn't have the information personally; you

15   didn't prosecute him, correct?

16   A   Absolutely not.

17   Q   And another known detail, again if I could put it

18   that way Mr. Caldwell, is that Mr. Greenberg, who

19   represented Larry Fisher, was not in contact with

20   you; is that correct?

21   A   Yeah, I'm -- I wasn't here when Mr. Greenberg

22   testified but I believe he took that position;

23   and, regardless, I have absolutely no memory of

24   the gentleman contacting me.

25   Q   All right. And in fact, Mr. Caldwell, the

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1   information that he provided to the Inquiry was

2   that he contacted the Regina office, --

3   A   Yeah.

4   Q   -- or what we know as head office, in Regina?

5   A   Yeah, that would be what I would have expected,

6   and understand now.

7   Q   All right. So basically, sir, you knew nothing

8   about that file; is that correct?

9   A   No, that's correct.

10   Q   Now Mr. Caldwell, did head office ever consult you

11   regarding a file that you had little to no

12   knowledge of, and you did not prosecute?

13   A   Umm, certainly, certainly not Fisher, certainly

14   nothing to do with Mr. Milgaard. At the moment I

15   can't think of any reason they would, and at the

16   moment I can't recall an occasion on which they

17   contacted me about a file that (a) wasn't in our

18   office and (b) I didn't prosecute, it would be

19   very -- I'd be flattered but I don't think it

20   happened.

21   Q   It would also be odd, would it not, Mr. Caldwell?

22   A   In the extreme, yeah.

23   Q   All right. Throughout the province -- and perhaps

24   I'm going to state the obvious, sir -- throughout

25   the province, sentencing standards are set by our

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1   appellate court; is that correct?

2 A   That's correct.

3 Q   So what would be a fair and reasonable sentence in

4   Saskatoon would be the same in Regina; would it

5   not?

6 A   Yeah. When a certain topic gets up to the Court

7   of Appeal, at that time they would come out with

8   guidelines as to what seemed appropriate in a

9   certain kind of offence, etcetera, so that's --

10   that happened at the Court of Appeal level and

11   tended to disseminate down through the other

12   courts and agencies.

13 Q   All right. So, Mr. Caldwell, can you see any

14   reason why head office would have contacted you

15   and spoken to you about the Larry Fisher matter

16   prior to sentencing?

17 A   No, absolutely none, because I couldn't help them

18   in any way, shape, or form, ma'am.

19 Q   All right. It was also suggested to you last

20   week, sir -- and this, again, was by Mr. Lockyer

21   -- that -- and there was some suggested or

22   discussed, perhaps, about the issue of public

23   interest, and the suggestion was that "would it

24   not have been in the public interest that Mr.

25   Fisher's matters be dealt with in Saskatoon"; do

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1   you recall that?

2   A   I remember him suggesting that.

3   Q   All right. And, sir, my question then, or one of

4   my questions to you on that issue, is in your

5   experience did you not see many occasions where

6   files were transferred to different locations,

7   whether it was within Saskatchewan or other

8   jurisdictions --

9   A   I --

10   Q   -- outside of the province?

11   A   I certainly did when -- I was in the, pardon me,

12   in the office in Regina up until February of 1962.

13   I happened to be the person who looked after an

14   industry called 421(3)'s. Now 421(3)'s, that was

15   a *Criminal Code* section in which people in another

16   province, we'll just say B.C. for instance, --

17   Q   Uh-huh?

18   A   -- wanted to get their charges shipped from

19   Saskatchewan there, strictly on the understanding

20   of a guilty plea, and that was -- there was a

21   form, set of forms you went through to make sure

22   that everyone agreed, and sent them off, and that

23   was an absolutely regular occurrence, and I

24   happened to be the person who handled it.

25   Q   And Mr. Caldwell, these matters of which you speak

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1   might well be very serious matters, --

2   A   Oh, absolutely.

3   Q   -- including sexual assaults that might have been

4   transferred; would that be fair?

5   A   Yes, they tended to be ones where the accused

6   didn't want -- may have been sentenced already and

7   didn't want to face coming back to Saskatchewan

8   with the danger, for instance, of a, say a

9   consecutive sentence or something like that, so

10   that was a frequent happening.

11   Q   Right. And in those instances, Mr. Caldwell,

12   would you agree with me that the public interest

13   was neither negatively impacted nor negated by

14   virtue of transferring those matters?

15   A   I wouldn't think so. The one -- the process I've

16   mentioned would -- we would not send the charge

17   from Saskatchewan unless we had some, I think,

18   document indicating a guilty plea, so a guilty

19   plea had to be the outcome. And of course that

20   would be duly publicized wherever it took place,

21   we'll say for example in British Columbia, so I --

22   it didn't -- there was nothing to report here and

23   I would say everything to report there. If it

24   happened that the news of all this got back to

25   Saskatchewan there'd be no reason that the press

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1   couldn't publish it, if they were so inclined,

2   here.

3   Q   Sure. And I will actually ask you, perhaps, a few

4   more questions about the press.

5   A   Yeah.

6   Q   But on this issue then, Mr. Caldwell, and the

7   matter of public interest, would it be fair to say

8   that public interest is sort of a

9   multi-dimensional analysis, and that you are not

10   just considering where something is dealt with,

11   that you also consider perhaps expense, or where

12   the prosecutor who has the file is located, --

13 A   Uh-huh.

14 Q   -- and that weighed into public interest as well?

15 A   Well there'd be many aspects to it. Sometimes it

16   would be not in the public interest to spend

17   thousands of dollars shipping some charge, say,

18   back to Saskatchewan which could be dealt with in,

19   for instance, Alberta, it would not be in the

20   public interest to spend a lot here sending the

21   same thing there.

22   And of course the public, you

23   know, public interest, I -- to an extent, I think,

24   is whatever the upset member of the public thinks

25   it is on a given day, in other words that varies

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1   all over, but certainly you want to operate in

2   such a way that you are not abusing that whole

3   thing, Ms. Krogan, would be my attitude at any

4   rate.

5   Q   All right. Mr. Caldwell, on that, on the notion

6   again of public interest, it was suggested to you

7   last week as well that the matter should have been

8   dealt with in Saskatoon so the public of -- the

9   members of this community in Saskatoon would be

10   aware; do you recall that, sir?

11 A   That, was that the Fisher matter --

12 Q   Yes, sir.

13 A   -- that you are talking about?

14 Q   Yes, sir. I'm sorry, I wasn't clear.

15 A   No, that's fine.

16 Q   Yes, indeed, it is the Fisher matter that I am

17   speaking of.

18 A   Well, the Fisher matter didn't all come into nice,

19   crisp focus all of a sudden. Now we realize that

20   we had, we'll say, four to six unsolved sexual

21   offences that, in fullness of time, that were

22   Fisher's handiwork. They didn't all emerge, you

23   know, sharply at one time. Fisher -- it did not

24   become thoroughly visible during the Milgaard

25   investigation, despite what I thought was a very

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1   careful investigation; the Manitoba matters, to

2   all intents and purposes no one knew about them

3   except initially Fisher, who decided he wanted to,

4   you know, process them and set in motion the trip

5   by the police to interview him, the guilty pleas

6   in Manitoba; and then the -- it would be the

7   incentive of Mr. Fisher and his Winnipeg counsel

8   to clean up other Saskatchewan things, as I

9   understand it they were dealing with Regina, and

10   there's -- there's nothing sinister about that.

11   One of the things, Ms. Krogan,

12   is one had to have a direct indictment for that

13   situation, and I think it was four counts, those

14   things came from Regina, they were either the

15   Premier or the Attorney General, the appropriate

16   authority had to sign them, so if I wanted to

17   process something like that in Saskatoon I would

18   be turning to Regina to say "please get me a

19   direct indictment". There were -- Mr. -- the

20   gentleman in Winnipeg, Mr. Fisher's counsel,

21   evidently was dealing with Regina which, you know,

22   it was in my estimation entirely unremarkable. So

23   there is a, I think a whole lot of variables that

24   exist in any of these, Fisher's was certainly an

25   unusual state of affairs. I don't know if and

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1   when or how much his sentence was ever publicized

2   in Saskatoon. I have no memory, for instance, of

3   me knowing of it when it did happen.

4   Q   All right.

5   A   So --

6   Q   Okay. More specifically perhaps, Mr. Caldwell --

7   and I thank you for that response -- but more

8   specifically the suggestion was made to you that

9   it would have been better, of course, dealing with

10   matters in Saskatoon so that the community here

11   would know. Do you recall that, do you recall

12   that being put to you, sir, --

13   A   Yeah, I do.

14   Q   -- is my question?

15   A   Yeah.

16   Q   And wouldn't that presume, sir, that the media

17   would be in the Saskatoon courthouse, that they'd

18   be there, --

19   A   Yeah.

20   Q   -- they'd be ready, willing and able to report the

21   story?

22   A   Yeah, that or maybe even, you know, having a

23   knowledge of it, if they did have knowledge of it,

24   pursuing the proper authorities to say "what's

25   goin' on here". The media coverage of these

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1   things was extremely hit and miss and when --

2   without repeating that whole story, at one point

3   they had a -- some very capable reporters from the

4   *StarPhoenix*, from CFQC radio and CKOM radio, on a

5   daily patrol to the police station, to the federal

6   courthouse if you will, they -- because they had

7   missed some things they had arranged a press

8   conference with Chief Kettles and this was to get

9   them into the picture so they wouldn't feel they

10   were being kept out. But on other occasions they

11   would be essentially invisible and as counsel,

12   prosecutor or otherwise, you had to, you know, be

13   very careful about pursuing them for your own

14   ends, if I may put it that way.

15   Q   I certainly understand that.

16   A   Yeah.

17   Q   Mr. Caldwell, it -- the suggestion that, that very

18   suggestion that matters should be dealt with in

19   Saskatoon also presumes that there would not have

20   been any media coverage originating from

21   Regina; --

22   A   Yes, that's right.

23   Q   -- would it not?

24   A   And one of the complaints about Regina is, as I

25   recall, is that this was done without the media's

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1   attention. I mean one of the real trouble you can

2   get into as a prosecutor is saying, you know, "my

3   old friend so and so should know about this, I'll

4   call him", in other words doing favours for media

5   people who you happen to think are fair or

6   whatever it is, there's -- I don't know why, I

7   don't know why anything is, any criticism is to

8   come out of the fact that the media did not happen

9   to evidently be advised of Fisher's Regina

10   appearance. Unless they just happened to be there

11   and look in the room, why would they know about

12   it, --

13   Q And --

14   A -- without any improper aspect?

15   Q And on that point, Mr. Caldwell, generally, then,

16   would you agree with me that it was not the

17   practice in Saskatoon for any prosecutor to

18   contact the media and invite them in to report on

19   or to listen to a particular matter?

20   A No, that was a, that was a very questionable

21   practice. You might feel, you might feel it

22   should be done, but I think you had -- one had to

23   be exceedingly careful unless this triggered

24   complaints that you were, you know, generating

25   publicity, in effect, for yourself, as I would put

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1   it.

2   **Q**   And Mr. Caldwell, on that final point with respect

3   to the media, one could never be certain, even if

4   a matter was dealt with in Regina and the media

5   was present one couldn't be certain that the

6   matter wouldn't be covered in Saskatoon as well,

7   often stories are carried in both, --

8   *A*   Yeah.

9   **Q**   -- both of the major papers in those cities; is

10   that correct?

11   *A*   That was my understanding at the time, some major

12   things that happened in Regina would be covered

13   here, and vice versa. But I remember mentioning

14   earlier in testimony that something very important

15   let's say could have happened in North Battleford

16   and never hit the Saskatoon paper, as an example,

17   so it was extremely variable and hit and miss how

18   things went.

19   **Q**   Now perhaps to step back a bit on your point, sir,

20   that the media was not contacted or generally it

21   was frowned upon that they should be contacted and

22   invited into a courtroom, would it then be fair to

23   say -- and I harken back to last week again when

24   Mr. Lockyer put to you that there should have been

25   a public explanation at the time as to why Larry

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1   Fisher got four years for the matters that were

2   dealt with in Regina; do you recall that?

3   A   I remember that.

4   Q   And again, sir, would the same principle hold

5   true; that it was just not practice --

6   A   Yeah.

7   Q   -- for a prosecutor to instigate or to contact the

8   media and provide an explanation such as that?

9   A   No, it certainly wasn't, and there was the very

10   real danger that the media person you didn't

11   contact would complain to the premier, whatever.

12   In other words, that was a -- if you decided to

13   contact some, one person, the others might very

14   well have their noses out of joint and I found

15   that, you know, prosecutors in general tread very

16   lightly in that area for that very reason. You

17   might some day get extremely careful and good

18   coverage of some case and the next day another one

19   that you thought mattered a great deal might just

20   go right over their heads collectively.

21   Q   Mr. Caldwell, again on the suggestion that an

22   explanation should have been given as to why Mr.

23   Fisher got four years, I'm going to state the

24   obvious, and I hope you agree with what I think is

25   obvious, sir. Isn't it true that the judge is the

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1   one who makes the final decision as to sentence

2   regardless of what a prosecutor or defence counsel

3   might put to him or her?

4   A   Absolutely. I think, if I'm not mistaken, Mr.

5   Fisher I believe was sentenced to 10 years in

6   Winnipeg, if my numbers are correct, to four in

7   Regina. My understanding is that that was

8   concurrent sentence. That is something the judge

9   does. He might have -- a different judge might

10   have walked in and said, you know, this means --

11   must be six years consecutive or 10 or whatever.

12   That judge happened to make that decision as we

13   now know and that was one of many sentencing

14   decisions that no doubt happened in Regina, let's

15   say, that week, and, you know, to that extent was

16   unremarkable as far as I'm concerned.

17   Q   But of course, sir, judges are bound by the

18   guidelines set by the appellate court?

19   A   Yeah, they are, and of course people, Crown

20   appeals, defence appeals, some of them

21   successfully against sentences that seem outside

22   that, and sometimes unsuccessfully, sometimes your

23   appeal, with all its merit, doesn't work out.

24   Q   And, Mr. Caldwell, given that it is a judge's

25   decision as to what sentence is appropriate, would

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1   it not be somewhat presumptuous for a prosecutor

2   to contact the media to explain perhaps what the

3   judge was thinking in coming to that decision?

4   A   Yeah, I don't think you could ever get into that,

5   saying this is no doubt what he was thinking.

6   Some media person might try to figure that out for

7   themselves, but I can't imagine a prosecutor

8   saying no doubt judge X was thinking Y and Z here.

9   I would think that would be very touchy.

10   Q   Folly?

11   A   I would think so.

12   Q   Thank you, Mr. Caldwell.

13   A   Yeah, thanks very much.

14   COMMISSIONER MacCALLUM: Ms. Krogan, can

15   you help me out with the page from the

16   transcript? You said that perhaps you should

17   have been consulted -- the suggestion was put by

18   Mr. Lockyer, perhaps you should have been

19   consulted --

20   MS. KROGAN: Mr. Commissioner, I would love

21   to say that I have that offhand, but I don't.

22   COMMISSIONER MacCALLUM: You don't, okay.

23   MS. KROGAN: He questioned on Wednesday of

24   last week.

25   COMMISSIONER MacCALLUM: Wednesday?

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1   MS. KROGAN: It was Wednesday.

2   COMMISSIONER MacCALLUM: Thank you.

3   *(Discussion off the record)*

4   MS KROGAN: Ms. McLean very kindly advised

5   that it would have been from Tuesday's

6   transcript.

7   COMMISSIONER MacCALLUM: Tuesday of last

8   week, okay.

9   A   I don't have that, Mr. Commissioner.

10   COMMISSIONER MacCALLUM: If I have your

11 question right, that it had to do with

12 consultation on the Fisher sentencing issues in

13 Regina and I took it from your question that Mr.

14 Caldwell agreed with Mr. Lockyer that perhaps he

15 should have been consulted. Was that your

16 question?

17   MS. KROGAN: That was my understanding --

18 that was the question, sir, and that was my

19 understanding of the response.

20   COMMISSIONER MacCALLUM: Yes, okay.

21   MS. KROGAN: I wanted to explore that

22 further.

23   COMMISSIONER MacCALLUM: I'll be able to

24 find it, thanks.

25   MS. KROGAN: Thank you.

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1   *A*   Okay, thank you.

2   **BY MS. KNOX:**

3   **Q**   Mr. Caldwell, just for the record so that anybody

4   reading the transcript will know where we are, I

5   am of course your counsel Catherine Knox and I can

6   indicate to you that I want to take a bit of time

7   to talk to you about some of the evidence you've

8   given in these proceedings over the last three

9   weeks and in doing so, if I forget to say it, I

10   want, where possible, to ask you to think about my

11   questions as most of them will relate to your

12   actions in 1969, 1970, in the time of 1969, 1970.

13   *A*   All right, ma'am.

14   **Q**   And I say that with a full appreciation, perhaps

15   better than most in the room, of how difficult it

16   is for you to keep sorted out, but if you could

17   kind of take your mind back to what it was like

18   when you came to Saskatoon as a prosecutor in 1962

19   to be working in an office with only one other

20   prosecutor and to be dealing in a prosecutorial

21   practice where oftentimes major files indeed were

22   being farmed out to private counsel because you

23   didn't have the resource base within your office

24   to handle them. I'm thinking of employing the

25   services of Mr. Tallis, employing the services of

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1   Mr. Halyk from my office and others as we know

2   from the record to prosecute murders and serious

3   charges even as you were running an office.

4   A   I'll attempt to keep that in mind, Ms. Knox,

5   thanks.

6   Q   Okay. And the other thing that I would ask, if

7   you could in answering some of the questions I'm

8   about to ask you, is to keep in mind the age as it

9   was of the time in terms of the level of knowledge

10   within the community of Saskatoon about things

11   like police investigation, Court proceedings and

12   things like that.

13   A   All right.

14   Q   I was trying to remember last night when I was

15   framing some of these questions for you what was

16   the common TV shows that were available at the

17   time. I can think of Perry Mason as being a TV

18   show that was in the public arena at that time.

19   Now every time we turn on our TVs, 10 different

20   channels, we can get Law and Order, we've had, you

21   know, a million shows, we've had all kinds of new

22   information, but try to think in terms of what the

23   general public would have known back then as I ask

24   you these questions.

25   A   Thanks, Ms. Knox.

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1   Q   Okay. Now, I'm going to start a little out of the

2   order I planned for myself, but to follow up on

3   some of the questions that Ms. Krogan asked with

4   you with respect to suggestions made to you last

5   week about how the Fisher file should have been

6   handled and how it was important that it should

7   have been brought back to the community of

8   Saskatoon so people in Saskatoon would know that

9   the rapist that everybody was scared of had been

10   captured.

11   A   Okay, ma'am.

12   Q   Now, at the risk of being accused by you and

13   others of being on a feminist soap box, as I have

14   been accused on occasions in the past, I'm going

15   to ask you, do you remember in 1969 what the state

16   of thinking was within police services and

17   prosecutorial services around allegations

18   primarily then of rape and where there wasn't

19   penetration of the penis in the vagina, the

20   indecent assault of women by male perpetrators?

21   A   Well, the offences, as we know, were categorized

22   differently. Indecent assault I think was the

23   bottom rung of sexual assaults as I recall,

24   possibly then attempted rape, then rape, and of

25   course various files would end up, in effect, as

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1   common assaults under certain circumstances, but

2   that whole library of possibilities was open, and

3   of course on occasion these things indeed did

4   escalate into murders.

5   Q   Okay. But, sir, in terms of the professional

6   reception of those kinds of complaints by police

7   and by Crowns, would it be fair to say that there

8   was a general school of thought out there that

9   there was a reluctance to believe women who came

10   forward, there was -- there were extreme

11   difficulties if you were a prosecutor in

12   prosecuting because of evidentiary rules, and in

13   fact that the solve rate on these kinds of

14   complaints or the charge rate was very low?

15   A   I would think that there was more of a reluctance

16   than there is now, Ms. Knox, as the first part of

17   my answer. Certainly police and/or prosecutors

18   who ended up, if you will, with believable

19   complainants and proper investigation, things they

20   believed in, would certainly follow them through

21   as best they could, but I think the, what you've

22   suggested may have -- was certainly more of

23   the case than it is now in terms of looking with

24   some doubt at females, complaints about, you know,

25   offences committed against them, but that's a very

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1   broad statement.

2   Q   It's also true, isn't it, and there has been some

3   skepticism when police officers have said in their

4   testimony here that they didn't necessarily

5   contact victims on these files to tell them what

6   happened, but in fact there was a major, over the

7   years between the late '60s into about 1973, would

8   you agree with me, or do you remember even, that

9   there was a movement by women in Canada, the

10   feminist movement, to try to address the many

11   problems that victims, and especially victims of

12   these kinds of horrible offences, were

13   encountering from police, within the justice

14   system, from judges generally, there was an effort

15   to try and take the biases out of the system to

16   get help for women because they were generally

17   seen by other women as being hard done by in the

18   police and criminal justice system when these

19   complaints were made.

20   A   I'm sure that's right, and I was aware of that in

21   a general way, that there was certainly legitimate

22   grounds for sentiment on the part of females, that

23   they were not treated as a class with as much, if

24   you will, veracity as, you know, equal males under

25   some circumstances. I know that movement,

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1   Ms. Knox, was something that was underway at that

2   time, and undoubtedly no more than due let's say.

3   COMMISSIONER MacCALLUM: Are you speaking

4   of an attitude by the police or by the

5   prosecution or by both?

6   A   I would think, My Lord, by I think society plus

7   the police and prosecutions, but not limited to

8   that. In other words, there was a certain degree

9   of cynicism I think about complaints by women,

10   some of which may never have reached Court cases

11   is the way I would put it, sir.

12   COMMISSIONER MacCALLUM: Maybe Ms. Knox

13   would be reluctant to ask so I'll ask, what about

14   the judiciary?

15   A   I think there would be -- there certainly were,

16   if you'll forgive me saying, old-time judges, not

17   in the sense of chronological years,

18   Mr. Commissioner, but ones who came from a time

19   when it was a little bit tough to sell some of

20   these complaints about sexual activity, followed

21   up by terminology like she had it coming or why

22   was she there at that time, there certainly were

23   some Queen's Bench judges of that day who were

24   notorious for absolutely not convicting people of

25   rapes, and I know that of my own knowledge. Of

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1   course, Mr. Commissioner, there were many good

2   ones, or, you know, fair ones as well.

3   COMMISSIONER MacCALLUM: Okay.

4   A   But that certainly was the case.

5   COMMISSIONER MacCALLUM: I didn't want to

6   steal your thunder, Ms. Knox, but --

7   BY MS. KNOX:

8   Q   That's okay. So, Mr. Caldwell, what we would be

9   talking about, and I come from a different

10   jurisdiction than you and I was only in grade 1 I

11   think when Mr. Hodson was in grade 6, so I'm even

12   younger than him, but back in those days the 'what

13   was she doing out at that hour of the night, why

14   was she wearing that kind of make-up, her skirt

15   was too short,' those kinds of things were the

16   kinds of questions that sometimes got bandied

17   around even in legitimate complaints of rape and

18   sexual assaults weren't they?

19   A   Yeah. I think some, as we all know, some of that

20   is held over, but I think it was much more the

21   case then, Ms. Knox, for sure.

22   Q   Okay. And, Mr. Caldwell, in 1969 did the City of

23   Saskatoon have, and if you don't remember you can

24   trust me on it, but to your memory going back to

25   1969, 1970 did the City of Saskatoon have, for

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1   example, a rape crisis centre or anyone who

2   advocated on behalf of women who were victims of

3   rapes, indecent assaults and stuff to your memory?

4   A   I'm sure there was no rape crisis centre. The

5   advocates I could think of would almost fall in

6   the area of social workers who dealt with the

7   females in question and tried to assist them, but

8   I don't think there was a --

9   Q   I'm going to push your memory a bit and ask you if

10   that dated back as early as 1969 or that that's

11   something that evolved through your practice to

12   your retirement from the active prosecution at the

13   provincial level into 1987.

14 A   It may have been later, Ms. Knox.

15   COMMISSIONER MacCALLUM: Do you mean help

16   by the social workers?

17   MS. KNOX: Social workers.

18 A   Social workers were a Saskatchewan phenomenon, a

19   lot of them were very helpful, and they would get

20   into those factual things, I suppose almost for

21   want of anyone else, Ms. Knox.

22   MS. KNOX:

23 Q   Mr. Caldwell, I'm going to suggest to you that the

24   first rape crisis centre in Canada didn't open

25   until 1973 and it was not in Saskatoon, so

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1   certainly there wouldn't have been one in

2   Saskatoon prior to 1973.

3   A   I'm sure you are right.

4   Q   And these are statistics drawn from a history of

5   sexual assaults in Canada, I will provide the

6   documentation to Mr. Hodson if he cares to have

7   it.

8   COMMISSIONER MacCALLUM: '70 which?

9   MS. KNOX: 1973.

10   COMMISSIONER MacCALLUM: '73.

11   BY MS. KNOX:

12   Q   And, sir, I believe -- I don't have the document

13   in front of me, I believe that first crisis

14   centre, as is the case with most things, opened in

15   Toronto, but we can check on that.

16   A   All right.

17   Q   Do you have a personal memory now of when the

18   first rape crisis centre opened in Saskatoon, in

19   particular, and in the Province of Saskatchewan if

20   it wasn't first here in Saskatoon?

21   A   I do not, Ms. Knox, have that.

22   Q   Okay. And, sir, by way of history and testing

23   your memory again, and I have notes in front of me

24   so it's easy for me, do you remember that the

25   *Criminal Code* with respect to the offences of

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1   rape, indecent assault, was in fact amended in

2   1982 and some of the archaic offences, archaic

3   rules were abolished again in large part because

4   of the movement by advocates for women victims

5   that said they just got hard done by in the

6   criminal justice system for archaic rules of

7   evidence, archaic attitudes by the players and all

8   kinds of a multiplicity of reasons to have the law

9   changed?

10   A   I'm sure that that is correct, ma'am, that that

11   happened at or about that time.

12   COMMISSIONER MacCALLUM: 1972?

13   MS. KNOX: 1982, Mr. Commissioner.

14   COMMISSIONER MacCALLUM: Oh, '82. And are

15   you speaking of the designation of offences

16   compendiously under sexual assaults?

17   MS. KNOX: The repeal of the old rape

18   provisions, the indecent assault on a female,

19   indecent assault on a male, there was a major

20   bill, I'm thinking C-127, C-128, that completely

21   effectively replaced it, also changed some of the

22   rules of evidence around issues like recent

23   complaint --

24   COMMISSIONER MacCALLUM: Recent complaint.

25   MS. KNOX: -- and those kind of things, and

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1   I do have again, as I said, a history, I can

2   provide it, but I'm just sort of skipping over

3   the highlights of some of it in terms of the time

4   and the way victims were being regarded in these

5   offences in those old days, if I may use that

6   term.

7   COMMISSIONER MacCALLUM: Uh-huh.

8   BY MS. KNOX:

9   Q   And, sir, do you have a personal memory of when it

10   was in the Province of Saskatchewan that a victim

11   services office, and by that I think I'm referring

12   to what you call the social workers who helped out

13   people, when a victim service office actually

14   opened in the Province of Saskatchewan, and in

15   particular in Saskatoon, to assist victims of

16   crime, including those who had horrific personal

17   things happen to them like the sexual assaults and

18   various permutations of the old offences of rape

19   and indecent assault?

20   A   I thought of social workers as separately, not in

21   a negative way, Ms. Knox, but when that victim

22   services organization came in, I'm not positive

23   about that, but there was a legislation in

24   Saskatchewan which allowed people to seek

25   financial compensation based on crimes committed

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1   against them, if you will. I at the moment am not

2   sure -- I assume that included sexual offences.

3 Q You are thinking of the victims of crime acts

4   which allowed for financial redress?

5 A That's what I'm sure it's called, or was called.

6 Q And we can check the date of that being invoked in

7   Saskatchewan, but I'm going to suggest to you it

8   certainly wasn't in place in 1969, and if this

9   province parallels others, probably didn't come

10   into place until the early or mid '80s.

11 A I'm sure you are right.

12 Q I'm like Mr. Lockyer and I'm going to tell you not

13   to trust me too much. But that's what you are

14   thinking of, is the victim services legislation.

15 A Okay.

16 Q Where victims could apply to the government for

17   financial compensation for lost wages, injuries

18   suffered and those kinds of things if they were

19   victims of crimes?

20 A That's my memory of it.

21 Q Okay. And, sir, one other -- I didn't pull up a

22   document number, but early in the proceedings, and

23   I'm not sure if you were present, Mr. Hodson

24   referred us to statistics, crime statistics for

25   the Saskatoon Police Service in 1969 and 1970. I

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1   have a memory that the complaints of rape in '69

2   or '70 was, like, 14 and the number that resulted

3   in charges was, like, five, and I may be wrong on

4   that, and I'm sure somebody will correct me, but I

5   just didn't take the time to go look the document

6   up to refresh my memory, but does that percentage

7   of charge rate sort of strike you as being in

8   accordance with the practice, the times, that it

9   would be a low charge rate, a relatively low

10   number of complaints if it was only 14, but

11   certainly that less than half of them ended up in

12   being charged or case concluded by a determination

13   that they were unfounded or some such thing?

14 A That sounds realistic to me, and to some extent of

15   course it was in proportion to the size of the

16   city, Ms. Knox, in terms of population; in other

17   words, it was quite a bit smaller, but of course

18   that statistic is very striking which seems small

19   by any measure I would say.

20 Q If I'm right on it, and I stand -- I'll have

21   someone correct me on it I'm sure if I'm not.

22 A Okay.

23 Q And, sir, did you develop any policy during the

24   years, and I don't mean this in any way to be

25   chastising, critical or anything of that nature,

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1   but did you, within your office in Saskatoon from

2   the time you came in 1962 or 1965, take any steps

3   to develop a policy or a direction for police and

4   yourself and Mr. Perras, your original prosecutor,

5   and subsequent prosecutors as they came, to

6   encourage them to be attentive to emotional crimes

7   like rape and sexual assaults and those kinds of

8   things that were personally painful and ensure

9   that somebody made sure to look out for victims?

10   A   Not in the so-called early days. One thing I do

11   recall that happened in our office was quite an

12   elaborate scheme was put together for the

13   prosecution of child victims, I think sexual and

14   otherwise, there were eight or 10 signatories to

15   this, including the chief of police, social

16   services, a lot of legitimate agencies who at that

17   point it was felt that these things were not

18   getting the attention or priority they deserved.

19   We got out a policy and I actually used the

20   signature page as part of my CV after that for a

21   while and that was more directed towards children,

22   but I think it would include sexual matters if I'm

23   not mistaken, Ms. Knox.

24   There was also another employee

25   of the provincial government in the local Crown

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1   prosecutors, and I expect elsewhere, who had a job

2   for a while of making certain that victims got to

3   know the results of the cases, in effect, and I

4   think maybe a little more proactive in seeing them

5   at the court house and making sure they are

6   comfortable, etcetera, but at one point there was

7   a real gap in notifying victims of the outcome of

8   their cases, good, bad or indifferent.

9   Q   Okay. And again in terms of assisting you and

10   assisting us with trying to put dates or time

11   frames around those developments --

12 A   Uh-huh.

13 Q   -- I'm going to suggest to you that the initiative

14   that you are talking about with respect to making

15   prosecutors better at prosecuting, police better

16   at investigating and the system more sensitive to

17   children was an initiative that came after the

18   Badgley Commission report on sexual offences

19   against children in Canada was released in 1985,

20   and again I might be a little wrong on the date,

21   I'm --

22 A   Just let me think of that. That's quite possible

23   because I was still with the department until 1987

24   and I recall this being something that happened

25   not long before I left. There was actually a

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1   study done in which some governmental agency

2   actually, in effect, approved of the way our

3   office was handling these things I think, and of

4   course, needless to say, I could never find the

5   study after that, but it did exist, so there

6   was -- that '85 sounds right because I wasn't

7   there that long after that, Ms. Knox, and that

8   document should be relatively easy to find I hope.

9   Q Okay. And, sir, again in terms of placing in time

10   when you have in your mind that during your tenure

11   as the senior Crown there was an actual staffing

12   position in the office to let victims of crime

13   know what happened to their cases, was that before

14   or after this initiative with respect to being

15   more responsive and more responsible about how we

16   dealt with complaints by children and their

17   families, that they were victims of sexual abuse?

18   A Well, that one position, Ms. Knox, was after I

19   left the -- because I learned about it when I was

20   on Provincial Court by saying who is that and

21   what's going on. It, I think, may have had a

22   limited life span, but I thought it was a very

23   commendable move.

24   Q Okay. But just so that we're clear on what was

25   available and what was there to consider in

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1   1969-'70, that position wasn't there until after

2   you left in 1987?

3   A That's right, yeah.

4   Q Okay. So to go back I guess to where I started

5   with this, in 1969, taking yourself back to 1969,

6   1970, 1968 when these first complaints came that

7   women were being assaulted in the city, within

8   your office did you have a particular mechanism in

9   place to be, and I'll use the feminist word,

10   sensitive to victims of these kind of complaints

11   and allegations and no mechanisms in place to make

12   sure that they were included, briefed and made

13   aware about complaints that they made?

14   A Were you suggesting we did not have it, Ms. Knox?

15   Q Yes.

16   A Yes, that's correct, we did not have any

17   organization, formal or otherwise, to do that at

18   that point for sure.

19   Q So to take that to its next logical conclusion, is

20   it fair then to say that what happened to the

21   victims that we've heard about in these

22   proceedings in 1969, 1970 who did not learn that

23   Mr. Fisher had pled guilty to and was convicted of

24   assaults, or rapes of at least four of them,

25   wasn't uncommon; in fact, if they had found out

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1   that might be more the extraordinary event?

2   *A*   If they had found out it would be the initiative

3   usually I think of a conscientious investigator

4   and on occasion a prosecutor might decide to carry

5   that out by making a phone call, but it was, I

6   would think, the exception.

7   Q   Okay. Now, sir, I want to take some time, and I

8   don't intend to go through everything that you've

9   been through in the last four weeks, I want to

10   just touch on some of the suggestions that have

11   been made to you, particularly where those

12   suggestions have been accompanied by the -- or

13   accompanied by a further suggestion that somehow

14   you engaged in improper behaviour, and that's of

15   course my biggest concern, and I want to start

16   with the suggestion that has been made a number of

17   times that you did not adequately disclose to

18   Mr. Tallis all that should have been disclosed to

19   him in 1969. Mr. Elson today touched a bit on the

20   disclosure standards of the day, Mr. Pringle

21   touched a bit on it when he examined you last

22   week, Mr. Lockyer and Mr. Wolch touched on it at

23   various points, but I want, if I could, to bring

24   up a letter that Mr. Tallis wrote to you on June

25   10th, 1969. The document number is 009289 and I

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1   want to refer you to a sentence, if I can bring

2   that out with my scratches all over it -- my

3   fingernails don't work very well on the screen I

4   must say -- you described Mr. Tallis last week as

5   a very able counsel, a professor at the law

6   school, one very learned in the law I think would

7   be a good way to capture your belief and your

8   understanding of his standard of practice?

9   A   Yeah, not only in the academic sense, but very

10   much in the practical day-to-day sense, Ms. Knox.

11   Q   Okay. In this letter to you, his first of June

12   10th, 1969 to advise you that he was going to be

13   acting as defence counsel for Mr. Milgaard, he

14   asked you for a number of things but he made this

15   statement that's of interest and which I direct

16   your attention to:

17   "I realize that I may not be entitled to

18   them as a matter of law but I can assure

19   you that I never try to abuse

20   co-operation of this nature when it is

21   accorded to me."

22   A   Uh-huh.

23   Q   And I take it, sir, that when Mr. Tallis made that

24   statement in that letter of June 10th, 1969 he

25   was, in fact, correctly stating the law with

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1   respect to the Crown obligation to provide

2   material to him?

3   A   Yes, he, I'm sure he was, and I -- I've -- I find

4   the wording of this paragraph is, I thought,

5   extremely appropriate because it's a polite

6   request, "would you assist me and let me have

7   copies and related reports", and then he says he

8   realizes he may not be entitled to them as a

9   matter of law, which we will assume is the actual

10   law of that day:

11   "... but I can assure you that I never

12   try to abuse co-operation of this nature

13   when it is accorded to me."

14   So there would be no earthly reason not to

15   cooperate with that because it was very (a)

16   correct in law I believe now, and (b) very, a

17   very polite and professional request for me to do

18   something.

19   Q   Sir, putting aside what you know now because we

20   have had many reviews of the David Milgaard

21   prosecution file, we have had reviews of the

22   police, the Gail Miller investigation file, all

23   the reviews that have gone through various formal

24   channels, some informal channels, but ultimately

25   bring us here today, and putting aside everything

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1   that you would now do differently with the benefit

2   of knowing that Mr. Milgaard was innocent of this

3   crime in 1969, did you in any way consciously

4   attempt, in 1969, or deliberately withhold

5   anything from Mr. Tallis that you felt could be

6   used by him to establish the innocence of David

7   Milgaard?

8   A   No, absolutely not, Ms. Knox.

9   Q   In your -- and there's various correspondence, I

10   won't go through it, that speaks with -- exchanged

11   between you and him, and notations in your file

12   about discussions with him, invitations to him to

13   come look at your file, for him to attend police

14   meetings that you were having with police

15   officers; at any time did you ever make any

16   suggestion to a police officer, "don't say that in

17   front of Mr. Tallis", or did you have any police

18   officer say to you, "don't let Cal Tallis know

19   about that because he might get on to the fact

20   that we're up to somethin' here or we're doin' a

21   dirty deed?"

22   A   None of that happened, I didn't detect that on the

23   part of any police officers and it simply was not

24   in -- it simply did not happen in this instance,

25   period.

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1   **Q**   Sir, there have been various suggestions made

2   through the inquiries that have gone on over the

3   years and the evidence that we have had at the

4   Inquiry about the information that you had in your

5   possession in 1969, and some have argued that you

6   had the whole police file, in fact Elmer Ullrich

7   testified in his video statements that he gave you

8   everything that he got, which he believed to be

9   the whole police file, --

10   *A*   Uh-huh.

11   **Q**   -- and you've stood fast that you didn't get the

12   whole Gail Miller murder file; do you recall that,

13   your evidence in that regard?

14   *A*   Yeah, I remember that.

15   **Q**   Okay. Sir, I'm going to ask to bring up -- now,

16   before I go there, would you agree with me that

17   all of the evidence points to the fact that Ray

18   Mackie was probably the, at the end of the day,

19   the person who had the most hands-on to do with

20   the file? And I speak of that in terms of

21   organizing the file, getting all of the materials

22   together, and ultimately I suspect he was the one

23   who delivered what should go to you on the

24   Milgaard file to Mr. Ullrich, and we'll see if

25   that is, proves to be the case, --

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1   *A*   Okay.

2   *Q*   -- but essentially he was a pretty key figure in

3   terms of the paper flow and keeping all of the

4   materials in line so that you would know

5   everything that you needed to know, hopefully, to

6   prosecute this case properly?

7   *A*   Yeah, that's right.

8   *Q*   Okay. And I wonder if I could bring up a portion

9   of a transcript of an interview that was recorded

10   between Mr. Mackie and Peter Carlyle-Gordge in

11   what was likely after Mr. Carlyle-Gordge met with

12   you on March 11th-March 12th, 1983, and the

13   document page in particular that I want brought up

14   is 325621, which is page 6 of the transcript of

15   the interview between Mr. Mackie and

16   Mr. Carlyle-Gordge.

17   COMMISSIONER MacCALLUM: What's the doc.

18   ID, do you know, Ms. Knox?

19   MS. KNOX: Unfortunately, I only took it

20   from 325619, I'm going to have to ask --

21   MR. HODSON: It's up there now, 325616.

22   COMMISSIONER MacCALLUM: 616?

23   BY MS. KNOX:

24   *Q*   Okay. Going if I could, then, to page 325621, and

25   I'm going to just get the staff to bring up the

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1   exchange that takes place between Peter

2   Carlyle-Gordge and yourself, starting here. Ray

3   Mackie?

4   MR. HODSON: RM, Ray Mackie.

5   COMMISSIONER MacCALLUM: And Ray Mackie?

6   BY MS. KNOX:

7   Q   Ray Mackie, sorry. And, in particular, I want to

8   direct you to the part where Peter Carlyle-Gordge

9   is saying to Mr. Mackie that he saw the file --

10   and by that we know it was your file within your

11   office that he had been in and looked at just

12   before this interview, if he did do it in

13   accordance with the schedule that you and he had

14   talked about -- and he comments that there were an

15   unbelievable number of interviews, and in your

16   file you had 95 plus, we keep talking about 95 --

17   A   Yeah.

18   Q   -- but did you get a few others after, like

19   Maurice Cerato, George Lapchuk, Ute Frank,

20   Craig Melnyk and those?

21   A   Uh-huh.

22   Q   And you will see here what Ray Mackie said in 1983

23   when Mr. Carlyle-Gordge was talking about how big

24   the file was, and he said, and:

25   "... he wouldn't have it all. There

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1   would be part of it in a file at the

2   station that was ... cover things that

3   were done and yet not connected with it

4   at all."

5   So, sir, in 1983 it would appear that Mr. Mackie

6   was sharing your view that there were two kinds

7   of files involved at this investigation, the part

8   that had to do with David Milgaard that was what

9   you called the David Milgaard prosecution file,

10   and a Gail Miller murder investigation file, as

11   you refer to it, that had many things on it not

12   sent to you because they didn't appear to be

13   connected to the prosecution of David Milgaard?

14 A That's the way I read this. He says:

15   "There would be part of it in a file at

16   the station that was ...",

17   etcetera, which is the part, clearly, that I did

18   not have, Ms. Knox, is what he is talking about.

19 Q And Mr. Caldwell, you would agree with me that you

20   and I haven't looked at that particular passage

21   before today, because I must confess I found it on

22   the weekend?

23 A No, we haven't.

24 Q But does it give you some comfort that as far back

25   as 1983 Ray Mackie, who played a major part in the

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1   file, was asserting that you did not have the full

2   investigation file?

3   A   Yeah, that's certainly, I think that's correct,

4   and it makes sense, and I'm pleased to see that he

5   had that memory of it, Ms. Knox, when he made this

6   interview, which of course is some time ago now.

7   Q   1983.

8   A   Yeah.

9   Q   Again, it doesn't have a date, but assuming that

10   Mr. Carlyle-Gordge -- and we'll hear from him --

11   followed what he thought he would do after he

12   finished his interviews with you, because Ray

13   Mackie testified that he called you and asked you

14   should he talk to Mr. Carlyle-Gordge, and you

15   encouraged him to go ahead?

16   A   I recall that as well, ma'am.

17   Q   Yes. Now, sir, at various points in time you have

18   been referred to the document by many in these

19   proceedings, including Mr. Hodson, Mr. Elson,

20   Mr. Wolch, Mr. Lockyer, that's "the script"

21   document?

22   A   Yeah, that's right.

23   Q   And you've asserted that that's a document that

24   was never in your prosecution file?

25   A   That's correct.

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1   Q   That the first times you saw it were during, I

2   guess, the 690 review when you saw it in Inspector

3   Quinn's office at the Saskatoon Police Service,

4   and you saw it when you accompanied Mr. Pearson,

5   or Sergeant Pearson to the prosecutors office in

6   the basement of the courthouse. And it was in a

7   file that was marked Art Roberts, Polygraph

8   Operator, or labelled to that effect, which we've

9   since found?

10   A   Yeah, that was in, that latter was in Regina. The

11   order of those, Ms. Knox, I'm not sure, but those

12   were the only two.

13   Q   Okay. There's some suggestion in some of the

14   materials that Mr. Wolch asserted at one time that

15   a copy of this script document had markings on it

16   that showed it had been received at the

17   prosecutors office, and I think he may have

18   suggested that there might even have been

19   handwriting on it that was yours, and I ask you;

20   have you ever seen a copy of a version of this

21   script document that has anything on it to

22   indicate that it was received at your office, or

23   personally reviewed and marked on by you, in any

24   manner whatsoever?

25   A   Not at all, ma'am.

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1   **Q**   Sir, you said to Mr. Lockyer last week that, and

2   when he was questioning, I guess what could best

3   be described as the efficiency of your memory in

4   that you could remember; you could remember things

5   that might be helpful, you couldn't remember

6   things that might not, that it was said by you

7   that this particular document stuck out in your

8   mind when you saw it in 1990 because it was

9   different. And that was a statement that's

10   contained in the transcript, and I -- I did mark

11   it, Mr. Commissioner, and I may come to it as I go

12   along, and I won't give you the document ID. The

13   discussion is around -- it's at transcript page

14   17721 where Mr. Lockyer said:

15   "And I must say, sir, I don't understand

16   how you can have absolute certainty in

17   that regard when we consider so many of

18   the other documents that you did see

19   that you now can't remember that you

20   ever saw. I'm wondering how you are

21   able to put all these other documents in

22   front of you ...",

23   and it continues on for some pages about that,

24   and your response to him was that you had never

25   seen a parallel document of this on any of the

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1   other serious prosecution files up until this

2   point. And I take it, as a prosecutor, there was

3   a familiarity and a design to the kinds of

4   reports that police sent to you; we have, in this

5   file we have the occurrence report, we have

6   investigation reports, but everything follows a

7   format as it were?

8   A   The large -- that's correct.

9   Q   And from the laboratory you get files, you get

10   forms in a particular format, if you practice for

11   ten years as a prosecutor you've seen a thousand

12   of them, if you practice for 20 years you've seen

13   20,000, and the numbers continue?

14   A   That's right, Ms. Knox.

15   Q   Okay. The kind of document that the script

16   document represents doesn't have any standard

17   police form to it; does it?

18   A   No, it does not. The thing I said to -- in this

19   line 15:

20   "I had never seen a, if you will, a

21   parallel document on any of the other

22   serious prosecutions we had had up until

23   that point come into -- pardon me, come

24   into our office."

25   And then, later in the paragraph:

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 1                         "... we never had similar documents

 2                          surface in other files and of course

 3                          that in itself made it stick out.",

 4            and, Ms. Knox, I couldn't put it any better than

 5            that in my opinion.

 6     Q      Okay.  I want to take your, the accuracy of your

 7            memory as you purport it to be, a step further and

 8            ask you; if this document had been on your file in

 9            1969 when you were prosecuting and at the

10            conclusion of the file in 1970, January 31st the

11            trial is over, I take it, your evidence being what

12            it is and your file being what it is, it would

13            have stayed with the file?

14     A      Yeah, that's correct.

15     Q      And --

16     A      It would have stayed with the file because my --

17            the way this particular file developed, despite

18            what I said to Chief Kettles in the letter I in

19            fact did hang onto the file indefinitely and I did

20            not discard items from it, and therefore by

21            definition that script would have had to be there

22            later.

23     Q      And, sir, if we follow that logic, that if it was

24            there in 1969 and it was there in 1970 and it was

25            there in 1990 when the file -- your file ended up
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1   in the courthouse in Regina -- and we'll hear

2   evidence from others, including Mr. Neufeld and

3   Mr. Brown --

4 A Uh-huh.

5 Q -- about how your file got kept and whether there

6   was any effort to keep the integrity of it

7   intact -- but if it had been there in 1969-1970,

8   if I can take myself where I want to go here, and

9   it was there in 1990, would you agree with me that

10   it would have been in the file in 1981 when Gary

11   Young came and looked at your file on behalf of

12   Mrs. Milgaard?

13 A It would have had to be in the file for -- because

14   of that very definition, ma'am.

15 Q And perhaps more significantly, given the mission

16   of disguise he went under of to you in 1983, it

17   would have been, had to have been there in

18   February of 1983 and March 1983 when

19   Mr. Carlyle-Gordge spent extended hours, according

20   to his correspondence to you, looking at your

21   file, dictating notes from it, and interviewing

22   you about it?

23 A Equally, it would have had to be there then.

24 Q Okay. Sir, I've reviewed the transcript of your

25   interview as it was recorded with

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1   Mr. Carlyle-Gordge, or two interviews, and I don't

2   find anywhere in that where he asks you about that

3   document; do you remember him asking you about

4   such a document?

5   A   No I do not.

6   Q   And, sir, I don't see anywhere in any of the

7   documentation that I have where he, subsequent to

8   meeting with you, reviewing your file, dictating

9   notes on your file, identified the existence of

10   that document to anyone. To your knowledge, did

11   Peter Carlyle-Gordge ever say to anybody, "oh my

12   God, I found a document that sent shivers through

13   my spine on that file when I was looking at it in

14   February and March on behalf of the Milgaards in

15   the efforts to exonerate David Milgaard?"

16   A   He -- I never -- I did not hear any reports back

17   to that effect and, clearly, it didn't happen in

18   my presence either.

19   Q   Okay. Sir, given the descriptions that have been

20   given to it by Mr. Lockyer, by Mr. Wolch and

21   others, if it had been on your file, and given

22   that Mr. Carlyle-Gordge noticed little details

23   like the Larry Fisher note by Sergeant

24   McCorriston --

25   A   Uh-huh.

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1   Q   -- or Constable McCorriston, can you imagine that

2   he would have missed it in his thorough review, or

3   what appeared to have been a thorough review of

4   your file, over a number of hours?

5   A   No, I can't imagine that he would have missed it.

6   I can only say that the way he went through the

7   file, un -- un, you know, bridled from my point of

8   view, he couldn't have helped coming across it if

9   it physically was there.

10   Q   And, sir, similarly with Gary Young when he came

11   to your office, and my understanding was his visit

12   to your office preceded Carlyle-Gordge by a couple

13   of years?

14   A   Uh-huh.

15   Q   Did he draw to your attention, say "what's this,

16   my God, this is a terrible thing, how could this

17   be", anything of that nature to suggest that he

18   saw anything in your file that caused him that

19   kind of shiver or concern that's been ascribed to

20   this document by this and other proceedings?

21   A   No, that did not happen with Mr. Young, ma'am, and

22   of course he was there under perfectly legitimate

23   circumstances as we will be hearing later on.

24   Q   Okay. In fact, he was there as counsel, with your

25   full co-operation --

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1   A   Yeah.

2   Q   -- and with your knowledge that he was there on

3   behalf of David Milgaard and Mrs. Milgaard in her

4   assistance to her son?

5   A   That's correct, came into the office, read the

6   file over, however long it took, and may or may

7   not have asked me some questions and went on his

8   way, as far as I know, happy, satisfied that he

9   had seen everything.

10   Q   And we had some evidence last week -- I believe

11   last week, I'm losing track of the weeks -- that a

12   CBC reporter or a CBC assistant, Sandra Bartlett,

13   at some point in the late '80s went through the

14   file?

15   A   Uh-huh.

16   Q   And did she, or to your knowledge did she ever

17   purport to see this document on your file, to get

18   shivers because she saw it there or in any way

19   identify that kind of supposedly sinister

20   machination by police, and maybe by you, in your

21   file from 1969-1970?

22   A   No. That was part of the Eric Malling interview

23   which, in fact, he did record a television program

24   in our offices in Canterbury Tower and it, to the

25   best of my knowledge, was never shown because he's

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1   -- he changed channels.

2   Now I first heard about or had

3   that name brought back, Sandra Bartlett, Ms. Knox,

4   in the Inquiry, and I came out of whatever room we

5   were shooting this interview in to find her in our

6   office looking through the file. I didn't

7   authorize that. It had to be, it had to be, you

8   know, gotten out so I could look and get the usual

9   information back into my head about numbers and

10   what -- and things like take, she was there and

11   perusing the file when I came out of somewhere

12   along the way of this televised show we did, and

13   that's how that happened. I'm -- should have

14   recalled that when I was asked about it, but it

15   wasn't by my leave, by any means.

16   Q   But nonetheless, with or without your leave, --

17   A   Yeah.

18   Q   -- she had apparently unrestricted access, at

19   least for a period of time --

20   A   Yeah.

21   Q   -- and we may hear from her as to how much time,

22   --

23   A   Yeah.

24   Q   -- but certainly she had access to your file, you

25   didn't remove anything from the file --

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1   *A*   Oh no, heavens no.

2   **Q**   -- before she got access to it, or put it back

3   after she did?

4   *A*   No, I did not. I didn't know she was going to

5   look in it, and her looking in it had nothing to

6   do with the contents, which were the same as

7   they'd been for ages now.

8   **Q**   And perhaps to state the obvious, before -- and I

9   believe you've stated it before -- before

10   Mr. Young came and before Mr. Carlyle-Gordge came

11   you didn't take anything off the file and hide it

12   from them I take it?

13   *A*   No, it stayed the same, to the best of my

14   knowledge and supervision, throughout all these

15   periods we have been dealing with now.

16   **Q**   And just a final question or two in this regard

17   and then I'll leave it as, conveniently, it's time

18   for me to end the day. In 1989 you were contacted

19   by Eugene Williams of the Department of Justice

20   and, among other things, you were asked to review

21   the file, your prosecution file as it still

22   existed from 1969-'70, and at one point he asked

23   you to review it with a view to finding any

24   mentions of attacks on other women with knives,

25   nurses and so forth, and we have -- and there are

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1   document numbers before the Commission, I can pull

2   them up for the morning if we need them -- but you

3   sent him a series of materials from your file, as

4   the letter indicated, in October 19 -- or letters

5   indicated in October 1989, including statements by

6   Miss (V9)----, Miss (V4)---, Miss (V)----, and I'm

7   going to draw -- (V6)--- (V6)-, among other

8   things, --

9   A   Uh-huh.

10 Q   -- and made references to other things in the file

11   that might be of interest to him. Had that

12   document been on your file in October 1989 when

13   you went to review it, there was reference at the

14   very first page to (V1)--- (V1)-, do you think

15   that you would have included that in the items you

16   identified for him that could potentially be of

17   interest in his review of this particular file

18   and, in particular, in light of the information he

19   had received from Mr. Wolch?

20 A   Well I think, by definition, if the document

21   somehow had been in the file at this point,

22   clearly it would have -- it would have caught my

23   attention and I would have said "what's this doing

24   here, when did it get here", and presumably sent

25   it to Mr. Williams, Ms. Knox, if I'm following

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1   you.

2   COMMISSIONER MacCALLUM: The script

3   document; is that what you are talking about?

4   BY MS. KNOX:

5   Q   The script document, yes, the four-page document.

6   A   Yeah.

7   Q   And, sir, Mr. Lockyer suggested to you in

8   ever-so-polite terms that he doesn't believe you

9   when you say you never saw that report or that

10   document before 1990; had you had a sinister

11   motivation sufficient that you would come before

12   this Inquiry and lie about it could you have taken

13   the document that was on your file in 1989, when

14   you went to look at it, and ripped it to shreds

15   and nobody would have been the wiser?

16 A   Well, I guess it's a hypothetical question, it

17   wasn't there. If it was there I certainly

18   wouldn't have destroyed it because, Ms. Knox, in

19   the Inquiry some number of things have come to

20   light for the first time, as I understand it quite

21   legitimately, and that may still happen; other

22   things have proven not to be where they should be.

23   I certainly wouldn't have treated it by destroying

24   it by any stretch of the imagination.

25 Q   Okay. Sir, I raise it only because, in his

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1   questions, Mr. Lockyer suggested that you were

2   conveniently choosing how you remember that and,

3   in effect, that you were lying, that it was indeed

4   a part of your 1969 file. And I ask you, if you

5   in fact had a sinister motive, could you not

6   simply have taken that and ripped it to shreds if

7   it was on your file?

8 A Oh, indeed, in that scenario I would have.

9 Q And similarly, if you would have had a sinister

10   motive, could you not have taken that lab report

11   about Ms. (V2)----- that you marked "omit,

12   different file" in 1969 --

13 A Uh-huh.

14 Q -- and simply ripped it to shreds so it wouldn't

15   appear on your file when anybody other than you

16   went into it?

17 A Under that definition I would have, Ms. Knox, done

18   that.

19 Q You could have, not that you would have, you could

20   have?

21 A Excuse me.

22 Q If you were trying to cover up malfeasance or

23   wrongdoing on your own part, you had ample

24   opportunity to destroy these documents rather

25   than, as he suggested, to find yourself in a

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1   position where you would have to lie under oath

2   about them; didn't you?

3   A   All kinds of opportunity over the years to do that

4   at any time I felt like it, is the way I would

5   answer that, madam. It clearly didn't happen.

6   Q   Mr. Caldwell, regrettably I have to say that I am

7   finished for the day, but not finished entirely,

8   so you do have to come back tomorrow.

9   A   One out of two isn't bad, ma'am.

10 Q   And Mr. Commissioner, if I can -- and I've made a

11   note to myself and this is just me in my editorial

12   ways -- when Mr. Wilson was asking questions of my

13   client and he was asking him in particular about

14   the allegations against Mr. Romanow, Mr. Lysyk and

15   others, my client said that he understood the

16   applications -- or the allegations and knew that

17   it was suggested that these gentleman had gotten

18   the two files, the Milgaard file and the Wilson

19   file together --

20 A   Oh, pardon me.

21 Q   -- and sort of connived about making sure nobody

22   discovered a link.

23   Just for the accuracy of the

24   transcript I take it, sir, when you said "the

25   Milgaard file and the Wilson file", be it Ron

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1   Wilson or learned counsel, you really meant the

2   Fisher file?

3   A   I did, and I specifically include -- exclude

4   Garrett Wilson from this plot, ma'am.

5   Q   Okay. That might be of some assistance to the

6   transcription staff so that it reads correctly.

7   A   Yeah. Glad you brought that up.

8   *(Adjourned at 4:31 p.m.)*

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