

*Commission of Inquiry*  
*Into the Wrongful*  
*Conviction of David Milgaard*  
*before*  
**THE HONOURABLE MR. JUSTICE**  
**EDWARD P. MacCALLUM**

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Transcript of Proceedings  
and  
Testimony before the Commission  
sitting at the  
Delta Bessborough Hotel at  
Saskatoon, Saskatchewan

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On Thursday, January 19th, 2006

Volume 109

Inquiry Proceedings



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  (Canada), The Hon. Irwin Cotler  
Mr. Marshall Hopkins, Esq., **for** Justice Calvin Tallis  
  (Retired)



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**Transcript of Proceedings**

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

MR. HARDY: Good morning, Mr. Commissioner.

We're ready to proceed with our first witness,  
Dr. Colin Merry.

**COLIN CLIVE MERRY, sworn:**

**BY MR. HARDY:**

Q Good morning, Dr. Merry.

A Morning.

Q Thank you for attending today to give testimony.

I understand you currently reside in Winnipeg?

A That is correct.

Q And how old are you?

A Nearly 71.

Q And am I correct that you are now retired?

A Yes.

Q And I understand that prior to your retirement you  
were a medical professional that specialized in  
the area of haematopathology?

A That is correct.

Q And can you tell us, please, what haematopathology  
is?

A It deals with essentially I suppose blood, but  
also includes -- well, it includes the whole of



1 the reticular endoceliac system and deals with  
2 leukemias, lymphomas, that sort of thing. It also  
3 extends into other areas. The lab which I was  
4 director of, we had a section which analysed  
5 urine, we had another section -- well, that  
6 section -- well, urine, it was more or less a  
7 section on its own because of the volume. Another  
8 area also examined body fluids. They ranged from  
9 cerebrospinal fluids, acidic fluids, pleura  
10 fluids, joint fluids, seminal fluids, any fluid  
11 more or less you could recover with a needle from  
12 a body, or without a needle shall we say.

13 Q And this was your expertise, in effect, through  
14 most of your career?

15 A Well, expertise -- well, I had I guess 40 years'  
16 experience. I don't like the term expert myself.

17 Q And in any event, though, your specialty or your  
18 area of work included the study and analysis of  
19 bodily fluids?

20 A That was a part of my responsibilities.

21 Q And can you tell us what you were doing in 1969?

22 A In '69, well, that was after -- let's see, I went  
23 to Winnipeg in '67, so in '69 I had already  
24 arrived in Winnipeg.

25 Q And what were you doing there?



1 A I was a pathologist and had a university  
2 appointment at the University of Manitoba.

3 Q And do I understand correctly that prior to your  
4 time in Winnipeg you actually worked in Regina?

5 A Yes, I worked at the Grey Nuns Hospital as it was  
6 there. I was responsible for the haematopathology  
7 and the blood bank, cross matching blood for  
8 transfusions and associated responsibilities.

9 Q And that would have been the case then up until  
10 1967 I think you mentioned?

11 A Up to '67, yes.

12 Q And during your time in Regina were you familiar  
13 with the capacity and abilities of the RCMP  
14 forensic lab?

15 A Not really. We -- I had minimal contact with  
16 them. There was a Dr. Rockaby who was head of the  
17 biochemistry section, he did collaborate with them  
18 I believe on developing breathalyzers for alcohol  
19 concentrations in breath. Blood bank? They  
20 occasionally dropped in and we used to give them  
21 specimens of blood when they wanted particular  
22 blood type. That was only very occasionally. I  
23 think they used it for development purposes or  
24 some sort of reference, but the technologists sort  
25 of dealt with them when they might drop in once



1 every month or few months.

2 Q Were you familiar at all with Staff Sergeant Bruce  
3 Paynter who worked in the lab at the RCMP facility  
4 in Regina in 1967?

5 A No. I really didn't get to know any of them by  
6 name. I mean, I did the odd medical legal autopsy  
7 as well but, you know, they came from the RCMP,  
8 they witnessed the procedure and took exhibits  
9 away, but we never got -- I never got to be an  
10 acquaintance, shall we say.

11 Q And moving forward in time, what were you doing in  
12 1990?

13 A 1990? Well, I was at that time at what was the  
14 Winnipeg General Hospital, but we also had to  
15 cover all the associate hospitals which later  
16 became the Health Sciences Centre and attached to  
17 the University of Manitoba.

18 Q And perhaps you can explain that for us, what was  
19 your position in that regard?

20 A I started off as lecturer when they sort of hired  
21 me on a -- you have a probationary period and, you  
22 know, if you survive the first 12 months, that's  
23 it, you are on permanent staff, so I was lecturer  
24 for 12 month s. That's on the university side.  
25 After that I became assistant professor and ended





1 up as associate professor on the university side  
2 and I was the lab director of the sort of section  
3 of haematopathology.

4 Q And I thought I had read somewhere perhaps that  
5 you were, or your title at the time was chief of  
6 haematopathology, would that be correct, in 1990?

7 A Yes, I guess I was head on the clinical side and  
8 later on the university side as well.

9 Q Okay. And I understand, Dr. Merry, that in 1990  
10 you were consulted respecting the serological  
11 evidence that had been entered in the 1969 trial  
12 of David Milgaard; would that be correct?

13 A I was initially consulted by Dr. Peter Markesteyn.

14 Q And can you take us through that, how did your  
15 involvement come about?

16 A Well, Dr. Markesteyn was a professor of forensic  
17 pathology and chief medical examiner in Manitoba  
18 and he would consult with the pathologists in  
19 various subsections if there was some aspect which  
20 involved that particular area and he consulted --  
21 now, if it was a head injury case or something of  
22 that description, he would just consult with a  
23 neuropathologist and when there was other  
24 involvements which involved my area, he would  
25 consult with me and we would go over the case, so



1 I think it was sort of just after lunchtime one  
2 day he phoned me in my office and said he had an  
3 interesting case which he would like my assistance  
4 with, so I was a little curious and walked over to  
5 his office to find out what it was about and  
6 that's how I sort of became involved.

7 Q And perhaps take us forward from there, what did  
8 you learn and what did you initially attend to?

9 A Well, there was a question of frozen yellow,  
10 yellowish substance which later thawed into a  
11 yellow liquid, as to the nature of that material  
12 which he asked me to evaluate.

13 Q And perhaps you could describe for us in some  
14 detail, what specifically were you asked to do?

15 A Well, I was asked to examine the transcript to see  
16 what evidence was there and to evaluate or assess  
17 what was present, so that's what I did.

18 Q And the next question I wanted to ask you was what  
19 information you had available to you. You've  
20 mentioned the transcripts. Was that the  
21 transcripts from the trial?

22 A That was the transcripts from the trial, yes.

23 Q Did you have any other source information  
24 available to you?

25 A Not really. I did -- I later communicated with



1 David Asper and I did ask for various other items  
2 of information with no success, also regarding the  
3 possibility of re-examining some of the material.  
4 Now, the anatomic pathology slides which Dr.  
5 Markesteyn had in his area, there wasn't a problem  
6 recovering them, but all the physical evidence  
7 resulted -- associated with the area which I was  
8 interested in were not available.

9 Q And you mentioned anatomical slides that were  
10 available. What were those?

11 A They were histological sections from the autopsy.

12 Q And would that have taken the form of pictures and  
13 the autopsy report or what --

14 A They would be glass slides.

15 Q You recall they were glass slides?

16 A I don't recall they were, but that's what they  
17 would have been.

18 Q Okay.

19 A And Dr. Markesteyn did mention to me that yes, he  
20 had examined the glass slides and did make various  
21 comments, but since it was not the area I was  
22 involved in, I didn't explore that any further.

23 Q And I won't dwell on this too long, but what did  
24 you understand the glass slides to contain?

25 A Sections of various organs at autopsy. I know



1           there was some difference of opinion on the  
2           interpretation of some of the uterine slides, but  
3           I didn't personally see them. It's not my, the  
4           area I examined.

5       Q       So in terms of your work, would I be correct in  
6           stating then that your sole source of information  
7           was the transcript of the trial itself?

8       A       What was contained in the transcript and what I  
9           could try and reconstruct as to what actually  
10          transpired at the time.

11      Q       Okay. And you did not have in your possession  
12          then any original lab reports or lab notes from  
13          1969; would that be correct?

14      A       That's correct.

15      Q       I'm going to turn your attention to some documents  
16          now, Dr. Merry. The first one I would like you to  
17          look at is document ID 169913, which will appear  
18          on the screen in front of you. And you'll note  
19          it's a memorandum to file from David, who we  
20          understand to be David Asper, and at the bottom of  
21          the page you'll note the date, May 30th, 1990, re:  
22          David Milgaard, and I'll read a portion of this to  
23          you. It indicates, at the beginning of the memo:

24                        "I was contacted on Sunday, May 27, 1990  
25                        by a Dr. Merry, who is a



1 Hematopathologist at the Health Sciences  
2 Centre, and connected with the  
3 University of Manitoba Medical School.  
4 He was consulted by Dr. Markesteyn as to  
5 the blood grouping issues because that  
6 is his specialty."

7 And I'll pause there. Would that information be  
8 accurate up to that point that I have read?

9 A Yes, that would be accurate.

10 Q And continuing from there it indicates:

11 "He will be conducting a battery of  
12 tests which he believes will establish  
13 among other things:  
14 a) that human semen is not yellow in the  
15 snow, but rather either clear or white,  
16 and not visible to the human eye. This  
17 likely means that what the police  
18 officer found in the snow was urine, and  
19 probably urine from some kind of an  
20 animal. He believes that certain  
21 enzymes present in urine will give rise  
22 to a positive test for human semen, as  
23 well as any testing for the presence of  
24 antigens."

25 And I'll pause there. In terms of that paragraph



1           that I have just read to you, would that be  
2           accurate, in terms of what you initially stated  
3           to Mr. Asper?

4       A       Well, it's not entirely accurate.   Umm --

5       Q       Maybe let's take it a sentence at a time.   If we  
6           look at the first sentence:

7                        "That human semen is not yellow in the  
8                        snow, but rather either clear or white,  
9                        and not visible to the human eye."

10          Would that be something that you had advised Mr.  
11          Asper?

12       A       White and translucent and not visible to the human  
13           eye in snow.

14       Q       Okay.

15       A       When frozen it is crystal white as snow.   Now  
16           there are photographs available of that, I  
17           believe, which Dr. Markesteyn and myself  
18           organized.

19       Q       Just for the time being, Dr. Merry, I just want to  
20           get an accurate account of what you initially  
21           advised Mr. Asper in terms of the tests which you  
22           were planning and what you thought those tests  
23           might establish.   And so I think the first  
24           sentence, you've got no concern with that, --

25       A       No.



1 Q -- from what I have just heard you. The second  
2 one:

3 "This likely means that what the police  
4 officer found in the snow was urine, and  
5 probably urine from some kind of an  
6 animal."

7 A Umm, urine, yes; umm, source of the urine, I  
8 believe that urine in snow is more likely to be of  
9 animal origin than human origin.

10 Q But this was an anticipated finding, if I can  
11 state it that way, that you relayed on to Mr.  
12 Asper?

13 A Umm, would you repeat that, please?

14 Q This was, the sentence I've just read to you, was  
15 something that you thought you could likely  
16 establish by conducting a test?

17 A Umm, I couldn't conduct a test because I didn't  
18 have anything to conduct it on, but I could  
19 investigate similar materials to see if they would  
20 have appearance or yield results which were  
21 obtained.

22 Q Okay. And in terms of the last sentence he  
23 indicates:

24 "He believes that certain enzymes  
25 present in urine will give rise to a



1                   positive test for human semen, as well  
2                   as any testing for the presence of  
3                   antigens."

4       A       Umm, not present in urine. It is a question that  
5               one could get in association with urine containing  
6               traces of semen, false positive results, as a  
7               result of the urine contamination.

8       Q       And I'm probably going to oversimplify this, but  
9               at this point in time were you advising Mr. Asper  
10              that the findings in relation to the yellowish  
11              substance that we will be talking of could be  
12              consistent with that substance being urine?

13      A       Umm, consistent with it being urine. Umm, the  
14               presence of spermatozoa had been confirmed in the  
15               transcript, so it appeared to be that it was most  
16               probably urine, but was contaminated with seminal  
17               fluid, which I am very familiar with, perhaps we  
18               will get to that later.

19      Q       Yeah, and that's probably -- as I say, I was just  
20               trying to establish sort of what your mindset was  
21               at the outset, and we will look at these specific  
22               findings in a little bit more detail and,  
23               hopefully, make them clear at that point.

24                               Moving to the second paragraph,  
25               that indicates again, the sentence leading into





1           these paragraphs was as follows:

2                   "He will be conducting a battery of  
3                   tests which he believes will establish  
4                   among other things:",

5           and if we move to the second paragraph:

6                   "Assuming that the samples were in fact  
7                   human semen, there is no evidence  
8                   whatever to establish the presence of  
9                   blood, and in the absence of such, the  
10                  only conclusion was that the antigens  
11                  were present in the semen by virtue of  
12                  secretion, and therefore excludes  
13                  Milgaard as the donor based on the  
14                  evidence."

15       A       That according to what was in the transcript, and  
16               I know that there was other evidence has come to  
17               light. At the time there had been no test for  
18               blood, no specific test conducted for blood, on  
19               that specimen. A peroxidase reaction was  
20               conducted, which is not specific, and since  
21               spermatozoa had been identified, if there is any  
22               contamination of a specimen by cellular material,  
23               which will necessarily contain cytochromes, it  
24               would automatically give a positive test.

25       Q       And doctor --



1       A       So it was, shall we say, an error to use a  
2               peroxidase test on something which would have been  
3               positive anyway.

4       Q       Okay. And we are going to get to that more  
5               specifically. Again, just in terms of this  
6               statement alone, and try to think back to what  
7               your mindset would have been when you were  
8               initially starting to work on this matter, and I  
9               want to read this statement to you and you can  
10              tell me if you agree with it, it says:

11                    "Assuming that the samples were in fact  
12                    human semen, there is no evidence  
13                    whatever to establish the presence of  
14                    blood, and in the absence of such, the  
15                    only conclusion was that the antigens  
16                    were present in the semen by virtue of  
17                    secretion, and therefore excludes  
18                    Milgaard as the donor based on the  
19                    evidence."

20              Now would that have been, overall, a statement  
21              that you would have agreed with at this point in  
22              time based upon what you knew at this point in  
23              time?

24       A       Well, more or less, I guess. Shall we say if one  
25               was satisfied that a result indicating the



1           presence of antigens was a valid result, then this  
2           would have excluded Milgaard. On the other hand,  
3           if one entertained the possibility that this was a  
4           false positive result, then it doesn't get us  
5           anywhere.

6           Q       So you are saying worked into your agreement with  
7                   this conclusion is also the assumption that Mr.  
8           Milgaard was a non-secretor and that the A antigen  
9           test was accurate?

10          A       Well the evidence presented was Milgaard was a  
11           non-secretor and that A antigen had been found in  
12           the seminal fluid. Now, if one believes that, yes  
13           that sentence is correct.

14          Q       Okay.

15          A       But I came to gravely doubt that and, well, we'll  
16           get to that later on.

17          Q       Okay. And we -- yeah, okay. I'm going to move  
18           forward. What information -- and let me ask this  
19           first; do you recall why you were having direct  
20           contact with Mr. Asper?

21          A       Umm, well it was Dr. Markesteyn who got me into  
22           it, and he said "you better talk to David Asper  
23           direct", so that's what I did. I think that was  
24           probably our first contact by phone.

25          Q       Okay. I'm going to turn you to another document,



1           it is 155509, and you'll see it's a letter to  
2           yourself from David Asper. And he reviews  
3           portions of the case, you will see particularly in  
4           the middle paragraph he gives you some information  
5           relating to the Crown's star witness, Albert  
6           Cadrain, suffering from some kind of acute  
7           psychiatric disorder, he encloses in the first  
8           paragraph a complete copy of the trial transcript,  
9           and then the letter concludes shortly after that.  
10          I take it this information on Albert Cadrain, and  
11          aspects relating to the case outside the  
12          serological portions, were not relevant for your  
13          purposes?

14        A       Umm, well, I've been involved in a few  
15                medical/legal cases in the past. One does  
16                encounter, shall we say, unusual characters  
17                involved in such events so, you know, they tend  
18                not to be upstanding citizens, shall we say. So  
19                that sort of thing, you know, didn't really have  
20                any great impact on me, shall we say.

21        Q       And wouldn't it be fair to say that it had no  
22                relevancy whatsoever for the purposes of the work  
23                that you were conducting?

24        A       Umm, no, there is no possible way it could  
25                influence investigation of serological results.



1 Q Okay. I turn you next to 106948. It's a report  
2 dated June 1st, 1990 from yourself directed to Mr.  
3 Asper, and it's just a two-page report, a very  
4 short report; do you recall this particular  
5 report, Dr. Merry?

6 A Yes, I recall that. I sort of gave him a short,  
7 preliminary report, you know, just how far I had  
8 got evaluating the situation.

9 Q And I see in the first sentence he indicates, or  
10 you indicate:

11 "I have examined the forensic evidence  
12 presented at the trial."

13 And, again, do I assume correctly that that would  
14 be based upon your review of the trial  
15 transcript?

16 A Yes, umm, that's correct.

17 Q And I'll read this next portion to you again:

18 "From this I do not believe that the  
19 possibility can be excluded that the  
20 frozen yellowish substance found near  
21 the body of the deceased was dog urine,  
22 from a dog positive for a blood group  
23 antigen cross reacting with the human  
24 blood group A.

25 Approximately 50 percent of



1 dogs are known to have the Tr antigen  
2 which cross reacts in this manner.

3 Such dog urine might well also  
4 contain spermatozoa."

5 A That is correct. I think it was either -- it was  
6 around the time -- I have cross-matched, I guess,  
7 thousands of units of blood for transfusion to  
8 humans, never transfused a dog. I was aware that  
9 the variants of the human A antigen are present in  
10 animal species, and I knew of the association with  
11 Tr antigen in dog. I did phone up the Animal  
12 Sciences Laboratory, which I had done some work  
13 with in the past, and they provided me with  
14 specimens of 21 dogs who they'd had in. Umm, I  
15 didn't want to try and secure dog blood myself, so  
16 they gave me the remains of specimens from a day,  
17 which I took to the lab I had, and I tested them  
18 against human anti A antisera used for blood  
19 transfusion purposes, and 11 of them did cross  
20 react and give a positive reaction. It varied a  
21 bit. Some gave a strong agglutination reaction  
22 characteristic of a human Group A1, and others  
23 gave a positive agglutination reaction  
24 corresponding to a human Group A2, which gives a  
25 weaker agglutination. So, you know, I have seen



1           it in the literature, I believed it, but I  
2           verified, yes, this is what does happen.

3       Q       Okay. And, just, I want to try and state this in  
4           simple terms if we can. You were considering the  
5           frozen yellowish substance --

6       A       That's correct.

7       Q       -- which had been concluded to be semen in the  
8           course of the 1970 trial, and were you stating  
9           here that in fact it could have been urine, and  
10          the fact that in 1970 A antigens were found was  
11          not necessarily inconsistent with your conclusion  
12          that it could be urine; and, similarly, the fact  
13          in 1969 that spermatozoa were found in the  
14          yellowish substance would similarly not  
15          necessarily be inconsistent with the conclusion  
16          that the substance was urine, and in fact dog  
17          urine?

18      A       Umm, it meant dog urine was a possibility. Umm, I  
19          had demonstrated that a dog could be a source of A  
20          antigen in that specimen.

21      Q       And --

22      A       And, well, there are other possible sources of A  
23          antigen as well.

24      Q       But in simple terms, if they -- the tests that  
25          would have been conducted in 1969 to detect the



1 presence of A antigens, I think what you are  
2 saying is because of the Tr antigen, which I take  
3 it is similar to the A antigens, that the result,  
4 although interpreted as being human A antigens,  
5 could have been just as consistent with it being  
6 the Tr antigen in terms of the person who was  
7 conducting the test?

8 A That is correct, yes.

9 Q And, similarly, dog urine -- implicit in this,  
10 what you are stating is that dog urine -- and  
11 you've stated expressly -- can contain  
12 spermatozoa?

13 A It is as likely to contain spermatozoa as human  
14 urine.

15 Q Okay. The next paragraph states:

16 "The use of a test, "used by hospitals  
17 to test for blood in urine", to test for  
18 blood in seminal fluid is totally  
19 invalid. Normal human seminal fluid  
20 specimens will, on standing, test  
21 positive as the spermatozoa disintegrate  
22 and liberate cytochromes and enzymes  
23 which catalyse the benzidine/peroxide  
24 reaction. This was known but was tested  
25 on some seminal fluid specimens





1 submitted to this laboratory for  
2 analysis."

3 And just to give some context for this paragraph,  
4 in this paragraph are you considering the  
5 evidence at trial that related to the question of  
6 whether or not there was blood in the yellowish  
7 substance that was being considered?

8 A Yes. This is based on the sort of photograph we  
9 took. We did seminal fluid analysis I guess  
10 virtually for the whole province, we seemed to be  
11 the only hospital that did it, and this was for  
12 fertility purposes, also some post-vasectomy cases  
13 who hoped they weren't fertile any more, so, you  
14 know, we had a mixture of cases. On the  
15 particular day when we had set up the test I think  
16 the, I think there were about, I think there were  
17 11, the racks have 12 in, specimens of seminal  
18 fluid which had come through, and they had been  
19 analysed, they had just got finished with them.  
20 So I tested them using the dipstick, one tested  
21 slightly positive, the rest were all negative.  
22 Umm, and the specimen which we, or I used, had a  
23 normal sperm count. I believe it was 117 million,  
24 the average, the normal, or the motile value is  
25 106. We normally, you know, take 100 million as,



1           you know, sort of normal. I looked at that  
2           specimen myself, no evidence of any blood in, no  
3           red cells to be seen, and on testing it was  
4           negative for peroxidase reaction. Umm, then it  
5           was poured on some snow and stuck in a deep freeze  
6           for 72 hours at minus 40.

7                       The rest of the specimens which  
8           had been finished with, we used to hold them 24  
9           hours, they got stuck in the refrigerator. So the  
10          following morning, out of curiosity, I re-tested  
11          them. Well, the spermatozoa had died overnight,  
12          and they tested intensely positive.

13       Q           On the benzidine/peroxide test?

14       A           Yeah.

15       Q           Okay. And so let's --

16       A           Except for those which were post-vasectomy.

17       Q           Okay. And, again, I want to try and simplify this  
18          paragraph if we can. You start off by saying:

19                   "The use of a test, "used by hospitals  
20                   to test for blood in urine", to test for  
21                   blood in seminal fluid is totally  
22                   invalid."

23          And as we know, that test, the hemostix test was  
24          applied in 1969 by the Regina lab to test for the  
25          presence of blood in what was believed to be



1           seminal fluid, and you are stating here that that  
2           was an entirely invalid use in that respect?

3           A       It was. Once a spermatozoa dies it may morph --  
4           maintain its morphology, its physical appearance  
5           down the microscope for a while will not appear  
6           much altered, however the cell wall, the proteins  
7           of the cytoskeleton will still be there, but the  
8           integrity of the cell membrane will have  
9           completely been destroyed or degenerated and it  
10          will leak. More or less, I guess, like a tea bag  
11          dipped into hot water, you know, you can see the  
12          tea come out of it, so that's what happens to the  
13          cytochromes in a cell when it dies.

14          Q       Okay. And just let me stop you there for a  
15          moment. So you agree with the statement that it  
16          was an invalid use of that test, being the  
17          hemostix test, which I think we're noting is also  
18          referred to as the benzidine/peroxide reaction  
19          test; would that be correct?

20          A       That is correct.

21          Q       Okay. And if I understand you correctly what you  
22          are stating is that if you have a sample of  
23          unadulterated semen which you allow to sit for a  
24          period of time, and later apply this test, the  
25          hemostix or benzidine/peroxide reaction test, that



1           in fact you can get a positive result  
2           notwithstanding that it is pure semen that has  
3           been sitting for a time being?

4           A       You will get a positive result. Now the specimen  
5           in question was found in snow, it was said to be  
6           minus 40, we reconstructed those conditions.

7                       When seminal fluid is frozen for  
8           storage for later use for, you know, producing a  
9           family, that is entirely different to normal  
10          freezing. It is snap-frozen in liquid nitrogen  
11          at -- I -- it's minus 194 point something degrees,  
12          it is literally snap-frozen so that ice crystals  
13          do not form and totally disrupt the internal  
14          structure.

15                     At minus 40, when seminal fluid  
16          is dropped onto snow, it is -- it freezes rapidly,  
17          but is not snap-freezing frozen, and you will get  
18          crystallization within the spermatozoa and they  
19          will be dead there and then.

20          Q       How long would it take for, as I say, using again  
21          the example of pure semen sitting still and  
22          leaving out for a moment the question of it being  
23          frozen, how long would it take before the positive  
24          hemostix test of our -- or before that test would  
25          show positive?



1       A       Umm, well, immediately it thawed the cytochromes  
2               would begin diffusing out. When we took the  
3               specimen which we had in the deep freeze out I had  
4               it on my lab bench in my office and it had started  
5               to thaw, and there was just a little fluid, and I  
6               was a bit curious so I stuck a test strip in it  
7               before I went for coffee and it tested,  
8               immediately, extremely strongly positive.

9       Q       Are we --

10      A       Umm --

11      Q       Are we talking, then, a matter of hours?

12      A       Well it had only just started to freeze -- to thaw  
13               when it came out, after I had took it out of the  
14               deep freeze. I mean later on it, you know, thawed  
15               right out.

16      Q       Okay. And I just want to be sure I'm following  
17               you. You have been talking about the substance  
18               being in a frozen state?

19      A       Yeah.

20      Q       And is the breakdown of the sperms that you  
21               earlier spoke of, which allows for the leakage of  
22               the cytochromes, does that occur in the frozen  
23               state or are those sperms, in effect, preserved in  
24               the frozen state?

25      A       Oh, well, they are preserved and dead in a frozen



1 state, but they are not going to leak anything,  
2 because they are frozen and they are solid. It's  
3 when -- once they thaw that the leakage occurs.

4 Q And are you saying in the freezing and thawing  
5 circumstances which we believe would have applied  
6 in this case, being frozen at minus 40, eventually  
7 thawing after the passage of hours, in fact days,  
8 that the positive hemostix test would have  
9 resulted almost immediately upon thawing?

10 A Yes.

11 Q Okay. Now was this issue that we have been  
12 speaking of, in other words knowledge that pure  
13 semen could later test positive on the hemostix  
14 test, was that knowledge known in 1969?

15 A Umm, yes, it was known. I mean there are warnings  
16 about using those, it comes in the blurb attached  
17 to the package that you can get false positive  
18 results, so, you know, if you dip it in, it comes  
19 out blue, that is a purely presumptive test and it  
20 requires further investigation. It does not mean  
21 there is blood there.

22 Q Right. And we understood that even in 1970 it was  
23 understood that it was a presumptive test, that it  
24 did not mean necessarily that there was blood  
25 there, --



1 A No.

2 Q -- but was it known by those with expertise at  
3 that time that one of the possibilities for a  
4 positive hemostix test would be simply the  
5 degradation of individual sperm sitting in a pure  
6 semen sample?

7 A Well I mean I have been -- taught medical  
8 laboratory technologists, interns, residents for,  
9 I don't know, going on 40 years, and I think they  
10 are all well informed of that fact in, you know,  
11 that process of being taught.

12 Q So the answer to that is "yes", as of 1969 that  
13 knowledge was known amongst those with expertise  
14 in this area?

15 A Well, the ones I taught. I mean, how other people  
16 taught, I wouldn't know.

17 COMMISSIONER MacCALLUM: Who did you teach,  
18 medical students or other people, simply  
19 technicians.

20 A I taught technologists, medical students, interns,  
21 residents.

22 BY MR. HARDY:

23 Q And that was teaching in 1969?

24 A That was teaching in 1969.

25 Q But what about within the body of your peers who



1           are working similarly as you are, what would be  
2           your conclusion, or reasonable conclusion as to  
3           whether or not they would be aware of this aspect  
4           that we've just been discussing?

5       A       It's partly the core material they are supposed to  
6           know and that's it, they should have learned that.

7       Q       And you were aware of this in 1969?

8       A       I've been aware of it for many years, yes.

9       Q       Okay. Turn to the next page, please, at the top  
10          of the page it states:

11                       "From the manner in which the test for  
12                       secretor status was performed it is not  
13                       possible to be certain if David Milgaard  
14                       is a secretor or non-secretor of blood  
15                       group A-antigen."

16      A       Yes.

17      Q       And I take it that you had reached that conclusion  
18           again from your review of the trial transcript?

19      A       Yes, I had come to the opinion that one could not  
20           rely upon that result. There did not, in the  
21           material I had examined, seem to be sufficient  
22           validation of scientific requirements to apply the  
23           test or analytical procedures. I mean, one has to  
24           know exactly what you are analysing, you have to  
25           know what interfering substances are present, what





1 will give false positive and what will give false  
2 negative results. I mean, you don't take  
3 something out of a packet, stick it into it, test  
4 it and say that's positive or that's negative, it  
5 is far more complex than that.

6 Q So from your review of the transcript, you  
7 immediately had concerns about the validity of the  
8 secretor status testing that had been apparently  
9 conducted in relation to David Milgaard?

10 A I did phone David Asper and ask him where and how  
11 was that saliva specimen collected and he told me  
12 it was collected in a police station in Saskatoon  
13 I believe, it was collected in the police station.  
14 Well, I thought it unlikely that a police station  
15 would have had a water bath available at least at  
16 56 degrees Centigrade or preferably at 100 degrees  
17 Centigrade, a boiling water bath available to  
18 immediately inactivate the ptyalin, or the other  
19 name for it is alpha amylase present in saliva. I  
20 thought it was unlikely.

21 Q Okay. And we are going to look at what the proper  
22 secretor status test would have been, but I take  
23 your point that you immediately had suspicions  
24 about whether or not that secretor test, status  
25 test had been properly done?



1       A       I did, yes.

2       Q       I'll turn you --

3       A       That is why I suggested to David Milgaard  
4               ultimately that I thought that that should be  
5               really examined.

6       Q       And when did you suggest that?

7       A       I can't remember the exact dates. It's kind of a  
8               while ago, you know. I did suggest it and it did  
9               get done. I'm not sure if it was documented or  
10              whether we discussed it entirely by phone. He did  
11              want me to do the test myself. Well, I told him  
12              no, I would not do it myself. It was done  
13              initially by another lab and as a lab director, if  
14              I thought somebody else's result was inaccurate, I  
15              would not repeat it myself, I would make sure that  
16              that lab was informed and that they should be  
17              given the opportunity to re-examine the matter  
18              themselves, so I told him I would rather it was  
19              done, repeated by that laboratory that -- it was a  
20              sort of ethical matter I guess between laboratory  
21              directors.

22      Q       Okay. But, Dr. Merry, can you place with any more  
23               specificity when this conversation was taking  
24               place?

25      A       Not really. It was, I don't know, perhaps two,



1           three weeks or longer. It did initiate the  
2           subsequent testing which was done.

3       Q       Okay. And that's the best you can tell us on that  
4           in terms of timing?

5       A       Yeah, unless there's something else in the  
6           evidence which was actually documented.

7       Q       No, I haven't --

8       A       I don't believe it was documented other than  
9           telephone conversations.

10      Q       It's not, there are references such as the one we  
11           just read, and I guess what I'm asking is would  
12           that suggestion have been made by you at the time  
13           of this letter, which is June 1st, 1990, or  
14           conversations in and around that time period?

15      A       It would be sometime later that I sort of followed  
16           up and said, you know, you better get it done,  
17           better get it re-examined.

18      Q       Okay. I'm going to turn you next to a report that  
19           was done by Dr. Markesteyn dated June 4th, 1990.  
20           The document is 155517. I think you've already  
21           confirmed for us that you were working with Dr.  
22           Markesteyn at the time, being consulted by him in  
23           relation to this matter. Are you generally  
24           familiar, or were you familiar with this report,  
25           Dr. Merry?



1       A       Well, I was familiar with it. I've sort of  
2               scanned through it, yes.

3       Q       And was your work included in this report, and  
4               when I say your work, your work on the serology  
5               aspects?

6       A       Well, I did write a separate report. I think it  
7               might be alluded to in this.

8       Q       Okay. And we will get to another report of yours,  
9               a longer report, it's actually in March of 1992,  
10              but I do want to review some of the sections of  
11              this report. Do you recall whether or not you  
12              were under the understanding that Dr. Markesteyn  
13              was going to be including some of your work and  
14              findings in the context of his report?

15      A       Yeah, I was aware of that. I mean, he asked for  
16              my assistance and it was more or less understood  
17              that he was going to be the principal author of it  
18              and I would be a contributing author and it would  
19              be included in it.

20      Q       Would it be fair to say then that the serological  
21              aspects that we'll look at in a moment was likely  
22              information that came from you?

23      A       Yes. He didn't -- you know, he knew what I was  
24              doing, he was witness to the procedure when we  
25              organized the photographs, but he, as far as I



1 know, didn't do any further investigation in that  
2 area himself.

3 Q Okay. Let's turn to page 155522. Oh, I'm sorry,  
4 it's page 6 of the document. The first paragraph,  
5 the title is, "Seminal stains at scene, yellowish  
6 stains in the snowbank." This is Dr. Markesteyn  
7 writing:

8 "I share Dr. Ferris' concerns about the  
9 integrity and continuity of the samples  
10 of the alleged semen which were  
11 recovered on February 4, 1969, at the  
12 scene. The scene, according to the  
13 evidence, had been extensively searched,  
14 trampled, and, the snow had been melted  
15 - in and around the body. There was  
16 heavy staining with blood from the  
17 deceased. The evidence seems to  
18 indicate that two yellowish stains were  
19 discovered some four days after the  
20 assault took place."

21 And did you have these concerns respecting the  
22 integrity and continuity of the samples that you  
23 were considering?

24 A Well --

25 Q Indirectly?



1           A           Indirectly. When I have done medical or legal  
2                       autopsies, immediately the specimen is collected.  
3                       I have to write in diamond pencil on the tube, the  
4                       glass tube or whatever it's in, my initials so it  
5                       can be identified. There has to be an absolute  
6                       chain of custody. I mean, seminal fluid  
7                       specimens, or semen specimens, that was a problem  
8                       when I went to the Health Sciences Centre in  
9                       Winnipeg, they would get assault cases into the  
10                      emergency or casualty department. A casualty  
11                      officer would examine the patient, take the swab,  
12                      so on, then they would come up to the lab. A  
13                      technologist would get it, then that technologist  
14                      would go off duty at 11:30 at night and another  
15                      technologist would come on, it would be handed  
16                      over to another technologist and down the road.  
17                      Then we would get subpoenas for the whole lot of  
18                      them to go to court to validate the chain of  
19                      custody.

20          Q           I understand, Dr. Merry, and --

21          A           So I simplified that, I had a box put in the  
22                       fridge with a baffle in it and I told them the guy  
23                       who examines the patient comes up, sticks it in  
24                       that locked box and that is it and then when he  
25                       has to go to court he comes up to the lab, I will



1 open it with a key that I have and he takes it  
2 back again and we hear no more of it and I don't  
3 have my staff in court.

4 Q I understand, Dr. Merry, and I do want to focus  
5 though on the questions that I'm asking, and I  
6 think the question --

7 A Well, the custody of evidence here --

8 Q -- was a concern for you?

9 A Well, yes, it was.

10 Q In trying to understand the substance, you would  
11 have concerns about the integrity and continuity  
12 of the samples; would that be correct?

13 A Well, I found it, shall we say, kind of  
14 surprising.

15 Q Okay.

16 A I mean, in the British Court I don't think it  
17 would have got to court, shall we say.

18 Q Okay. And in terms of the next paragraph, it  
19 states:

20 "Yellowish stains in snowbanks most  
21 commonly find their origin, not in human  
22 ejaculates, but in urine, most commonly  
23 of canine origin. I have been informed  
24 that male dog urine often contains  
25 semen. "Unused" semen in dogs is not



1 reabsorbed but is secreted in the urine.

2 Dogs urinate over other dogs' semen

3 and/or urine to establish territory.

4 Dogs have antigens which serologically

5 cross-react with human A-antigen. One

6 of the two yellowish stains contained

7 semen, perhaps intermingled with urine.

8 The other one did not contain semen and

9 perhaps contained urine only. We will

10 never know."

11 And I think we covered these aspects previously

12 in terms of the possibility of this substance

13 being dog urine; would that be correct, Dr.

14 Merry?

15 A Yes, so far as I have been informed that male dog  
16 urine, that that is Dr. Peter Markesteyn. Now,  
17 one of the last residents I taught actually came  
18 from the States, originally a doctor of veterinary  
19 medicine, then went into human medicine and  
20 qualified in that and then became a resident in  
21 pathology. I was one of the people who taught her  
22 pathology. She also simultaneously at this  
23 university qualified in veterinary pathology, so  
24 she was, ended up as both a human and veterinary  
25 pathologist. I specifically asked her about





1 spermatozoa in dog urine since I have not seen a  
2 great deal of dog urine, I've seen much more dog  
3 blood I guess. I mean, we did used to have drug  
4 trials and that sort of thing going on which we  
5 did lab testing for research purposes, but I've  
6 not seen that much dog urine.

7 Q So am I correct in --

8 A She confirmed, yes, you can find spermatozoa in  
9 dog urine the same as you do in humans.

10 Q Okay. This next paragraph states:

11 "Human semen does not freeze into a  
12 yellowish stain at -40 degrees F. In  
13 fact, it is white and difficult to spot  
14 in snow other than through special  
15 techniques such as ultraviolet light  
16 exposure, etc. One of the two yellowish  
17 lumps was found to contain semen; the  
18 other one, although it looked the same,  
19 did not contain semen or any other human  
20 material in that it did not contain, we  
21 are informed, blood, sweat, tears, or  
22 saliva. Dr. Emson examined the material  
23 prior to having it sent to the Crime  
24 Laboratory in Regina. He has informed  
25 me that he was sure it was semen, but,



1                   that he could not say from what species  
2                   it originated. The Serology Section  
3                   determined it to be not only semen but  
4                   of human origin. In order to reach a  
5                   firm scientific conclusion whether the  
6                   semen retrieved from the snowbank four  
7                   days after the assault was indeed human  
8                   one needs to review the methodology used  
9                   by the serologist at that time and thus  
10                  one needs to review the notes that were  
11                  made at that time."

12               And in particular in relation to that last  
13               sentence that I read to you, Dr. Merry, would you  
14               agree with that, and would you have agreed with  
15               that in 1990?

16       A       Yes, I agree with it and I did not manage to, what  
17               is it, needs to review the methodology used.  
18               Well, I didn't get a chance to do that either,  
19               so --

20       Q       You weren't in possession of original lab notes  
21               which would advise you of the methodology; would  
22               that be correct?

23       A       That's correct.

24       Q       Okay. Just in completing that aspect, the next  
25               paragraph states:



1 "I have been informed that the original  
2 notes on which this evidence by Staff  
3 Sgt. Paynter was based are no longer  
4 available. Staff Sgt. Paynter informed  
5 me that he does not remember (some  
6 twenty years after the event) whether or  
7 not he performed specific tests to  
8 determine the human origin of these  
9 specimens."

10 Would you have similarly been under the  
11 impression at that time that the original lab  
12 notes were not available, Dr. Merry?

13 A Yes.

14 Q Move to the next paragraph which states:

15 "The fact that the semen contained an  
16 A-antigen does not make it human --"

17 And I'll pause there for a moment. I think we've  
18 covered that; correct?

19 A That's correct.

20 Q "-- nor, I am informed, does the enzyme  
21 test for phosphatase used at that time  
22 make it human."

23 I'm going to pause there for a moment. We know  
24 from the trial evidence of Staff Sergeant Bruce  
25 Paynter that in examining the yellowish substance



1           he conducted a test initially known as an acid  
2           phosphatase test and obtained a positive result  
3           and I think what's being indicated here is that a  
4           positive acid phosphatase result does not  
5           necessarily mean that a substance is human; is  
6           that correct?

7           A       That is correct. The prostate produces acid  
8           phosphatase. It can be distinguished from other  
9           acid phosphatases produced elsewhere in the body.  
10          It is -- it used to be called heat and formal  
11          stable acid phosphatase whereas the other  
12          phosphatases were destroyed on treatment with  
13          those things, so you could sort of crudely  
14          fractionate them in those days, and you would  
15          expect to find acid phosphatase in any seminal  
16          fluid irrespective of species. Dogs are used as  
17          research and experimental model in prostate  
18          disease in fact. Elderly dogs and elderly men  
19          both on occasion suffer from benign aplasia of  
20          prostate, you know, prostatic disease, so it's an  
21          ideal experimental model, and yes, the prostate in  
22          a dog does very closely resemble, react and have  
23          the disease conditions of humans.

24          Q       Okay. The next comment is:

25                       "The human antibody test doesn't make it



1 human if there was any contamination  
2 with human blood."

3 And again, I take it you had no information at  
4 this point in time that a human antibody test had  
5 actually been done on the yellowish substance?

6 A No, I had no information.

7 Q And we'll be talking about that aspect in a moment  
8 further. And then the last point:

9 "The only way of excluding this semen  
10 from being of non-human origin would  
11 have been the morphology and/or species  
12 specific antigen-antibody reaction  
13 tests."

14 And in terms of the first comment, "would have  
15 been the morphology," do you understand what Dr.  
16 Markesteyn was referring to in referring to that  
17 aspect?

18 A Well, morphology isn't very good for speciation.

19 Q Just -- I'm going to stop you there for a moment,  
20 Dr. Merry. Do you understand what use Dr.  
21 Markesteyn was using of this phrase in the context  
22 of this sentence?

23 A Well, let's see, "The human antibody test doesn't  
24 make it human if there was any contamination with  
25 human blood." Yes, that's right. "The only way



1 of excluding this semen from being of non-human  
2 origin would have been the morphology." I  
3 don't -- spermatozoa of different mammalian  
4 species look very similar.

5 Q So again back to my question though, are you aware  
6 what use Dr. Markesteyn was making of this phrase?

7 A "And/or species specific antigen-antibody reaction  
8 tests," that I can understand. The morphology  
9 bit, morphology is not reliable for speciation.

10 Q And we're going to get to that in a moment, Dr.  
11 Merry, but I take it from what you are saying to  
12 me, that you didn't understand or don't understand  
13 what use Dr. Markesteyn is putting that term to;  
14 would that be correct?

15 A Well, he's suggesting that morphology might  
16 contribute in some way. Well, yes, it would  
17 identify, and yes, it would possibly be human, but  
18 you couldn't say it was human.

19 Q Okay.

20 COMMISSIONER MacCALLUM: It might be useful  
21 for you to explain to us what morphology means.

22 A Morphology is the physical appearance of something  
23 down a microscope.

24 COMMISSIONER MacCALLUM: Right.

25 A I mean, a spermatozoa is kind of like a tadpole,



1           it has a head, an acrosome and a very long tail.  
2           They all have the same basic morphology.

3                   COMMISSIONER MacCALLUM:   As between  
4           species?

5       A       As between species.   There might be some very  
6       discrete differences, but, you know, I've looked  
7       at I guess thousands of human seminal fluid  
8       specimens and unless somebody warned me actually  
9       they slipped a dog specimen in, you know, I might  
10      very well look at it and not realize that it was  
11      different.   Now, we do come to another confounding  
12      factor in this, I did examine what I knew was  
13      human seminal fluid after it had been frozen for  
14      72 hours and then thawed out.   Well, the  
15      morphology has, you know, considerably  
16      deteriorated, they are very dead, and you then  
17      have suboptimal morphology, so some who say they  
18      are experts, I always refuse to acknowledge that  
19      I'm an expert, once I think I'm an expert I'm in  
20      trouble because I think I've learned a lot.  
21      Forget it.   Now, those who claim to be experts,  
22      well, I would be a little weary about that.

23           BY MR. HARDY:

24      Q       And, Dr. Merry, we'll I think talk a little bit  
25      more about this morphology aspect, and I take your



1 point that you've just said I think in terms of  
2 semen or sperm that sits over time, that there's  
3 some degradation which I think I'm hearing you say  
4 perhaps would make it even more difficult to  
5 distinguish as between species when you are  
6 looking at the morphology or physical  
7 characteristics of the sperm; would that be  
8 correct?

9 A That's correct.

10 Q Okay. If we could move to the next page, 155523,  
11 you'll see the heading at the top is "Blood in  
12 Semen from Snowbank," and it states:

13 "The evidence suggested that an attempt  
14 was made to determine if the seminal  
15 fluid specimen retrieved from the  
16 snowbank contained blood. Evidence was  
17 given that a method used in hospitals at  
18 the time was used for the determination  
19 of blood in urine. This in all  
20 probability was the Hemostix test and,  
21 if so, would have been used contrary to  
22 manufacturer's instructions which  
23 specifically limits the use to a  
24 screening test for blood in urine."

25 I think we talked about this before, but you





1 would agree with that aspect?

2 A Well, I would agree with it. Now, spermatozoa do  
3 occur in urine. I guess -- and if they are alive  
4 you won't get a positive reaction, it's when they  
5 die and decide to fuse out that you get a positive  
6 reaction. Now, in connection with this, yes, one  
7 could say it's a common finding. Whenever such a  
8 term is used it has to be defined as far as I'm  
9 concerned. Now, I told the technologists, you  
10 know, I would like to know how common this is, I  
11 want a figure, so after three days they looked at  
12 out-patient specimens, patients who had something  
13 wrong with them, shall we say, but it was not  
14 disabling, it was not affecting their lifestyle in  
15 any way, and, you know, we came up to a plus/minus  
16 around the 10 percent mark. This was no surprise,  
17 I mean, we all knew about it. We never record  
18 that except if it is in a female under the age of  
19 14 years in which case we are obliged to report it  
20 to the Child Protection Agency.

21 Q You are talking about the location of spermatozoa  
22 in --

23 A -- female urine.

24 Q Female urine?

25 A Under 14 years of age.



1 Q Okay.

2 A But other than that, we do not report it at all,  
3 it is just dismissed as a normal finding.

4 Q Okay. And as I say, I think we've talked about  
5 this before, just finishing off that paragraph:

6 "The evidence given at the trial made it  
7 very clear that this test is not  
8 specific for blood."

9 And again what's being referred to here is the  
10 hemostix test.

11 "Not only do vegetables and leather give  
12 a positive reaction but so do also a  
13 range of bacteria and contaminated  
14 material such as soil ... as well as the  
15 cytochrome enzymes of spermatozoa  
16 themselves."

17 And I think we've talked about the cytochrome  
18 enzymes of spermatozoa themselves perhaps given  
19 that positive hemostix reaction, and additionally  
20 here we see the vegetables and leather aspect  
21 which was referred to originally at the trial and  
22 added to that is also a range of bacteria and  
23 contaminated material such as soil which I take  
24 it can similarly give a false positive on the  
25 hemostix test?



1       A       There's an enormous range of things which can give  
2               false positive results.

3       Q       And would it include the things that I've just  
4               referred to?

5       A       Yes, and a lot more besides.

6       Q       Okay. The last comment is:

7                       "The evidence stated that confirmatory  
8                       tests (presumably hemochromogen) failed  
9                       to confirm that this was blood."

10       And as I understand it, after you would have a  
11       positive hemostix test, that that would be a  
12       presumptive result and that you would go on, in  
13       terms of trying to determine whether the  
14       substance was blood, to conduct a hemochromogen  
15       test which would be a confirmatory test that the  
16       substance was blood; is that correct?

17       A       Yes. If we get -- well, I mean, we do get  
18       positive tests for blood in -- a genuine positive  
19       test for blood in urine, we confirm them. A  
20       hemochromogen test -- well, if we see red cells in  
21       it, I mean, we don't bother about a hemochromogen  
22       test, you can see the red cells in it so we know  
23       that it's blood, right, and it will be, you know,  
24       reddish in colour. If we can't see red cells in  
25       it, then we will have a look at, well, I guess you



1 would call it a hemochromogen test, we would see  
2 what absorption bands there were on spectroscopy,  
3 and cyanmethaemoglobin has a very strong alpha  
4 absorption band at 540 millimicrons, so you can  
5 say yes, that's haemoglobin.

6 Q And in terms of the comment itself, it seems that  
7 Dr. Markesteyn is stating here:

8 "The evidence ...",  
9 which I take to be the trial evidence:

10 "... stated that confirmatory tests  
11 (presumably haemochromogen) failed to  
12 confirm that this was blood."

13 Now we've reviewed the trial evidence of Staff  
14 Sergeant Paynter, he has indicated that he did  
15 not go on to conduct the haemochromogen test  
16 because there was insufficient sample; do you  
17 know otherwise where Dr. Markesteyn may have  
18 received information that confirmatory tests  
19 were, in fact, conducted?

20 A I -- I don't know, this is not my report, --

21 Q Okay.

22 A -- I don't know where. Now the other thing,  
23 tests wasn't conducted because of inadequate  
24 material, well this is a common situation you face  
25 with medical specimens, a limited specimen. Well



1           in this case, to pour the urine or whatever the  
2           liquid was into a cuvet, stick it in a double-beam  
3           scanning spectrophotometer is no great problem,  
4           and then pouring it out again and using it for  
5           some other test, this is non-destructive testing.

6       Q       Okay.

7       A       All you do is shine, you know, specific wave  
8           lengths of light through it to find where the  
9           absorption bands land or are.

10      Q       Okay. I'm going to move you down the par -- the  
11           page to a single paragraph under the A-antigens in  
12           the Semen From Snowbank, and I'm look at this  
13           paragraph here, and Dr. Markesteyn has stated:

14                   "I agree with the opinion expressed by  
15                   Mr. Brian Jay that if blood  
16                   contamination of type A had taken place,  
17                   but that the amount of blood was so  
18                   little that it would be Hemostix  
19                   positive and hemochromogen negative, the  
20                   amount of blood would also be too small  
21                   to show the presence of A-antigen."

22           And we'll try to state that in simpler terms, but  
23           first of all would you agree with that comment,  
24           Dr. Merry?

25      A       I would agree with it. When you are looking for A



1 antigen in saliva or in seminal fluid there is a  
2 tighter range. You can take the saliva and you  
3 can dilute it down 1 part in 200 with normal  
4 saline with 0.9 percent sodium chloride, you can  
5 dilute it down to say 1 in 200 or you can dilute  
6 it down to say 1 in 500, that is the normal  
7 tighter found in saliva in about 95 percent of  
8 them. I mean you'll get the odd one you can  
9 dilute to 1 in 1,000, you know, they are outliers,  
10 or you will get ones which, you know, don't go  
11 past 50 or something, so there is a tighter. And  
12 the same is true with seminal fluid, there is a  
13 tighter range. And this is nowhere near the  
14 tighter range, we are talking of logarithmic  
15 differences in magnitude.

16 Q So --

17 A Now it isn't sort of even 10 to the power of 2, a  
18 difference of 100, --

19 Q Okay.

20 A -- it's more like 10 to the power of 3, a  
21 thousand.

22 Q So if, ultimately, if we try again to think of  
23 this in simple terms we know that in 1969 the  
24 substance tested positive for the presence of A  
25 antigens, we know as well that it tested positive



1           on the hemostix test, which would be a presumptive  
2           test for blood, but we know as -- we also know  
3           that there was insufficient sample to conduct the  
4           haemochromogen test. Now is this analysis, in  
5           effect, saying that, in that circumstance, the  
6           presence of the A antigens cannot be accounted for  
7           by the presence of blood?

8       A       Well it looks like it is extremely probable that  
9           it can't be accounted for that way.

10                   Now the detection of A antigen,  
11           that's another problem we should go into I guess,  
12           because this --

13       Q       It --

14       A       -- this doesn't get any simpler, I can assure  
15           you, --

16       Q       No.

17       A       -- when you are exact -- when you are analysing  
18           something without exactly, very precisely, knowing  
19           what you are analysing, what interfering  
20           substances are present, what false positive you  
21           might get, and what false negatives you might get.  
22           So --

23       Q       So the circumstance I just provided to you; would  
24           that not be an absolute conclusion then?

25       A       Umm, --



1 Q In other words, that the A antigens that we know  
2 were found in 1969 could not be accounted for by  
3 the presence of blood?

4 A I think that's as near as beyond reasonable doubt  
5 as you are likely to get. Umm --

6 Q And would that have been known in 1969?

7 A Well, it would have been known in 1969, and if you  
8 had knew you were in that situation that's one  
9 thing, but if you didn't know you were in that  
10 situation and really didn't know what you were  
11 analysing, that's another situation, isn't it. I  
12 mean you could say in good faith "I think this" or  
13 in good faith "I think that" but, you know, if you  
14 haven't really started from the right place --

15 Q And --

16 A -- you are not going to arrive at the right  
17 destination either.

18 Q I understand. I'm not trying to oversimplify it,  
19 I am -- if we had a hypothetical scenario in 1969  
20 where someone came to you with what was understood  
21 to be semen that tested positive for A antigens,  
22 and they had advised that it had also tested  
23 positive for the hemostix tests, but that there  
24 was insufficient blood present to test or to  
25 conduct the haemochromogen test, would that have





1           led you to the conclusion that the A antigens  
2           could not have been accounted for by the presence  
3           of blood?

4           A       Umm, my reaction would be done -- be forget the  
5           hemostix testing, that was inappropriate at any  
6           rate, you haven't tested it for the presence of  
7           blood; if A antigen is found -- well, you don't  
8           anticipate that there's going to be any blood in  
9           seminal fluid.

10                           Umm, you know, I think in the  
11           lab which I last was director of I got the  
12           technologists to look up how many seminal fluid  
13           specimens we had analysed since I'd been running  
14           the place, it was around 15,000, I think only on  
15           perhaps three or four occasions did we ever detect  
16           blood in seminal fluid. I mean it's kind of a  
17           rare event.

18           Q       And would the rarity of that event have been known  
19           in 1969?

20           A       Well I guess if you are in the business, you know,  
21           and you do a fair bit of seminal fluid testing,  
22           yes, you would know. Whether somebody who  
23           tests -- did far less testing would know, you  
24           know, perhaps they might not be so familiar.

25           Q       Okay. If we move down to the bottom of this



1 section I just note, again, Dr. Markesteyn  
2 comments:

3 "The determination of the non-secretor  
4 status of Mr. Milgaard, although perhaps  
5 acceptable at that time, would now no  
6 longer serve as proof of his  
7 non-secretor status."

8 A Well --

9 Q And I'm not sure, from what you have previously  
10 told us, whether you would agree with that comment  
11 or not?

12 A Umm, well:

13 "The determination of the non-secretor  
14 status of Milgaard, although perhaps  
15 acceptable at that time, ...",  
16 well I kind of wouldn't think it was acceptable  
17 at the time myself.

18 "... acceptable at that time ..."  
19 well I, you know, I would not be enthusiastic  
20 about agreeing with that bit.

21 "... would now no longer serve as proof  
22 of his ...",  
23 yeah, well, I don't entirely agree with it.

24 Q Okay. And I think you've explained to us before  
25 that you have doubts about the tests or the



1 propriety of the test or properness of the test  
2 that was conducted in 1969?

3 A Yes.

4 Q Okay.

5 A Now I was consulted and asked to give my opinion  
6 on the subsequent analytical report which I cannot  
7 personally disclose, there is a caution on that,  
8 that it may not be disclosed without specific  
9 permission. If the Inquiry is in possession of  
10 it, I'm prepared to discuss it, --

11 Q I think --

12 A -- otherwise it must be obtained by the  
13 Commission.

14 Q I think we have it. You are talking about your  
15 subsequent report on secretor status?

16 A The subsequent RCMP report.

17 Q Yes, okay, I think we do have that and we'll get  
18 to it in a moment.

19 Just going to the conclusion of  
20 this report, 1555 -- oh, I'm sorry, page 8, a  
21 couple of comments. The first one here, Dr.  
22 Markesteyn states:

23 "I agree with Dr. Ferris that the  
24 serological evidence presented at the  
25 trial failed to link David Milgaard with



1                   the semen retrieved from vagina,  
2                   snowbank, and crotch of panties."

3           A fairly general statement, but would you be in  
4           agreement with that comment?

5       A       Well, it's a general statement, and I'm generally  
6           in agreement I suppose.

7       Q       Okay. And the next paragraph:

8                   "If, to everyone's satisfaction, it was  
9                   established that the origin of the  
10                  yellowish patch was unadulterated,  
11                  uncontaminated human semen, then the  
12                  presence of the A-antigen in this  
13                  specimen clearly, from a serological  
14                  point of view, could not be Mr.  
15                  Milgaard's."

16      A       The 'yellowish patch'; where is this yellowish  
17           patch exactly?

18      Q       This is the yellowish substance we have been  
19           speaking of.

20      A       In the snow?

21      Q       Yes.

22      A       Yeah. Well, it's not compatible with what was  
23           reported at the time, is it. I mean non-secretor,  
24           and then we find A antigen, which I think was  
25           false positive result at any rate, but the two



1 don't go together, do they.

2 Q Sure. And I think there's an assumption built  
3 into that conclusion that in fact Mr. Milgaard is  
4 a non-secretor, we know that that was later proven  
5 to be wrong, but based upon that assumption being  
6 worked into that paragraph would you otherwise  
7 agree?

8 A Well, 'otherwise agree', umm. I mean I'm agreeing  
9 with, you know, we know it's erroneous but if you  
10 put the two together I agree with two erroneous  
11 bits of information to end up with an answer which  
12 would be erroneous.

13 Q Okay.

14 A An unusual proposition in logic.

15 Q I take your point. But, of course, assumptions  
16 are built into what I am saying to you, and I  
17 think perhaps we've covered that, based upon those  
18 assumptions, that you would be in agreement?

19 A Yeah.

20 Q And I realize that you are taking issue with those  
21 assumptions, and in fact we'll look at your report  
22 which details, more specifically, some of those  
23 concerns.

24 This is perhaps a good time to  
25 break though, Mr. Commissioner.



(Adjourned at 10:29 a.m.)

(Reconvened at 10:48 a.m.)

BY MR. HARDY:

Q Dr. Merry, I'm next going to direct your attention to a document, it's a letter from the Chief Scientist of the Serology Central Forensic Laboratory for the RCMP, it's 185365. The letter is directed to Eugene Williams, counsel for the Department of Justice, they are considering Dr. Markesteyn's report that I have just referred you to. And you will see that, in the first paragraph:

"I have attached a copy of a report from Dr. Peter Markesteyn, Chief Medical Examiner, Manitoba. He has reviewed Dr. Ferris' report and all the other information as provided to Dr. Ferris."

If we move into the next paragraph, it indicates:

"The comments he makes in this area are interesting. From personal experience, I have noted that some canine blood will carry A-like antigens. I cannot make any comments regarding canine urine or semen. The morphological differences of human spermatozoa and canine spermatozoa



1                   are several. The experienced examiner  
2                   would not have any problems in  
3                   distinguishing between human and canine  
4                   spermatozoa."

5                   Is that a comment you would agree with, Dr.  
6                   Merry?

7           A       Umm, "the experienced examiner". Some people do  
8                   rather exaggerate the certainty with which they  
9                   can make decisions. I would be cautious. I would  
10                  say you can identify spermatozoa. Speciating, I'd  
11                  want to go to something more scientific, more  
12                  definitive, DNA analysis today.

13          Q       Okay. And maybe we should continue with this  
14                  discussion further in terms of the morphology, as  
15                  we were talking about, are the physical  
16                  characteristics of spermatozoa, talking canine  
17                  spermatozoa, human spermatozoa. Start from the  
18                  beginning, and if I was to ask you, are there  
19                  morphological differences between human  
20                  spermatozoa and canine spermatozoa?

21          A       Not that I would readily appreciate. Under a  
22                  microscope there might be differences but they are  
23                  so small I don't think you could use them as  
24                  reliable criteria to differentiate.

25          Q       What would be some of the differences? I'm not



1           promising I'm going to understand, but what would  
2           be some of the differences?

3       A       I don't know of any definitive differences. I  
4           mean if you sort of start from the top to the  
5           bottom, they all have a head which looks rather  
6           similar, it's sort of ovoid and slightly pointed;  
7           that's followed by an acrosome which contains  
8           mitochondria; then you've got a tail filament.  
9           Umm, you know, they have all got the same  
10          components and they look similar. I would not,  
11          myself, claim to be able to reliably distinguish  
12          between species.

13       Q       Would an experienced examiner in such matters be  
14           able to reliably distinguish between species?

15       A       Well, that would be their opinion upon their  
16           expertise, I guess. I wouldn't. My opinion of my  
17           expertise is such that I wouldn't make such a  
18           claim.

19       Q       You wouldn't be comfortable making those decisions  
20           yourself or recognizing those differences  
21           yourself?

22       A       No.

23       Q       And in terms of someone else who is indicating  
24           that the experienced examiner would be able to  
25           tell the difference, would you have any reason to





1 disagree with that comment?

2 A Well I won't disagree or agree with it. I mean  
3 it's a comment. I mean if you believe it, you  
4 believe it, if you don't believe it you don't  
5 believe it, it's up to you.

6 Q Do you believe it?

7 A I do not believe one can reliably, on morphologic  
8 grounds, speciate spermatozoa.

9 Q Okay.

10 A Period. Right.

11 Q I turn you next to document 002094. And this is a  
12 lab report that you may recognize or be familiar  
13 with, it's dated February 3rd, 1992, and it was a  
14 report, I believe, that confirms that David  
15 Milgaard is a secretor. Perhaps you could take a  
16 look at it for a moment and confirm whether or not  
17 I'm correct on that conclusion?

18 A Yeah, I'm familiar with that report.

19 Q And this report confirms that David Milgaard is a  
20 secretor?

21 A That is my understanding of it. I don't see how  
22 you can interpret it any other way.

23 Q Okay. Now I'll turn you next to a letter that  
24 shortly followed, 165775. So it was a letter  
25 directed to yourself dated February 10th, 1992



1 from David Asper, and he indicates as follows:

2 "Please find enclosed a copy of the lab  
3 report recently prepared with respect to  
4 secretor status testing performing on  
5 the saliva of David Milgaard. I have  
6 two questions:

7 1) Is it possible that an individual can  
8 at one time be a "secretor" and at a  
9 later time be a "non-secretor?" Will  
10 the ingestion of drugs, such as lithium,  
11 affect the testing for secretor status?

12 2) What is the most reliable testing  
13 procedure available for determining the  
14 secretor status of an individual?

15 Also, we obviously interpret  
16 the test result to conclude that David  
17 Milgaard is in fact a secretor. Is  
18 there anything else about this report  
19 about which you might wish to comment?"

20 If we could turn to a report dated 155546, a  
21 letter dated February 18th, 1992 from yourself to  
22 Mr. Asper; do you recognize that letter, Dr.  
23 Merry?

24 A Yes.

25 COMMISSIONER MacCALLUM: Sorry, I missed



1 the doc ID on the February 10, '92 letter.

2 MR. HARDY: It is -- the first one is  
3 165775.

4 COMMISSIONER MacCALLUM: Thanks.

5 BY MR. HARDY:

6 Q And you respond to Mr. Asper stating:

7 "In answer to your questions:

8 1) David Milgaard always was and always  
9 will be a blood group A antigen secretor  
10 all of the time. No drugs are known to  
11 influence the production or secretion of  
12 the A antigen. There are many patients  
13 who receive blood transfusions who are  
14 also on lithium and no immunohematologic  
15 abnormalities are noted in the medical  
16 literature."

17 And that would be an accurate account, obviously,  
18 of your position at that time?

19 A Yes. If lithium did affect it it would cause  
20 problems in cross-matching. Well, there's nothing  
21 in the literature, so that's it. As far as we  
22 know it doesn't cause any problems at all.

23 Q Okay. And then number:

24 "(2) The testing procedure in this  
25 circumstance would be entirely reliable



1 since:

2 a) The reliability of the previous  
3 result has been challenged and especial  
4 care would have been taken, particularly  
5 with the prospect of independent  
6 testing. The present result vindicates  
7 the challenge and demonstrates the  
8 unreliability of the previous testing  
9 procedure now confirmed by the same  
10 laboratory.

11 b) In the vast majority of cases one  
12 either is a secretor of a blood group  
13 antigen within the A.B.O.(H) blood group  
14 system and secretes a lot of it, or one  
15 is not a secretor; the results are clear  
16 cut. In rare instances the results  
17 might be difficult to interpret and  
18 other confirmatory testing procedures  
19 would be appropriate. Had this been the  
20 case, they would have been done in view  
21 of the previous challenge and the  
22 present intense scrutiny of such  
23 laboratory tests."

24 So I take it you are in complete agreement with  
25 the results of that lab test that we previously



1 looked at at this time?

2 A Well the lab test did give me some sort of  
3 scientific data which I could assess, and the  
4 stuff in the transcript wasn't exactly scientific  
5 data, it was rather confusing in fact. Umm, so  
6 yes, I'm satisfied. I mean if anybody is in any  
7 doubt we can refer to an international reference  
8 centre, but I don't think it's necessary, I'm  
9 prepared to agree with the RCMP that they did it  
10 correctly.

11 Q Okay.

12 A Umm, now I think, you know, there are extenuating  
13 circumstances as to how the error arose in the  
14 first time.

15 Q Right, and I'm not going to ask you about that  
16 right now because I think it's covered to some  
17 extent in your report, which we're going to touch  
18 upon next, but I will invite you to comment at  
19 that point.

20 A All right. Now there is another comment, I:

21 "In rare instances the results might be  
22 difficult to interpret and other  
23 confirmatory testing procedures would be  
24 appropriate."

25 Now the report received, I would interpret it



1           that they just used the normal testing  
2           procedures, they did not have any problem. They  
3           did not have to resort to an enzyme labelled  
4           immunosorbent technique, so-called ELISA  
5           technique, they didn't have to do that. I mean,  
6           if you can secure a reliable result with a test  
7           that is as far as you go, you do not go further.

8                       I mean on ordinary microscopy I  
9           have made, I suppose, hundreds of thousands of  
10          diagnoses. I have also submitted quite a bit to  
11          electron microscopy, but I only do that when it's  
12          necessary, otherwise you bankrupt the laboratory  
13          and the whole system. I mean you don't use a  
14          sledge hammer to crack a nut, do you.

15        Q        Okay. I'm going to turn you to a copy of your  
16                report, Dr. Merry, that you completed and that was  
17                dated March 6th, 1992. The document is 155549 and  
18                I assume you recognize that report?

19        A        Well, if you blow it up a bit on the screen, I  
20                could read it.

21        Q        Sure.

22        A        That's better, yeah.

23        Q        And I see the date of this is March 6th, 1992.  
24                Your preliminary report, I think, was June 1st,  
25                1990?



1 A Yeah.

2 Q Can you tell us what precipitated this particular  
3 report?

4 A Umm, well, you know, I was a bit frustrated that I  
5 couldn't actually conduct any testing on anything  
6 and everything seemed to have been lost, hadn't  
7 been kept, what have you, and then I suddenly  
8 realized they hadn't lost one thing, hadn't  
9 mislaid one thing, they had him in prison for 23  
10 years, so he was available for testing, so I said  
11 "let's do it".

12 Q And are you talking about in terms of the secretor  
13 status aspect?

14 A That's right.

15 Q Okay. And I see at the outset, and perhaps I'll  
16 look at this report, but do you recall -- first of  
17 all do you recall discussions with Mr. Asper prior  
18 to providing this report? As I say, you had  
19 previously provided a preliminary report two years  
20 prior?

21 A I had provided a preliminary report two years  
22 prior and eventually got 'round to submitting the  
23 final report.

24 Q And did you understand --

25 A And then, you know, this came up and we got the



1 repeat of the saliva test on David Milgaard.

2 Q Okay. And did you understand how this report was  
3 going to be used by Mr. Asper?

4 A No, not entirely. It's -- I mean, just because an  
5 expert turns up in court and presents evidence,  
6 you know, you do have to evaluate and analyse it  
7 and, you know, if I turn up in court I like  
8 somebody else there as well, and, you know,  
9 perhaps they will confirm what I say and perhaps  
10 they will give me ideas and I better think about  
11 something else, some other possibility. I mean,  
12 expert witnesses really shouldn't appear for  
13 defence or prosecution, they appear as expert  
14 witnesses and give a scientific evaluation.

15 Q Okay.

16 A Who they are appearing for should not enter into  
17 it.

18 Q Did you have any further information in terms of  
19 source material that you were additionally relying  
20 upon in writing this report, and when I say  
21 additionally, I mean additional to the trial  
22 transcript that you already confirmed for us that  
23 you did have?

24 A No, I didn't have any additional on this, no.

25 Q Okay. Let's take a look at some of the report.





1 It begins by confirming that Mr. Milgaard is a  
2 secretor according to the recent lab report that  
3 we looked at and you start in the fourth paragraph  
4 by saying:

5 "This totally contradicts the evidence  
6 contained in the trial transcript  
7 provided by this same laboratory 23  
8 years ago, namely, that Mr. Milgaard was  
9 not a secretor of A-antigen.

10 I do not consider that this is  
11 an advancement. Mr. Milgaard's secretor  
12 status is probably irrelevant since, the  
13 "yellowish substance" found in the  
14 snowbank which was subsequently examined  
15 was, mostly likely, dog urine."

16 I'll pause there just for a moment. Were you  
17 comfortable with the use of that terminology,  
18 "most likely"?

19 A Well, it appeared most likely, but that is not a  
20 scientific term. Most likely, yes, but we don't  
21 know.

22 Q But you were comfortable with the use of the term  
23 "most likely"?

24 A Yes. It was not used in a scientific context.  
25 You don't use terms "most likely". If there's a



1 probability, you give some evaluation of  
2 statistical probability.

3 Q But you indicate -- I mean, you were a scientist  
4 looking at this, you indicate you don't use terms  
5 like "most likely", but you have used that term?

6 A I did use it, yes.

7 Q And I'm asking if you are comfortable with the use  
8 of that term?

9 A Well, I still believe that yellow stains in snow  
10 are most likely dog urine and not human urine. I  
11 mean, they could be human urine in some -- I mean,  
12 in the east end of London there are some  
13 undesirable districts and I guess human urine is  
14 more prevalent than in other areas, but, I mean,  
15 dog urine is more common in snow than human urine.

16 Q Okay. Let's continue to the next page, it starts  
17 -- sorry, at the page we were just on it says:

18 "From --"

19 And then the next page,

20 "-- the transcript it appears unlikely  
21 that the original specimen of saliva  
22 obtained from Mr. Milgaard was  
23 **immediately heat inactivated**, as is  
24 required in determining antigen secretor  
25 status. Failure to do this would result



1                   in the enzyme *ptyalin*, which is present  
2                   in saliva, digesting the *A-antigen*  
3                   **before** the specimen was examined. This  
4                   would account for the false negative  
5                   *A-antigen* secretor status obtained. **In**  
6                   **Caucasians, the incidence of positive**  
7                   **secretor status is approximately 78%,**  
8                   **the incidence of blood group A is**  
9                   **approximately 45%."**

10                  And do I take it correctly that you were  
11                  explaining in greater detail what the likely  
12                  failure was in terms of the initial lab test for  
13                  secretor status?

14        A        Yes. I thought that it was probably -- it wasn't  
15                  immediately heat inactivated which would make the  
16                  result unreliable.

17        Q        And would that be because this enzyme you  
18                  mentioned, *ptyalin* --

19        A        *Ptyalin*.

20        Q        Sorry, *ptyalin*?

21        A        Yeah. Well, call it alpha amylase.

22        Q        Alpha amylase?

23        A        It's now referred to as alpha amylase, yes.

24        Q        But it would allow that substance to persist which  
25                  would in effect digest the *A-antigens*?



1       A       Yes. The A-antigen is a glycol protein and that  
2               is -- it is an amylase and it will digest the  
3               glycol part, the glycogen moiety of the molecule  
4               and the molecule would fall to bits so it gets  
5               digested.

6       Q       Okay. Then moving down to point 1, it states:

7                       **"Frozen lumps of "yellowish substance"**  
8                       **found in snowbank, later thawed to a**  
9                       **"yellowish liquid":**

10               Two observers, **Joseph Penkala** and **Bruce**  
11               **Ivan Paynter** stated that this substance  
12               was yellowish. Seminal fluid is  
13               **translucent white** in colour, so this  
14               **could not** have been seminal fluid! In  
15               the 24 years that I have been the  
16               Medical Section Head of this laboratory,  
17               we have examined approximately 15,000  
18               specimens of seminal fluid and have not  
19               ever encountered such a specimen which  
20               could be described as "yellowish"! The  
21               degree of translucency may vary slightly  
22               according to the sperm count but, the  
23               colour is **never** "yellowish"! There is  
24               **no** biological pigment in seminal fluid  
25               to impart colour."



1 And I take it that would have been your position  
2 at the time, Dr. Merry, that you were writing  
3 this report?

4 A That was my position at the time. It's still my  
5 position.

6 Q And you indicate, "Seminal fluid is translucent  
7 white in colour, so this **could not** have been  
8 seminal fluid," and again --

9 A It couldn't have been seminal fluid. It might  
10 have had seminal fluid in it, but it was not  
11 seminal fluid.

12 Q Do you mean it was not pure seminal fluid?

13 A It was not pure seminal fluid by a long way.

14 Q So contaminated seminal fluid could give a  
15 yellowish appearance?

16 A It would have to be, well, very significantly  
17 contaminated, yes.

18 Q And let's talk about a couple of examples. Could  
19 the presence of blood in seminal fluid give the  
20 appearance, or lead to a yellowish appearance?

21 A It could. If you dilute blood down, it's sort of  
22 pink, the pink sort of fades away. It can look  
23 very slightly yellowish with a white background  
24 and strong light, but very difficult -- I mean, by  
25 the time there's any suggestion of yellowness,



1           it's just about become imperceptible completely,  
2           so the sort of degree of yellow which you would  
3           get to, I can't imagine you would notice that in  
4           snow.

5       Q       Okay.

6       A       You would have to really look at it with a white  
7           background, a clean, white background.

8       Q       Are we to read when we read this paragraph --

9       A       There is another actual confounding bit, you know,  
10           when things crystalize or become finally divided,  
11           they turn white, it's an optical effect. I mean,  
12           if you take blue glass and you powder it up  
13           finely, it's virtually not blue any more, you've  
14           got sort of whitish powder.

15      Q       Okay. I want to take you back to this paragraph,  
16           and have I heard you correctly then that the way  
17           it should read when you say, "Seminal fluid is  
18           translucent white in colour so this **could not** have  
19           been seminal fluid," what you are stating there is  
20           that pure seminal fluid is translucent white in  
21           colour, so this could not have been pure seminal  
22           fluid?

23      A       No, it couldn't have been pure seminal fluid,  
24           that's for sure.

25      Q       But you've acknowledge that the yellowish



1 appearance could have resulted from contaminated  
2 seminal fluid?

3 A It could result from contamination, yes. The most  
4 likely contamination which is very common, as I've  
5 said, is urine.

6 Q Okay.

7 A A high dilution with urine.

8 Q Okay. I'm going to continue on, the next  
9 paragraph says:

10 "When seminal fluid is frozen it becomes  
11 opaque and as crystal white as snow. On  
12 5th June, 1990, a sample specimen of  
13 seminal fluid from this laboratory, was  
14 frozen ... on some snow and photographed  
15 in white light and in ultra-violet  
16 light."

17 You go on to indicate who was aware of the  
18 testing and that copies were provided, copies of  
19 the photographs were provided and included were  
20 colour chip charts. And again, was this testing  
21 or photographing done with pure seminal fluid  
22 samples?

23 A Yeah, it was done with a seminal fluid sample  
24 which I personally examined and I think the count  
25 on it was 117 million per cubic millimeter. I did



1           microscope it, no red cells present. Did test it,  
2           no peroxidase reaction. I've never tested seminal  
3           fluid with a hemostix before, I didn't think  
4           anybody else had, but still -- well, obviously  
5           they had, so I did it.

6        Q       Okay. So that was pure seminal fluid that you  
7           were using though?

8        A       Yes.

9        Q       Okay. To the next paragraph:

10                    "This laboratory also examines  
11                    approximately 65,000 specimens of urine  
12                    each year. The finding of spermatozoa,  
13                    in both male and female urine is very  
14                    common. Over 10 percent of out-patient  
15                    urine specimens contain spermatozoa."

16           And you are speaking of human urine here;  
17           correct?

18        A       That's the only type of patient we treat, yes.

19        Q       Okay. Then going down to the next paragraph:

20                    "The "yellowish frozen  
21                    substance/yellowish liquid" could **only**  
22                    have been urine which contained  
23                    spermatozoa. There is **no other**  
24                    yellowish body fluid which contains  
25                    spermatozoa."





1 A Yes.

2 Q And are you comfortable with that conclusion?

3 A I am comfortable with that conclusion. I know of  
4 no other yellowish body fluid which could contain  
5 seminal fluid. I mean, joint fluid is sometimes  
6 yellowish.

7 Q But just --

8 A So is cerebrospinal fluid, but I can't conceive of  
9 how you would get spermatozoa into a joint or into  
10 somebody's brain, so, you know, as far as I'm  
11 concerned, urine is the only possibility which is  
12 common.

13 Q But you've agreed with me previously, haven't you,  
14 that contaminated seminal fluid could give the  
15 yellowish appearance, and I mean contaminated not  
16 with urine, but contaminated otherwise, could give  
17 the appearance, or the yellowish appearance?

18 A Well, there are obviously yellow things which you  
19 could put in it. I mean, it wouldn't be, shall we  
20 say, natural or normal contamination, I mean, it  
21 would be deliberate contamination that would cause  
22 it to be yellow.

23 Q I mean, I'm just, I'm wanting to test you a bit on  
24 the certainty of your conclusion here. You seem  
25 to state it quite aggressively and perhaps, and if



1 I'm misphrasing that you can let me know, but we  
2 know that the scene, that four days had passed  
3 before this substance was located. We don't know,  
4 I guess, what went on at the scene necessarily,  
5 but I assume in scientific terms we can assume  
6 that there was the chance for contamination of  
7 varying sorts, and I'm wondering if you could  
8 eliminate contamination in this circumstance as  
9 being a possible source of the yellowish  
10 appearance?

11 A I suppose if you want to go to a thousand and one  
12 against or greater, you know, no, you couldn't. I  
13 don't think it really matters a great deal  
14 pursuing this. There are other problems with  
15 testing for antigens in the presence of a high  
16 delusion with urine, so, you know, we're getting  
17 into an awkward situation. We've got a positive  
18 result, which I don't believe was true, so would  
19 blood possibly have interfered? Well, it might  
20 have interfered with the true result, but since I  
21 think it's a false positive result, I mean, though  
22 it interfered -- well, it didn't interfere with  
23 getting a false positive result because -- the  
24 logical sequence is getting a little difficult for  
25 me to follow.



1       Q       No, and I'm much further behind than you, but if  
2               we look at that first sentence, the yellowish  
3               frozen substance/yellowish liquid could only,  
4               you've bolded only, contain spermatozoa. From  
5               what I've heard from you over the last few  
6               minutes, it doesn't sound like that would be an  
7               accurate statement?

8       A       Well, I've diluted it with one part in a thousand  
9               of doubt shall we say, right.

10      Q       Okay. And of course we can't measure the  
11               contamination possibilities --

12      A       No, we can't.

13      Q       I just want to know if there are contamination  
14               possibilities outside of urine which could have  
15               given seminal fluid a yellowish appearance, and I  
16               think I've heard you say that, I think you are  
17               saying it's very rare, but that that could happen?

18      A       Yes, I would concede that is highly improbable,  
19               but possible.

20      Q       And I think because you are saying that the most  
21               likely source of a yellowish substance, including  
22               in a contamination scenario in the circumstances  
23               that we're aware of, would be urine and, in  
24               particular, dog urine?

25      A       Well, yellow stains in snow, actually they are



1 quite common around where I live, I think they are  
2 dog, and in fact I've seen some of the dogs doing  
3 it and I try to discourage them from doing it  
4 shall we say.

5 Q Okay. The next paragraph talks about how  
6 spermatozoa can leak into dog urine, and I think  
7 we've talked about that, and you confirmed that  
8 that was a possibility. If we go on to point 2,  
9 it says:

10 "The presence of the A-antigen in the  
11 "yellowish substance":

12 There is no indication in the transcript  
13 that the possibility was considered that  
14 this "yellowish substance" was urine  
15 containing spermatozoa. Scanning  
16 spectrophotometry would have undoubtedly  
17 shown absorption bands consistent with  
18 urochromogens, the biological pigments  
19 in urine which impart the characteristic  
20 colour. Simple chemical analysis  
21 thereafter would easily have confirmed  
22 that this was indeed urine."

23 And the question I had for you, in terms of the  
24 scanning spectrophotometry, was that something  
25 that, a test that was available in 1969, for



1 example, in Regina?

2 A Yes. We had a very good double beam scanning  
3 spectrophotometer at the Regina Grey Nuns  
4 Hospital, it was in the chemistry department, and  
5 anybody in the other areas, you know, we shared  
6 equipment in common, so yes, it was not only  
7 available, but we had an extremely good one there.  
8 Now, I do not know what equipment the RCMP had  
9 available. Maybe they didn't have a scanning  
10 spectrophotometer, maybe that's why they used the  
11 tests they used.

12 Q Okay. But that scanner would have been available  
13 in 1969 and you are simply stating that we don't  
14 know whether the Regina lab had access to that  
15 equipment?

16 A No, I don't know.

17 Q Okay.

18 A Personally I think, you know, they should have had  
19 access to it, but, you know, that's none of my  
20 business --

21 Q Okay. And you state --

22 A -- what they are equipped with or not equipped  
23 with.

24 Q You state:

25 "Simple chemical analysis thereafter



1                   would easily have confirmed that this  
2                   was indeed urine."

3           And again, just to ask you a couple of questions,  
4           you don't know at this point when you are writing  
5           this report, do you, conclusively, that the  
6           substance that you are considering was urine?

7       A       No, you know, I considered that is an extremely  
8           strong probability, so now we do some simple  
9           analysis to document and prove it is, right.

10      Q       Okay.

11      A       But it wasn't done.

12      Q       No. You are saying it wasn't done originally in  
13           terms of proving that conclusion?

14      A       No.

15      Q       Okay. And you of course wouldn't be able to  
16           conduct those tests to prove that conclusion  
17           without having the substance?

18      A       Well, no, you can't analyse something if you  
19           haven't got it.

20      Q       And if we go to the next page, at the top you  
21           state:

22                   "This is a very serious oversight since,  
23                   if one is examining a body fluid under  
24                   the impression that it is one thing  
25                   whilst in reality it is something else,



1           inappropriate test procedures may be  
2           employed and anomalous results may be  
3           obtained which would lead to  
4           misinterpretation of this original  
5           sample.

6                     This cautionary comment applies  
7           to this section and to the following  
8           sections of this report."

9           And you felt these comments, I take it, were  
10          important in the context of your report?

11       A       Yes.

12       Q       Okay. If we move down the page --

13       A       Are we going to get into that area again?

14       Q       No. I'm going to take you to the --

15       A       Well, you know, we can go all through the sort of  
16          complicating problems which exist in that area if  
17          you like.

18       Q       I think we've been covering them and I'm hoping  
19          that we continue to cover them as we make our way  
20          through your report, because I'm assuming you  
21          considered most of these aspects in your report,  
22          we still have several pages to go, so let's see if  
23          we hit them as we make our way through, and then  
24          if there's anything left over we can discuss that,  
25          but down the page, still talking about the



1 presence of A-antigens, you indicate:

2 "The A-antigen is present in the urine  
3 of A-antigen secretors but, **may also** be  
4 present in small quantities in the urine  
5 of non-A-antigen secretors by a  
6 non-secretory mechanism. The A-antigen  
7 is not limited to red blood cells and is  
8 found associated with all body cells.  
9 When such body cells slough-off in the  
10 normal process of replacement they carry  
11 the A-antigen with them, e.g. into urine  
12 and faeces."

13 I think I follow that, and the only question I  
14 really had in relation to that is whether that  
15 applied similarly to semen. Can the  
16 sloughing-off process lead to A-antigens in  
17 seminal fluid in the same way as you've described  
18 it occurring into urine and faeces in a  
19 non-secretor?

20 A Not anything comparable. Kidneys have an enormous  
21 surface, the gut has an enormous surface area and  
22 you are getting cells shed off. When you are  
23 looking at salivary glands and prostate gland,  
24 nothing like the same order of magnitude.

25 Q Okay.





1       A       I mean, the only way that, you know, the surface  
2               epithelium of gut gets replenished, it grows up  
3               and the surface is sloughed out with faeces.

4       Q       Okay. So -- and in summary then, in simple terms  
5               in this paragraph, you are saying that in the  
6               urine of an A-antigen secretor and in the urine of  
7               an A-antigen -- or a non-secretor, you may still  
8               find A-antigens?

9       A       If you use enzyme labelled immunosorbent assay,  
10              you may very well find A-antigen in a  
11              non-secretor.

12      Q       Okay.

13      A       But if you use an agglutination inhibition  
14              technique, no, you wouldn't.

15      Q       Okay.

16      A       I mean, it is the same as glucose in urine, if you  
17              use an ultra-sensitive technique, you will find  
18              traces of glucose in everybody's urine, but --

19      Q       If you can please keep your voice up, Dr. Merry,  
20              just for the reporter's sake.

21      A       You will find traces of glucose in everybody's  
22              urine if you use ultra-sensitive analytical  
23              techniques. However, for clinical analysis, you  
24              do not find it in normal urine.

25      Q       Okay.



1       A       The level of sensitivity is deliberately kept  
2               above the normal level.

3       Q       Okay.

4       A       I mean, technology is such that we can now detect  
5               the normal or irrelevant, so you sort of put your  
6               testing procedure into the relevant range.

7       Q       Okay. And of course I want to concentrate on what  
8               you are stating here in your report in March of  
9               1992 and if we move to the next paragraph it  
10              states:

11                    "Neither is the A-antigen limited to the  
12                    human species. It is found in **many,**  
13                    **diverse** life forms, from the simple  
14                    forms of bacteria and moulds to the  
15                    higher life forms of plants and  
16                    animals."

17       And would I be correct then -- and actually I'll  
18       skip down to the bottom of the page:

19                    "The "yellowish substance" which was  
20                    undoubtedly urine containing spermatozoa  
21                    would inevitably be contaminated with  
22                    micro-organisms which may well have been  
23                    the source of the A-antigen detected.  
24                    Microbiological cultures of the  
25                    "yellowish substance" should have been



1                   undertaken to ascertain if  
2                   micro-organism producing "A-antigens"  
3                   were present."

4                   And again, if I was to state this in simple  
5                   terms, was this simply a further explanation for  
6                   why A-antigens may have been detected in the  
7                   yellowish substance?

8           A       Well, there are all sorts of possibilities. I  
9                   should, at the time I wrote that, perhaps also  
10                  added that they should have tested that  
11                  micro-organisms were not present which were  
12                  producing even agglutinin, an agglutinin which  
13                  would clump all types of red cells regardless of  
14                  their actual grouping, because then we are going  
15                  to get into agglutination inhibition techniques  
16                  and --

17          Q       No, but my question for you, Dr. Merry, is this  
18                   was another source you are referring to here of  
19                   A-antigens in the yellowish substance, another  
20                   potential source?

21          A       That's another potential source of that and the  
22                   presence of agglutinins themselves would also  
23                   produce a false positive result.

24          Q       Okay.

25          A       So we've got another bit to add into that.



1 Q Okay. You continue on:

2 "There's **no evidence** in the transcript  
3 that this was either thought of or done!  
4 There is a further problem: That  
5 approximately 50% of the dog population  
6 possesses the *Tr antigen* which  
7 cross-reacts with the human (blood  
8 group) *A-antigen*.

9 And I think we've talked about that, and again in  
10 simple terms you are indicating this could again  
11 be another potential source of the A-antigens  
12 that were detected in the yellow substance?

13 A Yeah.

14 Q Okay.

15 A All we have is we think most likely that's it. No  
16 scientific proof here, just most likely.

17 Q And just a general observation, I know that you've  
18 used bolding and exclamation marks through  
19 portions of your report, and it might be obvious,  
20 but what was the intent of bolding certain words  
21 and using exclamation marks in various locations?

22 A Well, they were mainly to sort of highlight things  
23 which should have been considered at the time. I  
24 mean, trying to analyse this, I wouldn't have been  
25 able to do it, it's too complex and the technology



1           was not such that I could have done it; that is,  
2           if you appreciate the complexity of what you were  
3           dealing with.

4           Q       Okay. The next sentence:

5                       "Obviously, the "yellowish substance"  
6                       which tested positive for the A-antigen  
7                       could have been and, probably was, dog  
8                       urine."

9           This next portion I don't, I'm not going to read  
10          all of it, and I don't mean to cut it short, Dr.  
11          Merry, but it's the next three paragraphs and if  
12          they are important, please let me know. I think  
13          what it is was that it was another explanation  
14          for why there may have been an A-antigen positive  
15          test result and you are questioning I think the  
16          testing procedures that may have brought about  
17          that A-antigen positive result?

18          A       Yeah. Well, the question of negative controls,  
19          non-specific binding, you know, I would have to  
20          have the exact documentation of the procedure  
21          which was performed.

22          Q       Okay.

23          A       Which I didn't have, and I, you know, I can't even  
24          say if it was done or not.

25          Q       Okay. If I move you to the next page, page 7,



1           there's a new heading, "**The positive test for**  
2           **blood in the yellowish substance**," and you  
3           indicate:

4                        "I have read Dr. Peter H. Markesteyn's  
5                        report of 4th June, 1990 and agree with  
6                        his comments in this regard. I would  
7                        only add that in the specimen of seminal  
8                        fluid from this laboratory which was  
9                        used in the photographs was examined  
10                      microscopically for the presence of red  
11                      blood cells and **none were found**. I also  
12                      performed a "Hemostix Test" on this  
13                      specimen, which is totally inappropriate  
14                      but, was done in view of the special  
15                      nature of this case, and the result was  
16                      negative. Other random seminal fluid  
17                      specimens were also tested for  
18                      comparative purposes and it was found  
19                      that fresh seminal fluid specimens may  
20                      test positive **or** negative **initially, but**  
21                      **all test positive if tested later**, due  
22                      to the liberation cytochromes from the  
23                      spermatozoa."

24           And was this what we spoke of earlier on, Dr.  
25           Merry?



1       A       Yeah, that's what we spoke of later on, earlier on  
2               rather. I guess that should be qualified, if a  
3               guy has had a vasectomy and he hasn't got any  
4               spermatozoa, obviously we're not going to get  
5               positive results, but --

6       Q       Okay.

7       A       But I know guys who have had a vasectomy and they  
8               are now totally infertile.

9       Q       Okay. Well, moving on, --

10      A       It might take three to six months to become  
11              totally infertile, but --

12      Q       Okay. I'll move you on to the next paragraph, and  
13              I think we've covered this as well, but we'll just  
14              recap it:

15                   "A wildly speculative hypothesis was  
16                   advanced at the trial, which is  
17                   scientifically untenable; namely: to  
18                   explain how Mr. Milgaard, who was  
19                   **incorrectly determined at the time to be**  
20                   **a non-secretor of the A-antigen, could**  
21                   **have produced the yellowish substance**  
22                   **which contained the A-antigen!**

23                   I agree with the opinion of  
24                   Mr. Brian Jay and Dr. Peter H.

25                   Markesteyn that it is **not possible** that



1 the explanation could be that the  
2 A-antigen was present as the result of  
3 blood contamination of blood group A in  
4 so little quantity that it gave a  
5 **positive** Hemastix (benzidine/peroxidase  
6 reaction) **but not** a positive  
7 haemochromogen reaction."

8 And, again, is this what we spoke of earlier?

9 A Yeah, that's what's -- yes, it is.

10 Q So in those circumstances I think you had  
11 indicated that -- and I can't remember your words  
12 exactly -- but the A antigens would almost  
13 certainly not be accounted for by the presence of  
14 blood?

15 A Yes.

16 Q Was that -- sorry?

17 A Yes, that's correct.

18 Q Okay. If we move to the next page, 155555, at the  
19 bottom of the page, point number 4, it states:

20 **"Is there any evidence that the**  
21 **yellowish substance was of human origin?"**

22 Dr. Peter H. Markesteyn has  
23 already dealt with this in his report.

24 I would **repeat my cautionary comment:**

25 **that it is absolutely critical that one**





1 is fully aware of the exact nature of  
2 the body fluid under examination! If a  
3 specific test was performed (**probably** a  
4 precipitin reaction at that time) on the  
5 yellowish substance (**undoubtedly** urine  
6 containing spermatozoa); the  
7 possibilities of spurious results are  
8 such that any conclusions would be open  
9 to grave doubt. If there was any human  
10 protein present in the yellowish  
11 substance it should have been  
12 concentrated and purified by gel  
13 filtration in a *Sephadex* column  
14 (cross-linked dextran) before any such  
15 test was performed. It would seem  
16 likely that **if** this had been done that  
17 it would have been remembered and  
18 recorded in the laboratory record."

19 And would I be correct, at this point in time,  
20 you were not in possession of the original  
21 laboratory record; is that correct?

22 A No, I was never in the possession of any original  
23 laboratory records.

24 Q Okay. And I note again in this paragraph -- and,  
25 Dr. Merry, forgive me if I'm dwelling on it



1 unduly -- but you seem very certain, although you  
2 haven't examined the substance obviously, that  
3 that substance was urine containing spermatozoa.  
4 I guess all I can ask you is if you are  
5 comfortable with your commitment on that aspect?

6 A Well I have seen urine which contained spermatozoa  
7 personally, and through the laboratory we have had  
8 so many cases that this is very common, and I  
9 can't think of any other circumstances in which  
10 you can get spermatozoa in something which looks  
11 like urine. I just can't think of what it would  
12 be. Now that is not a satisfactory scientific  
13 position. Somebody should have undertaken simple  
14 analysis to determine that it was urine. Now that  
15 is as close as we're going to get to it from a  
16 scientific point of view.

17 Q So fair to say you don't know whether it was urine  
18 or semen?

19 A It definitely had seminal fluid in it. That's the  
20 only source of spermatozoa. I can't think of  
21 anything else, other, for the rest of it apart  
22 from it being urine.

23 Q Okay. And I don't want to venture back too  
24 deeply, but there -- again, we had talked about  
25 contamination, and have I heard you correctly



1           that, yes, contamination could have been another  
2           explanation outside of urine?

3           A       It could have been. Probability factor, highly,  
4                   very highly unlikely. I can't put a figure on it,  
5                   but it, it wouldn't really occur to me unless  
6                   somebody suggested it to me, shall we say,  
7                   repetitively and forcefully.

8           Q       So, so -- but this is all -- am I correct that  
9                   your position on this is coming solely from the  
10                  descriptor of this substance as yellowish?

11          A       Well, it's not just been described by one  
12                  individual, you know. They have got me convinced  
13                  that this was a yellowish substance all right,  
14                  yes, from that descriptor.

15          Q       Okay, and we're going to look at that in just a  
16                  moment, what the actual descriptions were. Just  
17                  on the next page, it's your -- the last page of  
18                  the report, number 5:

19                       **"Red blood cells in normal human seminal**  
20                       **fluid (Dr. Harry Emson's testimony):**

21                               Here again I agree with Dr.  
22                               Peter Markesteyn's comments in his  
23                               report -- of all the **thousands** of  
24                               seminal fluid specimens examined in this  
25                               laboratory and, in four other



1                   laboratories with which I have been  
2                   associated, **I can only recollect red**  
3                   **blood cells being found on perhaps 3 or**  
4                   **four occasions!"**

5       A       So --

6       Q       And this goes back of course, I believe, to Dr.  
7               Emson's testimony at trial -- and I'm  
8               paraphrasing -- but which effectively indicated,  
9               in his view, that it was common to find red blood  
10              cells in the seminal fluid of young men.

11      A       Yeah.

12      Q       And I take it by this statement, and based upon  
13               your knowledge, you would have disagreed with that  
14               comment or position?

15      A       Yes. Umm, probably in the majority of cases in  
16               which you do get red cells in seminal fluid, which  
17               is rare, you don't actually ultimately find a  
18               cause. It's probably some very minor vascular  
19               abnormality, one always has to consider the  
20               possibility it might be associated with neoplasia,  
21               cancer of prostate, seminal vesicles, something of  
22               that sort. Fortunately, that is virtually unheard  
23               of. Probably the commonest cause is acute injury  
24               to the genitalia which may result in transitory  
25               presence of red cells. That also takes it into a



1 clinical situation. Those with acute injuries,  
2 recent acute injuries to genitalia, are unlikely  
3 to be wandering around the streets looking for any  
4 sort of sexual activity, should we say.

5 Q Okay. So let's go back to the position -- and  
6 hopefully I've fairly stated it -- but if Dr.  
7 Emson had stated that it was common to find blood  
8 in the semen of young men --

9 A Well, he didn't say how common it was. This is  
10 why I object to, you know, the use of "common". I  
11 mean if I say something is common, what do I mean  
12 by "common" within my experience?

13 Q Well, let's just try our best and use "common" as  
14 best we can for a moment, and bear with me.

15 A Well you better not use it, aren't you, unless you  
16 are prepared to give a figure attached to it.

17 Q Let's say 6 out of 10 circumstances equals common;  
18 would you agree with Dr. Emson's position on his  
19 comment that blood is commonly found in the semen  
20 of young men?

21 A Well if you are taking 6 out of 10 or even 4 out  
22 of 10, no.

23 Q What would it be out of 10?

24 A I would think nil.

25 Q Okay.



1       A       You know, in about 15,000 I happened to have seen  
2               it perhaps three or four times.

3       Q       Okay.

4       A       I mean --

5       Q       Wouldn't it be --

6       A       -- I'm not going to say it's common, I'm not going  
7               to say it's rare, I just said 15,000 and three or  
8               four.

9       Q       Fair enough.

10      A       Well, that's it. And any other pathologist who  
11              handles that volume would have also seen it, so  
12              within our experience, it's common.

13      Q       And would what you have just described for me, at  
14              least from your perspective, have been known in  
15              1969?

16      A       Well yes, I mean it would not have changed over  
17              the ages, I mean this is very basic factual data.

18      Q       Okay. So would it be fair to say, at that point  
19              in time, that out of 15,000 specimens you might  
20              expect to see three or four occurrences?

21      A       Well, you are getting into statistics. Maybe I  
22              happen to have a sample which wasn't  
23              representative, maybe it should have been 30 to  
24              40.

25      Q       Sorry, I only used 15,000, I thought you had



1 mentioned that number, and if I'm wrong I'm sorry.

2 A Well no, 15,000, we'll use that number, three or  
3 four. So perhaps the sample I happened to have  
4 had might not have been representative, all right,  
5 let's multiply it by ten, 30 to 40. Well, okay,  
6 we've got 30 to 40 in 15,000, well, common? Up to  
7 you to decide, isn't it.

8 Q And -- but back to my question; is that what you  
9 would expect -- and I know that that's the  
10 difficult question to answer -- but is that about  
11 what you would expect in 1969?

12 A Well, that's what I would expect in 1969, it's  
13 what I would expect now.

14 Q Okay. And just to confirm, I have no questions  
15 arising from the report, doctor, there are no  
16 further questions. This report was filed on the  
17 case on reference, and I don't have actually the  
18 volume reference but I will be able to obtain that  
19 for the Commission.

20 COMMISSIONER MacCALLUM: The Supreme Court  
21 hearing?

22 MR. HARDY: Sorry?

23 COMMISSIONER MacCALLUM: The Supreme Court  
24 hearing?

25 MR. HARDY: Yes, that's right. I believe



1           it's -- well, I'm only going to start guessing,  
2           so I won't.

3       BY MR. HARDY:

4       Q       Dr. Merry, I want to bring your attention to sort  
5           of what we know now today. And some of this  
6           information was available in 1969-1970, some of  
7           this information was available but you did not  
8           have during your work, and some of it has come out  
9           in testimony during this Inquiry, and I want to  
10          just review some of it with you briefly and see if  
11          it would have impacted any of your opinions as we  
12          have been reviewing them. And the first aspect is  
13          the appearance of the substance. We have been  
14          calling it "yellowish" throughout, and I took a  
15          review of the transcripts, and you've mentioned  
16          that it's Lieutenant Penkala and Staff Sergeant  
17          Bruce Paynter who described the substance, and  
18          that is correct. And at trial, just for reference  
19          sake, indeed Lieutenant Penkala describes it as  
20          yellowish, he described finding yellowish frozen  
21          lumps of snow or yellowish frozen lumps of some  
22          substance; Staff Sergeant Paynter described it as  
23          pale yellowish or clearish, and at another time he  
24          described it as pale yellowish, very pale  
25          yellowish. And I'm wondering, it seemed you were





1           working from the position that the substance was  
2           yellowish, would these other descriptors that I  
3           have just mentioned to you have affected any of  
4           your opinions or conclusions as you've expressed  
5           and as we've reviewed thus far?

6       A       No. They all, you know, thought it was yellow in  
7           some manner, urochromogen pigments are yellow.

8       Q       Okay. But I'm asking you to -- and I'm not saying  
9           you are wrong on that -- we have the yellowish  
10          description by Lieutenant Penkala, we have a pale  
11          yellowish or clearish description by Staff  
12          Sergeant Paynter, --

13      A       Yeah.

14      Q       -- so let's take one of those, let's take the  
15          clearish description. Would I be correct that, if  
16          the substance had been described to you as  
17          clearish, you would not have thought of the  
18          possibility that the source of the substance was  
19          urine?

20      A       Umm, urine, some urine is crystal clear, some  
21          urine is so turbid you can't see through it, I  
22          mean but that's pathological, admittedly, but, you  
23          know, the clearness of the urine has nothing to do  
24          with whether it is urine or not.

25      Q       I agree with you, but let's just, let's be fair



1           for a moment. If someone had come to you and  
2           asked you to consider a substance and the serology  
3           of that substance and described the substance to  
4           you and it was given -- purported to be seminal  
5           fluid, and it was described to you as clearish,  
6           could you have --

7       A       Well, if it was described as clearish --

8       Q       Sorry, just let me finish my question.

9       A       -- it ain't seminal fluid, because seminal fluid  
10           is not clearish.

11      Q       Would you have suspected, if that was the  
12           descriptor, that the substance was urine?

13      A       Now it's got to be clear and it's got to be  
14           yellow, has it?

15      Q       No, I'm asking you, if it was described to you as  
16           clearish would you have suspected that it was  
17           urine?

18      A       It is still highly probable it's urine, yes.

19      Q       So I guess what I'm saying is if, in 1990, Peter  
20           Markesteyn had asked you to assist him in  
21           determining the serology surrounding a sample of  
22           substance which purported to be semen, and it was  
23           described to you as being clearish, are you  
24           telling me that one of the first thoughts you  
25           would have had was that this substance may, in



1 fact, have been urine?

2 A Yes.

3 Q Okay.

4 A And my first thought, well my thoughts before  
5 embarking, if I had had the specimens to do  
6 anything with, is I have to do preliminary testing  
7 on this to find out what I'm proposing to analyse.  
8 If I don't do that, umm, I can't correctly -- well  
9 I can't select appropriate tests, and I can't  
10 correctly, I can't correctly interpret the  
11 results.

12 Q And was it not the yellowish descriptor, though,  
13 that led you to think that it was urine?

14 A I still have a strong suspicion, if you see  
15 something yellow in snow or down a toilet, it's  
16 probably urine.

17 Q And would you have had the same strong suspicion  
18 if the substance had been described to you as  
19 clearish?

20 A Yes.

21 Q Okay. And I think we've talked about the  
22 descriptor pale yellowish as well, and can semen  
23 that is contaminated with blood appear pale  
24 yellowish?

25 A Umm, I would hardly think so. If you want to



1 stretch the limits of probability, all right, well  
2 I guess we could say "yes", but I doubt whether  
3 it's within anybody's experience, but still --

4 Q Okay. So I think overall I'm hearing you,  
5 notwithstanding some of the descriptors I told  
6 you -- and in fairness still including the  
7 yellowish descriptor by Lieutenant Penkala -- that  
8 none of that information would have changed any of  
9 your opinions or thoughts on this matter as you  
10 have expressed and as we have reviewed?

11 A That is correct. I am left in the position, umm,  
12 there are possibilities of what things might be, I  
13 don't know, and I wouldn't have embarked on any  
14 sort of analysis until I had found out exactly  
15 what I was dealing with and knew all the problems  
16 associated with it in selecting the tests and  
17 interpreting it.

18 Q And I hear that from you, and it sounds like a  
19 reasonable approach, but it -- and -- but it  
20 doesn't seem to fit, though, with your conclusions  
21 in your report that's -- that read to me as if you  
22 were deciding that it was most probably urine.  
23 And perhaps that's just how I'm hearing you, but  
24 it -- that doesn't seem to fit the cautionary  
25 approach you are suggesting in terms of knowing



1           what substance you are looking at?

2           A       Well, I mean, I dealt with what was done. I could  
3           have taken the position it was totally  
4           inappropriate to have done this lot without doing  
5           preliminary testing to find out exactly what you  
6           have got and selecting your test procedures fully  
7           aware of all the problems associated therewith.

8           Q       Okay.

9           A       But I tried to give an assessment with what has --  
10          was done, which shouldn't have been done without  
11          this preliminary work to know what they were  
12          analysing.

13          Q       Okay. And I think we've covered it and you were  
14          comfortable with your conclusions on that basis.

15          A       I mean I guess I sort of deserve to get into some  
16          sort of problems. If I comment on something which  
17          was invalid and I don't believe should have been  
18          done, you know, I'll get myself into problems  
19          trying to criticize it or analyse it. I mean, it  
20          shouldn't have been done, period.

21          Q       Okay. Let's consider another aspect, which some  
22          of this information was available at the original  
23          trial, and I'll give a summary again for you, and  
24          we'll refer to a couple of documents just for  
25          confirmation. But Lieutenant Penkala, who located



1 the frozen substances, reported that he had found  
2 hair in the substances, the hair was sent to the  
3 laboratory along with the substance and was tested  
4 by a Mr. Molchanko or Corporal Molchanko, and he  
5 had concluded that there were seven human pubic  
6 hairs in the yellow substance that we have been  
7 speaking of, in the vial that ultimately tested  
8 positive for the A antigens, etcetera. And just  
9 to refer you to a couple of documents, we have  
10 them for reference sake -- and you wouldn't have  
11 had access to these documents obviously, Dr.  
12 Merry, when you were conducting your work -- but  
13 if we turn to 084974 you will see it's a letter to  
14 the lab enclosing a number of exhibits. Exhibit I  
15 is identified as:

16 "two plastic vials of unknown yellowish  
17 substance",

18 as we have been talking about:

19 ("in frozen state").

20 And if we can turn to the next page, point number  
21 9, the request from Lieutenant Penkala to the lab  
22 is to:

23 "Examine Exhibit "I" (two plastic vials  
24 of unknown substance) for the presence  
25 of spermatozoa, and establish whether it



1 is of human origin. Examine hair in  
2 this sample to determine nature of the  
3 hair (pubic, etc.)".

4 And then if we move forward to the actual lab  
5 report, which is 105544, again Exhibit I is  
6 noted:

7 "two plastic vials of unknown yellowish  
8 substance (in frozen state)".

9 If we move to the next page, point 5, Purpose:  
10 "Examine the hair in Exhibit "I" (two  
11 plastic vials of unknown substance) to  
12 determine the nature of the hair (pubic,  
13 etc.) and whether it has any similarity  
14 to Exhibits "J" and "K".

15 And then at the bottom of the page, under Data,  
16 it states:

17 "The hair from Exhibit "I" vials was  
18 examined and compared microscopically  
19 with the hair samples, Exhibits "J" and  
20 "K".

21 And then if we move to the next page, under  
22 Conclusion, Corporal Molchanko states:

23 "Six human pubic hairs were removed from  
24 one of the vials from Exhibit "I".

25 These hairs had characteristics which



1                   were similar to those found in the human  
2                   hair sample, Exhibit "J" (control sample  
3                   of pubic hair from victim). A common  
4                   origin is possible."

5                   And just one other reference. Corporal  
6                   Molchanko's original notes, what we believe to be  
7                   his original notes -- he has not testified -- but  
8                   if we turn to 249782, again, what we understand  
9                   to be notes from Corporal Molchanko. If we turn  
10                  to 249790 of that document the note he has  
11                  written under Conclusions at the bottom:

12                  "Seven human pubic hairs were removed  
13                  from one of the vials from Exhibit "I"  
14                  (P-13). These hairs had characteristics  
15                  which were similar to those found in the  
16                  human hair sample, Exhibit "J" (control  
17                  sample of pubic hair from victim). A  
18                  common origin is possible."

19                  Next page, he goes through the descriptors of the  
20                  hair, I just note the bottom:

21                  "General human hair pubic".

22                  And then he also confirms I2, which is the other  
23                  vial:

24                  "No hairs found."

25                  And his testimony is quite straightforward,





1 simply stating that pubic hair was located. In  
2 fact, the evidence relating to comparison with  
3 the control sample from the victim wasn't  
4 allowed.

5 But I'm wondering, just in  
6 terms of knowledge of the existence of these  
7 seven human pubic hairs in the yellow substance  
8 which you had been asked to consider in later  
9 years, would knowledge of the fact that these  
10 pubic hairs were present with that substance have  
11 had any impact on your conclusions or opinions as  
12 we've reviewed?

13 A Umm, yes, it would. If it is scientifically  
14 validated they are human hairs, and pubic hairs at  
15 that, well it would be reasonable to assume that  
16 they were associated with this yellowish substance  
17 containing spermatozoa, which you could then  
18 postulate, I suppose, reasonably, that if there's  
19 human hairs in it, it's human.

20 Q Okay.

21 A You don't have any direct test for that. I do  
22 not -- I am not an expert of hair, identifying  
23 whether it's human or not, and if it came from one  
24 human or more than one human, or if it's the same,  
25 I don't know. If you assume that yes, it's human



1           hairs in it, pubic hairs, so they have something  
2           to do with it, so we don't know what the A antigen  
3           was, but we can let the dog off the hook, shall we  
4           say. Right.

5           Q           Okay.

6                       COMMISSIONER MacCALLUM: You used "it" and  
7           I'm not sure to what you referred. "You could  
8           then reasonably postulate that if human hair was  
9           present it was human"; do you mean this, the  
10          spermatozoa, the semen that --

11          A           The yellowish fluid containing spermatozoa, yeah.

12                       COMMISSIONER MacCALLUM: All right. Okay.

13                       MR. HARDY: I see the time, Mr.  
14          Commissioner, probably a good time to break.

15                       COMMISSIONER MacCALLUM: Okay.

16                       *(Adjourned at 11:58 a.m.)*

17                       *(Reconvened at 1:31 p.m.)*

18          BY MR. HARDY:

19          Q           Good afternoon, Dr. Merry.

20          A           Good afternoon.

21          Q           Prior to the lunch break I was bringing to your  
22           attention some information which wasn't available  
23           to you when you were conducting your work in 1990,  
24           some of which was from the original transcript,  
25           and we had finished talking about the location of



1 the pubic hair within one of the samples of  
2 yellowish substance found in 1969. The next  
3 portion that I want to speak with you about arises  
4 from some of the original lab notes by Staff  
5 Sergeant Paynter in terms of the tests that he  
6 conducted on the yellowish substance in 1969, and  
7 I'll turn your attention to document 082386, and  
8 these have been identified by Staff Sergeant  
9 Paynter in testimony here at the hearing as his  
10 original notes that he kept during his work on the  
11 exhibits relating to the Gail Miller murder, and  
12 if we turn to the next page, please, you'll see at  
13 the top he refers to the two vials of substance  
14 that we have been speaking of, in large part 11,  
15 the frozen yellowish substance, and he has some of  
16 his own notations in relation to that sample, and  
17 he explained those to us during his testimony, and  
18 the first one I'm going to bring your attention to  
19 is the plus sign beside the phos notation, and in  
20 testimony Staff Sergeant Paynter confirmed for us  
21 that what that indicated is that with respect to  
22 this particular sample, he conducted an acid  
23 phosphatase test and that that test was positive  
24 and he described that as a test for detecting  
25 seminal fluid, and first of all, is that your



1           understanding of an acid phosphatase test, is it  
2           used for that purpose?

3       A     Acid phosphatase test, yes, it is used for that  
4           purpose. In a clinical setting, if a man has  
5           carcinoma of prostate with extensive bony  
6           metastasis, you can use a concentration of acid  
7           phosphatase as some sort of index as to how bad  
8           the condition is and how far it has progressed.  
9           It's a specific form of acid phosphatase. All  
10          enzymes have isoenzymes, that sort of variance.  
11          Now, acid phosphatases are active in acid pH and  
12          you have a great number of variance of those. In  
13          those days, you know, they didn't have molecular  
14          biology, they were kind of crudely fractionated,  
15          and prosthetic acid phosphatase is heat and formal  
16          stable. As I said before, formal refers to  
17          formaldehyde, right, so -- but he said it was  
18          positive for phosphatase. That's fine. I don't  
19          know if he sort of fractionated it and determined  
20          whether it was formal stable or not, but if it's  
21          seminal fluid, it's going to be formal and acid  
22          stable. An elevated phosphatase otherwise in  
23          another clinical setting you would have to  
24          differentiate because it might not be associated  
25          with carcinoma prostate, it might be associated



1 with Paget's disease or something else.

2 Q Would this be an appropriate initial test at least  
3 for the identification of seminal fluid in 1969?

4 A It would be an appropriate test to apply to  
5 identify -- well, seminal fluid, period, no  
6 speciation.

7 Q For any species?

8 A No.

9 Q So would I be hearing you correctly then that you  
10 could, from everything else you've told us, apply  
11 an acid phosphatase test to dog urine and  
12 potentially get a positive result?

13 A Yes. I've not dealt with dog tissue to any great  
14 extent, so I have not done these sort of tests.  
15 I've done it on human material, but not dog  
16 material.

17 Q Okay. And I guess the question would be would the  
18 positive acid phosphatase test on this substance  
19 eliminate the possibility that the substance was  
20 dog urine?

21 A No.

22 Q Okay. And beside that you'll see the positive  
23 micro, and again Staff Sergeant Paynter testified  
24 at the Inquiry and advised that following the  
25 positive acid phosphatase test on this sample, he



1 would have proceeded to examine the sample  
2 microscopically and in so doing would have  
3 identified spermatozoa and, in particular, human  
4 spermatozoa, and I'm going to refer you just  
5 briefly to what -- give me a moment, please -- if  
6 we turn for a moment, please, to page 11017 of the  
7 transcript from the Inquiry, I'll read this  
8 portion to you, and again this is Staff Sergeant  
9 Paynter testifying at this Inquiry, Dr. Merry.

10 A Yeah.

11 Q And it starts at this question:

12 "Q And so we see in terms of that first  
13 area that you cut out of the panties, it  
14 was negative, and in the second area, it  
15 was positive on the phosphatase test,  
16 and is that, as soon as you have the  
17 positive phosphatase test is when you  
18 would go onto microscopically examine  
19 that particular item?

20 A Yes, it would.

21 Q And perhaps you can tell us about that,  
22 what are you looking for on microscopic  
23 examination?

24 A Is to identify the human spermatozoa  
25 which can be a confirmation that human



1                   seminal fluid was present.

2                   Q     And I note that you describe it as human  
3                           spermatozoa. Was there a way to  
4                           particularly identify human spermatozoa?

5                   A     Yes. When you saw them in a  
6                           microscope, it was not difficult to  
7                           tell, to differentiate human  
8                           spermatozoa from other animal forms."

9                   And would I be correct, I think we've talked  
10                   about this previously, but would you perhaps  
11                   disagree with that position?

12                  A     I would disagree to an extent with that position.  
13                           I mean, I might try to tell human from an animal  
14                           species. The problem would be how do I know how  
15                           correct I am. I mean, unless somebody got the  
16                           answer and has submitted you all these specimens,  
17                           I have no means of knowing if I looked at 10  
18                           different specimens and try and say which were  
19                           human and which were dog, I have no means of  
20                           telling how correct I am, unless somebody actually  
21                           has the real answer. I mean, this has turned up  
22                           in other contexts like identifying hair as coming  
23                           from definitely one individual rather than two  
24                           separate individuals, they are very similar, but  
25                           now with DNA technology we know that what was



1 thought to be fairly reliable isn't, and in fact,  
2 you know, there are a number of cases now under  
3 legal review. I mean, I am very cautious in my  
4 interpretation of things.

5 Q And I know we touched on this previously, but  
6 would it be possible, you've been speaking of your  
7 own abilities and that is fair to state, and I  
8 don't know if you can answer the question, but  
9 would it be possible for an expert in this area in  
10 1969 to distinguish microscopically between canine  
11 sperm and human sperm?

12 A I cannot dispute that claim. I would say that I  
13 would not attempt to do it.

14 Q Okay. I turn you next --

15 A I mean, the other problem is if you consider the  
16 ideal situation of fresh seminal fluid with  
17 perfect morphology, that's one thing, but then you  
18 have to consider what happens when it isn't fresh  
19 seminal fluid, the morphology is degraded -- I  
20 mean, we did, we had at the Health Sciences Centre  
21 some people who were practiced as forensic  
22 pathologists and they would sometimes have this  
23 problem, not worrying about whether it was human  
24 or not, but looking at it to be sure that they  
25 could absolutely identify spermatozoa and this





1           wasn't some other artifact, and occasionally they  
2           would bring it to me, what do you think, you know,  
3           and then they sort of conned me into spending  
4           half, three-quarters of an hour looking at field  
5           after field until I could come up with the answer,  
6           yes, I have seen 10, 11 or whatever and I'm sure  
7           that they are spermatozoa, they are not artifact,  
8           so you have to interpret things within a context.

9           Q       Okay. The next area I want to speak to you about  
10           is testing that was originally done which led to,  
11           further led to the conclusion on the part of Staff  
12           Sergeant Paynter that the seminal fluid was of  
13           human origin. I'm again going to take you through  
14           some original materials which you would not have  
15           had access to during your work in 1990 and the  
16           first document is 084974 and we've seen this  
17           previously, again it's the letter to the crime lab  
18           identifying Exhibit I being the substance, unknown  
19           yellowish substance, that we've been speaking of,  
20           and if we move to the next page, please, I read  
21           this to you previously, the first portion of that  
22           entry indicated:

23                       "Examine Exhibit "I" ... for the  
24                       presence of spermatozoa, and establish  
25                       whether it is of human origin."



1 And if we move on to document 084976, again the  
2 lab report by Staff Sergeant Paynter in response,  
3 the substances that we've been speaking of are  
4 identified, and if we move to the next page,  
5 under conclusions you'll note he states in  
6 relation to I1 that:

7 "Human seminal fluid, highly probably  
8 from a "secretor" of Group "A" was found  
9 in Exhibit: I1 - sample of liquid."

10 And again I'm focusing on the human aspect. When  
11 Staff Sergeant Paynter testified at this Inquiry  
12 he was asked some questions in relation to this  
13 aspect, and I'll bring your attention to those,  
14 Dr. Merry, if we could turn to page 11022,  
15 please, and it states in the transcript:

16 "Q And can you tell us, I'm not promising  
17 I'm going to understand, but can you  
18 tell us, briefly, what that particular  
19 test involved?

20 A The human, antihuman test?"

21 And he's speaking of conducting this test  
22 generally speaking:

23 "Q Yes?

24 A It involved making an extraction of  
25 the stain or a liquid sample of the



1 stain, we would then add to a portion  
2 of that extract an antihuman globulin  
3 that we obtained commercially from  
4 Ortho Diagnostics and allow them to  
5 sit overnight. If there was human  
6 protein in the stain it would combine  
7 with the antihuman globulin from the  
8 material we put in it. The next  
9 morning I would then test for the  
10 presence of that added material, if it  
11 had been tied up by the blood sample  
12 being human blood I would not be able  
13 to find the material I had added, and  
14 that would tell me that it was human  
15 blood.

16 Q And would that have been a standard  
17 test, then, used in 1969 --

18 A That was --

19 Q -- for the purpose you have identified?

20 A That was the test we used prior to and  
21 long after 1969."

22 And if I move forward, please, to page 11033,  
23 just a single question and answer here:

24 "Q Okay. And I think, then, you've already  
25 answered this question, but the AH test



1                   that you have been describing for us,  
2                   then, could be conducted on a blood  
3                   sample or on a semen sample; is that  
4                   correct?

5                   A     Yes, you used the same tests for both  
6                   materials."

7                   And then the last piece of information I'll show  
8                   you, Dr. Merry, is again Staff Sergeant Paynter's  
9                   original notes, if we can turn to 082386, and the  
10                  second page of those notes, you'll see in  
11                  relation to the substances we've been talking of,  
12                  on this side of the page there's a positive AH  
13                  and that was the aspect that Staff Sergeant  
14                  Paynter was asked to comment on in the portion of  
15                  the testimony I just read to you. And are you  
16                  familiar with the antihuman test that Staff  
17                  Sergeant Paynter explained?

18                A     Yes, I'm familiar with it. Various variants of it  
19                    are used in blood bank technology.

20                Q     And would it be an accurate test for determining  
21                    whether a substance was of human origin?

22                A     Now we're going to get into some problems.

23                Q     Okay.

24                A     Ortho pharmaceutical company, I know them very  
25                    well, they have very prestigious research labs in



1 Raritan, New York. They produced this antisera  
2 for a specific purpose and it is licensed by the  
3 FDA for that purpose, all right, the federal  
4 department -- well, FDA, Federal Drug  
5 Administration. Now, in blood banking -- well,  
6 let's go back to the A situation. Now, they  
7 produce antisera for use in cross-matching for  
8 determining patient blood groups. To correctly  
9 determine group A, or even fractionate them into  
10 group A-1 and group A-2 we know that the Tr  
11 antigen cross-reacts with that human antisera.  
12 Well, for the application which it has been tested  
13 for and licensed for, Ortho aren't concerned about  
14 that, the FDA are not concerned about that, if you  
15 are cross-matching human blood who cares if it  
16 cross-reacts with a dog or a kangaroo, it doesn't  
17 matter, it's not relevant.

18 Q Let's come back --

19 A So the same applies to antihuman serum, right, it  
20 is licensed for use in blood banking, it has not  
21 been either verified or licensed for forensic  
22 work, so whoever uses it for that purpose would  
23 have to conduct the quality assurance tests  
24 themselves and they might find that yes, this  
25 batch is specific and does not react with other



1 species, or they might find, yes, it does react  
2 with other species, then they would have to use  
3 tissue extracts of that other species to absorb  
4 out the material in that antibody which was  
5 cross-reacting.

6 Q Are you suggesting --

7 A This is a common situation in manufacturing  
8 antisera.

9 Q Are you suggesting then that the antihuman protein  
10 test that has been described by Staff Sergeant  
11 Paynter, that the use of that test to determine  
12 the origin of seminal fluid was not an endorsed  
13 use of that test in 1969?

14 A You would have to go back to Ortho pharmaceuticals  
15 and ask them if it could be used outside -- well,  
16 you would have to ask them exactly what testing  
17 had been carried out on that, if it was indeed  
18 suitable. It may have been or it may not have  
19 been.

20 Q You are not aware whether it was and you were  
21 suggesting it was suitable --

22 A Well, if you compare it to anti-A antisera, we  
23 know it's licensed for use in human clinical work.  
24 They are not interested in what other species it  
25 might cross-react with, it's irrelevant. I mean,



1 with the antihuman stuff, so long as it detects  
2 human immunoglobulin on the surfaces of red cells  
3 for comparability testing, that is the only  
4 requirement. I mean, if you've got human donor  
5 blood, it ain't going to have dog immunoglobulin  
6 in its red cells is it, you didn't get it from a  
7 dog.

8 Q So you are saying it was an endorsed test for  
9 determining that blood was of human origin?

10 A No, it is endorsed for detecting human globulin  
11 within specific limitations, within a very  
12 specific context.

13 Q Would you have concerns about how Staff Sergeant  
14 Paynter used this test in this scenario that I've  
15 just read to you to reach the conclusion that the  
16 seminal fluid had a human origin?

17 A Well, Dr. Markesteyn, I think he sort of referred  
18 to this once, I think it was in one of David  
19 Asper's letters. It's not up to me to give an  
20 opinion on it. If the person does the test, it's  
21 up to them to provide the data.

22 Q So do you have any ability then to --

23 A I can't say yes or no. It's up to the person who  
24 did the test and the manufacturers of the antisera  
25 to say yes, this was okay.



1 Q So this test may in fact have been okay for  
2 purposes of determining human origin --

3 A It may well have been. On the other hand, a  
4 particular batch might not have been.

5 Q And you don't know --

6 A We don't know, and be sure of what you know and be  
7 sure of what you don't know.

8 Q Agreed.

9 A A man -- I always trust second opinions from  
10 people who occasionally say they don't know. If  
11 they always say they know, I'm suspicious.

12 Q So would it be correct then you can't offer us any  
13 assistance in determining whether or not this was  
14 a proper test for determining human origin?

15 A It was the proper test. The verification of the  
16 antisera is the responsibility of the person doing  
17 it.

18 Q Okay. So nothing to say that this result was  
19 wrong in terms of his conclusions --

20 A Nothing to say that it was wrong.

21 Q Let me finish, Dr. Merry. Nothing to say that it  
22 was wrong in terms of his conclusion that this  
23 result told him that it was of human origin?

24 A That's right.

25 Q Okay.





1       A       There are other problems. This is an  
2               agglutination inhibition technique. The detective  
3               system you use doesn't actually give you a  
4               positive result identifying anything, it just  
5               tells you that what was there in the antisera you  
6               used, it's bound with something in what you were  
7               testing in the seminal fluid, saliva or what have  
8               you.

9       Q       Okay, fair enough.

10      A       But it's not fair enough when you are dealing with  
11               urine. If you are dealing with urine, urine is  
12               concentrated human -- well, human urine is  
13               concentrated soluble excrement. It is very  
14               complex.

15      Q       Well, let's talk about that for a moment if you've  
16               brought it up. If the substance was dog urine and  
17               the test was properly conducted, could you get a  
18               positive result; in other words, a false positive  
19               for the antihuman protein test when the substance  
20               you are testing is dog urine?

21      A       If the antisera was absolutely specific for human,  
22               no. On the other hand, since you are testing  
23               urine, you maybe get non-specific binding which  
24               would appear to give a positive result.

25      Q       A false positive?



1 A A false positive result.

2 Q Okay. So the answer to that question then is yes,  
3 it could be dog urine and you could end up with a  
4 false positive result?

5 A The answer to the question, you know, to quite a  
6 number of questions is I don't know. That's it.

7 Q Okay. I'll turn to -- I'm finished with that  
8 portion of questions, Dr. Merry, and just a couple  
9 of other things I wanted to cover with you. You  
10 would have had an opportunity to review and  
11 consider the original trial evidence and I was  
12 going to bring to your attention the closing  
13 address to the jury by the Crown. If we could  
14 turn, please, to document 141905, and I don't  
15 think you would have previously had the  
16 opportunity to look at this document, Dr. Merry,  
17 as it wasn't a part of the transcripts in the  
18 initial state that I think you would have received  
19 them, although that's some speculation on my part,  
20 but in any event, it doesn't matter for purposes  
21 of my question. Crown counsel deals with the  
22 question of the serological evidence starting at  
23 page 141936, and I'm not going to review all of  
24 this with you. He goes through his thoughts on  
25 the serological evidence in his submissions and I



1 want you to try and place your mind back at the  
2 point of time when you had also similarly  
3 considered the trial evidence as a whole on this  
4 aspect, and at the end of it, at page 141940 he  
5 concludes with the comment at the top of the page,  
6 which states:

7 "So I leave that phase of the matter by  
8 stressing again that while this part of  
9 the evidence does not, of itself,  
10 identify the accused, it most certainly  
11 does not eliminate him."

12 And would you, upon your review of the trial  
13 evidence, agree with that comment, Dr. Merry?

14 A Yes, it doesn't identify him and it doesn't  
15 eliminate him. I guess one would have to ask the  
16 question, well, what does it do.

17 Q And perhaps that is the question, did it have --  
18 and please expand on that, did it have value in  
19 terms of what you've identified for us?

20 A No. I mean, all this bit we've been reviewing --  
21 well, I guess it landed in a difficult situation.  
22 They determined he was a non-secretor, then they  
23 go get this evidence, or -- well, I think it was a  
24 false positive that his urine is positive as a  
25 secretor, so they couldn't sort of take the



1 position, you know, we think this is totally  
2 unreliable, we'll drop the whole lot because, you  
3 know, you have to explore, well, how reliable is  
4 it, so non-secretor, seminal fluid, looks like  
5 secretor, you know, the defence would, I guess,  
6 claim that he's innocent, but I think -- well, we  
7 know that he was a secretor, I suspected it when I  
8 assessed the evidence, so we ended up he's a  
9 secretor, so I'm satisfied we got that bit right.

10 I think the second bit of  
11 there's evidence of secretion in the urine, I  
12 think that bits wrong, so now we've gone from sort  
13 of negative at the top and positive at the bottom  
14 to positive at the top and negative at the bottom  
15 as far as I'm concerned.

16 Q Okay.

17 A This evidence, it would have been better if it had  
18 never been produced at all.

19 Q Okay.

20 A It has not contributed to anything and, as far as  
21 I can see, it has not only confused some what you  
22 might call medical experts. It seems to have been  
23 very confusing all around.

24 Q Okay. Dr. Merry, I think those are all the  
25 questions that I have for you, thank you very



1 much.

2 My Friends may have some  
3 questions in cross-examination.

4 **BY MR. GIBSON:**

5 **Q** Dr. Merry, my name is Bruce Gibson, I act for the  
6 RCMP, and in light of your comments in the last  
7 two minutes here with respect to the value that  
8 the evidence actually had and your views on  
9 whether it linked Mr. Milgaard to the offence or  
10 not, I might be very brief with you. But if you  
11 are patient with me, I'll try to scan my notes  
12 quickly, and see where I want to go first. All  
13 right.

14 I'm going to try not to refer to  
15 the transcript of evidence that Staff Sergeant  
16 Paynter gave at the inquest, and trust that you  
17 will take what I say as what his evidence is  
18 rather than belabour the point and go through  
19 lengthy transcripts. Staff Sergeant Paynter gave  
20 some evidence with respect to the testing that he  
21 did. He informed the inquiry in 1969 that he did  
22 a hemostix testing screening test, which gave him  
23 a presumption that there would be blood in the  
24 sample that he has tested, and we've heard your  
25 evidence on that and you indicated that that



1           hemostix test could give a presumptive reading of  
2           there being spermatozoa or seminal fluid in a  
3           sample; is that correct?

4       A       Well, umm --

5       Q       And, again, I'm using the word "presumptive".

6       A       -- since spermatozoa -- I mean I'm conceding, yes,  
7           they looked and they saw spermatozoa. I'm not  
8           arguing with that. So they saw spermatozoa, which  
9           were very dead, and because they were there you  
10          would expect a positive peroxidase reaction. If  
11          you didn't get a positive peroxidase reaction the  
12          next most likely explanation would be your  
13          hemostix have long since expired and aren't  
14          working. Right.

15      Q       Now the other aspect of that was the hemostix test  
16           would give a, could also give a presumptive test  
17           that there could be blood present in the sample,  
18           and you'd agree with that I believe? Again --

19      A       I'd agree with that, yeah.

20      Q       -- it's all being presumptive. And Staff Sergeant  
21           Paynter went on to give evidence that you would  
22           then have to use a confirmation test, and he  
23           mentioned the haemochromogen test, and again would  
24           you agree that that's the type of testing that  
25           would have been done to try and confirm, or should



1           have been done to try and confirm if there was  
2           blood in that sample; correct?

3       A       Yeah, he talks about the haemochromogen crystal  
4           test.

5       Q       Now would he --

6       A       Now that is not what I would have used, but okay,  
7           if it's positive that's fine.

8       Q       Maybe --

9       A       On the other hand --

10      Q       -- if I could just stop you there, Dr. Merry, so  
11           we don't go down a path that we don't necessarily  
12           have to go to. Mr. Paynter gave evidence that he  
13           was not able to do a confirmatory test, being a  
14           haemochromogen test, and therefore his evidence  
15           was that he could not chemically or clinically, or  
16           whatever, positively state that there was blood in  
17           the sample that he had tested; does that make  
18           sense to you? If you can't do a confirmatory  
19           test, how could you say that it's blood, fair?

20      A       That is correct. And if you look at the  
21           transcript, that's the sort of judge's instruction  
22           to the jury, "there ain't blood there".

23      Q       Absolutely. And I'm going to move along along  
24           that line. Staff Sergeant Paynter gave evidence  
25           as well at the trial and at this Inquiry that



1           there could be many reasons for a false reading,  
2           that it could not be blood as well, there could be  
3           some other reason for there to be a positive  
4           reading on the presumptive test, on the hemostix  
5           test, and I think he mentioned leather and some  
6           vegetable matter and there was numerous others,  
7           and he gave evidence to that effect. So, again,  
8           would you agree with me that at the evidence at  
9           trial it was pretty well established, as you  
10          referenced the judge's comments, that there was no  
11          confirmation that there was blood, necessarily, in  
12          the sample that he tested?

13        A       That's right. Umm, presumptive test done, we have  
14               one explanation already for a positive presumptive  
15               test, if you try the test again and try to say  
16               there's blood there who knows whether there is or  
17               not.

18        Q       Now in 1969 the evidence was that David Milgaard  
19               was an A blood type non-secretor?

20        A       That's correct, yes.

21        Q       And the snowbank sample was identified as being  
22               from an A blood type secretor?

23        A       Yeah.

24        Q       Which, arguably, was favourable to Mr. Milgaard in  
25               the sense that there wasn't a link necessarily





1           made between those two?

2       A       That's right.

3       Q       So, if anything, that incorrect evidence, if we  
4           can call it that, by Staff Sergeant Paynter, if we  
5           assume that it was incorrect, was more favourable  
6           to Mr. Milgaard in that it didn't place him at the  
7           crime scene; would you agree with that?

8       A       Well, from my assessment of it we can't, we can't  
9           say that we know if the result was positive or  
10          negative. I would say it is not scientifically  
11          valid so it's a null result.

12      Q       Yes. But if, if we have the evidence that was at  
13          trial, and with the judge saying that 'there is no  
14          blood, there is no evidence of blood being found  
15          in that sample', but yet the sample is from an A  
16          blood type secretor and Mr. Milgaard is identified  
17          as an A blood type non-secretor, I guess it's  
18          logical to conclude that that arguably goes more  
19          towards eliminating Mr. Milgaard from the crime  
20          scene than implicating him at the crime scene?

21      A       Well, if you start from a false hypothesis, you  
22          can directly get to a correct false answer, for  
23          what that's worth, if you understand what I am  
24          trying to say.

25                   COMMISSIONER MacCALLUM: I get your point,



1 Mr. Gibson.

2 MR. GIBSON: Okay, thank you, Mr.

3 Commissioner.

4 BY MR. GIBSON:

5 Q And I don't know whether you have had a chance to  
6 review Dr. Ferris' report, but perhaps you have,  
7 and again I don't want to take a great deal of  
8 time plowing through that report, but again, Dr.  
9 Ferris at document 028652 at 658 says:

10 "... serological evidence at trial  
11 failed to link David Milgaard ..."

12 to the crime and could reasonably be concluded to  
13 have excluded him. And, again, would you agree  
14 with that hypothesis, doctor?

15 A Not after my assessment of the evidence. I mean,  
16 it came as no surprise to me when his secretor  
17 status was repeated and was found to be positive,  
18 that's what I expected.

19 Q But, again, just backing up to the evidence --

20 A But then, well so we've changed that bit of the  
21 equation, and I'm not satisfied we know whether it  
22 was yes or no so far as the secretor -- so far as  
23 the seminal fluid was concerned, as far as I'm  
24 concerned it's a null result.

25 Q But on --



1 COMMISSIONER MacCALLUM: What's the doc ID  
2 please?

3 MR. GIBSON: The doc. ID on that is 028652  
4 at 028658.

5 COMMISSIONER MacCALLUM: 652 at 658.

6 BY MR. GIBSON:

7 Q But, again, you would agree that some medical  
8 individuals -- and Dr. Ferris will have an  
9 opportunity to testify -- took the position that  
10 the medical evidence that was led at the Milgaard  
11 trial back in 1969 or 1970 went more towards  
12 exonerating David Milgaard than implicating him?  
13 Some have taken that view, and I take it you have  
14 a different view, but you can see how that view of  
15 that evidence could be --

16 A I can understand, I can understand how he came to  
17 that situation, but I have had other material  
18 presented to me and, shall we say, I now realize  
19 that I was in the twilight, but I think poor Rex  
20 Ferris, he was in the darkness when he decided  
21 that, you know, this would exonerate him.

22 Q And --

23 A We just did not have enough detail in the material  
24 which was presented, and even though we now have  
25 further detail, you cannot validate a lot of



1 things scientifically and they must remain null.

2 Q Now one comment that you gave us earlier this  
3 morning was the frozen lumps were found with some  
4 what was identified by Mr. Molchanko as pubic  
5 hair, human pubic hair, and I think you had the  
6 line of the morning, certainly, when you said that  
7 that let the dog off the hook?

8 A Well, if they were correctly identified as human,  
9 it would let the dog off the hook.

10 Q Now, doctor, would you agree with me that, as a  
11 forensic scientist, if someone gives you a sample  
12 like that --

13 A Yeah, but I'm not a forensic scientist, I'm a  
14 haemopathologist, I just got dragged into this.

15 Q Oh, sorry, okay. Now if we put ourselves into  
16 Mr. Paynter's position, and he has a sample that's  
17 given to him -- and I don't want to go through all  
18 of the tests that he undertook -- but would you  
19 agree with me that if there is human pubic hair  
20 identified with that sample one might be more  
21 inclined to identify that it was of human origin  
22 than of animal origin; that would just be common  
23 sense, wouldn't it?

24 A Yes, one would be inclined to come to that  
25 conclusion.



1 Q Okay. And we also talked about the coloration of  
2 the sample that was found, and again I don't want  
3 to talk about whether it was a pale yellowish or  
4 a -- you know, I don't want to go through that in  
5 any great detail with you, but I think you were  
6 fair in your comments this morning that there was  
7 contamination at the scene and that it's possible  
8 that if there is some blood, and if it's diluted,  
9 that it could give coloration to the sample, and  
10 that that one -- one could look at that and it's  
11 possible to have found a yellowish tinge to it, or  
12 a clearish coloration with a bit of yellow in it.  
13 Is -- is that, again, a fair summary of what your  
14 evidence was?

15 A Well I said possible, highly improbable, I think.  
16 I mean it reminds me of the Yorkshire expression:  
17 "I'll believe you, but thousands wouldn't".

18 Q Now we have the testing, and I won't go through  
19 that with you again, that Mr. Paynter has done,  
20 and I think you'd probably agree with me that a  
21 scientist basically doesn't have a choice,  
22 necessarily, of what his samples are that he is  
23 going to test?

24 A Yeah. I would like to add something to that.

25 Q What --



1       A       I sympathize with Sergeant Paynter. He was given  
2               this to examine. Now did he have the option of  
3               saying, you know, "I've considered it and decided  
4               we'll get into more trouble than a little, this  
5               isn't going to provide unequivocal verifiable  
6               evidence, forget it". I mean I doubt that.

7                       I mean I have been a laboratory  
8               director for quite a long time. None of my  
9               technical staff are in that position. They bring  
10              it to me, and I tell whoever thinks they are going  
11              to get the lab to analyse it that they are not  
12              going to get it to analyse, because it isn't going  
13              to yield a valid result.

14                     So I do not wish to criticize  
15              Sergeant Paynter in his situation, or predicament,  
16              depending upon just how -- what the situation was.

17       Q       And I guess, in sort of looking at that situation,  
18               Sergeant Paynter had the police come with him --  
19               come to him with a sample and say "this is what we  
20               have, we found it four days later near the, where  
21               the body was, is there anything you can do to help  
22               us", and I suppose as a scientist he said "well, I  
23               don't know what I can do, but I'll have a look"?

24       A       Umm, well --

25       Q       I mean it --



1       A       Well, I don't know, maybe they came and said "here  
2       it is, you process it, and that's it". But --

3       Q       But would you agree with me that, in the situation  
4       that we're dealing with here, it would have been  
5       much better to have a sample that was more closely  
6       tied to the body? Now there is evidence that the  
7       vaginal aspirate was destroyed and that was never  
8       tested by Staff Sergeant Paynter. Now would you  
9       agree with me that that would have been a better  
10      sample to have tested than something that was  
11      found four days later in a snowbank?

12      A       Yeah, but -- well there is a problem there. David  
13      Milgaard was blood Group A, secretor, the deceased  
14      was blood Group O, secretor status I don't know.  
15      Umm, I think that's another sample which would  
16      have been better -- well, it was not processed, --

17      Q       It wasn't.

18      A       -- and I think it would have been better if this  
19      lot hadn't been processed either.

20                       I mean I have concerns about  
21      this. I mean did Staff Sergeant Paynter have the  
22      staff and resources to go send somebody to  
23      Saskatoon to secure a valid sample from David  
24      Milgaard in the first place? Did he? No. It  
25      just arrives on his door step. I mean, it is one



1           thing -- well, I mean there is no reason why a  
2           valid sample couldn't have been collected if there  
3           were resources available; it's another situation  
4           if you find saliva, dried saliva at a crime scene,  
5           you process what you have got, that's all you are  
6           gonna get. But with David Milgaard in Saskatoon,  
7           they could have got a perfectly good sample, we  
8           wouldn't have had this rather unfortunate  
9           situation we now have.

10        Q       Now I take it, Dr. Merry, that the tests that went  
11           on in 1969 where you have a sample, and whether  
12           it's from a secretor or a non-secretor, etcetera,  
13           that that type of testing is probably not used  
14           much these days, and that if you have a human  
15           sample one would try to do DNA analysis on that,  
16           and you would get a much more specific result?

17        A       If you have got a seminal sample you go straight  
18           for DNA. Who cares what the blood groups are, you  
19           are not going to transfuse the deceased or the  
20           accused, so you are not interested in blood  
21           groups.

22        Q       So part of the mandate of this Commission is to,  
23           obviously, try to make recommendations so wrongful  
24           convictions don't happen in the future, and I take  
25           it you would agree that, for future cases, it





1           would be advisable to save exhibits so that they  
2           could be tested later on when science advances,  
3           and that may well help to solve the crime? I  
4           suppose that's a fairly easy thing to agree with?

5       A       I think when one looks at quality assurance  
6           procedures, which weren't fulfilled in various  
7           points of what we have looked at, that is a  
8           systemic failure. You have to identify the  
9           systemic failure and you have to make sure that it  
10          does not happen in the future. So there were  
11          low-tech systemic failures, okay, now we're going  
12          high-tech, well high-tech systemic failures isn't  
13          going to help us a helluva lot either, is it. So  
14          we better identify some fundamental principles.

15                COMMISSIONER MacCALLUM: So are you telling  
16           me that the valid recommendation would be that  
17           even if the science today is not capable of  
18           making use of a given sample, it should be saved  
19           anyway, in case science advances to the point  
20           where that sample will become useful? That's  
21           what I understood by his question.

22       BY MR. GIBSON:

23       Q       Yes.

24       A       Yes, that is correct.

25                COMMISSIONER MacCALLUM: Okay.



1       A       And, you know, we have to make sure there is  
2               absolute validation, all quality assurance  
3               procedures are in place, proficiency testing has  
4               verified the methods. If they fail in low-tech  
5               stuff, if they aren't in place for high-tech  
6               stuff, there will be errors in that as well.

7       BY MR. GIBSON:

8       Q       Dr. Merry, I want to talk just briefly about  
9               Mr. Paynter doing the microscopic analysis of the  
10              sample that he did. And, again, we've talked at  
11              length today about metamorphological differences  
12              between canine and human spermatozoa, if that's  
13              possible to differentiate, and I take it that you  
14              were of a different view than Dr. Markesteyn.  
15              That document was 04772 at 04778, and Dr.  
16              Markesteyn took the view that the only way of  
17              excluding this semen for being of non-human origin  
18              would have been the morphology and/or  
19              species-specific antigen body reaction tests. So  
20              he was of the view that you could make that  
21              determination through morphological testing or  
22              examination under a microscope, and you take a  
23              different view than that, and I think you've told  
24              us that; correct?

25      A       I don't think it could be absolutely reliably



1 done.

2 Q So --

3 A And --

4 Q No, and I appreciate that you have given us that.

5 And Dr. Markesteyn also gave some evidence I  
6 suppose, and will give some evidence, but through  
7 that document that was put to you he took that  
8 position, and you disagreed with that; correct?

9 A Well, I disagree with the first premise he puts.  
10 The second premise, --

11 Q Yes?

12 A -- specific immunologic identification, I agree  
13 with that.

14 Q Yeah. And, in fairness, his document says  
15 morphology and/or those species-specific antigen  
16 antibody reaction testing?

17 A Well, I mean, if you put it to Dr. Markesteyn  
18 perhaps you should qualify it; spermatozoa which  
19 had been dead four days, are all crunched up, the  
20 morphology leaves a great deal to be desired, do  
21 you think you can identify human from dog under  
22 those conditions. We're not looking at fresh  
23 material, you know. I mean --

24 Q And --

25 A -- I have had the odd medical -- well, I've had



1           one medical/legal autopsy, it took us two days to  
2           find out whether the body was male or female. I  
3           mean, things can get in a rather deteriorated  
4           condition.

5       Q       And I take it, doctor, that your evidence was that  
6           you obviously never looked at the sample and you  
7           weren't able to comment on whether Staff Sergeant  
8           Paynter was able to make that differentiation?

9       A       No, I'm not able to comment on that.

10      Q       Okay.

11      A       I don't know what he looked at, so that's it.

12      Q       And --

13      A       The other problem is, since we're on spermatozoa,  
14           how much -- how many spermatozoa were in the  
15           specimen? I mean, if we know the number, it might  
16           give us an idea as to dilution factors. I think  
17           we were logs out of detectable range. I mean,  
18           there is no data there recorded, is there any in  
19           existence at all?

20      Q       Not to our knowledge, we simply have Staff  
21           Sergeant Paynter's notes in that he identified the  
22           sample as human, but he never quantified it, and  
23           he gave evidence at the Inquiry that that's what  
24           he was able to differentiate or identify from the  
25           sample.



1       A       We're left with the unanswered question; was the  
2               dilution of the sample 1 in 10, 1 in 10,000, or  
3               possibly --

4       Q       Yes.

5       A       -- 1 in 100,000 or a million or more. We don't  
6               know, do we.

7       Q       Now, if we could just put up document 002511. And  
8               I think that document was put to you earlier today  
9               and, again, it was a letter from a Patricia Alain  
10              to a Mr. Eugene Williams, it's dated June 12th of  
11              1990. And she takes the position, the last  
12              sentence or two of that paragraph that's  
13              highlighted:

14                       "The morphological differences of human  
15                       spermatozoa and canine spermatozoa are  
16                       several."

17       And that:

18                       "The experienced examiner would not have  
19                       any problems in distinguishing between  
20                       human and canine spermatozoa."

21       So I take it that Dr. Markesteyn's position was  
22       that that is a test that could be done, you could  
23       look at that and make that differentiation;  
24       Mr. Paynter took that position; and it appears  
25       that Ms. Patricia Alain, who is the Chief



1 Scientist, Serology Department with the RCMP lab,  
2 also takes that position that there can be a  
3 differentiation under a microscope made. And I  
4 take it you disagreed with that as well; is that  
5 correct?

6 A Well Dr. Markesteyn and I did sort of briefly  
7 discuss that at one time. I wanted to see slides  
8 to have a look at the morphology.

9 Q Unfortunately, those weren't available.

10 A They weren't available.

11 Q But you will agree with me --

12 A The other thing --

13 Q No, if I may, Dr. Merry; you will agree with me  
14 that Dr. Markesteyn took the position that it was  
15 possible to look under a microscope and make a  
16 determination on morphology?

17 A Well, that's what it says in the transcript.

18 Q Absolutely.

19 A I took the position that we'll try, I'd like to  
20 see it under optical microscopy, if we've got a  
21 good sample we can do electron microscopy on it  
22 and see if, at electron microscopy level, we can  
23 distinguish, definitely, a difference. There was  
24 nothing there to do anything on.

25 Q Right. And then we have Staff Sergeant Paynter



1           give evidence that he was of the view you could  
2           look under a microscope and make a determination,  
3           and now we have Patricia Alain who also takes that  
4           position as well. And if I could just put up  
5           another document, please, 278893. And, again,  
6           this is a document originating within the  
7           Government of Canada from a Cathy MacMillan with  
8           the Biology Section of the RCMP, and it's an  
9           internal RCMP memo. If we could just turn to the  
10          next page of that, please, and if we could call up  
11          this part, please, and she writes:

12                 "In my opinion, the results obtained at  
13                 the time of the Miller investigation  
14                 indicating the two frozen lumps were  
15                 human semen, are correct. The tests  
16                 used at that time have not changed  
17                 significantly and are currently in use  
18                 in the Biology Section.

19                 Two tests are carried out in  
20                 order to conclude a stain is human  
21                 semen. The preliminary test, identifies  
22                 high levels of acid phosphatase which is  
23                 found in human semen. If this test is  
24                 found to be positive, the area is  
25                 examined microscopically for



1 spermatozoa. Human spermatozoa are  
2 morphologically different (as seen  
3 microscopically) than animal  
4 spermatozoa. Only at this stage, can a  
5 conclusion be drawn as to the origin of  
6 the semen."

7 And, again, we have Cathy MacMillan with the  
8 Biology Section of the RCMP indicating in her  
9 view, looking at spermatozoa under the  
10 microscope, that one is able to distinguish  
11 between animal spermatozoa and, I guess, human  
12 spermatozoa. And I take it you would disagree  
13 with that view, then, proffered by her?

14 A Well, I wouldn't take a black and white position,  
15 I would say with what certainty can you identify  
16 it; at a 99 percent level, at a 90 percent level,  
17 at 75 percent level? I mean --

18 Q So, again, it --

19 A -- morphology, I mean it's just eyeballing things,  
20 really, either directly or down a microscope.  
21 It's just a question of a visual valuation, I  
22 mean, it is not high-tech. You note what features  
23 you can see, but when the features are all  
24 extremely similar, it's very subjective. It's a  
25 very subjective judgement, it's not objective, you





1 know; "this -- dogs have this, humans have that".

2 Q Now, Dr. Merry, we know that the individual that  
3 was eventually convicted of the crime through DNA  
4 analysis, Mr. Fisher, was identified as an A blood  
5 type secretor, and would it be your view, then,  
6 that it was just a coincidence that Staff Sergeant  
7 Paynter was able to identify an A blood type  
8 secretor sample in the snow and identify that as  
9 human seminal fluid?

10 A Well, we have been through that, I think that's a  
11 sort of a null situation. I mean, statistically  
12 speaking, you are looking at -- well, it varies  
13 according to the population, over here they use  
14 the figure of 49 percent are Group A positive, it  
15 depends upon the ethnic mix of the community, but  
16 we look at 49 percent. I mean a coincidence,  
17 there is a 49 percent chance, if they got it  
18 right. If the result was right there is a 49  
19 percent chance that -- well, 49 percent they could  
20 get it right by chance. Umm, I don't think they  
21 -- you can regard it as a valid result.

22 Q And again, and I won't belabour this, this is my  
23 last point here, your view is that the evidence  
24 that was led at the trial for Mr. Milgaard, and we  
25 went through that at the outset of my questioning,



1 never linked Mr. Milgaard to the crime?

2 A No. I mean, if we had had the ideal situation, we  
3 got the secretor status right from the outset,  
4 that David Milgaard was positive, we had a valid  
5 seminal fluid specimen and we were quite sure that  
6 that was from a group A secretor, so we have  
7 evidence. Well, I looked up some data.  
8 Apparently Saskatoon in 1967 had a population of  
9 95,526. Well, that's near enough around the time  
10 I guess. So males over 16, I calculated that, I  
11 calculated the group A individuals, so if we've  
12 got a group A secretor and we've got a group A  
13 specific substance in the seminal fluid, David  
14 Milgaard would have been a suspect amongst 12,778  
15 others. I mean, I don't know how useful that is,  
16 but --

17 Q Certainly not useful to link him to the crime?

18 A Well, it narrows it down you might claim. I mean,  
19 you've narrowed it down from 33,434 males who  
20 could have done it, you've narrowed it down to  
21 12,778.

22 Q Now, if on the other hand the evidence goes in to  
23 the point where he's identified as a non-secretor  
24 and the sample found is for an A secretor and he's  
25 an A non-secretor, again that arguably, as you



1           said, would not connect him to the crime and  
2           arguably would go to eliminate him?

3       A       Yes. The irony of the whole situation is they got  
4           the secretor status wrong from the outset, we have  
5           a result which I would regard as null, but they  
6           said it was positive. There would have been good  
7           reason that he could be acquitted on the evidence  
8           which wasn't right and on erroneous evidence  
9           justice might have been done.

10           MR. GIBSON: Thank you.

11           MR. HARDY: No questions on re-exam.

12           COMMISSIONER MacCALLUM: Thank you, Dr.  
13           Merry, for coming, and you are excused.

14       A       Thank you.

15           MR. HODSON: The next witness is Tom Vanin.  
16           I'm wondering if we should take the afternoon  
17           break. We only sit until four today.

18           COMMISSIONER MacCALLUM: All right, yes.

19           *(Adjourned at 2:35 p.m.)*

20           *(Reconvened at 2:54 p.m.)*

21           MR. HODSON: Mr. Commissioner, the next  
22           witness is Mr. Tom Vanin and I would ask him to  
23           come up to the witness stand, please.

24       **THOMAS VANIN, sworn:**

25       **BY MR. HODSON:**



1 Q Good afternoon Mr. Vanin. Thank you for agreeing  
2 to testify before this Commission of Inquiry. I  
3 should note for the record that Mr. Vanin is  
4 represented by counsel, Mr. Morris Bodnar, who is  
5 present today.

6 COMMISSIONER MacCALLUM: Mr. Bodnar.

7 BY MR. HODSON:

8 Q And as well, Mr. Vanin, I understand, sir, would  
9 you like to claim the protection of the Canada  
10 Evidence Act and the Saskatchewan Evidence Act?

11 A Yes, sir.

12 Q And I believe, Mr. Commissioner, that his claim is  
13 sufficient to take the protection of those acts?

14 COMMISSIONER MacCALLUM: Yes.

15 BY MR. HODSON:

16 Q I understand, Mr. Vanin, that you are 62 years of  
17 age; is that correct?

18 A Yes, sir.

19 Q And that you reside in Saskatoon?

20 A Yes, sir.

21 Q And that you are a retired police officer having  
22 worked with the Saskatoon City Police from 1964 to  
23 1996; is that correct?

24 A Yes, sir.

25 Q I would like to show you document ID 333242, and



1           this is a document, Mr. Vanin, that I showed you  
2           the other day, it's a document provided to us by  
3           the Saskatoon City Police, they provided us  
4           similar information for all former police  
5           officers, or retired police officers who have  
6           testified, and I just quickly want to go through  
7           this to ensure that it's accurate. Have you had a  
8           chance to look at it?

9       A       Yes, sir.

10      Q       And I understand there may be one, is there a --  
11           that you may have gone straight from constable to  
12           sergeant, is that right, or is that accurate?

13      A       That's correct, I went from constable to sergeant.

14      Q       So the '73, corporal, you say that's not correct;  
15           is that right?

16      A       That's not correct.

17      Q       And then if we could just go down to transfers,  
18           please, this sets out time frames and the areas  
19           where you were assigned. Are you able to tell us  
20           whether that is accurate?

21      A       Where it says "operations support/service centre  
22           unit -- reader detail," to my knowledge I've never  
23           worked in those positions.

24      Q       Okay. Do you recall, if we could just go back,  
25           prior to that you were with major crime. Do you



1 recall where you went between major crime and  
2 finance informatics, or was it in major crime?

3 A No, from major crimes I would have gone to the  
4 finance informatics.

5 Q Okay. There's a couple of time frames just from  
6 this that I want to point out that we'll touch on  
7 a bit later. In 1969, at the time of Gail  
8 Miller's death, I understand that you were a  
9 uniform officer on patrol; is that correct?

10 A Yes.

11 Q And then as well this time frame right in here,  
12 January 25, '91 through until, if you can just  
13 highlight that part, the 1991 time frame, I'll be  
14 touching on that a bit later, you would have been  
15 an investigator in major crime or in charge of  
16 major crime; is that correct?

17 A I believe at that time I was in charge of major  
18 crime.

19 Q Now if we can -- we're done with that document.  
20 If we can go back to 1969, sir, were you involved  
21 in any way in the Gail Miller murder  
22 investigation?

23 A No, sir.

24 Q Were you generally aware of the case at that time?

25 A Yes, sir.



1 Q And just generally what did you know about it and  
2 where did you know about it from?

3 A Everybody in the department was advised that there  
4 was a murder and an investigation was taking place  
5 and this would have been common knowledge to all  
6 the members.

7 Q And I take it, sir, at some point in time you  
8 would have become aware that a Mr. David Milgaard  
9 was arrested, charged and convicted for that  
10 crime; is that correct?

11 A Yes, sir.

12 Q Did you at some point form any view regarding  
13 David Milgaard's guilt or innocence for the murder  
14 of Gail Miller?

15 A Yes, sir.

16 Q And can you explain when that took place, if you  
17 can put a time frame on it and what that was?

18 A Right from the time that Mr. Milgaard was arrested  
19 until this date, I've always believed that he was  
20 innocent.

21 Q And on what basis did you have that belief, Mr.  
22 Vanin?

23 A I couldn't find anybody that could give me any  
24 evidence, any of the detectives or anything that  
25 would convince me that Mr. Milgaard was



1 responsible for the murder. Eddie Karst and I had  
2 become good friends, and I think until this day  
3 we're still good friends, and I would ask him, you  
4 know, what evidence did they have, and he said  
5 from what he knew of the file there was nobody  
6 else -- that they had eliminated everybody else  
7 and this left Mr. Milgaard.

8 Q And just again to go back, sir, I take it you  
9 would have been aware that Mr. Milgaard went  
10 through a court proceeding and was convicted by a  
11 jury back in 1970?

12 A Yes.

13 Q And notwithstanding that conviction, did you have  
14 doubts at that time that he was the person that  
15 had committed the crime?

16 A Yes, I still had doubts, and I'll tell you, there  
17 was a large number of people in the department  
18 that were shocked when the jury came in with a  
19 guilty plea. Mind you, these were uniform members  
20 that had nothing to do with the case. He was  
21 represented by Mr. Tallis and we just felt that he  
22 had the best lawyer that was available and we just  
23 didn't see any hard evidence pointing to him, but  
24 again, we didn't have access to any of the files.  
25 I did not attend the trial or the prelim. It's





1           just the way the membership felt, or some of the  
2           membership felt.

3           Q       Were you aware of the incriminating evidence that  
4           was presented against Mr. Milgaard at trial?

5           A       Yes, I was told by somebody that Mr. Cadrain gave  
6           evidence and I was also told that there was blood  
7           on Mr. Milgaard's clothing. Later talking to  
8           other officers, and I didn't know Mr. Cadrain, I  
9           never did meet him, but the other officers that  
10          did know him told me that he was absolutely crazy  
11          and not believable, and in respect to the blood on  
12          the clothing, I found out later there was no  
13          blood.

14          Q       And where did you find that out from?

15          A       I think I found that out from David Roberts, a  
16          reporter for *Globe* Manitoba.

17          Q       And I think he's a *Globe and Mail* writer, or was a  
18          *Globe and Mail* writer at the time; is that  
19          correct?

20          A       I think so.

21          Q       And I'll be going to some documents later, and one  
22          would suggest that that would be in the 1991 time  
23          frame; is that right?

24          A       1991 or possibly earlier.

25          Q       Okay. And again I'll show you some documents



1 later, some articles of Mr. Roberts. So again if  
2 I could just go back at the time, 1970, and I  
3 think you've told us, and please correct me if I'm  
4 wrong, that at that time you had the same doubts  
5 then that you had later and still, or that you had  
6 later on; is that correct?

7 A Yes.

8 Q And you told us about how some uniform officers  
9 were shocked when he was convicted?

10 A Yes.

11 Q And can you tell us why, or what was your  
12 perception or what was the discussion?

13 A I think they felt that because Mr. Milgaard was  
14 represented by Mr. Tallis, that there would be no  
15 way that he would be convicted, and our only  
16 source of information was what was in the papers  
17 and we just didn't think there was enough evidence  
18 to convict him.

19 Q Okay. So just -- the information then that you  
20 would have had would have been from what you read  
21 in the paper as opposed to what you would have  
22 learned directly from your role as a police  
23 officer; is that right?

24 A In the beginning in the -- after Mr. Milgaard's  
25 conviction, yes, but then later on when I was,



1 wrote my exam and was promoted to sergeant, I was  
2 immediately transferred to detectives and then I  
3 started talking to detectives, and again I just  
4 couldn't, I couldn't -- nobody could give me any  
5 information that proved to me beyond a doubt that  
6 he was guilty.

7 Q And what effect if any did the fact that a jury  
8 found beyond a reasonable doubt that he had  
9 committed the crime, what role if any did that  
10 play in your thinking?

11 A None whatsoever. I think there's 140 men in the  
12 United States that were on death row that were  
13 acquitted or had their convictions reversed  
14 because of DNA.

15 Q And just back on your comments about Mr. Tallis,  
16 and I know there's a number of defence counsel in  
17 this room who would say oftentimes good defence  
18 counsel have clients who are convicted, or  
19 represent guilty parties, and I'm not suggesting  
20 that Mr. Milgaard was guilty, he was not, but the  
21 fact that Mr. Tallis represented him, can you  
22 explain how that influenced your thinking that he  
23 was not guilty or innocent?

24 A It wasn't so much the fact that Mr. Tallis  
25 represented him as I could not learn from anybody



1           what good, concrete evidence they had to point to  
2           Mr. Milgaard's guilt. There was no forensic  
3           evidence, there was no -- I just didn't see any  
4           hard evidence and nobody was able to show me any  
5           hard evidence.

6       Q       Okay.

7       A       And that's what I was looking for.

8       Q       And would it be fair to say, Mr. Vanin, that over  
9           the course of, let's say, from 1970, the date of  
10          the conviction through until the early 1990s, and  
11          I'll be dealing with that a bit later, that over  
12          those 20 years you continued to hold views,  
13          continued to ask questions and continued to hold a  
14          view that Mr. Milgaard was innocent; is that fair?

15      A       That's correct.

16      Q       Just back in 1969, 1970, do you have any  
17          recollection of Larry Fisher, that name being  
18          known in police circles, or did you know that name  
19          at all?

20      A       No. Larry Fisher's name came to me either by way  
21          of newspaper or from David Asper, a lawyer in  
22          Winnipeg.

23      Q       And would that be again in the 1990 time frame?

24      A       It would be in the late '80s or '90s, I'm not  
25          sure.



1 Q And so to the extent that you were probing and  
2 asking questions from 1970 onward, is it your  
3 evidence, sir, that the name Larry Fisher never  
4 came up then?

5 A Not until I read it in the paper or not until Mr.  
6 Asper asked me if I ever heard of Larry Fisher.

7 Q And we'll touch on that a bit later. What about  
8 back at the time of the Gail Miller murder, do you  
9 have any recollection of there being rapes  
10 occurring in and around that time in the area of  
11 the murder, do you have any recollection of that?

12 A Yes.

13 Q And what is your recollection?

14 A Just that there was rapes, but I was assigned, I  
15 was a young constable and I was assigned to patrol  
16 division and had nothing to do with any of the  
17 investigation, and at that time the structure was  
18 such that morality didn't share any information  
19 with patrol division or wouldn't share any  
20 information with detectives, the detectives  
21 wouldn't share any information, everybody worked  
22 in their own little clique.

23 Q And when you say, when you use the word wouldn't,  
24 are you saying a deliberate desire not to provide  
25 the information or that it just didn't happen?



1       A       I'm saying that there was, from my recollection or  
2               from my perception there was competition between  
3               the morality section and the detective section.

4       Q       Okay. In what sense?

5       A       In making the arrests or making good arrests,  
6               solving crimes.

7       Q       And so again let's just talk about your  
8               recollection of what was going on in the morality  
9               division then at the time. So you were in patrol  
10              in 1969, 1970; is that right?

11      A       Yes, sir.

12      Q       And again patrol would be, would be what, just  
13              give us a brief explanation of what that would  
14              involve?

15      A       You work in uniform in a marked patrol car, you  
16              are assigned a certain area of the city and you  
17              work a lot of shift work. You respond -- mostly  
18              responding to calls.

19      Q       And so if there were some rapes and rape  
20              investigations being conducted by morality  
21              officers, to what extent if any would you as a  
22              patrol officer be aware of what's going on or be  
23              involved in their investigation?

24      A       The only time a patrol member would ever become  
25              involved, if somebody from morality or detectives



1 would come to them and ask them if they saw  
2 anything unusual in their district or any unusual  
3 cars or, you know, if they could shed any light on  
4 any suspects.

5 Q And can you give us --

6 A Nobody in patrol was ever asked to be part of the  
7 investigation, or at least I was never asked to  
8 be.

9 Q Can you give us any specific examples of  
10 situations where morality and detectives did not  
11 share information or deliberately didn't work  
12 together or anything of that nature?

13 A Particularly in relation to bootlegging, often the  
14 bootleggers would be informants for the detectives  
15 and the morality people would be trying to arrest  
16 the bootleggers, so this information wouldn't be  
17 shared.

18 Q I don't think I'll touch that one. Again, so that  
19 was an area where there was some discomfort then  
20 between morality and detectives?

21 A I wouldn't say discomfort. I would like to think  
22 of it they were competing with each other.

23 Q And so competing in the sense that morality wanted  
24 to arrest the bootleggers and the detectives  
25 wanted to use the bootleggers to get information



1 to solve other crimes; is that fair?

2 A That's what I'm trying to say, sir.

3 COMMISSIONER MacCALLUM: I thought it was  
4 the other way around. Did I get it backwards, or  
5 does it matter? Who were the bootleggers  
6 informing, morality or the detectives?

7 A The bootleggers were informants to the detective  
8 division.

9 COMMISSIONER MacCALLUM: I did get it  
10 backwards. Thanks. Okay.

11 BY MR. HODSON:

12 Q Now, I understand, Mr. Vanin, at some point you  
13 began to express -- or let me just back up. Would  
14 it be fair to say that -- did you express your  
15 views and concerns about David Milgaard's  
16 innocence within the city police department to  
17 other police officers, to your superiors, for  
18 example, over the years?

19 A No, I didn't share that information with anybody  
20 because administration I think would have taken a  
21 very dim view of that.

22 Q And why is that?

23 A I don't know. I can't answer for administration.

24 Q Now, at some point, sir, did you begin to express  
25 your views and concerns about David Milgaard's





1 innocence with people outside the Saskatoon City  
2 Police Force?

3 A In the 1980s I believe Mrs. Milgaard was in the  
4 Saskatoon area and it became noted that there was  
5 private detectives making inquiries and there was  
6 some write-ups favouring Mrs. Milgaard and perhaps  
7 David Milgaard's innocence and then I started --  
8 at that time I was in major crime and I started  
9 receiving phone calls from all over Canada from  
10 different news organizations and I was learning  
11 more about David Milgaard's conviction from them  
12 than I was, than I knew from within the  
13 department.

14 Q And at some point, sir, did you start to talk to  
15 people outside of the Saskatoon City Police Force  
16 about your views and concerns about David  
17 Milgaard?

18 A Yes, sir.

19 Q And can you tell us with who? Can you tell us how  
20 it started and with who?

21 A It started by getting all these phone calls, and I  
22 mean many, many phone calls from all over Canada.

23 Q And at the time, sir, I think you said you were in  
24 major crimes?

25 A Yes.



1 Q And again --

2 A Some of the time I could have been in the traffic  
3 division.

4 Q Would they be -- let me just -- would they be  
5 calling you, and again we've heard some evidence  
6 already that a number of officers were getting  
7 contacted by the media. Would you have been  
8 called sort of randomly by a reporter saying,  
9 okay, you are Tom Vanin, you are in major crimes,  
10 maybe you can tell us something, would that be the  
11 type of calls you would be getting, or was there  
12 something that precipitated a call to you  
13 specifically?

14 A Some of it would be because I was in major crimes  
15 or was the supervisor in major crimes. Others  
16 were -- I had a pretty good track record for  
17 solving a number of homicides and I guess the word  
18 spread and these people would be contacting me,  
19 and I was contacted at work, I was contacted at  
20 home.

21 Q And would the first contact then have been by  
22 media; is that correct?

23 A Yes.

24 Q And do you remember any of the names of the people  
25 or the organizations that called you?



1 A I remember a gentleman by the name of Karp.

2 Q Carl Karp?

3 A I'm not sure of the first name. I had two  
4 conversations with him, but we never really shared  
5 anything, and then Dave Roberts, I had several  
6 calls from him and he made trips to Saskatoon to  
7 interview me and advised me that he was either  
8 working for Mr. Wolch or giving information to Mr.  
9 Wolch and at that point in time I contacted Mr.  
10 Wolch.

11 Q Okay. Let me just pause there for a moment. If  
12 we can call up 333242, please, and this was the  
13 document I showed you before, Mr. Vanin, I'm just  
14 trying to get a sense of the time frame, and I'll  
15 be showing you some articles from Mr. Roberts that  
16 suggest that he started to write in *The Globe and*  
17 *Mail* about this matter in 1991 and I think you  
18 said that the calls would have been either all or  
19 primarily when you were in major crime. Are you  
20 able to tell us whether it was likely in this time  
21 frame of January, '91 -- well, let's just take the  
22 year 1991. Would that sound right about the time  
23 frame when you would have started to talk to Mr.  
24 Roberts and Mr. Wolch and others?

25 A I think I was talking to Roberts before that and



1           that might have been about the time frame where I  
2           started to talk to Mr. Wolch's -- people in Mr.  
3           Wolch's firm.

4           Q       So again are you able to, and again, if you are  
5           not able to tell us, that's fine, but just from  
6           your answer that you were in major crime when you  
7           were contacted, I think you told us this was the  
8           time frame when you were in there, can we take it  
9           from that that it would likely be in and around  
10          1991, perhaps late 1990 that the media would be  
11          calling you?

12          A       I think the media was calling me long before that.

13          Q       Let me rephrase it. When you started to give  
14          information to Mr. Roberts and to Mr. Wolch and to  
15          Mr. Asper and others, and I haven't got there yet,  
16          but when you started to give information to people  
17          outside the Saskatoon City Police Service, would  
18          that have been in and around 1991; is that --

19          A       I'm not sure, sir.

20          Q       That's fine. So let's just go back, I think what  
21          you told us, the first call -- the first call came  
22          from Mr. Karp?

23          A       Oh, no, there was calls from Toronto and --

24          Q       Okay. Now -- and for the early calls, did you  
25          talk to them or did you turn them away?



1       A       I talked to them, but I had no information to give  
2               them.

3       Q       And who would be the first person then outside the  
4               Saskatoon City Police Service that you began to  
5               share internal information, if I can call it that,  
6               or information related to the Saskatoon City  
7               Police matters, would that have been Mr. Roberts?

8       A       Yes, I shared information, but not the  
9               confidential information. I made arrangements  
10              with Mr. Wolch's firm to do that.

11      Q       Okay. Let's just walk through then, and maybe  
12              we'll identify first the people that you talked  
13              to. First was Mr. Roberts; right? Is that  
14              correct? I think you said Mr. Karp, you talked to  
15              him a couple of times, but really didn't say much  
16              to him; is that fair? Am I characterizing your  
17              evidence right?

18      A       That's correct.

19      Q       And we know Carl Karp was with the CBC and had  
20              also written a book. Does that ring a bell at  
21              all?

22      A       I'm aware that he was writing a book.

23      Q       Okay. And was that what he was calling you about  
24              do you think?

25      A       I believe so.



1 Q And then Dave Roberts we know is a writer with *The*  
2 *Globe and Mail*, and there's another fellow there,  
3 Timothy Appleby that often wrote columns with him.  
4 Does that name sound familiar?

5 A Yes, and Appleby came to my house. I think he was  
6 from Toronto.

7 Q Yes. And so David Roberts and Timothy Appleby  
8 were reporters with *The Globe and Mail* that you  
9 shared information with from time to time; is that  
10 correct?

11 A We discussed the file and just generalities. I  
12 didn't want to divulge any information that could  
13 get me into trouble under the Saskatchewan Police  
14 Act.

15 Q And what were your concerns, or what was your  
16 understanding, Mr. Vanin, of what your obligations  
17 were as a member of the Saskatoon City Police  
18 about discussing police matters outside the  
19 confines of the police force?

20 A That you were subject to a charge.

21 Q And so again would it be fair to say that you knew  
22 that you weren't supposed to talk to the media and  
23 lawyers and others about police matters; is that  
24 fair?

25 A I could talk to them about police matters, but not



1           about confidential matters.

2       Q       And so then, after you talked to Mr. Roberts, I  
3           think you -- did you then call Mr. Wolch?

4       A       Yes.

5       Q       And what, tell us what took place in that  
6           discussion?

7       A       I spoke to Mr. Wolch briefly and he asked me, and  
8           I identified myself, and the reason why I was  
9           calling.

10      Q       Okay. And what was the reason you were calling?

11      A       I thought I might have some information that could  
12           help him in regards to Mr. Milgaard.

13      Q       And would that be confidential information?

14      A       Yes.

15      Q       And so just, then, we'll touch on this a bit  
16           later, but 'confidential information' would be  
17           information that was part of the Saskatoon City  
18           Police workings, so to speak, that wouldn't be or  
19           shouldn't be shared outside the Saskatoon City  
20           Police force; is that fair?

21      A       That's the way I understood it.

22      Q       Yeah. So you phoned Mr. Wolch and said "I have  
23           confidential information that may help you"; is  
24           that right?

25      A       I told him I believed that I could have some



1 information or could learn of some information  
2 that could help him in his file in respect to Mr.  
3 Milgaard.

4 Q And at that time what was the confidential  
5 information that you had?

6 A I'm not really certain, now, what it was.

7 Q Well was it a case that you had some or you  
8 thought you, you may have had some but you thought  
9 that you could get some more, or --

10 A I think it was that I could get more information.  
11 As I was getting information from them, things  
12 started to come together, and I just felt I could  
13 help him.

14 Q Okay. And what did Mr. Wolch -- tell us more  
15 about what you recall of your discussion with  
16 Mr. Wolch?

17 A He asked me to talk to David Asper, who was really  
18 in charge of the file, and in my conversation with  
19 Mr. Asper I asked him, if I shared information  
20 with him, whether I would have lawyer/client  
21 privileges, and he assured me that I would. I  
22 asked him, if I shared information with people  
23 that worked for him or others that were obtaining  
24 information for him, if I shared it with them  
25 would I still have lawyer/client privileges, and





1           he assured me I would. I also asked him that if I  
2           was ever charged, would he represent me and  
3           without any cost to me, and he assured me that he  
4           would.

5       Q       And when you asked him about whether you shared  
6           information with others working for him who were  
7           you referring to?

8       A       Roberts.

9       Q       That would be David Roberts?

10      A       Yes.

11      Q       And did Mr. Asper tell you that David Roberts was  
12           working for him?

13      A       I don't recall.

14      Q       Okay. Did you understand that David Roberts was  
15           working for David Asper?

16      A       That was my understanding.

17      Q       And based on what?

18      A       Just with my conversations with Roberts.

19      Q       And when you say "working for Mr. Asper", can you  
20           expand upon that, in what sense?

21      A       Gleaning out information and passing it on to him,  
22           that they could follow it up.

23      Q       And in the course of your -- and we'll get into  
24           this in detail -- but in the course of your  
25           subsequent dealings with Mr. Asper and Mr. Roberts



1           were there occasions where, in fact, you saw the  
2           two of them working together in the sense of  
3           sharing information back and forth?

4       A       Are you referring to Asper and Roberts?

5       Q       Yes.

6       A       I never did meet Mr. Asper, I only spoke to him  
7           many, many times on the phone.

8       Q       When you gave information to Mr. Roberts did you  
9           believe that it would get through to Mr. Asper?

10      A       I was assured it would.

11      Q       By Mr. Roberts?

12      A       Yes.

13      Q       When you gave information to Mr. Asper were you  
14           assured that it would get through to Mr. Roberts?

15      A       Oh no, he never -- that wasn't the deal, that he  
16           would share it with Roberts.

17      Q       At the time you had the discussion with Mr. Asper,  
18           again, do you recall what confidential information  
19           or what information you had that you thought might  
20           benefit them?

21      A       I -- I can't recall at this time.

22      Q       And this issue of lawyer/client privilege, was  
23           that your concern or issue, did you bring that up  
24           or did Mr. Asper bring that up?

25      A       No, that was my reason for calling Mr. Wolch and



1 speaking to Mr. Asper.

2 Q And what was your concern?

3 A Well, that I might get charged under *The Police*  
4 *Act* for giving out confidential information.

5 Q And so did Mr. Asper tell you, then, that any  
6 communications that you had with him or Mr. Wolch,  
7 then, were protected by solicitor/client  
8 privilege?

9 A Yes, sir.

10 Q And I take it, Mr. Vanin, you are not asserting  
11 that position today; is that correct? I believe  
12 your counsel has indicated to me that it is not a  
13 --

14 A From my discussion with you and Mr. Bodnar, you  
15 people suggested to me that I didn't have such  
16 protection.

17 Q Well, again, that's again for you to decide. I  
18 understand from Mr. Bodnar that it's not being  
19 raised in this proceeding that there is any  
20 privilege that would attach with your  
21 communications with Mr. Asper or Mr. Wolch; is  
22 that fair? You are prepared to tell us about your  
23 discussions with Mr. Asper and Mr. Wolch?

24 A Yes, sir.

25 Q Yeah. Now let's just -- you've talked to Mr.



1 Asper twice, you talked to Mr. Wolch, you talked  
2 with Mr. Asper; do you recall what Mr. Asper --  
3 anything else that he said to you at the time?  
4 Did he make any requests of you on the first call  
5 or what else was discussed?

6 A I don't know what call it was on. As I stated  
7 before, Asper and I had many many conversations,  
8 and at one time he asked me if I knew a Larry  
9 Fisher or if I ever heard of a Larry Fisher, and I  
10 said "no, I've never heard of that", and he says  
11 "that has never come up in the Milgaard file", I  
12 says, "not to my knowledge, I have no knowledge of  
13 such a person".

14 Q If we can then go, just to try and define, then,  
15 the people that you talked to, Mr. Roberts -- or  
16 pardon me -- Mr. Roberts, Mr. Asper, Mr. Wolch;  
17 did you ever deal with a person by the name of  
18 Paul Henderson, an investigator with Centurion  
19 Ministries?

20 A Yes, sir.

21 Q And can you tell us when and how that came about?

22 A I can't tell you when that was, but Mr. Asper was  
23 to come -- was going to fly to Saskatoon to  
24 interview me, and then he phoned me and told me  
25 that he had some other commitments and asked me if



1           it was okay if Joyce Milgaard and Paul Henderson  
2           would come to Saskatoon, and he explained to me  
3           who Paul Henderson was and I agreed to meet with  
4           him.

5       Q       Did he tell you what Paul Henderson was doing in  
6           connection with the case?

7       A       Yes, he was investigating the -- reinvestigating  
8           the case, I guess, would be the proper word.

9       Q       And then did you have a meeting with Mr. Henderson  
10          and Mrs. Milgaard?

11      A       Yes.

12      Q       And do you recall -- and, again, I will go through  
13          some documents later, Mr. Vanin, that may assist  
14          you in putting this in a time frame. Just, for  
15          now, let's just talk generally. Do you remember  
16          what time of year was it, was it summer, winter,  
17          are you able to remember that?

18      A       I think it was in the spring of the year, like  
19          late spring, maybe May.

20      Q       Okay. And, again, how long after your first  
21          contact with Mr. Asper would this meeting have  
22          been with Mr. Henderson and Mrs. Milgaard; are you  
23          able to -- weeks, months, years?

24      A       It would definitely have been months.

25      Q       Okay. And tell us, then, about your meeting with



1 Mr. Henderson and Mrs. Milgaard; what do you  
2 recall, where was the meeting, how long was it,  
3 and what did you discuss?

4 A I received the phone call from Mr. Henderson, I  
5 knew what date they would be in town, I received a  
6 phone call and we made -- agreed to meet at the  
7 Colonial Motel. Mrs. Milgaard was there with him,  
8 and that's the first time I ever met  
9 Mrs. Milgaard. And we sat down, we had coffee, we  
10 made some small talk, and at that point  
11 Mrs. Milgaard left. And any information that I  
12 shared was just with Paul Henderson, not with  
13 Mrs. Milgaard, because she had left, and that was,  
14 I believe that was the arrangement Asper and I had  
15 made.

16 Q That, what, that you would only share information  
17 with Paul Henderson and not with Mrs. Milgaard?

18 A That's correct.

19 Q And why was that?

20 A I don't know.

21 Q Was that his idea or your idea?

22 A Probably my idea.

23 Q And do you know why that would be?

24 A I can't tell you. I don't know.

25 Q And so again, at that time, your meeting with



1 Mrs. Henderson -- or Mr. Henderson, pardon me, and  
2 Mrs. Milgaard; when Mrs. Milgaard was present, did  
3 you share any confidential information when -- in  
4 her presence to either her or to Mr. Henderson?

5 A Absolutely not, we just had a coffee and made  
6 small talk and sort of got to know each other a  
7 little bit, I don't think Mrs. Milgaard was there  
8 for more than ten minutes and then she excused  
9 herself and --

10 Q Did you ever meet with Mrs. Milgaard again?

11 A The next time I saw Mrs. Milgaard was yesterday.

12 Q And did you ever talk to her on the telephone or  
13 provide her with any information?

14 A No, sir.

15 Q And I understand that, as well, there was an  
16 individual by the name of Greg Rodin, a lawyer  
17 acting for David Milgaard as well, that you had  
18 some dealings with after Mr. Asper; is that right?

19 A Yes. I understood that Mr. Asper resigned from  
20 the firm and the file was turned over to Rodin.

21 Q And, again, we'll touch on some documents a bit  
22 later but I take it that you had some further  
23 dealings with him; is that correct?

24 A With Mr. Rodin?

25 Q Yes?



1       A       Yes. He flew to Saskatoon, I believe twice, to  
2               interview me.

3       Q       And would that have been in connection with the  
4               civil proceeding, do you know, or --

5       A       I think with everything.

6       Q       Did you have any further discussions with Hersh  
7               Wolch after the first phone call?

8       A       No.

9       Q       And so again, --

10      A       Not, not 'til yesterday.

11      Q       Okay. And just as far as, let's talk non-media,  
12               if I can call it that, we can talk -- we've  
13               identified David Asper, Hersh Wolch, Paul  
14               Henderson, Greg Rodin, and Joyce Milgaard for  
15               about ten minutes, but the first -- so Asper,  
16               Wolch, Henderson and Rodin; would it be fair to  
17               say that you provided confidential information --  
18               well, let me take out Mr. Wolch. Did you ever  
19               provide any confidential information to Mr. Wolch?

20      A       Could you repeat the question, sir?

21      Q       Yeah. Did you ever provide any confidential  
22               information on police matters to Hersh Wolch?

23      A       No.

24      Q       And did you provide confidential police  
25               information to David Asper?





1       A       I don't know if it would be confidential  
2               information, it was definitely police information,  
3               now whether it would be considered confidential.  
4               I took the position that all police information  
5               was, was confidential, and was just simply trying  
6               to protect myself.

7       Q       And so again, I'll come back to the nature of the  
8               information in a moment, but put it this way;  
9               information that you normally wouldn't provide to  
10              an outside party, would that be a fair, relating  
11              to police matters, for example what was going on  
12              in the police station at the time regarding David  
13              Milgaard's case. If you knew as a police officer  
14              what was happening inside the walls of the police  
15              station, files were being looked at or witnesses  
16              were being interviewed, things of that nature, I  
17              take it, sir, at that time it would be  
18              inappropriate for you, as a police officer, to  
19              disclose that information to a non-police officer;  
20              is that fair?

21      A       I think the administration would have looked at it  
22               as inappropriate.

23      Q       And so again, when I used the word "confidential",  
24               what I mean to say is information that you knew,  
25               as a police officer, should not be shared outside



1 the walls of the police service; is that a fair  
2 understanding?

3 A Well, I'm not certain that it shouldn't have been  
4 shared, but I took the position that, --

5 Q Okay.

6 A -- you know, I just wanted to be cautious. I  
7 thought it would be prudent to protect myself.

8 Q Let me try this again. What I am trying to get  
9 at, Mr. Vanin, is that I think you told me earlier  
10 that at some point you decided to share  
11 confidential information with people assisting  
12 David Milgaard, information that related to police  
13 matters that you ordinarily would not share with  
14 outside parties; is that correct?

15 A Yes, but I --

16 Q And I'll come --

17 A There'd be no outside parties, other than those  
18 that worked for Mr. Milgaard, that would be asking  
19 these types of questions.

20 Q No, and I'll get back to your reasons for doing  
21 so, and we'll get into that in detail. I'm just  
22 trying to establish that what I thought you told  
23 me is that you made a decision to provide  
24 information on internal police matters, or what  
25 was happening on the matter, to people assisting



1 David Milgaard, and that you knew that it was not  
2 appropriate or it was against police regulation to  
3 be providing that information; is that fair?

4 A I wasn't certain that it was inappropriate, I just  
5 took that position myself, that --

6 Q Okay.

7 A To be cautious.

8 Q Okay, then let's put it on this basis, information  
9 that you believed it might be inappropriate to  
10 share with third parties; is that fair?

11 A Yes.

12 Q Okay. So, again, we have a category of  
13 information that would be known to city police  
14 officers and not known outside the city police  
15 service, and you say you were concerned that it  
16 might not be appropriate to share it, and so you  
17 took the precautions; correct?

18 A Yes, sir.

19 Q So that when I talk about 'confidential  
20 information' that's what I am referring to, that  
21 type of information that only police officers  
22 would know unless a police officer told someone,  
23 do you understand?

24 A Yes.

25 Q Okay. And I want to know whether that



1 information, whether you provided -- who you  
2 provided that to. You've told me you provided it,  
3 I think, to Mr. Asper; is that right?

4 A That's correct.

5 Q Did you provide any of that to Mr. Wolch?

6 A No, sir.

7 Q Did you provide any to Paul Henderson?

8 A Yes, sir.

9 Q And to Greg Rodin?

10 A Yes, sir.

11 Q David Roberts?

12 A There is information that I would have provided to  
13 Rodin and to Asper that I wouldn't provide to  
14 Roberts. The information that I provided to  
15 Roberts was general information.

16 Q Okay. So you were prepared to provide Asper and  
17 Rodin with more information than you were prepared  
18 to provide Roberts; is that right?

19 A Absolutely, sir.

20 Q And why is that?

21 A Well, they were lawyers, and they assured me that  
22 I had lawyer/client privileges.

23 Q All right. Did you ask Mr. Asper whether there  
24 was anything inappropriate with you providing this  
25 information to him?



1 A No, sir.

2 Q Why did you decide to provide this information to  
3 non-police members?

4 A Because I strongly believed that David Milgaard  
5 was innocent --

6 Q And --

7 A -- and as a police officer, I just felt it was my  
8 duty to do what I could. As a police officer and  
9 as a Christian it was my obligation to see an  
10 innocent man get set free.

11 Q Did you at any time go to anybody else in the  
12 Saskatoon City Police Service with your concerns  
13 and say "lookit, I think there's an innocent man  
14 convicted, we should do something about it"?

15 A No, sir.

16 Q Why not?

17 A At that time Joe Penkala was the chief of police,  
18 and Joe Penkala and I were not getting along.

19 Q And I'll go through some documents in a moment,  
20 sir, that I understand that there were a number of  
21 run-ins, for lack of a better word, between you  
22 and administration in the late '80s and early  
23 '90s; is that fair?

24 A That's correct.

25 Q And is that one of the reasons, Mr. Vanin, that



1           you decided to share this information with David  
2           Asper and Paul Henderson and Mr. Roberts, was your  
3           dealings with Mr. Penkala?

4           A       I knew I wouldn't get any assistance from Penkala  
5                   or the administration, so -- and, again, I just  
6                   believed so strongly that David Milgaard was  
7                   innocent and I just felt obliged, as a police  
8                   officer, to help where I could help.

9           Q       But, again, the question is the reason you didn't  
10                   go to administration and to the chief with your  
11                   concerns, was it related to the fact that you had  
12                   other unrelated issues with Mr. Penkala, ongoing  
13                   disputes with Mr. Penkala; is that fair?

14          A       That's fair, and plus the fact I had no confidence  
15                   in Penkala whatsoever, and most members didn't  
16                   have any confidence in him, and nor would we get  
17                   anywhere if we went with information to him, I  
18                   think he would just put a stop on it.

19          Q       And why do you say that?

20          A       Just for -- working with the man or working for  
21                   the man. He just decimated the police department  
22                   when he took over. We had what was considered one  
23                   of the best police forces in Canada, and when he  
24                   took over he just slashed all the specialized  
25                   units, and it seemed to us that his only objective



1 was to save as much money and return as much money  
2 to the Commission as possible.

3 Q If -- let's go back to the early '90s, whatever  
4 the time frame is when you began to share police  
5 information with outside parties, and I think you  
6 said '90-'91, in that time frame; is that fair,  
7 that time frame?

8 A That time frame, but I think it was as early as  
9 the '80s.

10 Q Sure. And we'll go over some documents that might  
11 assist you. Whatever the time frame, if there had  
12 been a different chief in place with the Saskatoon  
13 City Police, would you have gone to that chief  
14 with the information and the concerns you had  
15 about David Milgaard and his innocence?

16 A Yes, sir. When I was in major crime my boss was  
17 Deputy Chief Huey Fraser, and he is the best man I  
18 ever worked for, and I consider him the best  
19 police officer I ever met, and I certainly would  
20 have gone to him with this information, and I know  
21 that he would have given me the green light to go  
22 and assist.

23 Q Okay. And why didn't you go to him?

24 A He was retired.

25 Q But before he retired?



1       A       This did not come to light. He had already  
2               retired before this started to surface.

3       Q       Okay. I think you told us earlier, though, from  
4               1970 onward you had concerns about David  
5               Milgaard's innocence?

6       A       That was my own personal concerns, I had no, no,  
7               no evidence whatsoever, just -- it was just a gut  
8               feeling that I had and information that I got from  
9               senior detectives that a lot of them didn't feel  
10              right about this conviction.

11      Q       When did Mr. Fraser retire; in the late '70s?

12      A       I'm not -- I'm not certain, sir.

13      Q       And, again, what -- what would have caused you to  
14              go in, and whatever, let's say 1990, and I know  
15              you are not pinning it down on a date, let's just  
16              take that for an example. What was happening in  
17              1990 that would cause you to go -- or let me back  
18              up. I think you said in 1990, if Hugh Fraser had  
19              been the chief, you would have gone to him; why  
20              didn't you go to someone in 1970, or 1975, or  
21              1980, or 1985, what was the reason it wasn't until  
22              1990 or thereabouts?

23      A       Because none of this information was coming to  
24              light. It's only after Mrs. Milgaard got some  
25              assistance and we started the investigation and





1 articles started appearing in different papers and  
2 it started to snowball and it appeared that she  
3 was on the right track, and her, her lawyers and  
4 her assistants were on the right track. This did  
5 not come about in the '70s.

6 Q Okay. But, again, and I thought you said earlier  
7 that even back in 1970 you thought he was  
8 innocent, and I guess I'm trying to understand or  
9 have you explain what -- and I'm not, I don't  
10 intend to fault you for this, Mr. Vanin -- but if  
11 you felt that from 1970 to 1990 what would it be,  
12 20 years later, that caused you to do something  
13 that you didn't do in the previous 20 years?

14 A I think I just answered that question, is because  
15 of what Mrs. Milgaard had started, and new  
16 evidence started to come to light, and --

17 Q Okay.

18 A -- from talking to the news media and all these  
19 phone calls that I was getting from them. I  
20 didn't get any of that in the '70s.

21 Q Now, and again you may have touched on this, if it  
22 had been somebody other than Chief Penkala that  
23 had been chief at the time when you actually did  
24 go and give this information outside the police  
25 force, someone that you trusted, would you have



1           gone to the chief with your concerns as opposed to  
2           providing it to outside parties?

3           A       Certainly.

4           Q       Now I just want to go through, Mr. Vanin, briefly  
5           some of the documents that detail the proceedings  
6           that you had in the late '80s/early '90s. These  
7           were documents that the RCMP collected as part of  
8           their investigation and I just want to go through  
9           them with you. The first is 054574. And this is  
10          a letter from Inspector Quinn in 1993 to Inspector  
11          Murray Sawatzky. Now you know Inspector Quinn; is  
12          that right?

13          A       Yes, sir.

14          Q       Yeah, and I think you had a chance to read through  
15          this letter in the last couple of days; is that  
16          right?

17          A       Yes, sir.

18          Q       This is a summary of -- it's a service profile,  
19          and I'll go through parts of this, but generally I  
20          think, are you able to say this is accurate? And  
21          I can go through parts of it with you if you would  
22          like to wait until we go through it.

23          A       I read this document and the majority of it is  
24          accurate.

25          Q       Okay. And I just want to touch on a couple of



1 parts because I think this might summarize some of  
2 the issues that -- would it be fair to say that  
3 prior to -- let's just get a time frame. I think  
4 it was the late '80s, maybe -- what year was your  
5 automobile accident, was it '80 --

6 A 1986 I had two accidents, and one was a very  
7 serious accident. It was a high-speed chase, I  
8 was on duty, and the patrol car was rammed twice  
9 and involved in a head-on collision with the  
10 culprit, which resulted in very severe injuries to  
11 me.

12 Q And then I think you were off work for a lengthy  
13 time period; is that right?

14 A I was off work for approximately a year.

15 Q And then some issues arose regarding your return  
16 to work, and would that be, if I could call it,  
17 the start of issues between you and  
18 administration, and in particular Mr. Penkala; is  
19 that fair?

20 A That's what caused the rift, yes.

21 Q Yeah. And prior to that, at least looking from  
22 this document, prior to that it looks as though  
23 from this letter -- and I'd ask you to confirm  
24 it -- that there were no, no issues or very few  
25 issues between you and administration or the force



1           generally; is that fair?

2           A       The police force was extremely good to me, I loved  
3           being a police officer, I think I was a very good  
4           police officer. And I loved the work, I had good  
5           job satisfaction, and it was until this accident  
6           arose and this injury, and then I started to -- I  
7           felt I was being harassed by administration, and  
8           particularly Penkala, for not returning to work.  
9           And I'll give you one example.

10                       I was in City Hospital waiting  
11           to go in for I believe it was a CT scan, and Joe  
12           Penkala was in there, apparently he fell off a  
13           ladder and broke his ankle or something, and he  
14           told me there, he says, "I think it's time you got  
15           back to work" is what he said directly to me in  
16           the waiting room when both of us were waiting for  
17           medical treatment.

18           Q       And apart from Penkala, were there any other  
19           specific officers that you had issues with at the  
20           time in administration, or was it just  
21           Mr. Penkala?

22           A       Well, you always have some issues with some  
23           officers, but nothing that -- you don't hold  
24           grudges forever.

25           Q       Okay. If we can just go to the next page, and I



1           just want to go through parts of this, because it  
2           might shed some light on some matters. And,  
3           again, this is Inspector Quinn writing to  
4           Inspector Sawatzky in 1993, and I think Inspector  
5           Sawatzky had asked Inspector Quinn just to give a  
6           summary of your career with the police, and it  
7           says here:

8                       "Staff Sergeant Vanin was noted by his  
9                       supervisors and, on some occasions, by  
10                      Crown Counsel as being a very  
11                      intelligent and excellent investigator.  
12                      He had noted successes with a number of  
13                      major investigations, including  
14                      homicides, during his tenure in the  
15                      Detective Division. He also worked very  
16                      closely in investigations with Detective  
17                      E. Karst and senior investigators  
18                      assigned to those divisions during the  
19                      period of time that Vanin served there.  
20                      He also had a reputation of being very  
21                      protective of his information and very  
22                      protective of what he was working on  
23                      including documentation of his reports.  
24                      He did not associate with a large number  
25                      of members on duty and kept considerably



1 to himself."

2 Now that's someone else's words, but is that, do  
3 you agree with that characterization? Yes?

4 A Yes.

5 Q Now if we could just scroll down, I think this  
6 talks, it may summarize the following years. It  
7 says:

8 "Upon being transferred to the traffic  
9 division in 1985, he worked as a  
10 Supervisor in this area. During the mid  
11 summer of 1986 Staff Sergeant Vanin was  
12 involved in a motor vehicle accident  
13 while operating a Patrol car and  
14 sustained injuries to his back and neck  
15 areas. Subsequent problems occurred  
16 after this accident which resulted in  
17 excessive loss of work through the  
18 injuries and other medically related  
19 problems. The time off became a major  
20 source of aggravation for, not only  
21 Staff Sergeant Vanin, but also with the  
22 Department in attempting to ascertain  
23 when Vanin could return to work. This  
24 issue was the subject of a number of  
25 exchanges between Vanin and the



1 Administration of the Saskatoon Police  
2 Service at that time. Vanin did not  
3 return to duty for approximately one  
4 year, after which there continued to be  
5 an additional number of lengthy  
6 illnesses which were directly related to  
7 his back problems and other medical  
8 problems Vanin was suffering from. This  
9 absence from duty and what appeared to  
10 be a reluctance on Vanin's part to  
11 return to duty, continued to become a  
12 problem for both the Administration and  
13 Staff Sergeant Vanin."

14 It says:

15 "During this period of 1988 there was a  
16 request by not only Vanin, but one of  
17 the Inspector, to have Vanin transferred  
18 to a plainclothes unit, however, this  
19 apparently appeared to have been denied.  
20 It was also during the period commencing  
21 in 1988 that a number of disciplinary  
22 issues came to light. In April of 1988  
23 Vanin filed a complaint against his  
24 Staff Sergeant at that time, Staff  
25 Sergeant Martin, for Abusive Language



1                   and Neglect of Duty. At the same time a  
2                   complaint was laid against Vanin by the  
3                   Staff Sergeant for Insubordination,  
4                   subsequently resulting in a Written  
5                   Warning. The matter was appealed and  
6                   the appeal granted."

7                   Now is that an accurate summary of those events?

8       A           There are a number of mistakes there, or a couple  
9                   mistakes.

10      Q           Sure. If you could point them out?

11      A           Could you back up to the --

12      Q           Sure.

13      A           Just -- it says:

14                   "... involved in a motor vehicle  
15                   accident while operating a patrol car  
16                   ...",

17                   I was not operating the patrol car, I was a  
18                   passenger in the patrol car.

19      Q           And anything else?

20      A           Well, I certainly don't agree with the very last  
21                   sentence:

22                   "This absence from duty and what  
23                   appeared to be a reluctance on Vanin's  
24                   part to return to duty, ..."

25      Q           Would it be fair to say that there was a





1           disagreement between you and administration as to  
2           whether you were fit to return to work; is that  
3           fair?

4       A       Oh, I was following the advice of my doctors.

5       Q       Oh, and I don't want to get into which -- would  
6           you agree that there was an issue? You were  
7           saying "I'm not prepared to go back to work", and  
8           administration was saying that you were, was that  
9           a fair summary of it, there was a dispute about  
10          your medical fitness to return to work?

11      A       No, that's not correct. I was prepared to return  
12          to work depending on what assignment they would  
13          give me.

14      Q       Okay.

15      A       And --

16      Q       There was a dispute over that?

17      A       Yes.

18      Q       Okay. So there was a dispute related to the  
19          manner in which you would return to work; is that  
20          fair?

21      A       Or the assignment.

22      Q       The assignment --

23      A       And my specialist made it perfectly clear that if  
24          I was, if I was involved in another accident or in  
25          a serious scuffle or a violent arrest, that the



1 injuries to my neck could result in paralysis.

2 Q Okay. If we can just scroll down to the next  
3 paragraph. Was there anything else there, I'm  
4 sorry, Mr. Vanin, that you wanted to point out?

5 A No, sir.

6 Q And then this paragraph here about the complaints,  
7 issues with Staff Sergeant Martin, etcetera, is  
8 that accurate?

9 A No, that's not accurate. Martin left a report  
10 against me, Martin advises me that he was ordered  
11 by Inspector Wilton to leave that report and  
12 charge me with neglect of duty or --

13 Q There was issues between you and Mr. Martin; is  
14 that fair, and Mr. Wilton?

15 A No, actually his nickname was Smokey, Smokey  
16 Martin and I were actually good friends, and he  
17 came to me after, he said he only did that because  
18 he was ordered to do that by Wilton.

19 Q So a complaint was filed -- I mean, I don't want  
20 to get into debating over who was right or who was  
21 wrong, I simply want to understand and just  
22 identify, Mr. Vanin, that there were issues and  
23 generally the nature of the issues, and I  
24 appreciate, sir, that you, I'm sure, have strong  
25 views about your position on those issues; is that



1 fair, and that they are probably not the same  
2 views as administration?

3 A That would be fair.

4 Q So if we can -- again, can we leave that paragraph  
5 as setting out one of the issues that existed?

6 A Yes.

7 Q Okay. Just go down to the next paragraph, it  
8 says:

9 "Also in 1988 there was a complaint laid  
10 against Inspector Wilton by Staff  
11 Sergeant Vanin regarding an Assault and  
12 Abusive Conduct. During 1989 the charge  
13 of Neglect of Duty was laid against  
14 Staff Sergeant Vanin which specifically  
15 indicated he had left his assigned area  
16 without permission, for which 9  
17 convictions were registered."

18 And again I'll touch on some of those materials  
19 later because I think that ended up in some court  
20 proceedings; is that right?

21 A That's correct.

22 Q And if we can just scroll down, it says:

23 "There was a long period of appeals to  
24 the Saskatoon Board of Police  
25 Commissioners and also the Saskatchewan



1 Police Commission which eventually  
2 resulted in Vanin being initially  
3 demoted to the rank of Corporal and  
4 subsequently reinstated to the rank of  
5 sergeant to be returned to his position  
6 held prior to the sentencing of the  
7 conduct charges under the "Police Act".  
8 At that time Vanin was assigned back to  
9 the Major Crime Unit where he remained  
10 until his transfer to the Crime Index  
11 position. This appeal was heard and a  
12 decision rendered on January 17, 1991,  
13 by chairman of the Provincial Police  
14 Commission R.D. Lang, Q.C."

15 And I'll go to those materials a bit later, but  
16 is that correct, you had a prolonged dispute  
17 over -- I think Deputy Chief Wagner had a  
18 disciplinary proceeding, found you -- registered  
19 nine convictions, you went to the Police  
20 Commission, you went to the Court, I think you  
21 went back to the Police Commission and to the  
22 Court, something like that; is that --

23 A Yes.

24 Q And that would be 1990 -- '89, '90, '91; is that  
25 correct?



1 A Yes.

2 Q And then if we can go to the next page --

3 A I would just like to note that Mr. Laing, who was  
4 the chairman of the Provincial Police Commission,  
5 totally reinstated me and reinstated my rank and  
6 my position after the hearing.

7 Q Yeah, and I'll just identify those documents in a  
8 moment. And then lastly here:

9 "In addition, there was conflict in 1990  
10 between Staff Sergeant Vanin and an  
11 Inspector Ed Grabowski, in which Vanin  
12 laid a complaint against Grabowski for  
13 doing personal business on company time  
14 and perjury. The complaint laid was  
15 subsequently found not to be  
16 substantiated."

17 It's my understanding the perjury charge related  
18 to his evidence given in your disciplinary  
19 proceeding; is that right?

20 A That's correct.

21 Q And again, if we can call up 223639, and again  
22 this is a document from the public record, and I  
23 think this is one of the Court applications  
24 brought, if you could just go to the next page,  
25 please, again we won't spend much time on this,



1 but this shows April 24th, 1991, an application  
2 under the Police Act for disciplinary proceedings,  
3 and this would be relating to those convictions  
4 registered by Deputy Chief Ken Wagner; is that  
5 right?

6 A That's correct.

7 Q And again I don't propose -- actually, if you can  
8 just scroll down, it talks about the order of  
9 Chief Wagner on August 2nd, 1990, so that looks  
10 like the first decision, and then the next page,  
11 it says he found you guilty of nine counts of  
12 neglect of duty and this is an application to the  
13 Court for relief.

14 And then if we could go to  
15 333243, please, and again this is for the benefit  
16 of counsel, this is just a copy of a Court  
17 decision July 18th, 1991, and I'm not sure if this  
18 relates to the earlier motion, but this is an  
19 application brought to Court naming Joe Penkala  
20 and the Police Commission as a Respondent, and I  
21 think you were appealing a decision and he was  
22 appealing a decision, and just a couple of things.  
23 So that would be the date this decision was handed  
24 down, July 18th, 1991; is that correct?

25 A I'm not certain, but --



1       Q       I'm telling you that's what the Court document  
2               says.

3       A       Yeah, I see that.

4       Q       Just go to the next page, I can just briefly touch  
5               on a couple of parts here. Again it talks about a  
6               hearing into the offences presided by Chief Wagner  
7               and then you appealed the convictions, not the  
8               sentence. The board dismissed the appeal, but  
9               increased the penalty by demoting Sergeant Vanin  
10              to the rank of corporal. Vanin then appealed to  
11              the Saskatchewan Police Commission. On January 25  
12              Laing dismissed the appeal, allowed the appeal  
13              against sentence and ordered you to be restored to  
14              the position of supervisor in major crime. Then  
15              it says here on January 28, 1991, the first  
16              working day after the Commission's order, Sergeant  
17              Vanin was assigned by Chief of Police Joseph  
18              Penkala to a platoon patrol instead of being  
19              restored to acting supervisor of major crime and  
20              then went on to appeals. Is that accurate?

21      A       Yes.

22      Q       So can I summarize that, that after you went  
23               through these appeal proceedings, the Police  
24               Commission upheld the conviction but said you  
25               should go back to the position of -- restore your



1 rank and then when you got back to work Chief  
2 Penkala moved you to platoon patrol; is that  
3 right?

4 A That's correct.

5 Q And I take it platoon patrol would be a demotion  
6 from major crimes? Well -- yeah, a demotion from  
7 major crimes?

8 A Well, it held the same rank, but certainly didn't  
9 hold the same status in my opinion.

10 Q And were you upset when Chief Penkala moved you to  
11 platoon patrol?

12 A Certainly.

13 Q And is that in part what prompted these  
14 proceedings? I think you then took legal  
15 proceedings to try and challenge those; is that  
16 correct?

17 A I'm not sure. I very well could have.

18 MR. HODSON: This is probably an  
19 appropriate spot to break. It's four o'clock,  
20 Mr. Commissioner.

21 COMMISSIONER MacCALLUM: Thank you.

22 (Adjourned at 3:58 p.m.)  
23  
24  
25





**OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:**

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,  
Official Queen's Bench Court Reporters for the Province of  
Saskatchewan, hereby certify that the foregoing pages  
contain a true and correct transcription of our shorthand  
notes taken herein to the best of my knowledge, skill, and  
ability.

\_\_\_\_\_, CSR

Karen Hinz, CSR

Official Queen's Bench Court Reporter

\_\_\_\_\_, RPR, CSR

Donald G. Meyer, RPR, CSR

Official Queen's Bench Court Reporter



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