

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

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

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Volume 125

Inquiry Proceedings



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 (Retired)
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INDEX OF PROCEEDINGS**DESCRIPTION:****PAGE:****DAVID ALAN ASPER, CONTINUED**

- BY MR. HODSON

25151

REASONS FOR RULING

- APPLICATION FOR DAVID ASPER FOR STANDING

25189

AND FUNDING

DAVID ALAN ASPER, CONTINUED

- BY MR. HODSON

25195



Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Morning.

DAVID ALAN ASPER, continued:

BY MR. HODSON:

Q Morning, Mr. Asper.

A Good morning.

Q I should have mentioned yesterday, maybe just let me make this remark as we go through some of your evidence in the following days, that obviously what we will be looking for is your recollection of what things you did back in 1986 to 1992, what information you had at the time, and, again, I think you appreciate that in this Inquiry we have heard from many witnesses and many of the people that you dealt with and so the record now has, I think in some cases, maybe would reflect information that you didn't know at the time or didn't appreciate at the time. So in my questions not only do I want to know what you did with what you had, but to get your comments based on what we now know, if I can put it that way, and as well I think, as a number of witnesses have, with the benefit of hindsight, looking back saying, "okay,



1 here's what I know, here's what I knew, I didn't
2 know about A, B, C, if I had perhaps I might have
3 thought things differently". So, again, I just
4 wanted to raise that and --

5 A Well I have to say, you know -- and, you know, it
6 can be noted, I guess, as one of the systemic
7 issues -- it is extremely difficult in
8 preparing -- and I've tried to do my best -- to
9 separate what we knew at one point versus what we
10 know now.

11 Q Right.

12 A It's extremely difficult. I'll do my best.

13 Q Right. And, again, I'll try and assist you with
14 that.

15 A Thank you.

16 Q But, again, there will be situations where I will
17 tell you "here's what we've heard from the
18 witnesses", we did hear from, for example, Mr.
19 Tallis and Dr. Ferris and others, so that will
20 certainly come up.

21 I want to start off where we
22 ended yesterday and just follow up on a couple of
23 things you said. The last thing, I think we
24 talked a bit about David Milgaard, and I think
25 what you told us generally was that the fact that



1 he was in prison and not out on parole assisted
2 the cause, and I think the words you used were "a
3 war of liberty"; is that correct?

4 A "Liberation", yes, --

5 Q Liberation?

6 A -- "a war of liberation".

7 Q And who was the war against?

8 A Umm, in a general sense it was against the system,
9 it was against the people who put him there, and
10 it became against the people who had the power to
11 get him out, so it was pretty much us against
12 everyone.

13 Q And when you use the term "war", then, did you
14 consider the system or the state or those who had
15 put David Milgaard there, and those who wouldn't
16 let him out, as being your enemy?

17 A Yes.

18 Q And when --

19 A I -- sorry, we didn't start that way, but at a
20 certain point yes.

21 Q And we'll go through this chronologically, and I'm
22 not -- are you able to tell us, was there a point
23 in time when things switched or was it a gradual
24 switch? And, again, we'll go through all of this,
25 and if you'd rather answer it when we go through



1 the chronology I can leave it until then, if you
2 are able to tell us if there -- was there a
3 defining moment where directions changed?

4 A Umm, again, it's difficult to reconstruct knowing
5 everything that we know now, but in order for us
6 to be correct that David was innocent it meant
7 that a whole bunch of people had to be wrong,
8 including witnesses and including the people who
9 prosecuted, investigated and prosecuted the file.
10 I can't say that we treated them as an enemy
11 because -- at the outset, because, again, I took
12 the view that it was possible that the system is
13 based on the conduct of humans, humans are
14 fallible and people can make mistakes, and it was
15 my hope that that would be the attitude that we
16 would meet in terms of rectifying the problem:
17 "Okay, mistakes were made, let's solve it and move
18 on".

19 When we met with intransigence
20 pretty much at every step of the way, I can't say
21 exactly when it occurred, but when we realized
22 that we were not gonna get cooperation, there was
23 not going to be a willingness to accept the
24 fallibility of the system, then the gloves came
25 off.



1 Q And so what -- and again, they were your words, I
2 just want to try and understand them a bit better,
3 then. The gloves were off for the war; was
4 that -- the war of liberation; was that, for
5 example, March of 1986 when you got the file, or
6 is that something that came later?

7 A No, it evolved.

8 Q It evolved?

9 A As I say -- as I say, I mean look, I began very
10 much with a state of mind of good faith and faith
11 in the system, accepting that the system can make
12 mistakes, and hoping that the system was mature
13 enough to recognize that it was fallible, that it
14 would make mistakes, and that we could fix the
15 mistakes.

16 Q And so then, at some point in the process, I think
17 you've told us where you changed your view on
18 that. And at that point, I think, is that -- is
19 that what you are telling us, it evolved and at
20 some point it became a war of liberation?

21 A Yes.

22 Q And I think, when we go through the documents, it
23 might -- let me just throw out some dates and see
24 if you can give us some general idea. Your
25 application was filed December 28th, 1988, the



1 Larry Fisher information came to light February
2 28th of 1990, about 14 months later. And
3 certainly, in the months that followed March and
4 April -- and I'll take you to these documents
5 later -- there appears to be some suggestion that
6 maybe things have got off track in your
7 relationship with Federal Justice; would that be
8 roughly the time frame or was it sooner?

9 A Oh, no, I believe that the lapse of 11 months from
10 the filing of the application to the time that Mr.
11 Williams met with Ms. Hall --

12 Q Okay.

13 A -- had, by then, provoked me.

14 Q So and I think that, we'll see I think, was
15 November 7th, '89. So at that point --

16 A It took them 11 months to respond, basically, to
17 --

18 Q Okay. So let's just go back. So it would be the
19 latter part of 1989 that sort of, in your view,
20 things turned and became more of a war of
21 liberation and perhaps evolved from there; is that
22 fair?

23 A Yes. And, you know, I mean I -- it was a build.
24 I mean a war, war is the product of hostilities
25 that precede it, and I would say that the



1 hostilities had begun by then, or certainly the
2 dance or the prelude to war had begun by then.

3 Q And you used the term, when we talked about the
4 war, that you said "the gloves came off". Can you
5 tell us, in your view, did that change the rules
6 of the game?

7 A Yes.

8 Q And what rules changed?

9 A Umm, well this gets to sort of the, sort of does
10 the end justify the means question or the
11 philosophical question. Umm, I think -- and we --
12 I -- the rules changed in terms of my view that
13 the accusers, the original accusers and
14 prosecutors of David Milgaard who said he was a
15 rapist and murderer, had defamed him because he
16 didn't do it, and they'd utilized the
17 instrumentality of the state to put him in prison
18 for something that he hadn't done. The people
19 with the power and the authority to do something
20 about it weren't doing anything about it. In my
21 opinion that made them effectively complicit. And
22 in order to overcome that obstacle we -- I
23 determined that we needed the people of Canada as
24 our allies, much broader than simply a legal
25 argument or an application under Section 617, or



1 690 as it became, and in order to co-op the people
2 of Canada we needed to make our case and take
3 certain approaches that would be calculated to
4 appeal to people's sense of dignity, of freedom,
5 of liberty, and of justice, and as individual
6 actors became a part of that whole scenario we had
7 to identify them, single them out, and identify
8 bad guys.

9 Q Okay. And so, again, in a public forum?

10 A Yes.

11 Q And when you say "bad guys" what do you mean by
12 that?

13 A Well I'm sure Mr. Caldwell felt it, I'm sure
14 Mr. Karst felt it, I'm sure Mr. Williams felt it,
15 Mr. Corbett embarrassed himself from the
16 Department of Justice publicly, several people.

17 COMMISSIONER MacCALLUM: Just a 'sec,
18 please.

19 MR. HODSON: And what about --

20 COMMISSIONER MacCALLUM: Just a 'sec.

21 MR. HODSON: Oh, I'm sorry.

22 A Mr. Corbett was the, one of the people at the
23 Department of Justice who made the famous Elvis
24 quote, referring to those of us who believed in
25 David's innocence as being equal to those who



1 believed that Elvis Presley was alive.

2 COMMISSIONER MacCALLUM: Just identify

3 again for me who you refer to as "bad guys"?

4 A Caldwell.

5 COMMISSIONER MacCALLUM: Caldwell?

6 A Karst.

7 COMMISSIONER MacCALLUM: Karst?

8 A Corbett.

9 COMMISSIONER MacCALLUM: Yeah?

10 A Williams.

11 COMMISSIONER MacCALLUM: Williams?

12 A Umm, probably Penkala. I can't remember all the
13 names, but these are the characters who prosecuted
14 and investigated David.

15 BY MR. HODSON:

16 Q What about Mr. Tallis?

17 A Umm, I made -- I can recall making one comment
18 about Mr. Tallis' conduct of the defence that I
19 sincerely regret making, having heard what he has
20 described here, but I wouldn't -- I don't recall
21 making him a bad guy or considering him to be a
22 bad guy.

23 Q And what about some of the witnesses, then, the
24 people who gave evidence?

25 A Umm, --



1 Q And I'm thinking of the five witnesses that we
2 talked about yesterday; Wilson, John, Cadrain,
3 Melnyk, and Lapchuk?

4 A Yes, they are bad people, they were bad people.

5 Q In what sense?

6 A They lied.

7 Q Okay. And we'll go through that in a bit more
8 detail when we get to the specific issues. Just
9 back to the question, then, about the rules, and
10 maybe that's not a fair question because I'm not
11 sure, I guess 'rules' mean different things to
12 different people, but can you tell us what was
13 your -- what were the rules that you were
14 operating under, then, when you engaged in this
15 war?

16 A Well, we had, we had taken a major risk. We had
17 invited the entire national media into our office
18 and had made all of the information on our case
19 available to them, and we had challenged them to
20 look at what we were doing to find fault, and, if
21 none, then to help us free David. Umm, the
22 journalists were -- are by nature inquisitive,
23 sometimes skeptical, and to a person we couldn't
24 find anybody who could find a flaw or a fault in
25 what we were doing. The risk is, when you do



1 that, you -- actually there are no rules, because
2 you lose control of the process. It's no longer
3 simply about an application or a document that's
4 before the Federal Department of Justice, you've
5 now put your case into the hands of multiple news
6 organizations who have multiple interests, and
7 there is a risk to that, there's good risk,
8 there's some bad risks.

9 Q Okay. What are the good?

10 A And there are no rules, there are none.

11 Q And let's just talk about the no rules, and we'll
12 come back to this a bit later, but would you agree
13 then the rules that would govern a proceeding such
14 as this proceeding or a Court proceeding or a
15 judicial proceeding, that there are certain rules
16 regarding admissibility of evidence, for example?

17 A Yes.

18 Q And I take it you would agree that in going to the
19 public forum or to the media, I think what you are
20 saying is there are no rules as far as what's
21 admissible, whether it's reliable, whether there's
22 a response, it's out of your control; is that a
23 fair way to put it?

24 A It's out of your control and you ultimately, the
25 information, the public has to rely on the



1 principles of journalism and journalistic ethics
2 that you hope a news organization would impose on
3 its journalists.

4 Q And so again as far as -- let's go back to your
5 tent, I think you said you called them into your
6 tent, what were the rules that you played by, if I
7 can call it that, as far as what you gave to the
8 media, because I presume that they wouldn't get it
9 unless you gave it to them, is that fair, unless
10 they got it elsewhere?

11 A Well, one of the tactics was to bring them in and
12 to inspire hopefully some of them to conduct some
13 of the investigation for us because they had
14 resources that we didn't.

15 Q And just back again to the rules that you felt or
16 thought applied to you and what you gave them, can
17 you tell us about that?

18 A I think we pretty much gave them everything we
19 had.

20 Q But as far as -- let's go back to a piece of
21 information if it was --

22 COMMISSIONER MacCALLUM: You think you gave
23 who?

24 A I think we gave the media pretty much everything
25 we had.



1 BY MR. HODSON:

2 Q For example, if you had some doubtful information
3 or some very damaging prejudicial information,
4 what guidelines did you have?

5 A I think we gave them everything, good and whatever
6 there was bad. I recall there were these phantom
7 psychiatric reports or assertions that David was
8 this evil sex-proned, incorrigible person and I
9 think we gave the media everything, I don't think
10 we held back anything.

11 Q And what was -- I think that was prejudicial to
12 David's interests. What about prejudicial to
13 other people's interests, was there any point or
14 any threshold where you said hang on a minute
15 here, we best not put that out in the public?

16 A Well, I have to tell you, there's a balancing act
17 that has to occur and the interest here was a
18 liberty interest and measured against other
19 interests I think we came to the conclusion that
20 the liberty interest prevails.

21 Q And what does that mean?

22 A If there was damaging information about someone
23 else, perhaps about a reputation, for example,
24 potentially damaging to a reputation, that became
25 subrogated to the interest of liberty.



1 Q And let me give you an example, I'll come back to
2 this, and we did hear, for example, on the motel
3 room reenactment event, one of the witnesses
4 there, Craig Melnyk had concerns about how his
5 interest was damaged in the process, if I can put
6 it that way, and again we'll come back to the
7 details. Is that the type of interest that you
8 are talking about would be subrogated to David's
9 liberty interest?

10 A Yes, and let me just say generally on that point,
11 it is highly regrettable and I do regret that
12 rightly or wrongly the system that we faced put us
13 into the position of having to resort to these
14 means. I wish it didn't have to be that way and I
15 wish there was another way and, you know, maybe in
16 hindsight there could have been a different way,
17 but this is as we saw it, and we had to make some
18 choices and I regret that those choices had to be
19 made, but as I say, we were, we had placed the
20 freedom of an individual ahead of the reputation
21 or other less important interests on balance.

22 Q And would it be fair to say that in the process
23 some people did, I think we've heard the term
24 collateral damage, that some people along the way
25 did have their reputations or interests damaged by



1 what was put out in the media and in the public by
2 you?

3 A I'm told that, yes, I understand that, and if you
4 say so, I accept it.

5 Q No, no, I'm just saying that that has been
6 suggested, Mr. Asper. I'm just trying to get
7 your, to understand whether, when you talk about
8 these interests, whether that's the type of
9 thing -- are you telling us that, okay, if that
10 happened, that's an unfortunate byproduct, but
11 that interest isn't as strong as the liberty
12 interest or are you saying --

13 A Yes, that's what I'm saying.

14 Q Okay. You mentioned about going out to the media,
15 you talked about good risk and bad risk. Can you
16 expand upon that a bit?

17 A Well, the risk I guess to our effort was that the
18 media would disagree with us and come to the
19 conclusion that our claim was frivolous or
20 unsubstantiated or not worthy and either be
21 critical and defeat the efforts or just leave us
22 alone and ignore us, and similarly, you know, the
23 risk, the risk -- and it's partly what reinforces
24 the strength of the claim of innocence, the risk
25 is that once you set lose an investigative



1 journalist or a team of investigative journalists,
2 if you are guilty they could find that out and
3 that, you know, I guess that was a risk.

4 Q And again we'll deal with this more
5 chronologically when we go through your dealings
6 with Federal Justice, but did you -- what if
7 anything did you think of the risk, or whether
8 there was a risk or whether it might have a
9 detrimental effect on the authorities, if I can
10 call it that, the people you were trying to
11 influence to get David out of jail, I think you
12 told us that that was one of the purposes, did you
13 have any concerns or thoughts about whether going
14 this different route might have the effect of
15 undermining efforts through the legal channels, if
16 I can call it that?

17 A I would have to say yes, I had a bit of concern
18 about that, but I certainly came to the conclusion
19 that we could talk over and run over those
20 obstacles and if we could -- and I do believe in
21 democracy and I do believe in the power of the
22 people and I do believe that if we took our case
23 and said it loud enough and yelled it loud enough
24 and enough times that we would prevail.

25 Q We'll come back to the subject again, Mr. Asper,



1 when we go through some of the more specifics, but
2 I just want to go on to a couple of other things
3 you said yesterday. You talked about, when you
4 first looked at the file and I think the
5 transcript, and you went through it, and I think
6 you told us that you reached the conclusion that
7 the evidence should not have convicted David
8 Milgaard, or something like that, that the jury
9 should have acquitted based on what you read; is
10 that correct?

11 A Yes, yes.

12 Q And then I think at some -- so at that point I
13 think you told us that David should have been
14 found not guilty, that the case should not have
15 convicted him. At some point I think you told us,
16 and please correct me if I'm wrong, you moved from
17 a position of saying okay, he shouldn't have been
18 convicted to saying okay, I believe this person is
19 innocent; is that correct?

20 A Yes.

21 Q And that that may have evolved over the course of
22 maybe the first year or so?

23 A Yes.

24 Q And so at some point you became convinced that
25 David Milgaard was innocent?



1 A Yes.

2 Q And you had used the words yesterday, and I think
3 again today, that these people had lied at trial,
4 the five of them, and let's start with Melnyk and
5 Lapchuk. What was it that you believed they had
6 lied about at trial?

7 A It would have been impossible for David to
8 reenactment a murder he didn't commit.

9 Q Okay. What about -- I mean, some of the evidence
10 we heard, at least from Deborah Hall, for example,
11 that it was done as a joke.

12 A Well, that was not conveyed at the trial.

13 Q Okay.

14 A And you can get into the question of
15 characterization of what David did, was it a joke
16 or wasn't it a joke. At the time in 1986 it was a
17 joke, the evidence that we had developed was that
18 it was a joke. It was presented at trial, you
19 know, in effect, as this shocking reenactment, and
20 I believe it was Melnyk who actually had the
21 number, exact number of times that Gail Miller had
22 been stabbed.

23 COMMISSIONER MacCALLUM: Just a second, I
24 want to make sure I got the witness' answer.
25 Counsel asked you why do you say that the five



1 witnesses lied and I understood your reply to be
2 they must have if they say he committed a murder
3 that he did not commit; is that right?

4 A As to the so-called motel room reenactment on
5 Craig Melnyk I believe counsel was asking. We
6 had, in 1986, an affidavit suggesting that they
7 had not told the truth, but even before then, even
8 before we had that affidavit, if David was
9 innocent, then how could he have reenacted a
10 murder he didn't commit.

11 COMMISSIONER MacCALLUM: Well, I was only
12 concerned to understand your reply, sir, I'm not
13 challenging it.

14 A No, I'm just saying that was my reply.

15 COMMISSIONER MacCALLUM: But I understood
16 you to say that in your view five witnesses had
17 lied because they said he committed a murder.

18 A In effect, yes.

19 COMMISSIONER MacCALLUM: So does that apply
20 to all the five witnesses?

21 A Yes, sir.

22 COMMISSIONER MacCALLUM: In your view?

23 A Yes, sir.

24 COMMISSIONER MacCALLUM: Okay.

25 BY MR. HODSON:



1 Q And let's just go back, and perhaps the term
2 reenactment maybe shouldn't be there, but let's
3 just go back to what Melnyk and Lapchuk, the
4 essence of what they said at trial, and again,
5 we've heard from Mr. Melnyk, Mr. Lapchuk is
6 deceased, but the conduct attributed to David in
7 the motel room was after a news story came on that
8 he grabbed the pillow and that there was a
9 stabbing motion accompanied by words that varied
10 from various witnesses, but yeah, I killed her, I
11 stabbed her 14 times, so -- but when I think
12 people say a reenactment, it's sort of a grabbing
13 of a pillow, striking it and saying words that
14 could be viewed as an admission, okay.

15 A Yes.

16 Q And that was their evidence at trial. And was it
17 your view and is it your view that that was a lie,
18 that that conduct took place in the motel room?

19 A The conduct may have occurred. The
20 characterization of it, though, is very, very
21 important and if it's a joke, if it's a crude joke
22 as opposed to a serious admission of a murder, I
23 consider that to be a big difference.

24 Q Okay. And so as far as whether it's a crude joke,
25 let's just go a bit further with that because I



1 will spend some time on the Deborah Hall
2 affidavit, would it be fair to say that -- well,
3 let me back up. Was it your view at the time that
4 the events didn't happen; in other words, that
5 there was not an incident involving David Milgaard
6 and the pillow and him striking it and saying
7 words to the effect, putting aside the joke for a
8 moment, but words to the effect that 'I stabbed
9 her, I killed her,' I think Deb Hall's words
10 ultimately were, 'I fucked her in a snowbank and
11 then killed her,' or something of that nature.
12 Was it your view at the time that those events
13 didn't happen?

14 A I wasn't actually sure whether they had happened.
15 Part of the difficulty in getting to the, into the
16 minute detail or the absolute detail of whether it
17 was large events or small events was that in
18 questioning David and in meeting with David he was
19 having -- I mean, forgive me, I'll just give you a
20 bit of an expansive answer and then I'll focus
21 directly on that point. You never knew which
22 David you were getting when I would meet with him.
23 David was having an extremely difficult time in
24 prison and he wasn't always consistent in his
25 recollection and I have to tell you that on



1 occasion David would say that that event didn't
2 occur and on occasion he would tell me that it did
3 occur but it was a joke, and so I was taking the
4 trial evidence, I was looking strictly at the
5 trial evidence, and David had said very clearly at
6 no time had he ever made any admission of the
7 crime, period, end of discussion, and he was
8 consistent on that, that he had always maintained
9 his evidence, so when we're then looking at the
10 Melnyk and Lapchuk evidence, we take David's words
11 at face value that he had never made an admission,
12 and whether a fluffing of the pillow occurred or
13 not, it wasn't consistent with what David was
14 saying.

15 Q And when you say admission, I'm sorry, I thought
16 you said that he may have said it as a crude joke
17 and so when you use the word admission, maybe a
18 serious admission; is that what you mean?

19 A Well, yes.

20 Q Yeah. So that --

21 A An admission can't be an admission if it's a joke.

22 Q Right. So no, and I'm sorry, I just wanted to
23 understand. So on occasion David would tell you
24 that yes, that incident happened, I did do that
25 with a pillow, I did make some comments, but it



1 was a joke?

2 A Yes.

3 Q It wasn't an admission, but I did make comments
4 that I stabbed her, I killed her, those things, as
5 a joke?

6 A Yes.

7 Q And so again, if we just go back, because we'll be
8 spending a bit more time when we go through some
9 of this evidence a bit later, as far as whether
10 it's a joke or not, let's just assume for the
11 moment that the incident happened, as far as it's
12 a joke, the person who said it would have a view
13 as to whether he said it as a joke, that's
14 obvious; correct?

15 A Yes.

16 Q The person who is making the comments would be in
17 a position to say here's what I meant?

18 A Yes.

19 Q Right. And similarly, the people in the room
20 would have their own perception presumably of what
21 they heard said and what they saw, their
22 observations; correct?

23 A Yes.

24 Q And I suppose as well their own perception as to
25 whether they believed it to be a joke or not?



1 A Yes.

2 Q But regardless of what Mr. Milgaard thought, but
3 that they would have a perception of what
4 happened; is that fair?

5 A Yes.

6 Q And so again, back in 1986, I think what you are
7 telling us, you got conflicting stories -- I don't
8 mean to say conflicting, you had different stories
9 from David depending on when you talked to him
10 about the event, is it fair to say that if your
11 premise is, which I think it was at that time,
12 that he didn't commit the crime --

13 A I wasn't hanging my hat on that, on those two
14 witnesses I can tell you.

15 Q Yeah, but just to go back, that that event either
16 didn't happen or, if it did happen, it would be a
17 joke?

18 A Yes.

19 Q Now, just back at the evidence at trial, and I've
20 gone through the transcript and we've gone through
21 it many times, I don't believe that Melnyk and
22 Lapchuk were asked the question at trial did you
23 think he was joking. They did say words here's
24 what I saw, here's what the reaction was in the
25 room and I think they said it was a serious tone



1 or words to that effect, but they were not asked
2 the question did you think David was joking when
3 he said this, and I'm wondering then, Mr. Asper,
4 what was it in their evidence that you believed
5 then when you looked at it to be a lie?

6 A If David hadn't committed, if David didn't commit
7 the crime -- at the time -- before we had Deborah
8 Hall, although we knew about what Deborah Hall
9 might say early on as to the characterization, the
10 way the trial reads is that David shocked the room
11 with an admission of murder which David denied
12 ever doing and so the characterization of how
13 their evidence read --

14 Q Sorry, denied ever doing the murder or the
15 incident?

16 A The murder.

17 Q Okay.

18 A The murder. So if David didn't commit the murder
19 and if David says he never admitted to killing the
20 murder to anybody, committing the murder to
21 anybody, then certainly the characterization of
22 him reenacting the murder couldn't be accurate was
23 how I viewed it in 1986.

24 Q And did you consider whether Melnyk and Lapchuk
25 maybe misperceived the comments?



1 A No. It didn't matter to me actually.

2 Q And so again, and we'll come back to this when we
3 get to Deborah Hall's affidavit, so the -- can you
4 tell us again then what, when you said you viewed
5 that they were lying, what parts of their
6 evidence, again of Melnyk and Lapchuk, just
7 generally what was it that you viewed to be a lie?

8 A When we began, when we began David's position was
9 that he had not reenacted the murder, that he had
10 not taken the pillow and stabbed it and made all
11 the motions that they described.

12 Q Okay.

13 A That's what I had in 1986.

14 Q So at that time it was based on what David had
15 told you, your belief that the incident itself
16 didn't even happen, and so that the description --

17 A Well, not as described. Something may have
18 happened, I think the way David described it was
19 that he had fluffed the pillow and put it behind
20 his head is my recollection.

21 Q And what about the words that went with it about I
22 stabbed her, the crude comments or the jokes?

23 A I don't think he -- my recollection was that he
24 didn't recall making those comments.

25 Q Okay. Let's just go back, and again we'll come



1 back to the motel room reenactment when we deal
2 with Deborah Hall's affidavit, we get to Albert
3 Cadrain, and is it fair to say, let me just
4 generally with these five, would it be fair to
5 say, Mr. Asper, that at that time, and again if
6 you start with the premise that David Milgaard is
7 innocent, didn't commit the crime and shouldn't
8 have been convicted, that then to go look at the
9 record and say, well, anything that is
10 incriminating must be wrong, must be false, was
11 that a step that you would have undertaken? In
12 other words, were any --

13 A Talking about hindsight you mean?

14 Q Yeah, that you did at that time, yes.

15 A Oh, at the time.

16 Q Yes, or even in hindsight. I'm just trying to get
17 a sense of --

18 A Well, no, the problem is there could be
19 incriminating things about what happened that
20 morning that look incriminating --

21 Q Yes.

22 A -- that actually in hindsight are entirely
23 innocent.

24 Q Yes.

25 A It is conceivable, for example --



1 COMMISSIONER MacCALLUM: I don't know what
2 we're talking about, sir, what happened that
3 morning. Which morning?

4 A The morning of the murder.

5 BY MR. HODSON:

6 Q Yeah, and maybe I can give you an example.

7 A Sir, I'll give the example.

8 Q Yeah.

9 A If somebody says that they see blood on David
10 Milgaard's pants on the morning of the murder,
11 it's conceivable that he had blood on his pants,
12 it just wasn't related to the murder.

13 COMMISSIONER MacCALLUM: Yes.

14 BY MR. HODSON:

15 Q And that was my point or my question.

16 A Right.

17 Q So if we go back, and I think we've heard, for
18 example, the compact bag, we heard Mr. Tallis
19 testify that David told him, David Milgaard told
20 him in 1969 yes, that did happen, Nichol found it
21 and I grabbed it, I threw it out, I don't know
22 where it came from and I don't know why I did it,
23 and I think Mr. Tallis told us that was
24 incriminating because there was no explanation,
25 and the inference the jury might have drawn,



1 notwithstanding the fact that Gail Miller's purse
2 was in evidence, that that must have come from
3 Gail Miller.

4 You talked about blood on Albert
5 Cadrain's pants -- or Albert Cadrain seeing blood
6 on David Milgaard's pants again as -- let me put
7 it this way, Mr. Asper, is it possible to say that
8 with the premise that David Milgaard is innocent,
9 that Albert Cadrain's evidence at trial was in
10 fact truthful?

11 A Well, David denied having blood on his pants.

12 Q Okay.

13 A So --

14 Q Fair enough.

15 A And I'll prefer David over Albert Cadrain.

16 Q But let me put it this way, that -- and I think
17 you've already told us this, it's possible that a
18 witness could say incriminating things, that
19 matters that on their own might cause you to be
20 suspicious of David Milgaard and in combination
21 with other facts might be even more suspicious?

22 A That's true.

23 Q But might be true?

24 A That's true.

25 Q And so again is it fair to say that when we look



1 at those, even the five witnesses, let's call them
2 the five witnesses, I think we're on the same page
3 as to who those are, that it's quite possible that
4 some of their incriminating evidence was in fact
5 truthful; for example, throwing the compact out
6 the window?

7 A I never understood why that was incriminating
8 frankly, but --

9 Q Fair enough. That could be viewed by some to be
10 incriminating, including his counsel at the time,
11 Mr. Tallis, said he thought -- suspicious is maybe
12 a better word.

13 A Yes. I guess in a very broad sense I would agree
14 with that suggestion.

15 Q So --

16 A But I reserve the right to go back and look at
17 everything that they said because --

18 Q No, and I appreciate that, I'm not trying to pin
19 you down and have you agree with any of their
20 evidence, I'm just trying to talk generally about
21 that, and again --

22 A I mean, Mr. Hodson, I would say at this point,
23 given what we know, especially as to Cadrain, John
24 and Wilson, I'm just not sure that you can accept
25 anything that they said, not a word.



1 Q Fair enough, and let's put aside --

2 A About anything.

3 Q And let's put aside credibility for a moment,
4 okay, and what I'm trying to get at is, and maybe
5 we'll go back to 1986, and here's the question I
6 want you to consider --

7 A Yes.

8 Q -- is that as a lawyer when you looked at this and
9 went through it and said okay, he's innocent, did
10 you then go back and say, okay, well everybody who
11 said anything incriminating must have lied about
12 it?

13 A At certain -- yes, about certain parts of their
14 evidence. I mean, we can agree on this, they were
15 in Saskatoon, the witnesses testified they were in
16 Saskatoon. They were in -- you know, I mean,
17 we've gone, I think Mr. Fox yesterday went through
18 the Karst list of attributes. Were they
19 travelling in back alleys? Yes, they were in
20 Danchuks' back lane. I mean, there's certain
21 things we can agree on, absolutely, but the key,
22 the key components, for David to be innocent it
23 meant that Wilson had to have lied, John had to
24 have lied, Cadrain had to have lied for sure about
25 the core elements that implicated him, basically



1 what we now know is the Art Roberts flower bloom
2 of evidence.

3 Q What would Albert Cadrain have to have lied about?

4 COMMISSIONER MacCALLUM: What's a flower
5 bloom of evidence?

6 A The May 24th interrogation.

7 COMMISSIONER MacCALLUM: Explain to me what
8 you mean by that term, please.

9 A Well, all of a sudden the stories of Wilson and
10 John became much more flowery and enriched and
11 implicated Milgaard.

12 COMMISSIONER MacCALLUM: Okay.

13 A After he had interrogated them.

14 BY MR. HODSON:

15 Q And let me just, and I'm not trying to get you to
16 agree that what Mr. Cadrain said was true or not,
17 I'm just trying to get an understanding of back in
18 '86 when you first looked at this and whether or
19 not, when you approached this, your view was that
20 if it's damaging against David, or incriminating,
21 it must be false?

22 A Yes.

23 Q Okay. So that would be your view --

24 A No, I don't -- no, I didn't say that --

25 Q Okay.



1 A -- because there are certain parts of the evidence
2 that are incontrovertible that can be viewed as
3 incriminating.

4 Q Sure, okay.

5 A Was he near the scene of the crime? Yes. Was he
6 at Cadrain's home where the trail of evidence led?
7 Yes.

8 Q And certainly, and I tried this questioning with
9 Mr. Henderson and I don't think I got anywhere, I
10 think I'm getting the same place with you, but
11 certainly if we look at some of the evidence of
12 Wilson, John and Cadrain, and let's take Wilson,
13 some of his evidence is not only incriminating,
14 but is only consistent with David having committed
15 the murder, for example, that David admitted it
16 and that he said I fixed her and things of that
17 nature, so that there's certain pieces of evidence
18 that is incriminating, but would only be
19 consistent with David having committed the crime,
20 and I think you are saying that would be a lie; is
21 that fair?

22 A Yes.

23 Q And certainly Nichol John, now, depending on
24 whether you go with her trial evidence or her
25 sworn statement beforehand, but certainly her



1 trial evidence of what was supposed to be before
2 the jury, would that have been, and again maybe
3 it's not a fair question to ask whether that would
4 have been a lie, or was it what's in the sworn
5 statement that you considered to be a lie?

6 A Well, the assertion that she saw David commit the
7 murder is just a bald-faced lie.

8 Q Right. But as far as at trial she didn't adopt
9 that and she sort of had the rest of the trip up.

10 A Okay, so then Mr. Caldwell had a problem and he
11 had to try and get David in the vicinity and out
12 of the car and that was probably a lie as well,
13 especially trying to put them right at the scene
14 of the murder.

15 Q Sorry, what was probably a lie?

16 A Putting David at the scene of the crime and out of
17 the car.

18 Q Okay. And again that would be after they stopped
19 the woman for directions?

20 A Yes.

21 Q And got out of the vehicle, or Ron Wilson --

22 A No, no, no, no, not just stopping a woman and
23 asking for directions and getting out of the car,
24 doing it right where Gail Miller had to be
25 walking.



1 Q Okay, and we'll come back. You are talking about
2 the vicinity?

3 A Yes.

4 Q And what about the fact that the evidence that
5 they did after they stopped a woman, whomever it
6 might be, not saying it's Gail Miller, somewhere
7 about the vehicle being stuck and David and Ron
8 Wilson leaving the vehicle for a time period, was
9 that something that -- do you recall what you knew
10 of that from Mr. Milgaard or whether you viewed
11 that part of the evidence to be a lie?

12 A I think he agreed from the outset that they, that
13 the tires had been bald, the tires on the car were
14 bald and they were constantly getting stuck and
15 that they had gotten stuck at some point and they
16 had gotten out, looked at the situation and then,
17 you know, were out of the car for a very short
18 period of time.

19 Q Okay. If we could just go back to a couple of
20 other points that came up yesterday, I just want
21 to clarify. One is on just this issue of
22 innocence, and I had asked you the question about
23 your mandate, was it to get him out of jail, to
24 have the conviction set aside, to have him
25 declared innocent, and I just want to be clear,



1 and I thought what you said was that, for example,
2 if David Milgaard had been given a new trial and
3 been acquitted by a jury, I think what you told
4 us, in that sense he would be innocent as far as
5 you were concerned, that that would be the
6 objective you were seeking; is that fair?

7 A In -- as part of the new process?

8 Q Yes?

9 A Yes.

10 Q Or was there something beyond that that you were
11 seeking, in other words someone to declare him to
12 be innocent, or were you satisfied, as far as what
13 you were seeking to get, with what the criminal
14 courts would do would be to acquit him?

15 A That would have satisfied me, I'm not sure it
16 would have satisfied the family --

17 Q Okay.

18 A -- or David, but that would have satisfied me.

19 Q Okay. And then just last on this parole issue
20 that we've talked about a bit yesterday, and I
21 think what you told us was that -- and, again, I
22 don't want to mischaracterize your words -- but
23 that on occasion David Milgaard, although he
24 wanted to get out of prison, is it fair to say
25 that he wanted to get out on -- and -- his terms



1 as opposed to the system's terms, in other words
2 "you are still convicted, you are on parole, you
3 are out", he wanted to be out on his terms, to be
4 an innocent person; is that a fair way to put it?

5 A Yes.

6 Q And so we have heard evidence and we've seen in
7 the documents that his refusal to admit the crime
8 somehow impacted his parole, we've heard other
9 evidence and seen other documents that said "well
10 it just wasn't that, it was some other things",
11 and I'm trying to get from your perspective, Mr.
12 Asper, you met with him, you were a part of --

13 A I agree -- sorry -- I agree with that, and I do
14 not want to leave the impression that his, that
15 the denial of his parole was simply because he
16 refused to admit his guilt.

17 Q Okay. There were other --

18 A He was, he was a, not a model prisoner, and he had
19 institutional offences, and I was reminded he
20 often went to the parole hearings and almost
21 mocked them. I was at a parole hearing when he
22 would mock the parole board.

23 Q And so would it be fair to say that it wasn't just
24 a case of "check this box and you are out of
25 jail", that there were other issues, "check the



1 box that says you admit the crime and you are
2 out"?

3 A No, there were other issues, there were other
4 issues.

5 COMMISSIONER MacCALLUM: Mr. Hodson, I'm
6 sorry. As you know, that there's an outstanding
7 application for standing in favour of this
8 witness which I haven't decided, I was going to
9 do it within the next day or so, but in view of
10 what I am hearing from him, and the evidence, I
11 think it's something that we can't leave
12 outstanding any longer. It's distracting me in
13 trying to follow your questions, and the answers,
14 and I think we'll adjourn until I can come back
15 with an answer on this witness' standing.

16 MR. HODSON: Okay.

17 COMMISSIONER MacCALLUM: I'll try to do
18 that by 2:00 this afternoon -- 1:30 is when --
19 no, we come back at --

20 MR. HODSON: 1:30.

21 COMMISSIONER MacCALLUM: -- 1:30 as a rule?
22 I'll try to do it by 1:30.

23 (*Adjourned at 9:48 a.m.*)

24 (*Reconvened at 1:34 p.m.*)

25 COMMISSIONER MacCALLUM: Counsel, I will



1 read into the record my reasons for ruling on the
2 application for David Asper for standing and
3 funding, after which Ms. Congram will give you a
4 copy if you are interested in what I have said.

5 David Asper has applied for
6 standing and funding retroactive to November the
7 22nd, 2005.

8 As may be seen in Part I of the
9 Rules persons may be granted standing by the
10 Commissioner if they:

11 (a) Are directly and substantially affected
12 by the inquiry;

13 (b) Represent clearly ascertainable
14 interests and perspectives that are
15 essential to the Commission's mandate;

16 (c) The applicant has special experience or
17 expertise with respect to matters within
18 the Commission's terms of reference.

19 Mr. Asper had much involvement
20 in the re-opening effort, but none in the
21 investigation or prosecution. That is why he is
22 being called as a witness at this stage of the
23 inquiry. The documents show that he helped in
24 the gathering and publication of information
25 which came, or perhaps should have come, to the



1 attention of the authorities.

2 The question before us is
3 whether such information should have caused the
4 authorities to re-open the case sooner.
5 Answering that question will involve an
6 evaluation of the information produced through
7 Mr. Asper's risks.

8 I will deal first with the
9 material filed in support of the motion for
10 standing, then with counsel's oral submissions,
11 and finally with the evidence which I have
12 listened to which bears on the question of
13 standing.

14 The applicant submits that he
15 qualifies under all three of the grounds stated.

16 I will consider these in
17 reverse order:

18 (c) Special experience or expertise;

19 The applicant states his
20 experience in acting as an advocate for a
21 wrongfully convicted man. In terms of expertise,
22 AIDWYC has already been granted standing. As to
23 experience, we would hear from Mr. Asper about
24 his experiences when he testifies whether as a
25 witness or as a party.



1 Without meaning to denigrate
2 Mr. Asper's standing in the media world, were I
3 to feel the need from an expert from that milieu,
4 I would not choose one so closely involved in the
5 re-opening effort.

6 (b) Represents interests and perspectives
7 essential to the successful conduct of
8 the inquiry.

9 The interests and perspectives
10 cited are those of counsel, specifically a
11 defence lawyer. While Mr. Asper acted for the
12 Milgaards in the re-opening effort, he was not
13 defence counsel. His experience in the
14 re-opening could be fully related by him as a
15 witness.

16 (a) He is directly and substantially
17 affected by the inquiry.

18 The applicant refers to having
19 performed duties on the Milgaard file under
20 Mr. Wolch over a period of six years. His chief
21 argument, as I read it, is that his professional
22 reputation might suffer at the hands of parties
23 to the inquiry who seek to justify their own
24 roles in the conviction by casting aspersions
25 upon others who worked to overturn it. Thus, he



1 argues, he will be directly affected.

2 The Commission is cognizant of
3 its duty to provide notices under Part IV of the
4 Rules after information about alleged misconduct
5 has come to its attention which may give rise to
6 findings of misconduct. Where such notice has
7 been given, the affected party may apply for
8 leave to call evidence or may request that
9 Commission Counsel call evidence to respond to
10 allegations. Thus, an affected party is not
11 without remedy even though he lacks standing.
12 And, of course, notices would be given only on
13 the basis of factual information, not mere
14 aspersions. I cannot make findings of criminal
15 or civil liability.

16 But, arguably, Part IV does not
17 adequately allow a witness as such whose
18 reputation is in peril to adequately meet the
19 case against him because the privilege of
20 cross-examination is reserved for parties with
21 standing. I must, then, turn to the factors
22 which might support the application under the
23 first ground. The Applicant, in his written
24 materials, complains of aspersions being cast
25 against him, the ordinary meaning of which is



1 that his character or reputation is being
2 attacked. That is a legitimate ground to advance
3 in support of an application for standing,
4 because, if true, it would mean that he is
5 directly and substantially affected by the
6 inquiry.

7 I was not persuaded by the
8 material as submitted that this had been shown.
9 Certainly some counsel by their examination of
10 witnesses have signaled their belief that Mr.
11 Asper's words or activities in support of the
12 re-opening were hurtful to their clients. But I
13 thought that what I had heard, or might expect to
14 hear, could not be described as an attack on
15 character or reputation.

16 But having listened for only a
17 short time to Mr. Asper's evidence as a witness,
18 I hear that not long after he began acting in the
19 re-opening, he formed the view that 5 of the
20 witnesses who testified for the Crown in the
21 Milgaard trial were liars, and that 5 others, 3
22 members of the Bar and 2 former police officers,
23 were, "bad guys". He then drew analogies to
24 warfare without rules, and the gloves being off
25 to describe his reaction. The 2 former officers



1 in question have already testified and although
2 one did not ask for standing, his former
3 employer, the Saskatoon Police Service is a party
4 to this inquiry, so that officer's interests are
5 adequately covered in terms of cross-examination.
6 The other officer has standing, as does one
7 member of the Bar. The other 2 members of the
8 Bar were Federal Justice employees and their
9 employer has standing as well. I am concerned by
10 the reaction which might be provoked by such
11 testimony - a reaction which might be interpreted
12 by Mr. Asper, at least, and perhaps by the
13 public, as an attack upon character or
14 reputation. Let me emphasize that I do not
15 invite such reaction, nor do I mean to set limits
16 upon either the content or the style of
17 testimony, provided it meets the test of
18 relevance.

19 But in view of all that has
20 passed in the course of the re-opening, and in
21 view of the sometimes open hostility which
22 certain counsel and witnesses have displayed in
23 this inquiry, I must acknowledge the unlikelihood
24 that the "enemy", in Mr. Asper's metaphor, will
25 turn the other cheek.



1 It is not without concern that
2 I permit the membership of standing to grow. I
3 am concerned about cost and about time. But Mr.
4 Asper, as witness, has made the case for Mr.
5 Asper as party with standing. I am satisfied
6 that his reputation is directly and substantially
7 affected and that he should have standing from
8 this date but not for any discrete phase of the
9 inquiry dealing with systemic issues should one
10 be held.

11 The applicant has not filed
12 material in support of funding for counsel
13 beyond asking for it, so I will not make an order
14 at this time. If the applicant wishes to file an
15 affidavit in support of such a request, he may do
16 so, and I will deal with the request in writing.

17 Mr. Hodson, please continue
18 with your examination of the witness.

19 **DAVID ALAN ASPER, continued:**

20 **BY MR. HODSON:**

21 **Q** Afternoon, Mr. Asper.

22 **A** Good afternoon.

23 **Q** This morning we -- I had asked you some general
24 questions about sort of the six-year time period,
25 and I certainly intend to take you through the



1 documents, and we will do that this afternoon or
2 start that this afternoon and go through
3 chronologically.

4 I had asked you a question about
5 rules and, if I recall, I think I said in the
6 general sense, and I'm not sure what I meant by
7 the word "rules", but I think you said, as far as
8 the re-opening, your words were to the effect that
9 there were no rules. I'm wondering if we could
10 just go back to that and perhaps have you clarify
11 what you were referring to, were you talking about
12 the dealings with Federal Justice on the
13 re-opening, or can you elaborate at all?

14 A Thanks for that question, I'm -- I was concerned
15 that that was left a little bit open.

16 There were no rules in the sense
17 that there was no proceeding, no formal proceeding
18 to which rules would attach, i.e. rules of
19 evidence. But, I mean, we were very mindful all
20 along of our rules and conduct under the
21 professional codes of conduct, we hoped at all
22 times that the rules of ethics in journalism would
23 be applied by the media that were ultimately
24 invited into the case, and we were bound by our
25 conscience, what was right and what was wrong. I



1 think, as we go through this, I'm prepared to
2 concede where we were wrong, or where I was wrong,
3 or where I thought I was wrong, but when I speak
4 of rules I speak of rules that one would normally
5 associate with rules of a proceeding, a formal
6 proceeding.

7 Q And so if we can take that a bit further as far
8 as -- and again in fairness, Mr. Asper, when we go
9 through the specifics in the documents I'll come
10 back to this and I'll let you elaborate on it, but
11 just so maybe we can clear this up now. Now, as
12 far as when you were putting forward information
13 to Federal Justice as part of the re-opening as
14 far as the type of information, who you gave it
15 to, how you gave it to them, whether it was
16 through the media, through the public,
17 admissibility issues, things like that, what were
18 the rules, if any, that you felt applied to that
19 proceeding or that process?

20 A We were not aware of any rules that applied other
21 than the rules that obtained regarding our conduct
22 as counsel, as lawyers.

23 Q If we can now go, if I can call up 213127, please,
24 and what I want to do now, Mr. Asper, is take you
25 through chronologically the time frame of 1986,



1 1987, 1988 right up until the application was
2 filed at the end of December, 1988, and some of
3 these documents will be your documents, others are
4 documents that came from your file. Let me just
5 pause there for a moment. When you left the
6 Wolch -- was it the Wolch Pinx law firm, would
7 that be the correct --

8 A Yes.

9 Q -- in 1992, did you leave your files related to
10 this matter there?

11 A Yes.

12 Q And so we have received those from Mr. Wolch and
13 you've had a chance to look at the documents and I
14 think a number of your file documents would be in
15 the documents we received from Mr. Wolch; is that
16 correct?

17 A Yes, I've seen many of them.

18 Q So apart from that, you didn't have your own files
19 or your own documents relating to this matter; is
20 that correct?

21 A That's correct.

22 Q So this is a letter, and I think this is the first
23 letter, January 16th, 1986 to Mr. Wolch from Joyce
24 Milgaard, and I think you said you started in
25 March of '86; is that right?



1 A Yes.

2 Q And if we go -- again, this is where I got the
3 figure of \$2,000 being the cost to:

4 "... cover the visit with David, the
5 perusal of all transcripts, documents,
6 research data that Peter will provide,
7 and a final meeting providing us with
8 your conclusions & opinion on how to
9 proceed further."

10 Now, Peter I think is Peter Carlyle-Gordge; is
11 that right?

12 A I would assume so.

13 Q And let's just go back at that time. What did you
14 know about, what were you told by Mrs. Milgaard or
15 David Milgaard or Hersh Wolch about who Peter
16 Carlyle-Gordge was and how he fit into the matter?

17 A Well, I was certainly told he was a journalist. I
18 believe he was an author who, I'm maybe mixing
19 metaphors here, but I believe he was writing a
20 book. The way Joyce I think, or Hersh encountered
21 him was he was writing a book and became -- on
22 western Canadian murder cases I think and somehow
23 became interested in the Milgaard case, became
24 interested in the Katie Harper case, a case that
25 Mr. Wolch had dealt with, and began researching



1 and got interested in Joyce's cause.

2 Q And we have heard from Mr. Carlyle-Gordge and
3 we've got many of his documents. Did you
4 understand that he had done some leg work on
5 behalf of David and Joyce Milgaard in the early to
6 mid '80s?

7 A Yes. I can't recall off the top of my head
8 whether it was leg work on their behalf or whether
9 it was leg work on his own behalf in aid of a book
10 that he was writing, but leg work had been done.

11 Q And would it be fair to say that he had done some
12 work, some work interviewing witnesses and
13 investigating David Milgaard's conviction?

14 A Yes.

15 Q If we can then go to 162436, please.

16 COMMISSIONER MacCALLUM: That letter was by
17 Mrs. Milgaard was it?

18 MR. HODSON: Oh, yes, I believe that to be
19 the case. Actually, if you go back to that,
20 213127, and we'll just go to the next page, and
21 it's got her signature there, we can actually --
22 I don't think we need to flip it around. There
23 we go. So it was signed by Joyce Milgaard and
24 addressed to Mr. Wolch.

25 COMMISSIONER MacCALLUM: Thanks.



1 BY MR. HODSON:

2 Q And then if we can go to 162436, and this is a
3 January 22nd, '86 letter, I believe this to be
4 from -- well, it is from David Milgaard, his
5 signature is on the next page, to Mr. Wolch, and
6 again it's a bit of a follow-up. Do you know,
7 would you have seen this material on the file, is
8 that a fair -- is it a fair general assumption,
9 Mr. Asper, that to the extent that there was
10 correspondence either to you or to Mr. Wolch, that
11 it would likely have come across your desk?

12 A Not necessarily.

13 Q Okay.

14 A I don't -- I've seen this letter in the package of
15 material that you provided me, but I don't recall
16 specifically seeing this.

17 Q And maybe we can deal with it this way. Did you
18 keep your own set of correspondence and Mr. Wolch
19 keep his own set of correspondence and notes or
20 was it --

21 A We -- I think we tried to maintain a master file
22 that had everything in it, but there was stray
23 pieces of paper no doubt.

24 Q And so it's possible that a letter that Mr. Wolch
25 wrote to somebody you may not have seen?



1 A Yes.

2 Q And similarly, something that Mr. Wolch received
3 from a party on this matter you may not have seen?

4 A True, although I would say that anything material
5 we would have shared.

6 Q Okay.

7 A David wrote a lot of these kinds of letters.

8 Q I will go through some of them with you. So here
9 in his first letter he indicates that:

10 "Peter Carlyle Gordge has worked hard
11 and long on this and can demonstrate
12 that I did not commit the murder. I
13 believe you know him. I find it
14 remarkable that I have not met him in
15 person ..."

16 And so again, would it be fair to say, Mr. Asper,
17 that in 1986 when you became involved, you would
18 have become aware that Mr. Carlyle-Gordge had
19 done some work either as an author or in whatever
20 capacity that would assist your efforts in trying
21 to re-open the investigation or set aside the
22 conviction; is that a fair summary?

23 A Yes.

24 Q And then here Mr. Milgaard talks about:

25 "The 5th Estate will be airing my case



1 on T.V. in February. I wish to use the
2 publicity to go on the offensive. I
3 want to take the position that I can
4 demonstrate beyond any reasonable doubt
5 that I did not commit the crime and I
6 can do so on the same evidence that
7 convicted me ..."

8 And then let me just pause there. We will see in
9 some documents that follow, this is the early
10 1986 period, a number of letters or notes where
11 David Milgaard is concerned, (a), he wants to
12 have the Fifth Estate story run, and (b), it
13 looks like prior to your involvement they had
14 already done some work; is that correct?

15 A Yes.

16 Q And they had done some interviews and were
17 thinking or talking about or maybe even told Mr.
18 Milgaard that they were going to run a story?

19 A That's correct.

20 Q And I'm wondering if you can, and again if you
21 want us to go through the documents, which we
22 will, we can do that, but are you able to tell us
23 just generally what was the issue with the Fifth
24 Estate program when you first got involved?

25 A I wasn't quite sure. I think the executive



1 producer or the host wasn't comfortable with the
2 direction of the show, there were some editorial
3 problems I think. I'm not sure that -- I think
4 there were some problems -- my recollection is
5 that the host, Eric Malling, was not comfortable
6 with the direction that the program was headed.

7 Q And did David Milgaard have, and Joyce Milgaard
8 have some concerns about that or were they upset
9 about that?

10 A Yes, I think they had -- my recollection is that
11 they had offered themselves to be interviewed, had
12 committed to it and had actually pinned a bit of
13 hope, quite a bit of hope that the airing of the
14 program would help them in publicizing what they
15 were doing and revive, in effect, what Joyce had
16 started I think in around 1980 in her search for
17 Linda Fisher.

18 Q If we can go to 333 -- actually, just let me just
19 scroll down a bit, and he says:

20 "My immediate concerns are to meet you
21 and to make arrangements for Peter to
22 forward all his material to us (with his
23 explanation of it)."

24 And I think that did happen didn't it, you did
25 get materials from Peter Carlyle-Gordge at some



1 point?

2 A Yes.

3 Q If we can then go to 333272, this is a letter
4 January 28th, 1986 from David Milgaard to John
5 Crosbie, who I believe was the Justice Minister at
6 the time, and it's copied to the Fifth Estate and
7 to legal, I'm not sure if that's to you or not,
8 I'll just go through parts of this and ask you a
9 question, and again this would be -- well, within
10 days after the correspondence between Mrs.
11 Milgaard and David Milgaard to Hersh Wolch, and it
12 says:

13 "I am a prisoner. I have almost
14 seventeen years in now for a crime I did
15 not commit. The 5TH Estate program of
16 the C.B.C. will be demonstrating this in
17 the near future. It is possible to show
18 beyond any reasonable doubt that I am
19 innocent."

20 And then goes on to talk about that. Please
21 call. And again at this time I appreciate, Mr.
22 Asper, that you weren't with the firm yet, you
23 joined in March, but did you become aware that
24 Mr. Milgaard was writing directly to either the
25 Minister of Justice or the federal Department of



1 Justice from time to time?

2 A From time to time, yes, we would get
3 acknowledgement letters that David was writing to
4 various people.

5 Q If we can go to 333268, and this is a letter, it's
6 date stamped March 11th, 1986 and it's a reply to
7 Mr. Milgaard and it's from Henry Brown who is the
8 executive assistant for John Crosbie, and you'll
9 see here he's asked to reply to the letter of
10 January 28th, 1986, it says:

11 "Though you give no particulars of the
12 alleged offence, I would guess that you
13 are the David Edgar Milgaard who was
14 convicted in Saskatchewan for the 1969
15 murder of Gail Miller."

16 And then scroll down:

17 "On receipt of an application for mercy,
18 the Minister of Justice has the power to
19 order a new trial or appeal proceeding.
20 In an appropriate case, he can also
21 recommend to the Governor in Council the
22 granting of a pardon. These very
23 special prerogatives are granted only
24 rarely, in the most compelling
25 circumstances which suggest that there



1 has been a miscarriage of justice."

2 If we can then scroll down:

3 "If you have not exhausted the Court
4 process, you should do so. If you have
5 and feel that yours is a compelling
6 case, you may make an application to the
7 minister for relief. The following must
8 be sent to the minister: a brief fully
9 detailing why you say that there was an
10 injustice; copies of transcripts of the
11 preliminary hearing and trial; copies of
12 any judgments and reasons for judgment
13 that were issued in your case; copies of
14 any written arguments filed by the Crown
15 and defence. On receipt of this
16 material, your application will be duly
17 considered."

18 And then the next page:

19 "If you wish the assistance of a lawyer
20 and are unable to afford one, I would
21 suggest you contact Legal Aid Manitoba
22 ..."

23 Now, this letter, are you able to tell us whether
24 this would have been provided to you back in
25 1986, Mr. Asper?



1 A I couldn't tell you. I don't know.

2 Q If we can just go back to the first page, we
3 talked a little bit yesterday, and we'll deal with
4 it in a bit more detail, about your understanding
5 of the -- and just for the record, 617 was the
6 section of the *Criminal Code*, it was amended
7 effective December 12th, 1988 and renumbered
8 Section 690, and so --

9 A And I believe 683 is the pardon section.

10 Q Right, and 683 was the pardon section, so again, I
11 think if we're talking 617 or 690, we're talking
12 generally the same provisions. This -- this
13 information in the bottom paragraph about what
14 they say they require, would this have been
15 something that you would have been aware of or
16 became aware of?

17 A I don't recall that. I seem to recall us
18 receiving a separate letter, it might have been
19 from Doug Lewis who was the minister then,
20 requesting this information, but I don't recall
21 specifically seeing this information.

22 Q Right, and I'll get to that. I think on December
23 28th, 1988 you filed your application and I
24 believe, I think it's February 16th, '89 or
25 thereabouts Mr. Lewis wrote back and said send us



1 the transcripts, the exhibits and arguments,
2 etcetera, so I'll come to that. Is that the
3 letter you are thinking of?

4 A That's the one, yes.

5 Q Okay. So as far as what's stated here, a brief
6 fully detailing why you say that there was an
7 injustice, would this be consistent with what you
8 understood was required under Section 690 or 617
9 as far as what must be filed?

10 A Well, as I read this letter, I would read this to
11 not require something new potentially --

12 Q Okay.

13 A -- on its face, and my recollection was that we
14 were told, either formally or informally, that
15 there had to be something new.

16 Q And so again, just on this letter, are you able to
17 tell us whether or not you would have been aware
18 of its contents or not?

19 A I don't recall.

20 Q Okay. If we can go to 333264, and I just show you
21 this just as part of the record here, and we'll
22 certainly hear from other witnesses on this.
23 333264. And this is a memorandum of February 26,
24 1986, so it follows -- it's actually before the
25 March -- it's after Mr. Milgaard's January 28th



1 letter and before the March 11th letter I just
2 showed you and it's just a record at Justice that
3 indicates that a file is opened regarding an
4 application for the mercy of the Crown under 617
5 and the lawyer in charge of the file, Ron
6 Fainstein, and would you have become, did you
7 become aware that as a result of Mr. Milgaard's
8 letter, that Federal Justice actually opened a
9 file that appears in February of 1986 with respect
10 to a pending application?

11 A I don't recall being made aware of that.

12 Q Prior to -- let's just go back in time, and I
13 appreciate I'm trying to get you, Mr. Asper, to
14 pinpoint dates and when you may have talked to
15 people. Would you personally have talked to
16 anybody at Federal Justice prior to filing the
17 first application on December 28th, 1988?

18 A I don't think I did personally.

19 Q And do you know if Mr. Wolch did?

20 A I think he did.

21 Q And do you know who he would have talked to?

22 A I can only guess.

23 Q Who do you think he may have talked to? Do you
24 have a recollection of him having a relationship
25 with someone there?



1 A Yes. I think he would have -- my guess would be
2 either Mr. Rutherford or Mr. MacFarlane.

3 Q And again, do you know, did you know him to have a
4 relationship or a professional relationship with
5 those gentlemen or that he knew them?

6 A Yes, he did.

7 Q And when you say you are guessing, are you able to
8 tell us that he did have discussions with them
9 about --

10 A He talked to some -- I'm pretty sure that he
11 talked to somebody at Justice and I'm making, I'm
12 connecting dots here.

13 Q Yes.

14 A Who do you -- like, it's a big building full of
15 people, so you probably call people you know and
16 those are two people he knew. There were other
17 people from Winnipeg that we worked with who were
18 in the building. Mr. Wolch also knew Mr.
19 Fainstein, I'm guessing at Rutherford and/or
20 MacFarlane though, and there were subsequent
21 conversations. Just to be clear, there were
22 subsequent conversations with the two of those
23 gentlemen.

24 Q Subsequent to what?

25 A Subsequent to the filing of the applications.



1 Q Okay. So back before the first application is
2 filed, December 28th, 1988, I think you are
3 telling us you didn't have any dealings, but you
4 think Mr. Wolch did and likely with Mr. Rutherford
5 or Mr. MacFarlane?

6 A That's my recollection I think.

7 Q Possibly Mr. Fainstein?

8 A Yes.

9 Q And generally are you able to tell us what was
10 your understanding or what were you aware of as to
11 what was discussed?

12 A Well, I have to be very careful because I don't
13 have a clear recollection. Somewhere along the
14 way we got it in our mind from somewhere that we
15 had to create something new in order to have a
16 successful 617 application, new and credible,
17 believable.

18 Q New, credible, believable, and that would have
19 been before December 28th, '88?

20 A Yes.

21 Q And are you telling us that that information would
22 have come from Justice to Mr. Wolch in some form
23 as opposed to you?

24 A That's my -- well, it didn't come through me, so
25 that's my assumption. Now, as I say, there were



1 other partners in the law firm, our senior
2 partners all were involved in looking at the case,
3 considering its merits, so it's conceivable that
4 somebody else had a conversation other than Mr.
5 Wolch with somebody at Justice?

6 Q As far as the three year period, January, '86 to
7 December, '88, who was running the file, if I can
8 call it that, who was in charge of the file and
9 making decisions?

10 A Well, I would assume the buck stopped at Mr.
11 Wolch's desk.

12 Q Okay. And again, is that something -- I mean,
13 after the application was filed you certainly had
14 direct dealings with Federal Justice; is that
15 right, Mr. Williams and others?

16 A Yes, although it was odd, there was a split sort
17 of as to where correspondence would go and where
18 communication would go. Sometimes it would come
19 to me, sometimes to Mr. Wolch.

20 Q And that would be from Federal Justice?

21 A Yes.

22 Q And was there a rule or what did it depend on?

23 A I don't know. It just happened.

24 Q I note that in some cases you would write to
25 Federal Justice and he would write to Federal



1 Justice and would that dictate who might get the
2 response?

3 A Yes, absolutely, and then sometimes we would both
4 sign a letter and a response would come back to
5 one and not the other.

6 Q Go to 182348, this is a letter March 26, '86 from
7 Mr. Milgaard to the Fifth Estate, it talks about
8 again some concerns. So I take it those concerns
9 continued for a bit did they?

10 A I'm sorry?

11 Q That Mr. Milgaard's concerns about the Fifth
12 Estate continued for a bit did they?

13 A Oh, yes, for a considerable period of time.

14 MR. HODSON: Mr. Commissioner, I'm
15 wondering if I can just take a five minute
16 adjournment. I've got some sections or documents
17 that I think I may have left at the office to put
18 to Mr. Asper, just five minutes if we could?

19 (Adjourned at 2:07 p.m.)

20 (Reconvened at 2:17 p.m.)

21 BY MR. HODSON:

22 Q Thank you. The documents, I was just going to
23 show you 617 and 690 and I guess we do have them
24 on trial directory. 335456 is the first one, and
25 go to the next page.



1 COMMISSIONER MacCALLUM: 4561 did I hear
2 you say?

3 BY MR. HODSON:

4 Q 335456, and then go to the next page. So here at
5 the bottom, again this is to the Minister of
6 Justice, may, upon an application for the mercy of
7 the Crown by or on behalf of the person who has
8 been convicted in proceedings by indictment who
9 has been sentenced, etcetera, and then three
10 options, direct a new trial, refer the matter to a
11 court of appeal for a hearing, and determination
12 by that court as if it were an appeal or refer to
13 the court of appeal at any time for its opinion
14 any question upon which he, being the minister,
15 desires the assistance of that Court.

16 So this is the section we're
17 talking about then, Mr. Asper, the 617 at the time
18 that you were seeking to determine what needed to
19 be filed, how it needed to be filed, etcetera?

20 A Yes.

21 Q And then again just for the record, I'll just put
22 it up, 335463 --

23 A I should also point out, because it was a relevant
24 factor ultimately, that the application is, I
25 read, to the minister as opposed to a court of



1 competent jurisdiction, which to me signaled that
2 there was a political component potentially to the
3 process.

4 Q And that it would be a discretionary, is that your
5 understanding, it was a discretionary remedy?

6 A Yes, absolutely.

7 Q And so if we can go to the next page --

8 A It was an extraordinary remedy.

9 Q And the next page again, I don't propose to go
10 through it, I don't think there's any significant
11 changes, but it was renumbered 690 in, I think on
12 December 12th, 1988, so we're talking about the
13 same general provision, whether it be 617 or 690;
14 is that fair?

15 A Yes.

16 Q And we'll come back to that a bit later. If we
17 could call up 333266, and again here's a letter of
18 April 2nd, 1986 to Mr. Crosbie, and it deals, I
19 think concerns about his parole, indicates that
20 Mr. Wolch is his counsel, and then scroll down, it
21 talks about:

22 "I should be allowed to show a
23 demonstrable injustice ... that will
24 eventually get to you through a
25 Ministerial presentation."



1 And so can we take it from that that at this time
2 would it have been, was the plan then to put
3 together a 617 application this early, April of
4 '86?

5 A Not that I recall. In April of 1986 I would say
6 that from my perspective I was barely into finding
7 out what the case was all about.

8 Q Were you aware that David and/or Joyce Milgaard
9 had previously retained Gary Young and Tony
10 Merchant to provide assistance?

11 A At some point I became aware of that. It may have
12 been in our first meeting, but yes, I was aware.

13 Q And were you aware that Mr. Young had looked at
14 the question under 617 and that type of
15 application or what remedies might be available?

16 A I recall at some point becoming aware of that.

17 Q If we could go back to 156666.

18 A I certainly knew that Mr. Young and Mr. Merchant
19 had been previously retained.

20 Q And would that have been something you learned
21 fairly early on in your involvement?

22 A I don't recall.

23 Q And here's a letter April 14th, '86 from Mr. Wolch
24 to Peter Carlyle-Gordge, it says:

25 "I am attempting to help David Milgaard.



1 David has requested that I contact you
2 to obtain the relevant transcripts etc.
3 that might be of some assistance. Other
4 than some conversations with David and
5 reading the cases reported I have very
6 little to work with and am not really
7 sure in what direction I am going.

8 Any comments you might have and
9 transcripts would be greatly
10 appreciated."

11 Would you have been aware of this contact with
12 Mr. Wolch are you able to tell us?

13 A I would have been aware that we were going to try
14 and get from Mr. Carlyle-Gordge whatever material
15 he had. I would have thought we had transcripts,
16 I seem to remember a white plastic bag with
17 transcripts in it when Mrs. Milgaard came to the
18 office.

19 Q And then 218627.

20 COMMISSIONER MacCALLUM: What was the doc
21 ID there?

22 MR. HODSON: I'm sorry, it was 156666.

23 COMMISSIONER MacCALLUM: Okay.

24 BY MR. HODSON:

25 Q And then if we go to 218627, and this is a letter



1 April 21, '86 from Gordon Stewart, producer of the
2 Fifth Estate, to Mr. Wolch, who says:

3 "I have been asked by Mrs. Joyce
4 Milgaard to forward the enclosed
5 documents.

6 They are transcripts mostly of
7 telephone conversations between
8 Mr. Peter Carlyle-Gordge, a journalist,
9 and witnesses who gave evidence in the
10 David Milgaard murder case in 1970.

11 The trial transcript is being
12 sent to you separately by our researcher
13 in Regina, Ms. Sandra Bartlett, who will
14 be contacting you should you find
15 grounds for a new trial."

16 Again, does this assist your recall at all, Mr.
17 Asper, about who had what and where you got it
18 from?

19 A It's entirely possible, reading this letter, that
20 Ms. Bartlett had the transcripts and she was the
21 one that brought them, it's entirely possible. My
22 recollection is we had them earlier, but --

23 Q And this is April, this would be in the second
24 month after you, or the month following your
25 initial involvement?



1 A Yes. I just -- and it may just have been portions
2 of the transcript that Mrs. Milgaard had. I just
3 seem to recall having more meatier material
4 certainly when I got engaged with the case in
5 March.

6 Q Go to 162433, and this is an April 28th, '86 reply
7 from Peter Carlyle-Gordge to Mr. Wolch, and he
8 says, talks about the note of the 14th, it says:

9 "I gather the Fifth Estate CBC TV
10 program ... is now postponed. Joyce
11 Milgaard had mentioned your involvement
12 in the case and I have asked the
13 Producer of the program, Gordon Stewart,
14 to send on to you the trial transcript
15 and other material."

16 And I think we saw that in the letter. He says:

17 "If you haven't heard from him, I think
18 the fastest route is to phone the Fifth
19 Estate in Toronto and ask to speak to
20 him. He has copies of all the relevant
21 material and since Joyce, David and I
22 all agree you should have the material
23 to work on, there should be no problem."

24 A It may have been the case, I'm thinking this
25 through, because I recall when the Minister of



1 Justice responded to us in February of '89 after
2 we filed the 617 application, we had to provide
3 transcripts, and we had to provide full
4 transcripts, and I think we got those through the
5 Court, we may not have had full transcripts, so
6 this may be an attempt to gather pieces that were
7 all over the place, because ultimately we had to
8 get official transcripts which we didn't have, we
9 couldn't reproduce.

10 Q And as far as the material from Peter
11 Carlyle-Gordge, it looks like from this letter
12 that everything he had he gave to the *Fifth*
13 *Estate*, and he asked them to give you everything
14 that he had given them; is that fair?

15 A Yes.

16 Q Are you able to tell us whether or not, I mean was
17 it your understanding that you got everything from
18 Mr. Carlyle-Gordge, like all of his files?

19 A I couldn't say that.

20 Q And then he goes on to say:

21 "I only have one copy of my own material
22 and at the moment that's in another
23 town, so I think Toronto CBC would be
24 the fastest route for you. The key to
25 the case is to get one of the three



1 young Crown witnesses -- Cadrain, Wilson
2 or Nicol John -- to talk and admit they
3 were leaned on to change their
4 testimony. *Fifth Estate* has been trying
5 to do exactly that -- without success as
6 yet."

7 And let me just pause there. Would you have seen
8 this letter back at the time; are you able to
9 tell us?

10 A I may have. I don't recall.

11 Q And it looks like Mr. Carlyle-Gordge is saying
12 "lookit, the key is to go talk to these or to get
13 these three to talk", is that a fair reading of
14 that, "and get one of them to change"?

15 A No question.

16 Q Prior to filing the application on December 28th,
17 1988, did you or anyone on -- anyone in your firm
18 go and interview any of these three people or talk
19 to them?

20 A No.

21 Q And what was the reason for that?

22 A Well as I say, we were under the impression that,
23 first, we needed something new. Now a recantation
24 obviously would be new, but we were aware that
25 efforts had been made to contact them previously



1 without success, and there was a suggestion either
2 in the documents or -- as I recall I think it was
3 in the documents -- that not only were these
4 people not cooperative when they had been
5 contacted before, but that they really didn't want
6 any further contact, so one of the reasons why we
7 had hoped -- one of things we had hoped for in the
8 617 process was, as I said yesterday, that an
9 independent Crown would assist us and have access
10 to these people, under appropriate circumstances,
11 that they had rejected previously.

12 Q And so are you telling us that it would be a
13 deliberate decision, then, not to go talk to
14 Wilson, Cadrain, and John by you?

15 A That's my recollection, yes. Mrs. Milgaard had
16 attempted to contact them and they had not been
17 receptive.

18 Q And he talks here about the:

19 "Fifth Estate has been trying to do
20 exactly that ...",

21 and that is to get them to talk and admit they
22 were leaned on to change their testimony; do you
23 have any knowledge of what they were doing?

24 A No, but that would not have been helpful would be
25 my guess at the time.



1 Q And why is that?

2 A Umm, because they had, as I say, they had not been
3 very receptive to Mrs. Milgaard's approaches or
4 Mr. Carlyle-Gordge, as I recall, and having TV
5 cameras and a reporter show up at your door would
6 likely not be successful either.

7 Q If we can then go to 213125.

8 A I mean that's the other, just to go back to the
9 systemic issue, --

10 Q Yes.

11 A -- that's the other side, the flip side of getting
12 the media involved, that's part of the risk is
13 that it can backfire and witnesses can get scared
14 off.

15 Q And did that happen on this matter?

16 A Umm, I don't recall it happening.

17 Q Okay.

18 A Umm, no, I don't recall it happening, but it's a
19 risk.

20 Q This is a, I think this is your memorandum to
21 Mr. Wolch April 28th, 1986 regarding a visit with
22 Mr. Milgaard at Stony; --

23 A Yes.

24 Q -- is that correct?

25 A Yes.



1 Q And I think you've looked at this recently; would
2 this be your first memorandum outlining your first
3 visit with David Milgaard?

4 A It may be. It took me a while to get clearance to
5 actually go into the penitentiary.

6 Q Do you have --

7 A So this is maybe --

8 Q Yeah, sorry. Do you have a memory of the first
9 time you met him personally?

10 A I, yes I do, actually.

11 Q And what do you remember?

12 A Umm, I was -- it was my first time in the
13 penitentiary, which is a little bit
14 nerve-racking, and David walked in and I actually
15 remember seeing his wrists, the first thing I saw
16 were his wrists. And I was already a bit off
17 centre by just being in the penitentiary, and
18 seeing the scars on his wrist shocked me, and then
19 sort of this vibrant human being spoke. And we
20 had a counsel interview room, and he was very
21 excited that we were getting involved with the
22 case, and we talked about the case and he
23 actually, I mean, he was very excited. And, I
24 mean, it was a very pleasant conversation, it was
25 an introductory conversation. And he had work



1 with him, he had pieces of paper with him, and the
2 apple doesn't fall far from the tree, I would say,
3 in the Milgaard family, and he sort of had his
4 list of what we were to get going on.

5 Q And do you know if Mr. Wolch had been out to see
6 him in person prior to your visit, or would you
7 have been the first firm person to visit him?

8 A I'm not sure.

9 Q And so, again, do you recall -- I think you said
10 you talked about the case; can you tell us what
11 you remember about what you would have asked him,
12 what he would have said? And we'll go through
13 this memorandum as well, I don't mean to ask you
14 to go just by memory, but from your recollection
15 can you tell us generally what was discussed?

16 A Well there was some pretty fundamental
17 conversation about whether he was innocent or not
18 and, you know, what lay ahead. And I laid it out
19 for him pretty clearly that if he was playing
20 games with innocence, that the cost to him could
21 be that he would never get out of jail, and that
22 this was the risk that I foresaw.

23 Q I'm sorry, what do you mean by "playing games with
24 innocence"?

25 A If he was lying to us, if he was lying to me,



1 because I said to him "are you" -- I just asked
2 him straight out "did you do it", and he
3 emphatically said "no", and we got into a little
4 discussion, and I just said to him "you can't be
5 cavalier about this, you can't take the system on
6 the way you may have to and challenge the system
7 without a consequence", and the consequence to
8 him, and I explained it, "may be that you are
9 never going to get out of prison".

10 Q And that would be that if you said you are
11 innocent, and you are not innocent, that he may
12 never --

13 A Yes.

14 Q Is that what you were saying?

15 A Yes.

16 Q Okay.

17 A Yes.

18 Q Would you have -- and I take it, are you able to
19 tell us, would April 28, would this memo be the
20 first visit do you think? Again, that would be --

21 A It would be the first or second I would think. As
22 I say, it took a while, I mean I only started at
23 the firm the beginning of March, it took a while
24 for me to get security clearance --

25 Q Right.



1 A -- at the penitentiary.

2 Q So is it likely that this would be a memo of your
3 first visit with him?

4 A Probably.

5 Q Yeah.

6 A I think so.

7 Q And, again, I appreciate --

8 A Mind you I, well, I don't know, I can't say that,
9 because I thought I spent longer than a half hour
10 with him.

11 Q Okay. So, again, I'm not sure if much turns on
12 that but you would have, early on in your
13 engagement, spent some time with David Milgaard;
14 is that fair?

15 A Yes.

16 Q And before you met with him did you have some
17 general understanding of the case and the case
18 that was put against him at trial?

19 A Yes.

20 Q Had you done some reading?

21 A Yes.

22 Q Would it have been important to you, Mr. Asper, to
23 find out what David Milgaard's recollection of the
24 key events was?

25 A Yes.



1 Q And if you could tell us how that would be
2 important in the work you were going to do?

3 A Umm, I wanted to be able to put to him everything
4 that was adverse to him at the trial and ask for
5 him to see if he had an explanation for it, and
6 that would be -- that would have been very
7 important in terms of, I thought, presenting our
8 case to Justice. I -- irrespective of what we
9 later learned about new evidence I just thought
10 that, as a first step, you had to explain the
11 evidence at trial.

12 Q And so did you then ask him to recount the events
13 of January 30 and 31, 1969?

14 A I did.

15 Q And --

16 A I'm not sure if I did it in narrative or whether I
17 put to him -- and I'm not sure if it was in this
18 particular meeting, --

19 Q Okay.

20 A -- but over a series of meetings I would have put
21 to him all of the evidence from the trial.

22 Q And what was your impression of Mr. Milgaard's
23 memory about those events in, again, in the spring
24 of 1986?

25 A Umm, he tried -- his memory, I would say, varied.



1 Sometimes David was in good shape, sometimes David
2 was in not-so-good shape mentally, and I would try
3 to be able to know when which was which.

4 Sometimes I didn't, sometimes it wasn't
5 particularly clear, and sometimes, after I got to
6 know him over a period of time, there wasn't
7 always a strain of consistency based on where his
8 head was at on a given day. And if he -- he was
9 trying to -- he was involved in a number of
10 activities in the prison, if he had had a conflict
11 with the warden or somebody just prior to my
12 meeting with him I just, I didn't know what I was
13 getting, necessarily, on a day-to-day basis.

14 Q And did you have any concerns about, sort of, the
15 reliability of his memory of events?

16 A Generally what I would try to do is determine
17 consistency, when he was consistent on points I
18 would accept them over a period of time,
19 generally.

20 Q And were you aware, was he -- had he been reading
21 the transcripts and reading matters and thinking
22 about these matters over the years?

23 A Well, this is part of the problem, you get mired.
24 You got nothing else to do, really, and you get --
25 sit with transcripts and summaries of the case,



1 and live the case, and relive the case over and
2 over and over every day. It can affect, I think
3 it can affect -- you can start to reconstruct as
4 opposed to remember.

5 Q And did you have those concerns that, in relating
6 events to you, that -- did you have concerns that
7 he might be reconstructing rather than
8 remembering?

9 A Yes.

10 Q Okay. That --

11 A I'm going through that myself as I try to testify.

12 Q And, again, did you ever get the sense that he was
13 doing anything but trying to tell you the truth?

14 A Oh, no, he -- I have no doubt that he was being
15 perfectly honest. He was -- I will tell you that
16 he was, he was a bit set back when I told him or
17 discussed with him the consequences of him
18 claiming innocence falsely, and I'd -- I think
19 that he took that quite seriously and I think that
20 he tried to be as honest as he could at all times.

21 Q And did he ever tell you, in these meetings,
22 anything to the effect that he had concerns about
23 whether his memory was good or bad about certain
24 things?

25 A Umm, no, I think he didn't want to admit that.



1 Q And would it be fair to say that the focus of your
2 interviews with him and the review of the facts
3 would be to focus on, if I can call it, the
4 incriminating parts -- not to say that the others
5 aren't important -- but a focus on the
6 incriminating evidence against him?

7 A The five.

8 Q The five witnesses?

9 A The five witnesses.

10 Q So --

11 A I focused on the five.

12 Q So what the five witnesses said?

13 A Yes; Wilson, John, Cadrain, Melnyk, and Lapchuk.

14 Q Okay. And if we can maybe just go through this
15 memo, and this may assist, and again number 2 it
16 says:

17 "Mr. Milgaard indicated that he is
18 interested in retaining your services
19 for the purposes of either obtaining a
20 new trial or exoneration and
21 compensation."

22 Then it says:

23 "Mr. Milgaard indicated that the Crown,
24 at the time of the trial, had a
25 statement from one Debbie Hall which



1 apparently say's that David never went
2 through the motion of stabbing pillows
3 when a news report of the murder came on
4 the television set while he was in a
5 motel room somewhere on the road between
6 Saskatoon and Vancouver. You might
7 recall that in the court of appeal
8 decision there had been some evidence
9 that David saw a news report of the
10 murder and then went through a series of
11 stabbing motions using the pillow as the
12 victim."

13 Now when I read that it looks like, Mr. Asper,
14 that Mr. Milgaard is the one who told you about
15 Deborah Hall, is that correct, about Deborah
16 Hall's evidence?

17 A That's possible, I may have -- it may have been in
18 the material that Mrs. Milgaard gave me as well.
19 I don't recall hearing it first from David but
20 it's possible.

21 Q Do you recall where you heard about it first or
22 read about it first?

23 A No.

24 Q And is it fair to take from this memorandum that,
25 at this time, David Milgaard would have known



1 about what Deborah Hall was saying about the motel
2 room incident?

3 A Yes.

4 Q And would you have asked him, at this time, about
5 his recollection of what may have happened in the
6 motel room or what may not have happened?

7 A I don't recall.

8 Q I think you told us this morning -- and please
9 correct me if I'm wrong -- that sometimes he said
10 it didn't happen and on other occasions he said it
11 did happen, or --

12 A Well or --

13 Q -- something happened?

14 A Yeah. And I -- I -- I'm -- I apologize. You were
15 asking about my understanding in 1986, and it's
16 very difficult actually, because a lot of things
17 were fairly fluid. I went back and looked at the
18 brief that I prepared, or the draft 617
19 application, --

20 Q Right.

21 A -- and that accurately -- and its contents, which
22 includes David's affidavit in which he says that
23 nothing happened, and he used -- and we used
24 Deborah Hall's affidavit which said nothing
25 happened as corroborative, I would assume, of



1 that, in the draft form. That's where I -- that's
2 where the thinking was in 1986 --

3 Q Okay.

4 A -- and that is -- that reflects my understanding
5 of what he was saying.

6 Q Okay. So for -- and, again, I will go through
7 that brief with you, and you can certainly
8 elaborate further, but are you telling us that at
9 least initially, for the first while, your
10 understanding was that David denied that it
11 happened and your view was that an incident didn't
12 happen; is that fair?

13 A Well that was -- it began -- yes, in 1986, that's
14 how it began.

15 Q And you used the word "fluid" on this; what do you
16 mean by that?

17 A Well I also took the occasion again early this
18 morning and I reread it, to look at Melnyk and
19 Lapchuk's evidence at trial, to refresh my memory
20 of why we were saying it didn't happen. Umm, it
21 was fluid because on the one hand Melnyk described
22 one thing I think on the bed, Lapchuk described
23 another thing on the floor; Melnyk described one
24 set of words, Lapchuk described another set of
25 words; Melnyk said that his robbery charges were



1 gonna be dropped because he had an alibi, and over
2 time, in trying to deconstruct what they were
3 saying and resolve their conflicts and their
4 inconsistencies, I think David accepted that there
5 may have been a fluffing of a pillow, or some
6 action, as opposed to nothing happened.

7 Q Okay. And what about words being spoken by him as
8 attributed to him by Melnyk, Lapchuk, Hall, and
9 others?

10 A I don't recall -- he -- I don't recall if he ever
11 said -- remembered anything specific, but he, I
12 think, came to the view that he could have said
13 something off the cuff in a joking way.

14 Q And 'said something'; something similar to what,
15 in a joking way, similar to what Melnyk and
16 Lapchuk said they heard?

17 A He, my recollection is that he always absolutely
18 denied the Melnyk and Lapchuk language, which was,
19 you know, actually identifying a specific number
20 of times that he's allegedly stabbed and --

21 Q And what about Deborah Hall's version of what he
22 said; those words?

23 A I think by that point David's view was "okay,
24 maybe I don't remember, maybe something happened".

25 Q Okay. And is --



1 A "Whatever, whatever, I didn't kill Gail Miller"
2 was, I think, his view.

3 Q But did he ever get to the point of saying "maybe
4 I said words similar to what Deborah Hall said I
5 said"?

6 A I think he finally came to accept that "well,
7 maybe something happened and maybe I said
8 something", yes.

9 Q And back in 1986, at this time -- and we see this
10 certainly in your brief when we go to that and in
11 the application when it's filed -- you
12 characterized the motel room re-enactment
13 evidence -- I think that's how it's been termed --
14 as being quite damaging and a strong part of the
15 Crown's case. Was that your view at the time, in
16 '86, --

17 A Yes.

18 Q -- that this was --

19 A Yes. I mean I read it, as I read the transcript I
20 read it as the *coup de gras*, in effect, to the
21 Crown's case.

22 Q And so in 1986 when you're looking at this, and
23 again, this morning we talked a bit about that,
24 when you reached the conclusion that either (a) he
25 shouldn't have been convicted, or (b) he was



1 innocent, that -- were you trying to find some way
2 to attack this evidence to try and undermine it,
3 to try and remove it, so that when you went
4 forward to Federal Justice you could explain it
5 somehow; is that -- either discount it or explain
6 it; is that a fair way to put it?

7 A Well, I mean, the reality is that as we were
8 trying to find something new, there wasn't a lot
9 new that we had access to, at least we thought, to
10 trigger what we hoped would be an expansive
11 investigation by the Department of Justice into
12 all the other aspects of the case -- into all
13 aspects of the case, and -- but we had Deborah
14 Hall. So, yes, we thought we could use the
15 Deborah Hall affidavit to discredit what we
16 thought was damaging evidence by Melnyk and
17 Lapchuk.

18 Q So if Deborah Hall said "lookit, it didn't happen,
19 the incident didn't happen", that would be new
20 evidence because evidence that was used, I think
21 in your view, to convict David Milgaard was false?

22 A Yes.

23 Q And did you view the Deborah Hall evidence as
24 being, at the time as being significant, was it --

25 A You know, I think anything was significant at that



1 point, anything.

2 Q Okay. And then we go through, and, again, this is
3 your notes of what David Milgaard told you:

4 "Milgaard says that he is not a
5 "secreter" and therefore the typing of
6 blood from the frozen semen found near
7 the body could not be his. You will
8 recall that 2 yellow clumps of a frozen
9 substance were found near the victims
10 body. These clumps were determined to
11 be seminal fluid containing "A"
12 antigens. As I understand it the way
13 that these antigens would be traceable
14 in semen is if the individual is known
15 as a "secreter". This means that an
16 individual secretes blood antigens into
17 other body fluids and not exclusively
18 semen. Although Milgaard is type A
19 blood he say's that he's not a
20 secreter. He could not recall whether
21 this fact was disputed at trial but
22 claimed that if it had he would have
23 remembered."

24 And do we take it, from that, that Mr. Milgaard
25 was telling you "lookit, I think this secretor



1 evidence should have exonerated or excluded me?"

2 A I don't recall what conversation we would have had
3 about that. I mean I -- and, again, I confess
4 that at the time I wouldn't have had the faintest
5 idea what this was all about.

6 Q The secretor issue?

7 A Yes. I mean I may have read about it, but in
8 terms of any experience, I would have had no idea
9 what --

10 Q And is it something that you came to understand
11 and look at as -- again, I think when we get into
12 the Dr. Ferris report -- as being something that
13 might be of assistance to you in your quest to
14 have the case re-opened?

15 A Yes.

16 Q And then number 5, he says:

17 "He will also ...",

18 I think that maybe should be "you", but:

19 "He will also remember from the trial
20 that there was evidence of a woman's
21 compact being found in the glove
22 compartment of the vehicle after the
23 killing and Milgaard grabbing the
24 compact and throwing it out the window.
25 He say's there was never any compact



1 thrown from the car."

2 Again, do you have a recollection of discussing
3 that with Mr. Milgaard?

4 A No.

5 Q Is that something that he -- let's just go back.
6 You would have been aware that Wilson, John and
7 Cadrain all testified that when they left
8 Saskatoon, between Saskatoon and Rosetown, a --
9 Nichol John found either a cosmetic or a compact
10 bag, or whatever, a make-up bag in the glove box,
11 looked at it, asked whose it was, or words to that
12 effect, and that David grabbed it and threw it out
13 the window; and you would have been aware of that
14 being evidence against him at trial?

15 A Yes.

16 Q And we touched on this yesterday and I asked you
17 was that -- did you view that as being damaging
18 evidence against David at the trial?

19 A Yes.

20 Q Okay. And, again, would that be something, in
21 your quest to have the case re-opened, that you
22 would want to try and either dispute or undermine
23 in some way, given that it came from the three,
24 Wilson, John and Cadrain?

25 A I think the undermining of the witnesses



1 themselves, umm, the -- yes, I mean the answer,
2 short, the answer is "yes, if you can kick that
3 out it helps".

4 Q Yes. And was it your view at the time, Mr. Asper,
5 that Wilson, John and Cadrain were lying at trial
6 when they said David threw a compact out the
7 window?

8 A Well I think he, David, I believe has been
9 consistent throughout that he didn't do that, umm,
10 so I don't -- I don't know if they're lying or not
11 about that.

12 Q But at the time, back in '86-'87-'88, through the
13 re-opening period, did you have the view that they
14 were lying about that?

15 A I would have accepted David's view on that, yes.
16 And we would have also looked at -- I mean the
17 inference, obviously, is that the compact case
18 came from Gail Miller. Of course there was no
19 evidence whatsoever to link it to Gail Miller and,
20 in fact, the evidence was to the contrary insofar
21 as -- in as much as the -- I seem to recall all of
22 the contents of Gail Miller's purse being located,
23 including her make-up, and I seem to recall
24 putting everything into the purse and it being
25 full or basically full.



1 Q I think the purse and contents were evidence at
2 trial and I think that was an argument that Mr.
3 Tallis had put to the jury about -- similar to
4 what you are saying.

5 Now at the Supreme Court
6 reference, and in fact before this Commission of
7 Inquiry, Mr. Tallis has testified that in 1969,
8 when he met with David Milgaard, David Milgaard
9 told him that in fact he had thrown out a cosmetic
10 or compact bag as Wilson, John and Cadrain had
11 testified, and that he didn't know where it came
12 from, and he didn't know why he threw it out; at
13 what point did you become aware of Mr. Tallis'
14 statement to that effect?

15 A I think --

16 Q Would it have been at the Supreme Court reference?

17 A Yes, yes, I think it would have been. I think
18 Mr. Wolch and I met with Mr. Tallis prior to the
19 reference at some point and he indicated that that
20 had been what David had said at -- before his
21 trial, his original trial.

22 Q And did that change your view, then, on what
23 position you were taking on David Milgaard's
24 behalf as about (a) whether or not that event
25 happened and (b) whether Wilson, John and Cadrain



1 were lying about it at trial?

2 A Well it didn't change my position insofar as
3 whether it was relevant, whether it was Gail
4 Miller's compact, if it happened. That wouldn't
5 have changed. Umm, I don't -- umm, I don't recall
6 how we resolved that, frankly.

7 Q Okay. Now the next line here, and when I first
8 read it, it says:

9 "6. He want's to know when and if the state
10 is backing off on the story.",
11 I thought that had referred to the compact. When
12 I look at it again I'm wondering whether that
13 should have said "the *Fifth Estate*"?

14 A Yes.

15 Q And, "He want's to know when and if the *Fifth*
16 *Estate* is backing off on the story."?

17 A Yes.

18 Q Is that what it --

19 A Yes.

20 Q Yeah. So it's not talking about the state backing
21 off on the compact story?

22 A No.

23 Q Okay. And again, you touched on this earlier, was
24 this something that bothered David Milgaard in his
25 discussions with you, the fact that the *Fifth*



1 Estate was going to run it and then not going to
2 run it?

3 A Very much so.

4 Q And in fact we heard or saw some evidence that he
5 thought that Mr. Merchant may have done something
6 to undermine the program; is that right?

7 A I seem to recall something to that effect, yes.

8 Q Number 7:

9 "Milgaard said that sometime immediately
10 prior to the trial he gave Cal Tallis a
11 scribbler which contains a detailed
12 description of Milgaard's recollection of
13 what happened the day of the murder. He
14 would like us to have this and suggested
15 that next time you speak with his mother
16 ask for it."

17 And do you -- what do you remember about that,
18 Mr. Asper, the scribbler, and where it came from
19 and what happened to it?

20 A My only recollection is that we got a series of
21 handwritten notes that I believe an inmate had
22 transcribed, another inmate had transcribed. I
23 don't recall ever seeing a scribbler.

24 Q And I'll show you a document a bit later that has
25 sort of distinctive handwriting in a lined



1 scribbler book.

2 A Right.

3 Q Your recollection is actually handwritten notes of
4 David's?

5 A No, I think he had another inmate transcribe the
6 scribbler, I think.

7 Q Okay. What is your recollection, I mean what did
8 the document look like that you saw that
9 represented this scribbler?

10 A It was a photocopy.

11 Q It was a photocopy, but what was -- was it of a
12 book, was it miscellaneous notes?

13 A No, it was lined paper.

14 Q Okay. With numbers on? And I'll call it up in
15 the --

16 A Okay, but I may be wrong, I don't think we saw
17 that, I don't recall seeing it until very late in
18 the process.

19 Q Around the time of the Supreme Court reference?

20 A That's what I was going to say, yes.

21 Q If we can go to the next page, it says:

22 "Milgaard was very anxious for me or you
23 to go through his case with a fine tooth
24 comb and confront him with every piece
25 of evidence which points toward his



1 guilt. He say's that he can explain it
2 all away and want's to do so as soon as
3 possible. He did not call any evidence
4 at the trial and say's that that was
5 probably his problem. I am still going
6 through the material that you gave me
7 and perhaps latter this week we could
8 spend some time discussing it."

9 Are you able to tell us what -- elaborate on what
10 you wrote there about:

11 "He did not call any evidence at the
12 trial and say's that that was probably
13 his problem."

14 Do you read that as him saying that it was his,
15 David Milgaard's problem, or that that was the
16 problem generally?

17 A Umm, I don't think, I don't think David -- you
18 know, some clients sort of slip out of themselves
19 and move into the third person, that's not what
20 was happening there. I think that may be just
21 shorthand for Mr. Tallis did not call any evidence
22 on his behalf at the trial. Umm --

23 Q Let me --

24 A Sorry.

25 Q Sorry, no, you go ahead?



1 A No, I was going to say, and I think David's view
2 at this time of the memo -- and I'm guessing --
3 was that he probably felt that they could have
4 rebutted, they should have actively rebutted, by
5 calling a defence.

6 Q Okay. So when we read this what he is saying is
7 "lookit, we didn't ..." -- "we" being David
8 Milgaard and his counsel -- didn't call any
9 evidence, and that's one of the problems as to why
10 he got convicted; is that --

11 A Yes.

12 Q -- a fair way to read it?

13 A Yes, I think that's what he felt.

14 Q As opposed to a reading that says, well, the
15 reason they didn't call it is because David
16 Milgaard decided not to and it's his problem?

17 A No, no, I think he was -- my reading of this, my
18 recollection was that he thought that there should
19 have been some attempt to rebut the evidence.

20 Q And again you told us earlier that you would have
21 talked to David Milgaard about the facts on a
22 number of occasions, is that fair, gone over with
23 him about the key dates, January 30, 31 and the
24 motel room reenactment date; is that fair?

25 A Yes.



1 Q And I think you told us that where he was
2 consistent from meeting to meeting, you tended to
3 place more weight on that; is that correct?

4 A Yes.

5 Q Did you at any time consider contacting Mr. Tallis
6 and asking him what David Milgaard informed him of
7 back in 1969?

8 A I believe that Mr. Wolch and I discussed that.
9 Part of the problem was when the Milgaards came to
10 see us they were pretty suspicious of everybody in
11 the system, they had suffered an enormous wrong.
12 They were kind of interested on us being very
13 sterile and being very careful about who we talked
14 with about the case. At some point I think Mr.
15 Wolch contacted Mr. Tallis either by telephone or
16 by letter and Mr. Tallis advised us that he didn't
17 have the file and didn't really have a very good
18 recollection in detail of the events surrounding
19 the case, and my recollection was that he was also
20 very concerned, given his position on the Court of
21 Appeal, about talking about the case.

22 Q And, sir, this is information that Mr. Wolch would
23 have relayed to you from his telephone call with
24 Mr. Tallis?

25 A Yes.



1 Q Or did you participate in that?

2 A Yeah, Mr. Wolch told me that.

3 Q And again, we had talked earlier about, I think
4 you told us that it was important to get a good
5 understanding of the facts, or David's version of
6 events; is that correct?

7 A Yes.

8 Q And --

9 A Although I will say that we were pretty forgiving
10 in the sense that we accepted his claim of
11 innocence, we accepted that his recollection
12 wasn't going to be perfect, he was 17 years in, he
13 had suffered hugely I think, I assume everyone in
14 the room is aware of the suffering of David
15 through his years in prison, and that we weren't
16 going to get from him the kind of clarity that you
17 might get, so we looked at the case at face value.

18 Q Okay. So is what you are saying is that his
19 recollection of the events may not have been the
20 best evidence for the reasons you've stated as to
21 what he said happened back in 1969; is that fair?

22 A That's true.

23 Q And again my question about Mr. Tallis, did you
24 consider the fact that what David would have told
25 his lawyer back in June of 1969 would have been



1 perhaps more reliable a recollection of events
2 being closer to the events; do you follow me?

3 A I think, as I say, Mr. Wolch and I discussed that
4 and I think that's why Mr. Wolch placed the call
5 to Mr. Tallis.

6 Q So that again did you place -- did you consider
7 that Mr., that what Mr. Tallis could tell you
8 about the information he received from David
9 Milgaard in 1969 and 1970 might assist you in sort
10 of understanding at least his version of events as
11 he relayed it to Mr. Tallis?

12 A Sure, but my recollection is that Mr. Tallis at
13 the time didn't really have much to offer.

14 Q Okay. So I think, and Mr. Tallis just finished
15 testifying, and I think what we saw, or his
16 evidence was that he did not, and I stand to be
17 corrected on this, I think he said he did not meet
18 with Mr. Wolch or with you until after he had met
19 with Eugene Williams, which I think was March 21,
20 1990, and do you take any issue with that?

21 A I thought there had been a phone call.

22 Q No, no, that was a meeting, and I think what he
23 said is that there had been a phone call and I
24 think there's a letter that suggests there was a
25 phone call maybe in 1989 or 1990 prior to that.



1 A That may be. I've seen it in the documents you
2 provided me.

3 Q And we'll go through that.

4 A Yeah.

5 Q And again, apart from what might be in the
6 documents, do you have any recollection as to when
7 Mr. Wolch would have called Mr. Tallis?

8 A No.

9 Q And do you have a recollection of -- when would be
10 the first time you, David Asper, sat down and had
11 put in front of you Mr. Tallis' version or
12 recollection of what David Milgaard had told him
13 when he defended him?

14 A Probably would have been the Supreme Court, or
15 sometime in preparation for the Supreme Court.

16 Q So after November, '91 and before -- I think his
17 evidence was March of '92?

18 A I think so.

19 Q Yeah.

20 A I think so.

21 MR. HODSON: I see it's just after three,
22 Mr. Commissioner. I know we had a short break
23 earlier. Do you want to break now for the
24 afternoon?

25 COMMISSIONER MacCALLUM: Thanks.



(Adjourned at 3:01 p.m.)

(Reconvened at 3:20 p.m.)

BY MR. HODSON:

Q Mr. Asper, when we adjourned we were talking about efforts to talk to Mr. Tallis and I think, I just want to go over that, I think what you said is -- let me back up. I think the evidence so far is that the first meeting, direct meeting between either you or Mr. Wolch and Mr. Tallis would have been after, at least according to Mr. Tallis, would have been after March, 1990 and there may have been a letter or phone call prior, and I think you said you don't dispute that, your recollection is it would have been around the time of the Supreme Court reference that you would have met with him?

A That's my recollection, yeah, and I'll say, Mr. Hodson, Mr. Commissioner, going forward, my whole experience in dealing with this specific question creates check lists, in effect, of what I would do if I had another case, and in fact I've consulted on other cases, one currently in Manitoba, wrongful conviction cases, and on the check list is go to previous counsel early and get everything as fast as possible from previous counsel, from



1 trial counsel.

2 Q And so in this case, based on your experience, are
3 you saying if you were doing it over again, you
4 would have talked to Mr. Tallis sooner than you
5 did?

6 A Yes.

7 Q Much sooner; is that fair? I don't want to --

8 A Yes.

9 Q And can you tell us why?

10 A Well, even if trial counsel, as I think
11 Mr. Tallis' view was when we first contacted him
12 was that he didn't have a particularly good
13 recollection, I think that it just makes sense to
14 find out from previous trial counsel, you know,
15 and to probe a little bit, and if necessary to
16 provide the means by which memory might be
17 refreshed.

18 Q And was one of the reasons, and I thought I heard
19 your evidence earlier, one of the reasons that you
20 maybe didn't approach Mr. Tallis until much later
21 would be, I think your words were that the
22 Milgaard family was suspicious, I can't remember
23 the words you used, I'm sorry, but concerned about
24 others and they wanted to keep you sterile or away
25 from them. Can you just expand upon that a bit,



1 please?

2 A Well, to some degree you have to respect your
3 client's, or to a large degree you have to respect
4 your client's instructions, and justifiably the
5 Milgaards were very, very concerned and paranoid,
6 if I can put it in extreme terms, about the actors
7 in the system that put their -- put David in
8 prison, and it took, you know -- I'm not sure that
9 that paranoia is gone to this day.

10 Q And so would that paranoia about the actors in the
11 system been a factor in your decision not to go to
12 Mr. Tallis sooner than you did?

13 A Possibly, yes.

14 Q And again, would that be a reluctance to -- maybe
15 you can explain, what would be the downside of
16 going to him, or was there a downside of going to
17 him right away, and I appreciate your comment, Mr.
18 Asper, about now in hindsight how you would do it,
19 but getting back to trying to find out at the time
20 what were the factors that caused you not to go
21 see him, are you able to --

22 A You know, I think, to be perfectly honest, I think
23 the answer is really simply that I was the
24 articling student and, you know, just in
25 discussions with Mr. Wolch who would have had the



1 standing to make the phone call, I doubt that
2 Justice Tallis would have taken my call even, or
3 he may have responded to my letter, I think that
4 it was just a decision taken at a level beyond me.

5 Q If we can go back --

6 A I don't want to -- I don't want to, you know, fob
7 it off, but I just don't think I would have been a
8 person at that stage to make that kind of call.

9 Q And is it your evidence that it was a decision
10 made by someone else then as far as the timing and
11 as to whether or not Mr. Tallis should be called?

12 A In the end, yes.

13 Q If we can go through, and again I just want to, if
14 we can try and walk through, Mr. Asper, and I
15 would like to get from you your recollection of
16 what David Milgaard told you about the facts of
17 the case, if I can call it that, and let me try
18 and do it this way. I'm not too concerned about
19 whether it was in April of '86 or December of '86,
20 so just generally and at some point early on, and
21 if things changed over time from him if you could
22 tell us, and maybe let's just walk through, and
23 we'll maybe walk through based on what Mr. Tallis
24 has testified as to what he was told, and I'm
25 simply looking for your recollection as to whether



1 David would have told you this or not.

2 The first one would be the
3 elevator break-in on the way from Regina to
4 Saskatoon. Do you have any recollection of what
5 David might have told you for that, and if there's
6 a document, Mr. Asper, that would assist you, I
7 can certainly bring it up for you.

8 A There is, and I was -- again, trying to sift 1986
9 from 1987 from '88 from '89 and '90 and so on is a
10 little bit difficult, so I actually referred to --

11 Q His affidavit?

12 A Yes.

13 Q 301675, if you can bring that up.

14 A And that captured at the time in 19 -- I think it
15 was November, 1986.

16 Q Yes.

17 A It was my birthday, it was my birthday in 1986.

18 Q You will be done before your birthday this year.

19 A Sorry, it was the 25th. I'm the 26th.

20 Q If we can go to the next page.

21 A This captures what he was telling me at the time.

22 Q So this would have been, and again this would be
23 about six or seven months in, would this be the
24 culmination of a number of interviews where you
25 would have got his story down; is that fair?



1 A Yes, yes.

2 Q Now, in going through this, there's no mention
3 made of things and that may be because either you
4 didn't feel they were important enough to put them
5 in the affidavit or maybe he didn't tell you, so,
6 for example, on the elevator break-in, I'm not
7 sure, maybe that is --

8 A I think he always, my recollection was that he
9 never denied doing that.

10 Q Okay. And then what about having a knife on him,
11 do you remember discussions with him about whether
12 or not he had a knife? Mr. Tallis gave evidence
13 that David told him he had a soft-bladed or
14 flexible-blade knife, it was not a paring knife,
15 it was not a bone-handled hunting knife, but it
16 was some other type of knife. What do you recall
17 about that?

18 A I don't recall specifically, and I can't recall if
19 it's in the affidavit or not.

20 Q No.

21 A My recollection is that he said that when they
22 came out of the grain elevator that he had a
23 flashlight.

24 Q Right.

25 A That they had found a flashlight, but I don't



1 recall -- other than after the trip, after --
2 sorry, after Saskatoon them getting some sort of a
3 paring knife to cut up fruit and cheese.

4 Q I think in Rosetown.

5 A Fruit and cheese.

6 Q So just again between Regina and Saskatoon, your
7 recollection is that he never told you that he had
8 a knife?

9 A I don't recall that, no.

10 Q Now, as far as when they arrived in Saskatoon, I
11 don't think there was any dispute that they were
12 driving around somewhere in Saskatoon the morning
13 of the murder; is that --

14 A That's correct.

15 Q And do you have any recollection of trying to
16 pinpoint with him where that was and whether it
17 was anywhere near where Gail Miller's body was
18 found?

19 A Yes. He -- my recollection was that he was
20 looking for a church as his landmark to Shorty
21 Cadrain's home, that they had gotten lost. They
22 were getting -- as I said before, the tires were
23 bald and they were having trouble navigating and
24 the car was spinning its wheels all over the
25 place. I think he talked about being in the



1 downtown area, I recall him talking about being at
2 or near the Sears store I think, and he spoke
3 about the Danchuks, he spoke about the motel, the
4 Trav-a-leer.

5 Q Do you recall anything about stopping, and I think
6 his words to Mr. Tallis were an old woman for
7 directions?

8 A Sorry, yes, yes, yes, he never denied that, he
9 said that they had stopped an older woman and
10 asked her for directions.

11 Q Now, in -- what Mr. Tallis testified is that David
12 had told him in preparations I think for the
13 preliminary hearing and trial that when they
14 stopped this woman for directions, that he thought
15 about, I think his words were robbing or stealing
16 her purse or something like that, and I think
17 again, if I recall correctly, David Milgaard also
18 admitted that in a conversation with Gary Young
19 and Peter Carlyle-Gordge and his mother in 1980 or
20 '81. Do you have any recollection of talking to
21 David about that and getting his recollection of
22 that?

23 A My recollection is that he said that it was not
24 impossible that they considered, I think he would
25 use the words rolling someone at some point, some



1 point along the trip he said that.

2 Q Now, we've heard various evidence about their
3 vehicle getting stuck and I don't think there was
4 any dispute that they got stuck at the Danchuks'
5 after they went to the Trav-a-leer Motel and at
6 trial the evidence of Wilson and John was that
7 after they stopped the woman for directions, at
8 some point after their vehicle got stuck and that
9 David and Ron got out of the car and they both
10 left to look for help, Ron Wilson's evidence at
11 trial was 10 to 15 minutes or thereabouts. What
12 Mr. Tallis has testified both I think at the
13 Supreme Court and here is that David acknowledged
14 that after they stopped the woman for directions
15 the car got stuck, that he and Mr. Wilson got out
16 and that he went, I think his words were, for a
17 short while and then came back, certainly not 10
18 or 15 minutes. I don't think Mr. Tallis -- I
19 stand to be corrected, but I think it would be in
20 the neighbourhood of a couple of minutes, but a
21 short while, and then returned to the car, and
22 what he told Mr. Tallis is that he didn't do
23 anything while he was gone. Do you have a
24 recollection of what David Milgaard would have
25 told you about getting stuck after they stopped



1 the woman for directions and before the Danchuks'
2 and the Trav-a-leer?

3 A My recollection is that he said that they were --
4 as I say, they were getting stuck constantly
5 because the tires were bald, that they actually
6 did get stuck in a rut I believe. They got out,
7 they looked at the situation, it was awfully cold,
8 they were not dressed for it and they got back in
9 the car and rocked it and moved on.

10 Q Okay. But as far as he and Ron Wilson leaving the
11 car for a short while to look for help and coming
12 back, do you recall whether he mentioned anything
13 about that to you?

14 A I think that was what he was referring to.

15 Q Okay.

16 A That's my recollection of what he told me. Now,
17 when he told me that --

18 Q And we heard from Mr. Tallis that what David
19 Milgaard told him is that when he got back to the
20 car, that two people came along and helped push
21 them out. Do you have any memory of David telling
22 you that?

23 A I don't have any memory of it. I'm clouded
24 though, because I remember, I think it was
25 Mr. Tallis or someone actually went out and looked



1 for the, tried to find the two people.

2 Q I think what the evidence we heard --

3 A I don't want to confuse my memory with that
4 memory.

5 Q I think, if I may assist, Mr. Asper, the evidence
6 of Ron Wilson was that two men in their 40s, and
7 he described them to the police, and a '67 or '68
8 cream-coloured Dodge or Chrysler was how he
9 described them, and the police actually went out
10 and looked for them and they were never located,
11 that was his evidence at trial, that this was who
12 pushed them out, and again I think what Mr. Tallis
13 has said is yes, that David Milgaard more or less
14 confirmed that that's what happened. Does that --

15 A Could be. I don't remember.

16 Q And going into the Trav-a-leer to get a map and
17 getting stuck at the Danchuks', Mr. Milgaard
18 related that to you?

19 A Yes.

20 Q Tell us about the Danchuks, you mentioned that
21 before. What was your view of the importance of
22 the evidence of the Danchuks back when you first
23 looked at this?

24 A Well, there are brackets around the key pieces of
25 evidence in terms of implicating David. The



1 brackets are Mr., I believe, Rasmussen from the
2 motel and the Danchuks, two very credible people
3 who observed David and observed nothing untoward,
4 none of the things that were later claimed by his
5 "friends" to have been the case with David, both
6 physically on his clothes and in terms of his
7 demeanour.

8 The Danchuks I thought were
9 particularly important because there was a salt of
10 the earth couple who would have encountered David,
11 according to the Crown's theory, moments after he
12 had just raped and murdered Gail Miller, and not
13 long before Cadrain and the others claimed to have
14 started to see blood on his clothes. They, the
15 Danchuks, had the opportunity to witness David's
16 demeanour and his clothes. There was no blood and
17 his demeanour was not consistent -- his demeanour
18 was not unusual and by inference not consistent
19 with someone who would have just committed a rape
20 and a murder.

21 Q Now, they both, you would have been aware they
22 both testified at trial, they both said basically
23 that and that that was argued by Mr. Tallis to the
24 jury and in fact I believe that the judge made
25 some direction in a general way.



1 A Yes.

2 Q You would have been aware of that?

3 A Yes.

4 Q Again, is that something that -- yesterday you
5 said when you first looked at the matter you
6 concluded that the jury shouldn't have convicted
7 him; is that right?

8 A Yes.

9 Q And would the Danchuks' evidence be something that
10 stands out as, just as you've described it, it
11 didn't fit with him having committed the crime?

12 A Yes.

13 Q But notwithstanding that, you were aware that the
14 jury convicted him nonetheless?

15 A Yes.

16 Q Now, there was also evidence that after they
17 arrived at the Cadrain house, that he took the car
18 for a drive around the block a couple of times, or
19 down the alley, and it stalled, and I think what
20 Mr. Tallis told us is that, and in fact some
21 police officers, that that was viewed as being
22 suspicious, that a vehicle getting stuck, having
23 their vehicle been stuck at least twice, perhaps
24 more that morning, 40 below, that he would take
25 the car out for a drive, and again coupled with



1 the evidence that Gail Miller's wallet was found
2 on that street, I think it was viewed by some as
3 suspicious, damaging. Did you have -- what did
4 David Milgaard tell you about that incident?

5 A David told me that he loved to drive cars and that
6 this was an opportunity for him to go and just
7 take a spin in the car, and I questioned him, and
8 I remember discussing this with him, and it then
9 occurred to me that the inference that taking the
10 car was the time when he was able to dispose of,
11 or allegedly dispose of articles belonging to Gail
12 Miller, implies that he had brought the articles
13 with him into the car before the Danchuks' and
14 taken those articles with him from the Danchuks'
15 to Cadraains', out of sight obviously of the others
16 in the car, and then go into Cadraains', go out of
17 Cadraains', take the car and go and throw all this
18 stuff around, which didn't seem plausible to me.

19 Q I think the one officer, or somebody, or maybe it
20 was even Mr. Tallis, said that it was a wallet
21 that was the article.

22 A Well, but there was a series of articles strewn
23 from where Gail Miller's body had been found down
24 toward the Cadrain house.

25 Q So again, when you talked to Mr. Milgaard about



1 the driving, did you have concerns when you looked
2 at that, and again back to my earlier question,
3 when you looked at what happened and said okay,
4 what is damaging, what's incriminating, how do we
5 attack it, what if anything did you think about
6 the driving around incident, was that something
7 that you viewed as being maybe suspicious?

8 A Oh, it certainly looked suspicious, yes.

9 Q But your client told you it happened?

10 A Yes, he said -- I don't recall him ever denying
11 that.

12 Q And I don't recall seeing that anywhere.

13 A As I say, I mean, he was quite candid, and if you
14 searched my own records you might find that people
15 do like to drive and take cars into back lanes
16 and --

17 Q The next item would be, and we've touched on this
18 again, we'll just quickly go over it, but the
19 compact, and I've already told you, and I think
20 you are aware of Mr. Tallis' evidence, and at any
21 time do you recall, did David Milgaard tell you
22 that he either remembered doing that or he may
23 have done it or couldn't deny it or was his
24 position always it didn't happen?

25 A I think his position was always it didn't happen.



1 Q Now, we also heard from Mr. Tallis about his
2 statements that Mr. Milgaard gave to the police,
3 and I don't think we need to bring them up, at
4 least not at this moment, but would you have been
5 aware that he gave, was interviewed by the police
6 initially and gave a written statement I think on
7 March 3rd, '69? You are familiar with that
8 generally?

9 A Yes.

10 Q And I think we heard from some police officers and
11 from Mr. Tallis that in that statement some might
12 view it as being, having some suspicious answers,
13 if I can put it that way, or maybe being a bit --

14 A I've seen the editorialising, I believe it's Mr.
15 Karst --

16 Q Yes.

17 A -- who says that his demeanour isn't inappropriate
18 for somebody who is facing a murder charge?

19 Q Yeah, and I was think more of what's written down,
20 and let me give you one example that we've heard
21 some evidence about, 'Were you in Saskatoon
22 earlier this year? I don't know. Time means
23 nothing,' things like that, and I think when I put
24 these to Mr. Tallis I cautioned him and said, you
25 know, that there might be valid explanations as to



1 why he answered the way he did which would be
2 inconsistent with having committed a crime, but
3 just on the face of the document, did you have
4 concerns when you looked at this, that the
5 statement that he gave to the police might be
6 viewed by some as being suspicious because of the
7 way he answered, even though he may have had good
8 reasons for answering that way?

9 A I'm not sure that I would see it so much as
10 suspicious as just a cocky kid.

11 Q Okay. But put it this way, an issue that might
12 have to be dealt with?

13 A I might -- and, sorry, and with a cocky kid I
14 might well ask further questions.

15 Q Okay. But as far as -- and you are trying to
16 re-open the case in '86 and onwards. Did the
17 statements that David Milgaard had given to the
18 police cause you any concerns that you had, well,
19 we better try and explain away anything in there,
20 or were you comfortable with that, did you see
21 them as in any way being a negative or an
22 impediment?

23 A No, no.

24 Q And again, the motel room we've talked about, I
25 won't go back to that. So again, after you've



1 talked to David Milgaard, and we'll go to this
2 November, '86 affidavit and your subsequent brief,
3 that would have been the underpinnings of your
4 efforts, is that fair, that here are the facts
5 that my client has told me or that we've put
6 together and on the basis of this we're going to
7 go and challenge this conviction with the
8 authorities?

9 A Well, it was more than that, it was here are the
10 facts that -- here's David Milgaard's position and
11 his formal sworn denial of guilt, here's Debbie
12 Hall, here's -- and what we tried to do in that
13 draft, which, you know, wasn't filed, was to take
14 apart the evidence at trial, and there's an
15 extensive analysis of our thinking in 1986 as to
16 the state of the facts and our view as to the
17 unreasonableness of the verdict.

18 Q Now, those facts, and I think we've gone through
19 at least the key ones that we talked about, as you
20 move forward through until 1992 do you recall
21 whether your position changed or your
22 understanding of those facts changed at all or was
23 that a constant?

24 A Well, I suppose to be fair, assuming that the
25 Debbie Hall statement to Eugene Williams is her



1 recollection, is an accurate recollection, then
2 obviously that changed -- that changed her
3 position from 1986 and I guess, you know, David
4 started to I think acknowledge that okay, well,
5 maybe something did happen that I don't remember,
6 so that part of it I think had to be modified, but
7 as for the rest, I don't think it changed.

8 Q Umm --

9 A I mean, there were nu -- there were nuances, and
10 it's interesting in reviewing the material, the
11 Cadrain statement and the Cadrain "recantation",
12 which really wasn't, speaks of the interrogation
13 of the police in Saskatoon and by the police in
14 Saskatoon and I think our position in '86 was that
15 that first interrogation actually occurred in
16 Regina, and so he -- when he gave the statement in
17 '90 or '91 talking about, I think he used the word
18 torture --

19 Q Mental hell and torture, yes.

20 A -- that may well have been what happened to him in
21 Regina where he denied having anything to do with
22 the crime or having seen anything to do with the
23 crime, but -- so our positions remained basically
24 the same, but there were nuances that could have
25 fit a changing set of facts.



1 Q And did you have any concerns, again let's talk
2 about the end of '86, did you have concerns that
3 sort of the version of events that you had from
4 David, I think you have already testified that,
5 you know, you had some concerns based upon what he
6 had been through, that his memory may not have
7 been as good as it otherwise might be, did you
8 have concerns about sort of the factual
9 underpinnings of what you were going forward with
10 or were you comfortable that lookit, here are the
11 facts, let's march forward?

12 A I was comfortable certainly, yes.

13 Q And would those have been important as far as
14 developing your strategy and how you are going to
15 attack the conviction, sort of the base line
16 here's what happened?

17 A Oh, without a doubt, if I hadn't been satisfied on
18 the face of the trial itself, that this was just
19 completely unreasonable, that was the basic fuel.

20 Q And so again, for example, let's take the compact
21 just for an example, I think at that time your
22 client was telling you that it didn't happen and
23 we've now heard some evidence from Mr. Tallis that
24 David told him it did happen, and if we assume for
25 the moment that that's true, would that be a fact



1 that might have, had you known it back in 1986 --
2 let's say David would have said to you, yes, you
3 know what, I did that, and I don't know why I did
4 it, but it happened, I don't know where it came
5 from, would that have changed your approach in how
6 you attacked the conviction?

7 A I don't think so. I -- the, Mr. Hodson, the key
8 facts, the core of the case was around where --
9 you know, the car getting stuck, them getting out
10 of the car, being separated, the opportunity, the
11 window of opportunity, and the alleged admissions,
12 and the weapon and the alleged admission "I fixed"
13 or whatever, that was the core.

14 And that's, as I said this
15 morning, Mr. Commissioner, that's what I referred
16 to as the blossom of Mr. Roberts' May 24th
17 interrogation.

18 Q If we could just go back, let me give you another
19 example. What if, in 1986, you had been advised
20 by either Mr. Milgaard or Mr. Tallis that says
21 "lookit, on this motel room incident, that
22 something did happen, there was a stabbing of the
23 pillow, there were words spoken that, if true,
24 would be an admission, and that people perceived
25 it differently, some as a joke, some not as a



1 joke, but something happened"; would that have
2 changed how you would have dealt with that issue
3 in your re-opening efforts?

4 A Well, yes, it wouldn't -- I assume, then, we
5 wouldn't have had Debbie Hall's affidavit saying
6 what she did in '86, which was one of the bases
7 for the application.

8 Q And so, and I think what you are referring to, and
9 we'll get to this, I think her affidavit was --
10 with you was November 23rd, '86, it was filed
11 December 28th, '88, and on November 7th, 1989 I
12 think Mr. Williams examined her under oath when
13 she then added the words or attributed the words
14 to Mr. Milgaard, similar words used by Mr. Lapchuk
15 and Mr. Melnyk, is that -- that's what you are
16 referring to?

17 A No, no, no, no. Be very careful. There is a very
18 important distinction --

19 Q Okay.

20 A -- and it's not a distinction without a
21 difference. The -- I would argue -- and I don't
22 want to be advocate here, I slip into it -- but
23 Melnik and Lapchuk first of all describe,
24 physically, two different things, but they both
25 attribute words to Mr. Milgaard that coincide, I



1 think my recollection is, with the precise number
2 of knife wounds inflicted upon the deceased,
3 whereas Deborah Hall uses completely different
4 language. Now that's not to say that something
5 didn't happen, but even in her November statement
6 to Mr. Williams, at best you've got, now, three
7 different stories.

8 Q If we go back and say "if an incident happened
9 where he grabbed a pillow, made a stabbing motion,
10 and uttered words in a room of five people, some
11 or all of whom were under the influence of drugs
12 and were asked to recollect what was said and what
13 was done, would you expect to get identical
14 stories"; that's what's been put?

15 A I wouldn't expect identical stories. I think you
16 have to ask how it's probative.

17 Q And so again, just getting back to if in 1986 --
18 and we'll go through the affidavit and the other
19 evidence a bit later -- but you had brought up the
20 fact that in 1986 you didn't know, I think you are
21 saying you didn't know what Deborah Hall was going
22 to say to Mr. Williams three years later; is that
23 fair?

24 A Right.

25 Q And that if she would have told Mr. Williams, told



1 you what she told Mr. Williams about what she said
2 David Milgaard said in the room, that might have
3 changed your view in how you used that evidence?

4 A Oh yes.

5 Q And it might have, in fact, changed your approach
6 on the motel room incident; is that fair?

7 A Potentially, yes.

8 Q And so one scenario is to say the incident -- and
9 when I describe "the incident" I mean two things
10 -- well, one thing; the actions of stabbing or
11 punching or doing something to a pillow and
12 uttering words acknowledging involvement in a
13 murder, whether it's "I stabbed her" or whatever,
14 so that incident; and I think in '86 would you
15 agree your position was "that incident didn't
16 happen and Melnyk and Lapchuk were lying" --

17 A Right.

18 Q -- "when they said it did happen"?

19 A Right.

20 Q Is that a fair summary?

21 A Right.

22 Q And then, later, did the position change to -- a
23 bit to "well if it did happen, or if an incident
24 did happen, it would have been a joke and it
25 should have been taken as a joke"?



1 A I think --

2 Q Is that a fair --

3 A -- that's a fair evolution.

4 Q Sure.

5 A Now the issue of the Melnyk lie, it's interesting,
6 I understand that he presented righteously that he
7 hadn't lied at trial. The attack, I think our
8 position would have been on that that you either
9 put all of the evidence in or you put none of it
10 in on the motel room, and either you put in
11 everybody with different stories and everybody
12 high on drugs and describing different things and
13 using different words, or you put none of it in.
14 Because the effect was, at trial, that these two
15 people had, I think, had basically seen the same
16 thing.

17 Q Let me just pick up on that. We --

18 A And I -- sorry --

19 Q Okay.

20 A And as I review, and of course with the benefit of
21 hindsight, Melnyk's evidence at trial was that the
22 robbery charges were going to get dropped because
23 he had an alibi, he testified under oath that he
24 had an alibi, and of course we now know that that
25 was a lie because he pled guilty.



1 Q Actually, I think he was found guilty.

2 A Or found guilty.

3 Q I think his evidence before this Inquiry was that,
4 although he was found guilty, he was wrongfully
5 convicted and that he wasn't involved in that
6 incident. But again --

7 A I'm busy.

8 Q Yes.

9 A I'm not available.

10 Q But just back on the motel room incident, what Mr.
11 Tallis told us -- and this Commission has heard
12 from everybody who was in that room including Mr.
13 Lapchuk by way of tape and I think it's fair to
14 characterize that everybody saw an incident where
15 David Milgaard grabbed a pillow and struck it in
16 some fashion and uttered words, and I think some
17 would take the view that Deborah Hall's version of
18 what he said might have been the most damning
19 compared to Melnyk and Lapchuk -- and what Mr.
20 Tallis told us is that, based on what Ute Frank
21 told him at the time and what Deborah Hall said to
22 Eugene Williams in the Supreme Court of Canada, he
23 would not have wanted to call them as witnesses at
24 trial because they would have been damaging to Mr.
25 Milgaard. And I'm just wondering, I -- your



1 earlier comment --

2 A Oh, look, from Mr. Milgaard's perspective it's
3 best that none of it goes in.

4 Q Okay.

5 A You are playing with, I mean clearly counsel is
6 playing with fire with that issue.

7 Q So let's just go back and talk about the facts.
8 And I think, Mr. Asper, you have had a chance
9 to -- I think you have -- to read or review the
10 substance of Mr. Tallis' evidence, both at the
11 Supreme Court and before this Inquiry, about
12 what -- what David told him about the events of
13 the morning; and in particular that he had a
14 knife, a flexible-blade knife; that they saw a
15 woman for directions that was in the vicinity of
16 where Gail Miller's body was found, now he
17 described "vicinity" as being between 20th and
18 22nd, going up and down the avenues, couldn't say
19 a block or ten blocks, but somewhere I think his
20 evidence was that if David testified he couldn't
21 deny that it would be near the funeral home, he
22 couldn't say it was -- that they stopped a woman
23 for directions with the thought of robbing her or
24 stealing her purse; and then the vehicle got stuck
25 not a half a block after but I think he said



1 shortly after; and that David left the vehicle for
2 a short while; and that they acknowledged the
3 driving around at Cadrain's house; and that on the
4 way out of Saskatoon he threw a compact; and that,
5 with respect to the motel room incident, what he
6 told Mr. Tallis is "lookit, I was there in the
7 room, I can't recall my actions or my words, but I
8 can't deny it"; if you would have had that
9 information in 1986 -- and, again, I appreciate
10 we're asking you to go back in retrospect -- but
11 can you tell us, might that have influenced the
12 positions you might have taken in the re-opening?

13 A No.

14 Q And why not?

15 A I think, as we discussed either this morning or
16 yesterday, there's just -- there -- none of that
17 amounts to murder.

18 Q No, and I'm not --

19 A None of -- and if you take -- if somebody admits
20 to all of that and says "but I didn't do it" --

21 Q Yes, and I should have added --

22 A -- and you look at them incredulously and you say
23 "are you out of your mind", and they steadfastly
24 say "I didn't do it" and admit to all of what you
25 just said, --



1 Q Yes?

2 A -- let's assume I know that in 1986, --

3 Q Yes?

4 A -- and I've got 17 years in and I've not wavered
5 once and I maintained at the time that I was
6 arrested that I didn't do it, I think as a lawyer
7 you certainly have a duty to listen to "I didn't
8 do it".

9 Q Oh --

10 A Notwithstanding that there's all those trappings
11 of "maybe you did do it".

12 Q No, let me rephrase the question, I think you may
13 have misunderstood.

14 And in addition, obviously, that
15 he tells you he had nothing to do with the murder,
16 but in your role as counsel for Mr. Milgaard at
17 the time in '86, with the belief that he is
18 innocent, and to try and challenge his conviction,
19 but with those facts as Mr. Tallis outlined that
20 he was given back in 1969, I'm trying to get you
21 to think what would you have done differently in
22 the re-opening?

23 A Oh.

24 Q I'm not suggesting that you just say "oh, I'm not
25 going to do anything".



1 A No.

2 Q With those facts, how would you -- would you have
3 changed anything in how you attacked the
4 conviction, keeping in mind that you believed him
5 to be innocent and you believed him to be
6 wrongfully convicted? Do you understand where I'm
7 going with that?

8 A Yes.

9 Q Okay.

10 A And you open a pretty big door on that question
11 because I would do a lot different.

12 Q What would you do?

13 A I think, to be honest and to bare a little bit of
14 the soul here, I think some of the things we
15 didn't do I feel guilt about. It would have been
16 helpful to hear what Mr. Tallis had said, all the
17 things you've just recited, but I don't think that
18 would have changed -- sorry -- I think knowing
19 that doesn't affect what I think, in hindsight, we
20 ought to have done.

21 I fear that the ambiguity in
22 which we operated cost David some time in prison
23 because we didn't focus our resources. When we
24 said "in for a penny, in for a pound", and if you
25 are seeking out truth and liberty in David's case,



1 you've got to mean it. I would have gone to, I
2 would have hired, sought out some professional
3 investigation, not waited for Justice, gone to
4 Wilson, John, and Cadrain. I don't know that
5 there was anything to get there.

6 We might have brought a fresh
7 set of eyes to the file, and the fresh set of eyes
8 might have seen some things that we were
9 overlooking, even in some of the Peter
10 Carlyle-Gordge material relating to Larry Fisher.

11 Mr. Commissioner, I remain
12 mortified to this day at my file of clippings that
13 I maintained. The first clipping is the warning
14 given to the women in Saskatoon, and then maybe
15 one or two clippings into the file is another
16 headline saying *Killer possible rapist*, and I feel
17 very guilty that we didn't pursue that.

18 There is a lot of things I'd do
19 differently, Mr. Hodson, and knowing what Mr.
20 Tallis recited at this hearing doesn't make me
21 change what I would do different.

22 Q I'm sorry, does or?

23 A Does not.

24 Q Does not. And again, as far as specifics, let's
25 just talk about the secretor issue. We did not --



1 I mean you are aware of Mr. Tallis' evidence about
2 his approach to the secretor issue, and the
3 exculpatory nature, and what he put before the
4 jury, and I think you have had a chance to read
5 his address to the jury as well; have you?

6 A Yes, yes.

7 Q And, again, if you would have known that would
8 that have changed anything you would have done
9 with that issue?

10 A Umm, my opinion on that issue is no, I don't think
11 we could have done anything different.

12 Q Let me ask it this way. With the information you
13 had from Mr. Tallis are you saying that you might
14 have focused your efforts on different aspects of
15 the case, with more information?

16 A We would have had to, yes.

17 Q And just back on the clippings you had talked
18 about -- and I think you had, and you had pointed
19 these out to me earlier, I think they are 039527,
20 and, again, I think this is one that -- this is
21 the article you were referring to?

22 A Yes.

23 Q And, again, is this something, I think you said
24 when you went back and looked at your file, would
25 have been something you -- is this something you



1 would have got back in '86 in the set of documents
2 you received?

3 A Yes.

4 Q And again, we'll come back to this, I think the
5 other one was 039068, I think these were the two
6 that you had identified, *Killer possible rapist*.
7 And I take it at the time, Mr. Asper, that they
8 didn't twig anything with you or cause you to
9 follow up on or anything of that nature; is that
10 fair?

11 A That's true.

12 Q Yeah. If you go back to -- and, again, I
13 appreciate we're doing this with hindsight -- back
14 on the newness issue again. At what point were
15 you looking for -- was it sort of early on that "I
16 have, I've got to find something new"? I think
17 you had told us that lookit, when you look at it
18 you reached the conclusion that the jury should
19 have acquitted based on what's there?

20 A Yes.

21 Q And was it fairly early on that you had -- and I
22 hate to use the word again -- but I think "hook"
23 was what you said, something that gets you in the
24 door with Justice to say "okay, this is now
25 something new, we're in the door, now look at



1 everything else"; is that a fair way to put it?

2 A Yes.

3 Q And I think when we go to your brief a bit later,
4 I think in late '86 or early '87 you would have
5 prepared a fairly lengthy brief reviewing
6 primarily the evidence at trial; is that right?

7 A Yes.

8 Q And trying to say "look, based on this, he
9 shouldn't have been convicted"?

10 A Well I -- and we didn't know what to file, and so
11 in the -- what we, physically, we actually had to
12 file, and so it evolved, and this was the first
13 crack at it to try to lay the foundation for the
14 Deborah Hall affidavit and the Ferris report.

15 Q Just on the 617 and 690, was there anything -- and
16 I don't believe there was at the time -- any
17 regulations or guidelines or anything in writing
18 published by anybody that said "here's what the
19 test is, here's what materials ought to be filed",
20 things of that nature?

21 A That's correct, there was nothing.

22 Q What did you understand -- and, again, if you want
23 to break it down over time periods, but let's say
24 up until December of 1988 when you filed your
25 first application; what did you understand the



1 test to be, what is it you thought that you had to
2 establish with the Minister to get some relief or
3 to get something?

4 A Umm, I, to be honest, I don't think I had the
5 faintest idea. Umm, I don't know when the
6 "probably innocent" or "probably a miscarriage of
7 justice" language came into the whole discussion,
8 but it crept in. I just, you know, I -- look, I
9 suspect that, crude as it sounds, I was
10 functioning on the basis that there was some kind
11 of a smell test, you know, whether it's lurking
12 doubt or --

13 Q Air of reality?

14 A -- air or reality, or it just didn't smell right.

15 Q Okay. And, again, the "probably innocent" -- and
16 we see that in some later documents, I think in
17 the '90, in the 1990 -- was that -- and, again, I
18 think you said something new and something that
19 passed a smell test; is that a -- or some kind of
20 threshold as having some credibility?

21 A Well it was almost, I mean, I think we started to
22 function almost on the basis of a fresh evidence
23 test.

24 Q Okay. Let's go back to 162432.

25 A I'm not -- sorry -- and I'm not sure if --



1 Q Yes.

2 A -- the fresh evidence test has evolved since I was
3 last practicing law, but I think there were three
4 prongs to it, and I don't even remember what they
5 were.

6 Q I would help you but I'm in the same boat as you,
7 sir. This is June 5, 1986, and this is a letter
8 from you to Mr. Carlyle-Gordge, and just to sort
9 of go back a bit, we had gone through your meeting
10 with Mr. Milgaard, I think, was in April of '86,
11 Mr. Wolch wrote to Peter Carlyle-Gordge in March
12 and got a letter back, and it looks like you are
13 now writing to him direct and you say:

14 "I am assisting Mr. Wolch in this
15 endeavour and have began to wade through
16 the trial transcripts as well as the
17 interviews that you conducted with
18 several key witnesses. I am trying to
19 see Mr. Milgaard on a weekly basis as he
20 is now at Stony Mountain Institution and
21 hope that within the next few weeks I
22 will have a firm grasp of the whole
23 case."

24 And I want to just pause there, Mr. Asper, and
25 have you tell us about how -- how often -- tell



1 us about your role in staying in touch with David
2 Milgaard. It says here that you went to see him
3 on a weekly basis; can you tell us a bit about
4 that?

5 A Part of my duties as a student and as a soon-to-be
6 lawyer, I was about to be called to the bar there,
7 was to visit with clients at Stony Mountain
8 Penitentiary, which is just north of Winnipeg, and
9 to visit with and maintain contact with a
10 number -- many clients of the firm. And I used
11 that opportunity to get to know David, and I was
12 there, I -- looks like on a weekly basis, I'm not
13 surprised, and to build a relationship with him.
14 He was very anxious about his fate, he sometimes
15 let his hopes and expectations get out ahead of
16 the pace of the system and the process, and needed
17 to be calmed. He was often at odds with prison
18 authorities. He was trying to -- he, at the time
19 he was taking university courses, he was quite, I
20 wouldn't say argumentative, but he was -- he would
21 debate with his teachers constantly. He was
22 trying to form and had formed a support group for
23 lifers within the prison that was often at odds
24 with the institutional authorities, and I needed
25 to essentially manage him, and keep him focused



1 and on track. We were starting to formulate a bit
2 of a team by this point and I needed to keep him
3 focused and not, hopefully not in trouble, and as
4 I say, I wanted to build confidence with him and
5 get to know him.

6 Q And would it be fair to say that over the six
7 years you acted for him, that you did that, you
8 spent a fair bit of time with him and did get to
9 know him well?

10 A Yes.

11 Q Now I understand, at least from some of the
12 documents, that on occasion Mr. Milgaard fired you
13 and Mr. Wolch; is that --

14 A Many occasions.

15 Q And, again, we -- I think there is a few letters
16 in here that -- we may touch on one. Can you just
17 tell us just generally what, how that would come
18 about and what would happen?

19 A Umm, he'd have a -- he'd get mad and fire us.
20 He'd want something to have happened or he would
21 want something to have been done that either
22 wouldn't have been done or done to his
23 satisfaction, or wouldn't have resulted in the
24 result -- in the end that he was seeking, and he
25 would, he would fire us, fire -- he'd fire me. I



1 don't know how much he fired Hersh but I think I
2 got fired more.

3 Q And then I take it things would get patched up or
4 --

5 A Yes. Mrs. Milgaard would generally make peace.

6 Q And what about, you talked about a team, what role
7 did Joyce Milgaard play in the work that you were
8 doing, again, generally? We'll see when we go
9 through some specifics but tell us generally; what
10 role did she play?

11 A Well, I mean, Joyce drove it. There is no
12 question about it. Joyce provided the inspiration
13 and the focus and she had an encyclopaedic
14 knowledge of the material. As I say, we -- I --
15 from my perspective, and it's, you know, I was
16 trying to build a practice, I was trying to have a
17 career and I was busy doing other things, and
18 Joyce rightly wanted attention and she got it.
19 She kept us very focused.

20 Q And, again, I think we'll see when we get into
21 some later documents that you would spend a fair
22 bit of time dealing with her on strategy matters,
23 decisions, information, things of that nature?

24 A Yes, at -- yes, at -- and I can't remember at what
25 point, but there came a point where a serious



1 strategy had to be considered and put into place,
2 a media strategy, a -- it was a bit theatrical.

3 Q Yeah. And just on -- and, again, I don't want to
4 get too far into this, but as far as instructions,
5 if I can call it that, who; would David Milgaard
6 call the shots, would Joyce Milgaard call them, or
7 would it be a team approach? Can you give us some
8 insight as to who would make decisions? For
9 example, who made the decision to file the first
10 application, who made the decision what to put in
11 there, and who made the decisions as the file went
12 on; was it the client, was it Mrs. Milgaard, the
13 lawyers?

14 A Well the -- as I recall, it was Mr. Wolch who
15 actually got antsy about filing the first
16 application. I think I have seen a document where
17 he is berating me for not having it ready sooner.
18 So I -- on the major legal issues, the lawyering
19 issues, I think Hersh would call the shots, but we
20 were quite a collaborative group, but I -- but --
21 and I think we all deferred, on the big issues, to
22 Hersh.

23 Q And then on a --

24 A Later on it got a little crazy and sometimes Hersh
25 was behind, behind the pace of what was going on



1 and wasn't always happy about it, but --

2 Q Okay.

3 A -- you've got to take some chances I guess.

4 Q I'm sure you'll tell us more about that as we move
5 along. The -- as far as a client instruction,
6 would it be David or Joyce Milgaard or a bit of
7 both as far as, you know, if you needed to get a
8 call on something; how did that come about?

9 A Depended on the issue. We would get instructions
10 from both.

11 Q Now, again, let's just go back to
12 Mr. Carlyle-Gordge's letter. He says:

13 "At some point it may become necessary
14 for us to contact some of the witnesses
15 that you interviewed, notably Nicholl
16 John, Ron Wilson and Albert Cadrain.
17 Accordingly, I would very much
18 appreciate your providing me with the
19 addresses that you had for those people
20 so that if they have moved I at least
21 have a fairly recent starting point."

22 And so is it fair at this point, Mr. Asper, that
23 at least there was a thought about maybe
24 interviewing the three?

25 A No question about it, yes.



1 Q And then at some point it was decided not to; is
2 that a fair characterization?

3 A Yes. My recollection is that when we got the full
4 material from -- and I can't remember when -- but
5 we saw how, and I think it was Nichol and Ron had
6 reacted to the attempts to contact them, we
7 thought better of it. I think we came to the
8 conclusion that it wasn't worth it.

9 Q And what were your concerns, that it would be a
10 waste of time, or that something might --

11 A That they'd been spooked.

12 Q Okay.

13 A We needed them to, I mean bottom line is we needed
14 them to recant, if we were going to make good on
15 our case and our argument what we wanted from them
16 was to tell the truth and to recant their
17 evidence, or the incriminating part of their
18 evidence at least, and my recollection was that,
19 on the basis of the information that we had at the
20 time, they were apparently not in a mood to do
21 that.

22 Q And so how did you perceive or think that they
23 might end up recanting if you didn't go and get it
24 from them?

25 A Well I guess my view -- you know, I'm, I hope I'm



1 not reconstructing in my mind here -- but I think
2 you have to imagine how difficult it would be for
3 somebody to recant to the mother of a person you
4 had torpedoed.

5 Q Okay.

6 A And that's what was -- that -- that's what had
7 happened. And they had faced, they had come face
8 to face with, essentially, their victim. And so I
9 would have hoped that, again, an independent
10 Crown, an independent agency on our behalf, could
11 have made some progress with them.

12 Q And just at the end of Mr. Carlyle-Gordge's letter
13 he --

14 A And by that -- sorry -- by that I mean the
15 Department of Justice.

16 Q Yes.

17 A Okay.

18 Q And, here, it says:

19 "Also, Mr. Milgaard advises me that you
20 had formulated a theory which suggested
21 that it was physically impossible for
22 Mr. Milgaard to have committed the
23 murder."

24 And, again, would that be similar to what you had
25 gone through, Mr. Asper? And I think you reached



1 the conclusion, at least in your materials,
2 saying that it was physically impossible for him
3 to have committed the murder; is that --

4 A Based on the evidence presented at trial, yes.

5 Q Yes. And is there something different that Mr.
6 Carlyle-Gordge is referring to here than what you
7 --

8 A I don't think so. But I recall, I think he, it
9 was either he or Joyce sparked the idea of placing
10 everybody according to the Crown's theory and then
11 setting them in motion, but -- with a re-enactment
12 just to show what -- where everybody would be, and
13 I think that's what that paragraph refers to.

14 Q And, again, we have seen the video I think on a
15 couple of occasions that I think Mr. Rossmo or Dr.
16 Rossmo prepared in '91. Was that intended to
17 capture this idea that "lookit, this couldn't have
18 happened how the evidence came out"; is that --

19 A Well there were -- yes, there were -- I had done
20 this with a -- and I, the tape is gone, I don't
21 know what happened to it -- but I had done this
22 with my own little video, and I believe that Joyce
23 had tried with a film to actually try to do it
24 with relatives, but we didn't have the video
25 capacity that Mr. Rossmo ultimately employed.



1 Q If we could go to 162430, please. And this is,
2 this says '89, but I think that's Robert Bruce
3 just initialing that he read it. I think this is
4 June 18th of '86 because it responds to your June
5 letter of '86; is that correct, are you able
6 to --

7 A I don't know.

8 Q I think --

9 A That's my handwriting, though, on the top, "Gord
10 Stewart, Robin Taylor".

11 Q Right. And so, again, I think if we read the
12 letter it looks as though it's -- and I think Mr.
13 Carlyle-Gordge may have in fact told us that, but
14 again he is responding and talks about the
15 addresses for Wilson, John, and Cadrain, and then:

16 "The Danchuks, fairly critical outsiders
17 who saw David ...",

18 etcetera. And then I think, remember in your
19 letter you asked him to give you the theory about
20 the impossibility -- hang on a sec', here, we're
21 having a bit of a -- do you have a preference on
22 colour, Mr. Asper, or --

23 A Blue.

24 Q Blue. Used to be red?

25 A Blue.



1 Q "I can't go into a synopsis --"

2 A Not green.

3 Q "-- of why David is unlikely to have
4 committed the murder here, except to say
5 that a careful study of the transcripts,
6 timing, distances, temperatures, etc.
7 all make it unlikely he did it. Time is
8 critical: The church caretaker saw the
9 likely murder at 7.10am in the
10 headlights of a car parked at the murder
11 spot."

12 And then goes on to talk about the clothing. We
13 haven't talked about that yet, Gail Miller's
14 clothing. Tell us what, sort of initially when
15 you looked at that, what significance did you put
16 on that, the fact that when Gail Miller's body
17 was found that the, and I don't think there's any
18 dispute on this, that the nurse's uniform was
19 pulled off, that the stab marks were through the
20 coat but not through the dress?

21 A I can't remember whether I was prompted by
22 something or whether I thought it on my own, but
23 there was snow in Gail Miller's clenched fists and
24 that made me believe that with the dress down but
25 the coat on, that she had fought and fled and that



1 it was an unusual set of circumstances that it was
2 tough to explain. I still can't explain it.

3 Q Then if we can go to the next page, Mr.
4 Carlyle-Gordge says:

5 "It's especially revealing (of the
6 massive perjury in this case) to compare
7 the preliminary hearing transcript with
8 the trial transcript and then with the
9 later interviews."

10 Let me just pause here for the interviews, and I
11 think from what we have in the records, and I
12 think what Mr. Carlyle-Gordge provided and
13 testified, that he had interviewed, prior to your
14 involvement in 1986, he had interviewed and I
15 think tape recorded or made notes, but usually
16 tape recorded interviews with Albert Cadrain,
17 Dennis Cadrain and Mrs. Cadrain, the mother. Do
18 you recall being generally aware and looking at
19 his interviews of those people?

20 A Yes.

21 Q And as well there were two interviews of Ron
22 Wilson conducted by Joyce Milgaard by phone in
23 1981 or '80. Do you remember those?

24 A Yes.

25 Q And Nichol John I think was interviewed by Tony



1 Merchant and Joyce Milgaard in 1980 or '81. Do
2 you recall being aware of that or --

3 A Yes, I was aware of it.

4 Q And then I think there was a phone call between
5 Joyce Milgaard and George Lapchuk in the early
6 '80s. Do you remember having looked at that? Is
7 that something, if it was in the stuff he gave
8 you, that you likely would have looked at?

9 A Yes, I think I saw that.

10 Q And then as well Peter Carlyle-Gordge interviewed
11 the prosecutor Mr. Caldwell on two occasions, we
12 have two partial transcripts here, but would you
13 have been aware that Mr. Carlyle-Gordge had
14 interviewed Mr. Caldwell on a couple of occasions
15 in 1983?

16 A Oh, yes.

17 Q And would you have been aware that he was given an
18 opportunity to look at Mr. Caldwell's file?

19 A Yes.

20 Q Did you ever ask Mr. --

21 A I'm sorry, I'm not sure we thought that it was the
22 whole file, but some of his file anyway.

23 Q Some part of his file?

24 A Yeah.

25 Q Did you ever consider asking Mr. Caldwell to look



1 at his prosecutor's file from '86 to '90, that
2 time frame?

3 A Well, that's certainly another add to the check
4 list matter for me. No. We -- at least I didn't.
5 I think Mr. Caldwell actually called Mr. Wolch at
6 one point, I don't know what they talked about, I
7 think it was regarding the exhibits, the
8 availability of the exhibits. No. We thought
9 that that would come out through the 617 process.

10 Q And so that's something -- what about prior to
11 filing, did Mr. Carlyle-Gordge tell you that he
12 got access to the file?

13 A No. Sorry, he told us that he had had access, but
14 our mindset, bear in mind, was that pretty much
15 for us to be right, pretty much everybody else had
16 to be wrong or mistaken, and that mindset very
17 much pervaded certainly how I conducted myself,
18 and add to that the paranoia that the Milgaards
19 felt about the system that had wronged them. I
20 think that we probably, that probably affected our
21 thinking about who should be contacted.

22 Q And so again, and I stand to be corrected, but I
23 think you said with respect to Mr. Tallis, that in
24 hindsight you would have talked to him earlier,
25 but that at the time I think you said this



1 paranoia may have influenced delaying that step;
2 is that a fair --

3 A If Mrs. Milgaard came to see me today, probably
4 the first letter I would write would be to Mr.
5 Caldwell.

6 Q Okay. And then let's just talk about Mr.
7 Caldwell, did the paranoia as you described it,
8 would that have been a factor that may have
9 precluded you from going to Mr. Caldwell and
10 looking at his file?

11 A Possibly, but as I say, I think that the belief
12 was, and I think that there's correspondence on
13 the file, that after we had filed the 617, that
14 there would be full, complete disclosure through
15 the federal government.

16 Q And so let me, and again we'll see some
17 correspondence I think in '89 or '90, we'll take
18 you through that, but was it your expectation
19 then, Mr. Asper, that after you filed the
20 application, that at some point you would get the
21 prosecutor's file from Federal Justice?

22 A Yes.

23 Q And what about the Saskatoon City Police file, and
24 I think the evidence we've heard is that the Gail
25 Miller investigation file was different than Mr.



1 Caldwell's prosecutor file and the evidence we've
2 heard is that not all of the police reports and
3 information ended up going to the prosecutor, so
4 when I talk about the police file, I'm talking
5 about what the investigators had, and again, do
6 you recall giving any thought to trying to get
7 that or can you tell us what you expected to
8 happen with respect to the police file?

9 A Well, we certainly expected we would have, that we
10 were going to get to see the entire, everything
11 related to the Milgaard case, including police
12 files, through the section 617 process just as a
13 matter of course. I don't know how you can
14 investigate the claim of a wrongful conviction
15 without getting access to all of that and, as I
16 say, I scanned, I've been scanning some of the
17 evidence as it has been coming in and happened to
18 scan Sergeant Pearson's evidence where he just
19 made so much sense the day he testified that so
20 much of this could have been avoided if we had sat
21 down in the case conference with the Department of
22 Justice right from the outset and everybody put
23 your cards on the table and figure out who was
24 going to do what and set the ground rules.

25 Q And so you say put your cards on the table. What



1 do you mean by that?

2 A Bring everything you've got related to the case.

3 Q Okay.

4 A Everybody bring everything, police, Crown,
5 defence, applicant, everything.

6 Q And is that something that you would have expected
7 would happen, and I'm talking you personally, Mr.
8 Asper, is that something that you thought was
9 going to happen when you filed or what did you
10 think was going to happen?

11 A That's what I thought was going to happen.

12 Q And do you recall, and again we're getting a bit
13 ahead of ourselves here, but we'll come back to
14 this when we look at the documents in 1989 and
15 '90, but do you have a recollection of talking to
16 Mr. Williams or to someone there saying lookit,
17 why don't we do this or can this happen or what do
18 you remember about that?

19 A My recollection is that Mr. Wolch was having --
20 Mr. Wolch had primary contact with the Department
21 of Justice and our position all the way along, as
22 soon as we filed the 617, was let's -- I don't
23 know if we called it a case conference, but let's
24 sit down and talk about how we proceed, and I
25 don't think we were granted a meeting until



1 November, '90, '91 maybe, just before the case was
2 re-opened.

3 COMMISSIONER MacCALLUM: With whom, sir?

4 A With the Department of Justice.

5 BY MR. HODSON:

6 Q And so I think the first application was rejected
7 February 27th, and I'll go through some documents
8 to assist you.

9 A I may have.

10 Q No, no, and I'm just -- we'll go through and you
11 can have a chance to answer again once we've
12 looked at documents, but your memory is that your
13 first sit-down meeting with Justice would have
14 been around November of '91 just before they sent
15 it to the Supreme Court; is that right?

16 A Yes. I can't recall. They kept asking us for
17 final submissions and I can't recall whether we
18 got to do that before the first application was
19 rejected or whether that was part of the second
20 application.

21 Q And in fairness, Mr. Asper, I'll take you through
22 the correspondence chronologically and that may
23 assist.

24 A You know, I just say, from a systemic perspective,
25 none of what happened in terms of how the



1 pathology of this case unfolded I don't think
2 would have happened if we hadn't had that first
3 meeting.

4 Q And we'll certainly come back to that point. This
5 is probably a good spot to break for the day,
6 Mr. Commissioner.

7 COMMISSIONER MacCALLUM: Okay.

8 (Adjourned at 4:26 p.m.)
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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



\$	1			
\$2,000 [1] - 25199:3	10 [2] - 25261:11, 25261:17	25273:19, 25275:17, 25275:20, 25280:9, 25281:2, 25288:7, 25299:14	25212:2, 25212:19, 25220:6, 25222:16, 25224:21, 25274:11	25303:12, 25304:22
'	11 [2] - 25156:9, 25156:16	1987 [2] - 25198:1, 25257:9	2:00 [1] - 25188:18 2:07 [1] - 25214:19 2:17 [1] - 25214:20 2nd [1] - 25216:18	683 [2] - 25208:9, 25208:10 690 [8] - 25158:1, 25208:8, 25208:11, 25209:8, 25214:23, 25216:11, 25216:13, 25286:15
'67 [1] - 25263:7 '68 [1] - 25263:7 '69 [1] - 25268:7 '80 [1] - 25299:23 '80s [2] - 25200:6, 25300:6 '81 [2] - 25260:20, 25300:1 '86 [26] - 25182:18, 25198:25, 25201:3, 25213:6, 25214:6, 25217:4, 25217:23, 25219:1, 25220:6, 25237:16, 25256:19, 25269:16, 25270:2, 25271:14, 25272:2, 25274:6, 25274:10, 25276:14, 25281:17, 25285:1, 25286:4, 25288:10, 25297:4, 25297:5, 25301:1 '86-'87-'88 [1] - 25242:12 '87 [1] - 25286:4 '88 [4] - 25212:19, 25213:7, 25257:9, 25274:11 '89 [6] - 25156:15, 25208:24, 25221:1, 25257:9, 25297:2, 25302:17 '90 [7] - 25257:9, 25271:17, 25287:17, 25301:1, 25302:17, 25304:15, 25305:1 '91 [5] - 25252:16, 25271:17, 25296:16, 25305:1, 25305:14 '92 [1] - 25252:17 'rules' [1] - 25160:11 'said [1] - 25236:14 'sec [2] - 25158:17, 25158:20 'were [1] - 25268:21	11th [2] - 25206:6, 25210:1 125 [1] - 25147:22 12th [2] - 25208:7, 25216:12 14 [2] - 25156:2, 25170:11 14th [2] - 25217:23, 25220:8 15 [2] - 25261:11, 25261:18 156666 [2] - 25217:17, 25218:22 162430 [1] - 25297:1 162432 [1] - 25287:24 162433 [1] - 25220:6 162436 [2] - 25200:15, 25201:2 16th [2] - 25198:23, 25208:24 17 [2] - 25250:12, 25281:4 182348 [1] - 25214:6 18th [1] - 25297:4 19 [1] - 25257:14 1969 [9] - 25178:20, 25206:14, 25229:13, 25243:7, 25249:7, 25250:21, 25250:25, 25251:9, 25281:20 1970 [2] - 25219:10, 25251:9 1980 [3] - 25204:16, 25260:19, 25300:1 1981 [1] - 25299:23 1983 [1] - 25300:15 1986 [40] - 25151:13, 25155:5, 25168:16, 25169:6, 25174:6, 25175:23, 25176:13, 25181:5, 25197:25, 25198:23, 25202:17, 25203:10, 25205:4, 25206:6, 25206:10, 25207:25, 25209:24, 25210:9, 25216:18, 25217:5, 25224:21, 25229:24, 25234:15, 25235:2, 25235:13, 25237:9, 25237:22, 25257:8, 25257:15, 25257:17, 25270:15, 25271:3, 25273:1,	1988 [10] - 25155:25, 25198:1, 25198:2, 25208:7, 25208:23, 25210:17, 25212:2, 25216:12, 25222:17, 25286:24 1989 [4] - 25156:19, 25251:25, 25274:11, 25304:14 1990 [5] - 25156:2, 25251:20, 25251:25, 25253:11, 25287:17 1992 [3] - 25151:13, 25198:9, 25270:20 1:30 [4] - 25188:18, 25188:20, 25188:21, 25188:22 1:34 [1] - 25188:24	3 3 [1] - 25193:21 30 [2] - 25229:13, 25248:23 301675 [1] - 25257:13 31 [2] - 25229:13, 25248:23 333 [1] - 25204:18 333264 [2] - 25209:20, 25209:23 333266 [1] - 25216:17 333268 [1] - 25206:5 333272 [1] - 25205:3 335456 [2] - 25214:24, 25215:4 335463 [1] - 25215:22 3:01 [1] - 25253:1 3:20 [1] - 25253:2 3rd [1] - 25268:7	7 7 [1] - 25245:8 7.10am [1] - 25298:9 7th [2] - 25156:15, 25274:11 9 9:00 [1] - 25151:2 9:48 [1] - 25188:23 A ability [1] - 25307:7 able [17] - 25153:22, 25154:2, 25203:22, 25207:23, 25209:16, 25211:7, 25212:9, 25218:12, 25221:16, 25222:8, 25227:18, 25229:3, 25230:3, 25247:9, 25255:21, 25266:10, 25297:5 absolute [1] - 25171:16 absolutely [4] - 25181:21, 25214:3, 25216:6, 25236:17 accept [5] - 25154:23, 25165:4, 25180:24, 25230:18, 25237:6 accepted [4] - 25236:4, 25242:15, 25250:10, 25250:11 accepting [1] - 25155:11 access [5] - 25223:9, 25238:9, 25301:12, 25301:13, 25303:15 accompanied [1] - 25170:9 according [3] - 25253:10, 25264:11, 25296:10 Accordingly [1] - 25293:17 accurate [2] - 25175:22, 25271:1
0		2 2 [5] - 25193:22, 25193:25, 25194:7, 25232:15, 25239:8 2005 [1] - 25189:7 2006 [1] - 25147:21 20th [1] - 25279:17 21 [2] - 25219:1, 25251:19 213125 [1] - 25224:7 213127 [2] - 25197:23, 25200:20 218627 [2] - 25218:19, 25218:25 22nd [4] - 25147:21, 25189:7, 25201:3, 25279:18 23rd [1] - 25274:10 24th [2] - 25182:6, 25273:16 25151 [1] - 25150:4 25189 [1] - 25150:6 25195 [1] - 25150:9 25th [1] - 25257:19 26 [2] - 25209:23, 25214:6 26th [1] - 25257:19 27th [1] - 25305:7 28 [1] - 25227:19 28th [13] - 25155:25, 25156:2, 25205:4, 25206:10, 25208:23, 25209:25, 25210:17,	3 3 [1] - 25193:21 30 [2] - 25229:13, 25248:23 301675 [1] - 25257:13 31 [2] - 25229:13, 25248:23 333 [1] - 25204:18 333264 [2] - 25209:20, 25209:23 333266 [1] - 25216:17 333268 [1] - 25206:5 333272 [1] - 25205:3 335456 [2] - 25214:24, 25215:4 335463 [1] - 25215:22 3:01 [1] - 25253:1 3:20 [1] - 25253:2 3rd [1] - 25268:7	4 40 [1] - 25265:24 40s [1] - 25263:6 4561 [1] - 25215:1 4:26 [1] - 25306:8
			5 5 [5] - 25193:19, 25193:21, 25240:16, 25288:7, 25297:5 5th [2] - 25202:25, 25205:15	
			6 6 [1] - 25244:9 617 [19] - 25157:25, 25208:5, 25208:11, 25209:8, 25210:4, 25212:16, 25214:23, 25215:17, 25216:13, 25217:3, 25217:14, 25221:2, 25223:8, 25234:18, 25286:15, 25301:9, 25302:13,	
039068 [1] - 25285:5 039527 [1] - 25284:19				



<p>accurately [1] - 25234:21</p> <p>accusers [2] - 25157:13</p> <p>acknowledge [2] - 25194:23, 25271:4</p> <p>acknowledged [2] - 25261:13, 25280:2</p> <p>acknowledgement [1] - 25206:3</p> <p>acknowledging [1] - 25276:12</p> <p>acquit [1] - 25186:14</p> <p>acquitted [3] - 25167:9, 25186:3, 25285:19</p> <p>act [1] - 25163:16</p> <p>acted [2] - 25191:11, 25290:7</p> <p>acting [2] - 25190:20, 25193:18</p> <p>action [1] - 25236:6</p> <p>actions [2] - 25276:10, 25280:7</p> <p>actively [1] - 25248:4</p> <p>activities [2] - 25193:11, 25230:10</p> <p>actors [3] - 25158:6, 25255:6, 25255:10</p> <p>add [2] - 25301:3, 25301:18</p> <p>added [2] - 25274:13, 25280:21</p> <p>addition [1] - 25281:14</p> <p>address [1] - 25284:5</p> <p>addressed [1] - 25200:24</p> <p>addresses [2] - 25293:19, 25297:15</p> <p>adequately [3] - 25192:17, 25192:18, 25194:5</p> <p>adjourn [1] - 25188:14</p> <p>adjourned [1] - 25253:4</p> <p>Adjourned [4] - 25188:23, 25214:19, 25253:1, 25306:8</p> <p>adjournment [1] - 25214:16</p> <p>admissibility [2] - 25161:16, 25197:17</p> <p>admissible [1] - 25161:21</p> <p>admission [13] - 25170:14, 25170:22, 25172:6, 25172:11, 25172:15, 25172:17, 25172:18, 25172:21, 25173:3, 25175:11, 25273:12, 25273:24</p> <p>admissions [1] - 25273:11</p>	<p>admit [7] - 25187:7, 25187:16, 25188:1, 25222:2, 25223:21, 25231:25, 25280:24</p> <p>admits [1] - 25280:19</p> <p>admitted [3] - 25175:19, 25183:15, 25260:18</p> <p>adopt [1] - 25184:8</p> <p>advance [1] - 25193:2</p> <p>adverse [1] - 25229:4</p> <p>advised [2] - 25249:16, 25273:19</p> <p>advises [1] - 25295:19</p> <p>advocate [2] - 25190:20, 25274:22</p> <p>affect [3] - 25231:2, 25231:3, 25282:19</p> <p>affected [8] - 25189:11, 25191:17, 25192:1, 25192:7, 25192:10, 25193:5, 25195:7, 25301:20</p> <p>affidavit [17] - 25169:6, 25169:8, 25171:2, 25176:3, 25177:2, 25195:15, 25234:22, 25234:24, 25238:15, 25257:11, 25258:5, 25258:19, 25270:2, 25274:5, 25274:9, 25275:18, 25286:14</p> <p>afford [1] - 25207:20</p> <p>afternoon [5] - 25188:18, 25195:22, 25196:1, 25196:2, 25252:24</p> <p>Afternoon [1] - 25195:21</p> <p>agency [1] - 25295:10</p> <p>agree [11] - 25161:12, 25161:18, 25180:13, 25180:19, 25181:14, 25181:21, 25182:16, 25187:13, 25220:22, 25276:15</p> <p>agreed [1] - 25185:12</p> <p>ahead [5] - 25164:20, 25226:18, 25247:25, 25289:15, 25304:13</p> <p>Aid [1] - 25207:21</p> <p>aid [1] - 25200:9</p> <p>Aidwyc [1] - 25190:22</p> <p>air [1] - 25287:14</p> <p>Air [1] - 25287:13</p> <p>airing [2] - 25202:25, 25204:13</p> <p>Alan [4] - 25150:3, 25150:8, 25151:5, 25195:19</p>	<p>Albert [8] - 25177:2, 25179:4, 25179:5, 25179:9, 25179:15, 25182:3, 25293:16, 25299:16</p> <p>Alexander [1] - 25149:12</p> <p>alibi [3] - 25236:1, 25277:23, 25277:24</p> <p>alive [1] - 25159:1</p> <p>allegations [1] - 25192:10</p> <p>alleged [4] - 25192:4, 25206:12, 25273:11, 25273:12</p> <p>allegedly [2] - 25236:20, 25266:11</p> <p>alley [1] - 25265:19</p> <p>alleys [1] - 25181:19</p> <p>allies [1] - 25157:24</p> <p>allow [1] - 25192:17</p> <p>allowed [1] - 25216:22</p> <p>almost [4] - 25187:20, 25205:13, 25287:21, 25287:22</p> <p>alone [1] - 25165:22</p> <p>ambiguity [1] - 25282:21</p> <p>amended [1] - 25208:6</p> <p>amounts [1] - 25280:17</p> <p>analogies [1] - 25193:23</p> <p>analysis [1] - 25270:15</p> <p>answer [8] - 25153:25, 25168:24, 25171:20, 25188:15, 25242:1, 25242:2, 25255:23, 25305:11</p> <p>answered [2] - 25269:1, 25269:7</p> <p>Answering [1] - 25190:5</p> <p>answering [1] - 25269:8</p> <p>answers [2] - 25188:13, 25268:12</p> <p>antigens [3] - 25239:12, 25239:13, 25239:16</p> <p>antsy [1] - 25292:15</p> <p>anxious [2] - 25246:22, 25289:14</p> <p>anyway [1] - 25300:22</p> <p>apart [3] - 25198:18, 25252:5, 25270:14</p> <p>apologize [1] - 25234:14</p> <p>Appeal [1] - 25249:21</p> <p>appeal [6] - 25158:4, 25206:19, 25215:11, 25215:12, 25215:13, 25233:7</p> <p>Appearances [1] - 25149:1</p>	<p>apple [1] - 25226:2</p> <p>applicant [7] - 25189:16, 25190:14, 25190:19, 25191:18, 25195:11, 25195:14, 25304:5</p> <p>Applicant [1] - 25192:23</p> <p>Application [1] - 25150:6</p> <p>application [35] - 25155:25, 25156:10, 25157:25, 25161:3, 25188:7, 25189:2, 25192:22, 25193:3, 25198:1, 25206:17, 25207:6, 25207:16, 25208:23, 25210:4, 25210:10, 25210:17, 25212:1, 25212:16, 25213:13, 25215:6, 25215:24, 25217:3, 25217:15, 25221:2, 25222:16, 25234:19, 25237:11, 25274:7, 25286:25, 25292:10, 25292:16, 25302:20, 25305:6, 25305:18, 25305:20</p> <p>applications [1] - 25211:25</p> <p>applied [5] - 25162:16, 25189:5, 25196:23, 25197:18, 25197:20</p> <p>apply [2] - 25169:19, 25192:7</p> <p>appreciate [10] - 25151:15, 25151:20, 25180:18, 25205:21, 25210:13, 25228:7, 25255:17, 25280:9, 25285:13, 25293:18</p> <p>appreciated [1] - 25218:10</p> <p>approach [5] - 25254:20, 25273:5, 25276:5, 25284:2, 25292:7</p> <p>approached [1] - 25182:19</p> <p>approaches [2] - 25158:3, 25224:3</p> <p>appropriate [2] - 25206:20, 25223:10</p> <p>April [12] - 25156:4, 25216:18, 25217:3, 25217:5, 25217:23, 25219:1, 25219:23, 25220:6, 25224:21, 25227:19, 25256:19,</p>	<p>25288:10</p> <p>area [1] - 25260:1</p> <p>arguably [1] - 25192:16</p> <p>argue [1] - 25274:21</p> <p>argued [1] - 25264:23</p> <p>argues [1] - 25192:1</p> <p>argument [4] - 25157:25, 25191:21, 25243:2, 25294:15</p> <p>argumentative [1] - 25289:20</p> <p>arguments [2] - 25207:14, 25209:1</p> <p>arrangements [1] - 25204:21</p> <p>arrested [1] - 25281:6</p> <p>arrived [2] - 25259:10, 25265:17</p> <p>Art [1] - 25182:1</p> <p>article [2] - 25266:21, 25284:21</p> <p>articles [4] - 25266:11, 25266:12, 25266:14, 25266:22</p> <p>articling [1] - 25255:24</p> <p>ascertainable [1] - 25189:13</p> <p>aside [5] - 25171:7, 25181:1, 25181:3, 25185:24, 25202:21</p> <p>aspects [3] - 25238:12, 25238:13, 25284:14</p> <p>Asper [51] - 25149:14, 25150:3, 25150:6, 25150:8, 25151:5, 25151:7, 25165:6, 25166:25, 25175:3, 25177:5, 25179:7, 25187:12, 25189:2, 25189:5, 25189:19, 25190:23, 25191:11, 25194:12, 25195:4, 25195:5, 25195:19, 25195:21, 25197:8, 25197:24, 25201:9, 25202:16, 25205:22, 25207:25, 25210:13, 25214:18, 25215:17, 25219:17, 25228:22, 25233:13, 25242:4, 25245:18, 25252:10, 25253:4, 25255:18, 25256:14, 25257:6, 25263:5, 25279:8, 25285:7, 25288:24, 25293:22, 25295:25, 25297:22, 25302:19, 25304:8, 25305:21</p> <p>Asper's [5] - 25190:7, 25191:2, 25193:11,</p>
---	---	--	--	--



<p>25193:17, 25194:24 aspersions [3] - 25191:24, 25192:14, 25192:24 assertion [1] - 25184:6 assertions [1] - 25163:7 assist [10] - 25152:13, 25202:20, 25219:16, 25223:9, 25232:15, 25251:9, 25257:6, 25263:5, 25305:8, 25305:23 assistance [5] - 25207:19, 25215:15, 25217:10, 25218:3, 25240:13 Assistant [1] - 25148:5 assistant [1] - 25206:8 assisted [1] - 25153:1 assisting [1] - 25288:14 associate [1] - 25197:5 assume [8] - 25173:10, 25199:12, 25213:10, 25234:25, 25250:13, 25272:24, 25274:4, 25281:2 assuming [1] - 25270:24 assumption [2] - 25201:8, 25212:25 attach [1] - 25196:18 attack [6] - 25193:14, 25194:13, 25238:2, 25267:5, 25272:15, 25277:7 attacked [3] - 25193:2, 25273:6, 25282:3 attempt [2] - 25221:6, 25248:19 attempted [1] - 25223:16 attempting [1] - 25217:25 attempts [1] - 25294:6 attention [3] - 25190:1, 25192:5, 25291:18 attitude [1] - 25154:15 attribute [1] - 25274:25 attributed [3] - 25170:6, 25236:8, 25274:13 attributes [1] - 25181:18 Audio [1] - 25148:12 author [2] - 25199:18, 25202:19 authorities [6] - 25166:9, 25190:1, 25190:4, 25270:8, 25289:18, 25289:24</p>	<p>authority [1] - 25157:19 availability [1] - 25301:8 available [3] - 25160:19, 25217:15, 25278:9 avenues [1] - 25279:18 avoided [1] - 25303:20 aware [33] - 25197:20, 25202:18, 25205:23, 25208:15, 25208:16, 25209:17, 25210:7, 25210:11, 25212:10, 25217:8, 25217:11, 25217:12, 25217:13, 25217:16, 25218:11, 25218:13, 25222:24, 25230:20, 25241:6, 25241:13, 25243:13, 25250:14, 25264:21, 25265:2, 25265:13, 25267:20, 25268:5, 25284:1, 25299:18, 25300:2, 25300:3, 25300:13, 25300:17 awfully [1] - 25262:7</p> <p style="text-align: center;">B</p> <p>backfire [1] - 25224:13 backing [3] - 25244:10, 25244:16, 25244:20 bad [12] - 25158:8, 25158:11, 25159:3, 25159:21, 25159:22, 25160:4, 25161:8, 25163:6, 25165:15, 25193:23, 25231:23 bag [5] - 25178:18, 25218:16, 25241:10, 25243:10 balance [1] - 25164:21 balancing [1] - 25163:16 bald [5] - 25184:7, 25185:13, 25185:14, 25259:23, 25262:5 bald-faced [1] - 25184:7 bar [1] - 25289:6 Bar [3] - 25193:22, 25194:7, 25194:8 bare [1] - 25282:13 barely [1] - 25217:6 Bartlett [2] - 25219:13, 25219:20 base [1] - 25272:15 based [11] - 25151:22, 25154:13, 25167:9,</p>	<p>25176:14, 25230:7, 25254:2, 25256:23, 25272:5, 25278:20, 25285:19, 25286:8 Based [1] - 25296:4 bases [1] - 25274:6 basic [1] - 25272:19 basis [9] - 25192:13, 25230:13, 25270:6, 25287:10, 25287:22, 25288:19, 25289:3, 25289:12, 25294:19 bear [1] - 25301:14 bears [1] - 25190:12 became [14] - 25153:10, 25155:20, 25156:20, 25158:1, 25158:6, 25163:24, 25167:24, 25182:10, 25199:21, 25199:23, 25202:17, 25208:16, 25217:11 become [6] - 25202:18, 25205:23, 25210:6, 25210:7, 25243:13, 25293:13 becoming [1] - 25217:16 bed [1] - 25235:22 beforehand [1] - 25183:25 began [8] - 25155:9, 25176:8, 25193:18, 25199:25, 25235:13, 25235:14, 25288:15 beginning [1] - 25227:23 begun [2] - 25157:1, 25157:2 behalf [7] - 25200:5, 25200:8, 25200:9, 25215:7, 25243:24, 25247:22, 25295:10 behind [3] - 25176:19, 25292:25 Beitel [1] - 25148:8 belief [4] - 25176:15, 25193:10, 25281:17, 25302:11 believable [2] - 25212:17, 25212:18 belonging [1] - 25266:11 below [1] - 25265:24 Bench [4] - 25307:1, 25307:3, 25307:14, 25307:18 benefit [2] - 25151:25, 25277:20 berating [1] - 25292:17 Bessborough [1] -</p>	<p>25147:16 best [7] - 25152:8, 25152:12, 25163:15, 25250:20, 25275:6, 25279:3, 25307:6 better [4] - 25155:2, 25180:12, 25269:19, 25294:7 between [8] - 25205:10, 25219:7, 25233:5, 25241:8, 25253:8, 25259:6, 25279:17, 25300:4 beyond [5] - 25186:10, 25195:13, 25203:4, 25205:18, 25256:4 big [4] - 25170:23, 25211:14, 25282:10, 25292:21 birthday [3] - 25257:17, 25257:18 bit [44] - 25152:24, 25155:2, 25160:7, 25161:12, 25165:16, 25166:17, 25170:25, 25171:20, 25173:8, 25173:9, 25186:20, 25196:15, 25197:7, 25201:6, 25204:12, 25204:13, 25204:19, 25208:3, 25208:4, 25214:9, 25214:12, 25216:16, 25225:13, 25225:16, 25231:16, 25237:23, 25245:24, 25254:15, 25254:25, 25257:10, 25268:13, 25275:19, 25276:23, 25282:13, 25286:3, 25288:9, 25289:3, 25290:1, 25290:8, 25291:22, 25292:2, 25293:6, 25297:21, 25304:12 blade [2] - 25258:14, 25279:14 bladed [1] - 25258:13 block [3] - 25265:18, 25279:19, 25279:25 blocks [1] - 25279:19 blood [10] - 25178:9, 25178:11, 25179:4, 25179:5, 25179:11, 25239:6, 25239:16, 25239:19, 25264:14, 25264:16 bloom [2] - 25182:1, 25182:5 blossom [1] - 25273:16 Blue [3] - 25297:23,</p>	<p>25297:24, 25297:25 board [1] - 25187:22 boat [1] - 25288:6 Bobs [1] - 25149:5 body [7] - 25239:7, 25239:10, 25239:17, 25259:17, 25266:23, 25279:16, 25298:16 bone [1] - 25258:15 bone-handled [1] - 25258:15 book [5] - 25199:20, 25199:21, 25200:9, 25246:1, 25246:12 Boswell [1] - 25148:4 bothered [1] - 25244:24 bottom [3] - 25208:13, 25215:5, 25294:13 bound [1] - 25196:24 box [3] - 25187:24, 25188:1, 25241:10 Boychuk [1] - 25149:8 brackets [2] - 25263:24, 25264:1 break [6] - 25252:22, 25252:23, 25257:3, 25258:6, 25286:23, 25306:5 break-in [2] - 25257:3, 25258:6 brief [8] - 25207:8, 25209:5, 25234:18, 25235:7, 25237:10, 25270:2, 25286:3, 25286:5 Bring [1] - 25304:2 bring [5] - 25162:11, 25257:7, 25257:13, 25268:3, 25304:4 broad [1] - 25180:13 broader [1] - 25157:24 brought [4] - 25219:21, 25266:12, 25275:19, 25283:6 Brown [1] - 25206:7 Bruce [2] - 25149:9, 25297:2 buck [1] - 25213:10 build [4] - 25156:23, 25289:13, 25290:4, 25291:16 building [2] - 25211:14, 25211:18 bunch [1] - 25154:7 busy [2] - 25278:7, 25291:17 byproduct [1] - 25165:10</p>
---	---	--	--	---



<p>C</p> <p>Cadrain^[28] - 25160:2, 25177:3, 25179:5, 25179:15, 25180:23, 25181:24, 25182:3, 25182:16, 25183:12, 25222:1, 25223:14, 25232:13, 25241:7, 25241:24, 25242:5, 25243:10, 25243:25, 25264:13, 25265:17, 25266:24, 25271:11, 25283:4, 25293:16, 25297:15, 25299:16, 25299:17</p> <p>Cadrain's^[5] - 25179:5, 25179:9, 25183:6, 25259:21, 25280:3</p> <p>Cadrains'^[3] - 25266:15, 25266:16, 25266:17</p> <p>Cal^[1] - 25245:10</p> <p>calculated^[1] - 25158:3</p> <p>Caldwell^[12] - 25149:5, 25158:13, 25159:4, 25159:5, 25184:10, 25300:11, 25300:14, 25300:25, 25301:5, 25302:5, 25302:7, 25302:9</p> <p>Caldwells^[2] - 25300:18, 25303:1</p> <p>calmed^[1] - 25289:17</p> <p>Calvin^[1] - 25149:12</p> <p>cameras^[1] - 25224:5</p> <p>Canada^[4] - 25149:11, 25157:23, 25158:2, 25278:22</p> <p>Canadian^[1] - 25199:22</p> <p>Candace^[1] - 25148:3</p> <p>candid^[1] - 25267:13</p> <p>cannot^[1] - 25192:14</p> <p>capacity^[2] - 25202:20, 25296:25</p> <p>capture^[1] - 25296:17</p> <p>captured^[1] - 25257:14</p> <p>captures^[1] - 25257:21</p> <p>car^[23] - 25184:12, 25184:17, 25184:23, 25185:13, 25185:17, 25241:1, 25259:24, 25261:9, 25261:15, 25261:21, 25262:9, 25262:11, 25262:20, 25265:17, 25265:25, 25266:7, 25266:10, 25266:13, 25266:16, 25266:17, 25273:9,</p>	<p>25273:10, 25298:10</p> <p>cards^[2] - 25303:23, 25303:25</p> <p>career^[1] - 25291:17</p> <p>careful^[4] - 25212:12, 25249:13, 25274:17, 25298:5</p> <p>caretaker^[1] - 25298:8</p> <p>Carlyle^[27] - 25199:10, 25199:16, 25200:2, 25202:10, 25202:18, 25204:25, 25217:24, 25218:14, 25219:8, 25220:7, 25221:11, 25221:18, 25222:11, 25224:4, 25260:19, 25283:10, 25288:8, 25288:11, 25293:12, 25295:12, 25296:6, 25297:13, 25299:4, 25299:12, 25300:10, 25300:13, 25301:11</p> <p>Carlyle-gordge^[24] - 25199:10, 25199:16, 25200:2, 25202:18, 25204:25, 25217:24, 25218:14, 25219:8, 25220:7, 25221:11, 25221:18, 25222:11, 25224:4, 25260:19, 25283:10, 25288:8, 25288:11, 25296:6, 25297:13, 25299:4, 25299:12, 25300:10, 25300:13, 25301:11</p> <p>Carlyle-gordge's^[2] - 25293:12, 25295:12</p> <p>cars^[2] - 25266:5, 25267:15</p> <p>case^[63] - 25158:2, 25160:18, 25161:5, 25166:22, 25167:14, 25187:24, 25190:4, 25192:19, 25195:4, 25196:24, 25199:23, 25199:24, 25200:19, 25202:25, 25206:20, 25207:6, 25207:13, 25213:2, 25217:7, 25219:10, 25220:4, 25220:12, 25220:24, 25221:25, 25225:22, 25226:10, 25228:17, 25229:8, 25230:25, 25231:1, 25237:15, 25237:21, 25238:12, 25238:13, 25240:14, 25241:21, 25242:17, 25246:23, 25249:14, 25249:19, 25249:21,</p>	<p>25250:17, 25253:21, 25254:2, 25256:17, 25264:5, 25269:16, 25273:8, 25282:25, 25284:15, 25288:23, 25294:15, 25299:6, 25303:11, 25303:21, 25304:2, 25304:23, 25305:1, 25306:1</p> <p>cases^[6] - 25151:18, 25199:22, 25213:24, 25218:5, 25253:22, 25253:23</p> <p>cast^[1] - 25192:24</p> <p>casting^[1] - 25191:24</p> <p>Catherine^[1] - 25149:5</p> <p>caused^[2] - 25190:3, 25255:20</p> <p>cautioned^[1] - 25268:24</p> <p>cavalier^[1] - 25227:5</p> <p>Cbc^[3] - 25205:16, 25220:9, 25221:23</p> <p>centre^[1] - 25225:17</p> <p>certain^[10] - 25153:20, 25158:3, 25161:15, 25181:13, 25181:20, 25183:1, 25183:17, 25194:22, 25231:23</p> <p>certainly^[26] - 25152:20, 25156:3, 25157:1, 25166:18, 25175:21, 25183:8, 25183:11, 25183:23, 25183:25, 25195:25, 25199:17, 25209:22, 25213:13, 25217:18, 25220:4, 25235:7, 25237:10, 25257:7, 25261:17, 25267:8, 25272:12, 25281:7, 25301:3, 25301:17, 25303:9, 25306:4</p> <p>Certainly^[1] - 25193:9</p> <p>Certificate^[1] - 25307:1</p> <p>certify^[1] - 25307:4</p> <p>challenge^[3] - 25227:6, 25270:7, 25281:18</p> <p>challenged^[1] - 25160:19</p> <p>challenging^[1] - 25169:13</p> <p>chance^[4] - 25198:13, 25279:8, 25284:4, 25305:11</p> <p>chances^[1] - 25293:3</p> <p>change^[8] - 25157:5, 25222:3, 25222:14, 25223:22, 25243:22, 25244:2, 25276:22,</p>	<p>25283:21</p> <p>changed^[18] - 25154:3, 25155:17, 25157:8, 25157:12, 25244:5, 25256:21, 25270:21, 25270:22, 25271:2, 25271:7, 25273:5, 25274:2, 25276:3, 25276:5, 25282:3, 25282:18, 25284:8</p> <p>changes^[1] - 25216:11</p> <p>changing^[1] - 25271:25</p> <p>channels^[1] - 25166:15</p> <p>character^[3] - 25193:1, 25193:15, 25194:13</p> <p>characterization^[6] - 25168:15, 25170:20, 25175:9, 25175:12, 25175:21, 25294:2</p> <p>characterize^[1] - 25278:14</p> <p>characterized^[1] - 25237:12</p> <p>characters^[1] - 25159:13</p> <p>charge^[3] - 25210:5, 25213:8, 25268:18</p> <p>charges^[2] - 25235:25, 25277:22</p> <p>check^[5] - 25187:24, 25187:25, 25253:20, 25253:23, 25301:3</p> <p>cheek^[1] - 25194:25</p> <p>cheese^[2] - 25259:3, 25259:5</p> <p>chief^[1] - 25191:20</p> <p>choices^[2] - 25164:18</p> <p>choose^[1] - 25191:4</p> <p>Chris^[1] - 25149:8</p> <p>chronologically^[5] - 25153:21, 25166:5, 25196:3, 25197:25, 25305:22</p> <p>chronology^[1] - 25154:1</p> <p>Chrysler^[1] - 25263:8</p> <p>church^[2] - 25259:20, 25298:8</p> <p>circumstances^[3] - 25206:25, 25223:10, 25299:1</p> <p>cited^[1] - 25191:10</p> <p>City^[1] - 25302:23</p> <p>civil^[1] - 25192:15</p> <p>claim^[4] - 25165:19, 25165:24, 25250:10, 25303:14</p> <p>claimed^[3] - 25239:22, 25264:4, 25264:13</p>	<p>claiming^[1] - 25231:18</p> <p>clarify^[2] - 25185:21, 25196:10</p> <p>clarity^[1] - 25250:16</p> <p>clear^[5] - 25185:25, 25197:11, 25211:21, 25212:13, 25230:5</p> <p>clearance^[2] - 25225:4, 25227:24</p> <p>clearly^[4] - 25172:5, 25189:13, 25226:19, 25279:5</p> <p>clenched^[1] - 25298:23</p> <p>Clerk^[1] - 25148:8</p> <p>client^[5] - 25267:9, 25270:5, 25272:22, 25292:12, 25293:5</p> <p>client's^[2] - 25255:3, 25255:4</p> <p>clients^[4] - 25193:12, 25247:18, 25289:7, 25289:10</p> <p>clipping^[1] - 25283:13</p> <p>clippings^[3] - 25283:12, 25283:15, 25284:17</p> <p>closely^[1] - 25191:4</p> <p>closer^[1] - 25251:2</p> <p>clothes^[3] - 25264:6, 25264:14, 25264:16</p> <p>clothing^[2] - 25298:12, 25298:14</p> <p>clouded^[1] - 25262:23</p> <p>clumps^[2] - 25239:8, 25239:10</p> <p>co^[1] - 25158:1</p> <p>co-op^[1] - 25158:1</p> <p>coat^[2] - 25298:20, 25298:25</p> <p>cocky^[2] - 25269:10, 25269:13</p> <p>Code^[1] - 25208:6</p> <p>codes^[1] - 25196:21</p> <p>cognizant^[1] - 25192:2</p> <p>coincide^[1] - 25274:25</p> <p>cold^[1] - 25262:7</p> <p>collaborative^[1] - 25292:20</p> <p>collateral^[1] - 25164:24</p> <p>colour^[1] - 25297:22</p> <p>coloured^[1] - 25263:8</p> <p>comb^[1] - 25246:24</p> <p>combination^[1] - 25179:20</p> <p>comfortable^[5] - 25204:1, 25204:5, 25269:20, 25272:10, 25272:12</p> <p>coming^[2] - 25262:11, 25303:17</p>
---	--	---	--	--



<p>comment [3] - 25159:17, 25255:17, 25279:1</p> <p>comments [8] - 25151:22, 25172:25, 25173:3, 25173:16, 25175:25, 25176:22, 25176:24, 25218:8</p> <p>Commission [9] - 25147:2, 25147:14, 25148:1, 25148:2, 25148:8, 25192:2, 25192:9, 25243:6, 25278:11</p> <p>Commission's [2] - 25189:15, 25189:18</p> <p>Commissioner [39] - 25151:3, 25158:17, 25158:20, 25159:2, 25159:5, 25159:7, 25159:9, 25159:11, 25162:22, 25168:23, 25169:11, 25169:15, 25169:19, 25169:22, 25169:24, 25178:1, 25178:13, 25182:4, 25182:7, 25182:12, 25188:5, 25188:17, 25188:21, 25188:25, 25189:10, 25200:16, 25200:25, 25214:14, 25215:1, 25218:20, 25218:23, 25252:22, 25252:25, 25253:18, 25273:15, 25283:11, 25305:3, 25306:6, 25306:7</p> <p>commit [11] - 25168:8, 25169:3, 25169:10, 25174:12, 25175:6, 25175:18, 25177:7, 25184:6, 25202:12, 25203:5, 25205:15</p> <p>committed [12] - 25169:2, 25169:17, 25175:6, 25183:14, 25183:19, 25204:12, 25264:19, 25265:11, 25269:2, 25295:22, 25296:3, 25298:4</p> <p>committing [1] - 25175:20</p> <p>communication [1] - 25213:18</p> <p>compact [15] - 25178:18, 25180:5, 25240:21, 25240:24, 25240:25, 25241:9, 25242:6, 25242:17, 25243:10, 25244:4,</p>	<p>25244:11, 25244:21, 25267:19, 25272:20, 25280:4</p> <p>compare [1] - 25299:6</p> <p>compared [1] - 25278:19</p> <p>compartment [1] - 25240:22</p> <p>compelling [2] - 25206:24, 25207:5</p> <p>compensation [1] - 25232:21</p> <p>competent [1] - 25216:1</p> <p>complains [1] - 25192:24</p> <p>complete [1] - 25302:14</p> <p>completely [2] - 25272:19, 25275:3</p> <p>complicit [1] - 25157:21</p> <p>component [1] - 25216:2</p> <p>components [1] - 25181:22</p> <p>concede [1] - 25197:2</p> <p>conceivable [3] - 25177:25, 25178:11, 25213:3</p> <p>concern [2] - 25166:17, 25195:1</p> <p>concerned [10] - 25169:12, 25186:5, 25194:9, 25195:3, 25196:14, 25203:11, 25249:20, 25254:23, 25255:5, 25256:18</p> <p>concerns [20] - 25164:4, 25166:13, 25204:8, 25204:20, 25214:8, 25214:11, 25216:19, 25230:14, 25231:5, 25231:6, 25231:22, 25267:1, 25269:4, 25269:18, 25272:1, 25272:2, 25272:5, 25272:8, 25294:9</p> <p>concluded [1] - 25265:6</p> <p>conclusion [8] - 25163:19, 25165:19, 25166:18, 25167:6, 25237:24, 25285:18, 25294:8, 25296:1</p> <p>conclusions [1] - 25199:8</p> <p>conduct [10] - 25154:13, 25159:18, 25162:12, 25170:6, 25170:18, 25170:19,</p>	<p>25191:7, 25196:20, 25196:21, 25197:21</p> <p>conducted [3] - 25288:17, 25299:22, 25301:17</p> <p>conference [2] - 25303:21, 25304:23</p> <p>confess [1] - 25240:3</p> <p>confidence [1] - 25290:4</p> <p>confirmed [1] - 25263:14</p> <p>conflict [1] - 25230:10</p> <p>conflicting [2] - 25174:7, 25174:8</p> <p>conflicts [1] - 25236:3</p> <p>confront [1] - 25246:24</p> <p>confuse [1] - 25263:3</p> <p>Congram [2] - 25148:3, 25189:3</p> <p>connecting [1] - 25211:12</p> <p>conscience [1] - 25196:25</p> <p>consequence [2] - 25227:7</p> <p>consequences [1] - 25231:17</p> <p>consider [9] - 25153:14, 25170:23, 25175:24, 25181:6, 25190:16, 25249:5, 25250:24, 25251:6, 25300:25</p> <p>considerable [1] - 25214:13</p> <p>considered [4] - 25184:5, 25207:17, 25260:24, 25292:1</p> <p>considering [2] - 25159:21, 25213:3</p> <p>consistency [2] - 25230:7, 25230:17</p> <p>consistent [11] - 25171:24, 25172:8, 25172:13, 25183:14, 25183:19, 25209:7, 25230:17, 25242:9, 25249:2, 25264:17, 25264:18</p> <p>constant [1] - 25270:23</p> <p>constantly [3] - 25185:14, 25262:4, 25289:21</p> <p>consulted [1] - 25253:21</p> <p>contact [10] - 25207:21, 25218:1, 25218:11, 25222:25, 25223:6, 25223:16, 25289:9,</p>	<p>25293:14, 25294:6, 25304:20</p> <p>contacted [4] - 25223:5, 25249:15, 25254:11, 25301:21</p> <p>contacting [2] - 25219:14, 25249:5</p> <p>contain [1] - 25307:5</p> <p>containing [1] - 25239:11</p> <p>containsa [1] - 25245:11</p> <p>content [1] - 25194:16</p> <p>contents [4] - 25209:18, 25234:21, 25242:22, 25243:1</p> <p>continue [1] - 25195:17</p> <p>Continued [2] - 25150:3, 25150:8</p> <p>continued [4] - 25151:5, 25195:19, 25214:9, 25214:12</p> <p>contrary [1] - 25242:20</p> <p>control [3] - 25161:2, 25161:22, 25161:24</p> <p>conversation [6] - 25213:4, 25225:24, 25225:25, 25226:17, 25240:2, 25260:18</p> <p>conversations [4] - 25211:21, 25211:22, 25218:4, 25219:7</p> <p>conveyed [1] - 25168:12</p> <p>convict [1] - 25238:21</p> <p>convicted [16] - 25167:7, 25167:15, 25167:18, 25177:8, 25187:2, 25190:21, 25203:7, 25206:14, 25215:8, 25237:25, 25248:10, 25265:6, 25265:14, 25278:5, 25282:6, 25286:9</p> <p>conviction [11] - 25185:24, 25191:24, 25200:13, 25202:22, 25253:23, 25270:7, 25272:15, 25273:6, 25281:18, 25282:4, 25303:14</p> <p>Conviction [1] - 25147:4</p> <p>convinced [1] - 25167:24</p> <p>cooperation [1] - 25154:22</p> <p>cooperative [1] - 25223:4</p> <p>copied [1] - 25205:6</p>	<p>copies [4] - 25207:10, 25207:11, 25207:13, 25220:20</p> <p>copy [2] - 25189:4, 25221:21</p> <p>Corbett [3] - 25158:15, 25158:22, 25159:8</p> <p>core [3] - 25181:25, 25273:8, 25273:13</p> <p>correct [22] - 25153:3, 25154:6, 25167:10, 25167:16, 25167:19, 25173:14, 25173:22, 25198:7, 25198:16, 25198:20, 25198:21, 25203:14, 25203:19, 25224:24, 25233:15, 25234:9, 25249:3, 25250:6, 25259:14, 25286:21, 25297:5, 25307:5</p> <p>corrected [3] - 25251:17, 25261:19, 25301:22</p> <p>correctly [1] - 25260:17</p> <p>correspondence [8] - 25201:10, 25201:18, 25201:19, 25205:10, 25213:17, 25302:12, 25302:17, 25305:22</p> <p>corroborative [1] - 25234:25</p> <p>cosmetic [2] - 25241:9, 25243:9</p> <p>cost [4] - 25195:3, 25199:3, 25226:20, 25282:22</p> <p>Council [1] - 25206:21</p> <p>Counsel [5] - 25148:2, 25151:4, 25168:25, 25188:25, 25192:9</p> <p>counsel [18] - 25169:5, 25180:10, 25191:10, 25191:13, 25193:9, 25194:22, 25195:12, 25197:22, 25216:20, 25225:20, 25248:8, 25253:24, 25253:25, 25254:1, 25254:10, 25254:14, 25279:5, 25281:16</p> <p>counsel's [1] - 25190:10</p> <p>coup [1] - 25237:20</p> <p>couple [8] - 25152:22, 25167:2, 25185:19, 25261:20, 25264:10, 25265:18, 25296:15, 25300:14</p> <p>coupled [1] - 25265:25</p>
--	---	---	---	---



<p>course [7] - 25167:21, 25192:12, 25194:20, 25242:18, 25277:20, 25277:24, 25303:13</p> <p>courses [1] - 25289:19</p> <p>court [5] - 25215:11, 25215:12, 25215:13, 25215:25, 25233:7</p> <p>Court[20] - 25148:9, 25161:14, 25207:3, 25215:15, 25221:5, 25243:5, 25243:16, 25246:19, 25249:20, 25252:14, 25252:15, 25253:15, 25261:13, 25278:22, 25279:11, 25305:15, 25307:1, 25307:3, 25307:14, 25307:18</p> <p>courts [1] - 25186:14</p> <p>cover [1] - 25199:4</p> <p>covered [1] - 25194:5</p> <p>crack [1] - 25286:13</p> <p>Craig[2] - 25164:4, 25169:5</p> <p>crazy [1] - 25292:24</p> <p>cream [1] - 25263:8</p> <p>cream-coloured [1] - 25263:8</p> <p>create [1] - 25212:15</p> <p>creates [1] - 25253:20</p> <p>credibility [2] - 25181:3, 25287:20</p> <p>credible [3] - 25212:16, 25212:18, 25264:2</p> <p>crept [1] - 25287:8</p> <p>crime [15] - 25172:7, 25174:12, 25175:7, 25177:7, 25183:5, 25183:19, 25184:16, 25187:7, 25188:1, 25203:5, 25205:14, 25265:11, 25269:2, 25271:22, 25271:23</p> <p>Criminal[1] - 25208:6</p> <p>criminal [2] - 25186:13, 25192:14</p> <p>critical [3] - 25165:21, 25297:16, 25298:8</p> <p>Crosbie[3] - 25205:5, 25206:8, 25216:18</p> <p>cross [2] - 25192:20, 25194:5</p> <p>cross-examination [2] - 25192:20, 25194:5</p> <p>Crown[9] - 25193:20, 25207:14, 25210:4, 25215:7, 25222:1, 25223:9, 25232:23, 25295:10, 25304:4</p>	<p>Crown's [4] - 25237:15, 25237:21, 25264:11, 25296:10</p> <p>crude [5] - 25170:21, 25170:24, 25172:16, 25176:22, 25287:9</p> <p>Csr[8] - 25148:9, 25148:10, 25307:2, 25307:12, 25307:13, 25307:16, 25307:17</p> <p>cuff [1] - 25236:13</p> <p>culmination [1] - 25257:24</p> <p>cut [1] - 25259:3</p>	<p>25175:6, 25175:10, 25175:11, 25175:18, 25175:19, 25176:14, 25176:18, 25177:6, 25178:9, 25178:19, 25179:6, 25179:8, 25179:11, 25179:15, 25179:20, 25181:22, 25182:20, 25183:14, 25183:15, 25183:19, 25184:6, 25184:11, 25184:16, 25185:7, 25186:2, 25186:18, 25186:23, 25189:2, 25189:5, 25195:19, 25199:4, 25199:15, 25200:5, 25200:13, 25201:4, 25202:7, 25203:11, 25204:7, 25205:4, 25205:11, 25206:3, 25206:13, 25217:8, 25217:25, 25218:1, 25218:4, 25219:10, 25220:21, 25225:3, 25225:14, 25228:13, 25228:23, 25230:1, 25233:1, 25233:9, 25233:19, 25233:25, 25235:10, 25236:4, 25238:21, 25239:3, 25241:12, 25241:18, 25242:6, 25242:8, 25243:8, 25243:20, 25243:23, 25244:24, 25247:15, 25247:17, 25248:7, 25248:15, 25248:21, 25249:6, 25250:14, 25250:24, 25251:8, 25252:10, 25252:12, 25255:7, 25256:16, 25257:1, 25257:5, 25258:13, 25260:11, 25260:17, 25260:21, 25261:9, 25261:13, 25261:24, 25262:18, 25262:21, 25263:13, 25263:25, 25264:3, 25264:5, 25264:10, 25266:4, 25266:5, 25267:21, 25269:17, 25270:1, 25270:10, 25271:3, 25272:4, 25272:24, 25273:2, 25276:2, 25278:15, 25279:12, 25279:20, 25280:1, 25282:22, 25289:1, 25289:11, 25292:5, 25293:6, 25297:17, 25298:3</p> <p>David's [13] - 25158:25,</p>	<p>25163:12, 25164:8, 25172:10, 25176:8, 25234:22, 25236:23, 25242:15, 25246:4, 25248:1, 25250:5, 25264:15, 25282:25</p> <p>day-to-day [1] - 25230:13</p> <p>days [2] - 25151:11, 25205:10</p> <p>de [1] - 25237:20</p> <p>deal [6] - 25166:4, 25177:1, 25190:8, 25195:16, 25201:17, 25208:3</p> <p>dealing [3] - 25195:9, 25253:19, 25291:22</p> <p>dealings [4] - 25166:5, 25196:12, 25212:3, 25213:14</p> <p>deals [1] - 25216:18</p> <p>dealt [4] - 25151:17, 25199:25, 25269:12, 25274:2</p> <p>Deb [1] - 25171:9</p> <p>debate [1] - 25289:21</p> <p>Debbie[4] - 25232:25, 25270:11, 25270:25, 25274:5</p> <p>Deborah [21] - 25168:10, 25171:1, 25175:7, 25175:8, 25176:3, 25177:2, 25233:15, 25234:1, 25234:24, 25236:21, 25237:4, 25238:13, 25238:15, 25238:18, 25238:23, 25275:3, 25275:21, 25278:17, 25278:21, 25286:14</p> <p>deceased [2] - 25170:6, 25275:2</p> <p>December[13] - 25155:25, 25198:2, 25208:7, 25208:22, 25210:17, 25212:2, 25212:19, 25213:7, 25216:12, 25222:16, 25256:19, 25274:11, 25286:24</p> <p>decided [3] - 25188:8, 25248:16, 25294:1</p> <p>decision [7] - 25223:13, 25233:8, 25255:11, 25256:4, 25256:9, 25292:9, 25292:10</p> <p>decisions [4] - 25213:9, 25291:23, 25292:8, 25292:11</p> <p>declare [1] - 25186:11</p>	<p>declared [1] - 25185:25</p> <p>deconstruct [1] - 25236:2</p> <p>defamed [1] - 25157:15</p> <p>defeat [1] - 25165:21</p> <p>defence [6] - 25159:18, 25191:11, 25191:13, 25207:15, 25248:5, 25304:5</p> <p>defended [1] - 25252:13</p> <p>deferred [1] - 25292:21</p> <p>defining [1] - 25154:3</p> <p>degree [2] - 25255:2, 25255:3</p> <p>delaying [1] - 25302:1</p> <p>deliberate [1] - 25223:13</p> <p>Delta[1] - 25147:16</p> <p>demeanour [5] - 25264:7, 25264:16, 25264:17, 25268:17</p> <p>democracy [1] - 25166:21</p> <p>demonstrable [1] - 25216:23</p> <p>demonstrate [2] - 25202:11, 25203:4</p> <p>demonstrating [1] - 25205:16</p> <p>denial [2] - 25187:15, 25270:11</p> <p>denied [8] - 25175:11, 25175:14, 25179:11, 25235:10, 25236:18, 25258:9, 25260:8, 25271:21</p> <p>denigrate [1] - 25191:1</p> <p>Dennis[1] - 25299:17</p> <p>deny [3] - 25267:23, 25279:21, 25280:8</p> <p>denying [1] - 25267:10</p> <p>Department[9] - 25158:16, 25158:23, 25161:4, 25205:25, 25238:11, 25295:15, 25303:21, 25304:20, 25305:4</p> <p>Depended [1] - 25293:9</p> <p>describe [3] - 25193:25, 25274:23, 25276:9</p> <p>described [14] - 25159:20, 25176:11, 25176:17, 25176:18, 25193:14, 25235:21, 25235:22, 25235:23, 25235:24, 25263:7, 25263:9, 25265:10, 25279:17, 25302:7</p> <p>describing [1] -</p>
--	---	--	--	---



<p>25277:12 Description [1] - 25150:2 description [2] - 25176:16, 25245:12 desires [1] - 25215:15 desk [2] - 25201:11, 25213:11 detail [5] - 25160:8, 25171:16, 25208:4, 25249:18 detailed [1] - 25245:11 detailing [2] - 25207:9, 25209:6 details [1] - 25164:7 determination [1] - 25215:11 determine [2] - 25215:18, 25230:16 determined [2] - 25157:23, 25239:10 detrimental [1] - 25166:9 developed [1] - 25168:17 developing [1] - 25272:14 dictate [1] - 25214:1 difference [2] - 25170:23, 25274:21 different [17] - 25160:11, 25160:12, 25164:16, 25166:14, 25174:8, 25274:24, 25275:3, 25275:7, 25277:11, 25277:12, 25277:13, 25282:11, 25283:21, 25284:11, 25284:14, 25296:5, 25302:25 differently [4] - 25152:3, 25273:25, 25281:21, 25283:19 difficult [7] - 25152:7, 25152:12, 25154:4, 25171:23, 25234:16, 25257:10, 25295:2 difficulty [1] - 25171:15 dignity [1] - 25158:4 direct [4] - 25213:14, 25215:10, 25253:8, 25288:13 direction [4] - 25204:2, 25204:6, 25218:7, 25264:25 directions [11] - 25154:3, 25184:19, 25184:23, 25260:7, 25260:10, 25260:14, 25261:7, 25261:14,</p>	<p>25262:1, 25279:15, 25279:23 directly [7] - 25171:21, 25189:11, 25191:16, 25192:1, 25193:5, 25195:6, 25205:24 Director [1] - 25148:3 directory [1] - 25214:24 disagree [1] - 25165:18 disclosure [1] - 25302:14 discount [1] - 25238:5 discredit [1] - 25238:15 discrete [1] - 25195:8 discretionary [2] - 25216:4, 25216:5 discussed [6] - 25212:11, 25226:15, 25231:17, 25249:8, 25251:3, 25280:15 discussing [3] - 25241:2, 25247:8, 25266:8 discussion [3] - 25172:7, 25227:4, 25287:7 discussions [4] - 25211:8, 25244:25, 25255:25, 25258:11 displayed [1] - 25194:22 dispose [2] - 25266:10, 25266:11 dispute [5] - 25241:22, 25253:13, 25259:11, 25261:4, 25298:18 disputed [1] - 25239:21 distances [1] - 25298:6 distinction [2] - 25274:18, 25274:20 distinctive [1] - 25245:25 distracting [1] - 25188:12 doc [1] - 25218:20 Document [2] - 25148:4, 25148:5 document [6] - 25161:3, 25245:24, 25246:8, 25257:6, 25269:3, 25292:16 documents [32] - 25155:22, 25156:4, 25187:7, 25187:9, 25189:23, 25196:1, 25197:9, 25198:3, 25198:4, 25198:13, 25198:14, 25198:15, 25198:19, 25199:5, 25200:3, 25203:9,</p>	<p>25203:21, 25214:16, 25214:22, 25219:5, 25223:2, 25223:3, 25252:1, 25252:6, 25285:1, 25287:16, 25290:12, 25291:21, 25304:14, 25305:7, 25305:12 Dodge [1] - 25263:8 Don [1] - 25148:10 Donald [3] - 25149:14, 25307:2, 25307:17 done [22] - 25157:18, 25168:11, 25200:4, 25200:10, 25200:11, 25202:19, 25203:14, 25203:16, 25228:20, 25245:5, 25257:18, 25267:23, 25275:13, 25281:21, 25282:20, 25284:8, 25284:11, 25290:21, 25290:22, 25296:19, 25296:21 door [4] - 25224:5, 25282:10, 25285:24, 25285:25 dots [1] - 25211:12 doubt [7] - 25201:23, 25203:4, 25205:18, 25231:14, 25256:1, 25272:17, 25287:12 doubtful [1] - 25163:2 Doug [1] - 25208:19 Douglas [1] - 25148:2 down [16] - 25180:19, 25204:19, 25206:16, 25207:2, 25216:20, 25252:10, 25257:25, 25265:19, 25266:23, 25268:19, 25279:18, 25286:23, 25298:24, 25303:21, 25304:24, 25305:13 downside [2] - 25255:15, 25255:16 downtown [1] - 25260:1 Dr [3] - 25152:19, 25240:12, 25296:15 draft [3] - 25234:18, 25235:1, 25270:13 drawn [1] - 25178:25 dress [2] - 25298:20, 25298:24 dressed [1] - 25262:8 drew [1] - 25193:23 drive [4] - 25265:18, 25265:25, 25266:5, 25267:15 driving [4] - 25259:12,</p>	<p>25267:1, 25267:6, 25280:3 dropped [2] - 25236:1, 25277:22 drove [1] - 25291:11 drugs [2] - 25275:11, 25277:12 duly [1] - 25207:16 duties [2] - 25191:19, 25289:5 duty [2] - 25192:3, 25281:7</p>	<p>25273:20, 25277:8, 25277:10, 25280:15, 25290:21, 25296:9 elaborate [4] - 25196:13, 25197:10, 25235:8, 25247:9 elements [1] - 25181:25 elevator [3] - 25257:3, 25258:6, 25258:22 elsewhere [1] - 25162:10 Elvis [2] - 25158:23, 25159:1 embarrassed [1] - 25158:15 emphasize [1] - 25194:14 emphatically [1] - 25227:3 employed [1] - 25296:25 employees [1] - 25194:8 employer [2] - 25194:3, 25194:9 enactment [2] - 25237:12, 25296:11 enclosed [1] - 25219:4 encountered [2] - 25199:20, 25264:10 encyclopaedic [1] - 25291:13 end [8] - 25157:10, 25172:7, 25198:2, 25256:12, 25272:2, 25290:24, 25294:23, 25295:12 endeavour [1] - 25288:15 ended [2] - 25152:22, 25303:3 enemy [3] - 25153:16, 25154:10, 25194:24 engaged [2] - 25160:14, 25220:4 engagement [1] - 25228:13 enormous [1] - 25249:11 enriched [1] - 25182:10 entire [2] - 25160:17, 25303:10 entirely [3] - 25177:22, 25219:19, 25219:21 equal [1] - 25158:25 Eric [1] - 25204:5 especially [3] - 25180:23, 25184:13, 25299:5 Esq [4] - 25149:6,</p>
E				
<p>early [13] - 25175:9, 25200:5, 25203:9, 25217:3, 25217:21, 25228:12, 25235:17, 25253:24, 25256:20, 25285:15, 25285:21, 25286:4, 25300:5 earth [1] - 25264:10 Eddie [1] - 25149:8 Edgar [1] - 25206:13 editorial [1] - 25204:2 editorialising [1] - 25268:14 Edward [1] - 25147:7 effect [16] - 25166:9, 25166:14, 25168:19, 25169:18, 25171:7, 25171:8, 25175:1, 25196:8, 25204:15, 25231:22, 25237:20, 25241:12, 25243:14, 25245:7, 25253:20, 25277:14 effective [1] - 25208:7 effectively [1] - 25157:21 effort [4] - 25165:17, 25189:20, 25191:5, 25191:12 efforts [8] - 25165:21, 25166:15, 25202:20, 25222:25, 25253:5, 25270:4, 25274:3, 25284:14 either [25] - 25165:20, 25174:15, 25194:16, 25201:10, 25202:19, 25205:24, 25209:14, 25211:2, 25223:1, 25224:6, 25232:19, 25237:24, 25238:5, 25241:9, 25241:22, 25249:15, 25253:9, 25258:3, 25267:22,</p>				



<p>25149:7, 25149:8, 25149:9 essence [1] - 25170:4 essential [2] - 25189:15, 25191:7 essentially [2] - 25289:25, 25295:8 establish [1] - 25287:2 Estate [16] - 25202:25, 25203:12, 25203:24, 25205:6, 25205:15, 25214:7, 25214:12, 25219:2, 25220:9, 25220:19, 25221:13, 25222:4, 25223:19, 25244:13, 25244:16, 25245:1 etc [2] - 25218:2, 25298:6 etcetera [4] - 25209:2, 25215:9, 25215:19, 25297:18 ethics [2] - 25162:1, 25196:22 Eugene [3] - 25251:19, 25270:25, 25278:22 evaluation [1] - 25190:6 event [5] - 25164:3, 25172:1, 25174:10, 25174:15, 25243:24 events [17] - 25171:4, 25171:12, 25171:17, 25228:24, 25229:12, 25229:23, 25230:15, 25231:6, 25249:18, 25250:6, 25250:19, 25251:1, 25251:2, 25251:10, 25272:3, 25279:12 eventually [1] - 25216:24 evidence [110] - 25151:11, 25159:24, 25161:16, 25167:7, 25168:9, 25168:17, 25170:16, 25172:4, 25172:5, 25172:9, 25172:10, 25173:9, 25174:19, 25175:4, 25175:13, 25176:6, 25179:2, 25179:9, 25180:4, 25180:20, 25181:14, 25182:2, 25182:5, 25183:1, 25183:6, 25183:11, 25183:13, 25183:17, 25183:24, 25184:1, 25185:4, 25185:11, 25187:6, 25187:9, 25188:10, 25190:11,</p>	<p>25192:8, 25192:9, 25193:17, 25196:19, 25203:6, 25219:9, 25229:9, 25229:11, 25229:21, 25232:6, 25233:8, 25233:16, 25235:19, 25237:13, 25238:2, 25238:16, 25238:20, 25238:23, 25240:1, 25240:20, 25241:14, 25241:18, 25242:19, 25242:20, 25243:1, 25245:4, 25246:25, 25247:3, 25247:11, 25247:21, 25248:9, 25248:19, 25250:20, 25251:16, 25252:17, 25253:7, 25254:19, 25256:9, 25258:12, 25261:2, 25261:6, 25261:10, 25263:2, 25263:5, 25263:11, 25263:22, 25263:25, 25265:9, 25265:16, 25266:1, 25267:20, 25268:21, 25270:14, 25272:23, 25275:19, 25276:3, 25277:9, 25277:21, 25278:3, 25279:10, 25279:20, 25284:1, 25286:6, 25287:22, 25288:2, 25294:17, 25294:18, 25296:4, 25296:18, 25302:24, 25303:1, 25303:17, 25303:18 evil [1] - 25163:8 evolution [1] - 25277:3 evolved [7] - 25155:7, 25155:8, 25155:19, 25156:21, 25167:21, 25286:12, 25288:2 exact [1] - 25168:21 exactly [3] - 25154:21, 25222:5, 25223:20 examination [4] - 25192:20, 25193:9, 25194:5, 25195:18 examined [1] - 25274:12 example [21] - 25152:18, 25155:5, 25161:16, 25163:2, 25163:23, 25164:1, 25164:2, 25168:10, 25177:25, 25178:6, 25178:7, 25178:18, 25180:5, 25183:15, 25186:1, 25258:6,</p>	<p>25268:20, 25272:20, 25272:21, 25273:19, 25292:9 except [1] - 25298:4 excited [2] - 25225:21, 25225:23 excluded [1] - 25240:1 exclusively [1] - 25239:17 exculpatory [1] - 25284:3 executive [2] - 25203:25, 25206:8 Executive [1] - 25148:3 exhausted [1] - 25207:3 exhibits [3] - 25209:1, 25301:7, 25301:8 exonerated [1] - 25240:1 exoneration [1] - 25232:20 expand [2] - 25165:16, 25254:25 expansive [2] - 25171:20, 25238:10 expect [3] - 25193:13, 25275:13, 25275:15 expectation [1] - 25302:18 expectations [1] - 25289:15 expected [3] - 25303:7, 25303:9, 25304:6 experience [8] - 25189:16, 25190:18, 25190:20, 25190:23, 25191:13, 25240:8, 25253:19, 25254:2 experiences [1] - 25190:24 expert [1] - 25191:3 expertise [3] - 25189:17, 25190:18, 25190:21 Explain [1] - 25182:7 explain [8] - 25229:10, 25238:4, 25238:5, 25247:1, 25255:15, 25269:19, 25299:2 explained [1] - 25227:8 explanation [3] - 25178:24, 25204:23, 25229:5 explanations [1] - 25268:25 extensive [1] - 25270:15 extent [1] - 25201:9 extraordinary [1] - 25216:8</p>	<p>extreme [1] - 25255:6 extremely [3] - 25152:7, 25152:12, 25171:23 eyes [2] - 25283:7</p> <p>F</p> <p>face [7] - 25172:11, 25209:13, 25250:17, 25269:3, 25272:18, 25295:7, 25295:8 faced [3] - 25164:12, 25184:7, 25295:7 facing [1] - 25268:18 fact [20] - 25152:25, 25179:1, 25179:10, 25180:4, 25185:4, 25239:21, 25242:20, 25243:6, 25243:9, 25244:25, 25245:4, 25250:24, 25253:21, 25264:24, 25265:20, 25272:25, 25275:20, 25276:5, 25297:13, 25298:16 factor [3] - 25215:24, 25255:11, 25302:8 factors [2] - 25192:21, 25255:20 facts [16] - 25179:21, 25232:2, 25248:21, 25250:5, 25256:16, 25270:4, 25270:10, 25270:16, 25270:18, 25270:22, 25271:25, 25272:11, 25273:8, 25279:7, 25281:19, 25282:2 factual [2] - 25192:13, 25272:8 Fainstein [3] - 25210:6, 25211:19, 25212:7 faintest [2] - 25240:4, 25287:5 Fair [3] - 25179:14, 25180:9, 25181:1 fair [52] - 25156:22, 25160:10, 25161:23, 25162:9, 25164:22, 25171:2, 25174:4, 25174:10, 25177:3, 25177:4, 25179:25, 25183:21, 25184:3, 25186:6, 25186:24, 25187:4, 25187:23, 25200:11, 25201:8, 25202:16, 25202:22, 25216:14, 25221:14, 25222:13, 25228:14,</p>	<p>25232:1, 25233:24, 25235:12, 25238:6, 25248:12, 25248:22, 25248:24, 25250:21, 25254:7, 25257:25, 25270:4, 25270:24, 25275:23, 25276:6, 25276:20, 25277:2, 25277:3, 25278:13, 25285:10, 25286:1, 25290:6, 25290:8, 25291:21, 25293:22, 25294:2, 25302:2 fairly [6] - 25217:21, 25234:17, 25285:21, 25286:5, 25293:21, 25297:16 fairness [2] - 25197:8, 25305:21 faith [2] - 25155:10 fall [1] - 25226:2 fallibility [1] - 25154:24 fallible [2] - 25154:14, 25155:13 false [3] - 25177:10, 25182:21, 25238:21 falsely [1] - 25231:18 familiar [1] - 25268:7 family [3] - 25186:16, 25226:3, 25254:22 famous [1] - 25158:23 far [30] - 25161:20, 25162:4, 25162:7, 25162:20, 25170:24, 25173:9, 25173:11, 25184:8, 25186:4, 25186:12, 25196:7, 25197:7, 25197:12, 25197:14, 25209:5, 25209:9, 25213:6, 25221:10, 25226:2, 25253:7, 25256:10, 25259:10, 25262:10, 25269:15, 25272:13, 25283:24, 25292:4, 25293:5, 25293:7 fashion [1] - 25278:16 fast [1] - 25253:25 fastest [2] - 25220:18, 25221:24 fate [1] - 25289:14 fault [2] - 25160:20, 25160:24 favour [1] - 25188:7 fear [1] - 25282:21 February [8] - 25147:21, 25156:1, 25203:1, 25208:24, 25209:23, 25210:9, 25221:1, 25305:7</p>
--	---	---	---	--



<p>Federal^[14] - 25156:7, 25161:4, 25166:6, 25194:8, 25196:12, 25197:13, 25210:8, 25210:16, 25213:14, 25213:20, 25213:25, 25238:4, 25302:21</p> <p>federal ^[2] - 25205:25, 25302:15</p> <p>felt ^[8] - 25158:13, 25158:14, 25162:15, 25197:18, 25248:3, 25248:13, 25301:19</p> <p>Ferris^[3] - 25152:19, 25240:12, 25286:14</p> <p>few ^[2] - 25288:21, 25290:15</p> <p>Fifth^[14] - 25203:12, 25203:23, 25205:6, 25214:7, 25214:11, 25219:2, 25220:9, 25220:18, 25221:12, 25222:4, 25223:19, 25244:13, 25244:15, 25244:25</p> <p>figure ^[2] - 25199:3, 25303:23</p> <p>file ^[37] - 25154:9, 25155:5, 25167:4, 25191:19, 25195:14, 25198:4, 25198:14, 25201:7, 25201:21, 25210:3, 25210:5, 25210:9, 25213:7, 25213:8, 25249:17, 25283:7, 25283:12, 25283:15, 25284:24, 25286:10, 25286:12, 25292:9, 25292:11, 25300:18, 25300:22, 25300:23, 25301:1, 25301:12, 25302:10, 25302:13, 25302:21, 25302:23, 25302:25, 25303:1, 25303:4, 25303:8</p> <p>filed ^[21] - 25155:25, 25190:9, 25195:11, 25198:2, 25207:14, 25208:23, 25209:9, 25212:2, 25213:13, 25215:19, 25221:2, 25237:11, 25270:13, 25274:10, 25286:19, 25286:24, 25302:13, 25302:19, 25304:9, 25304:22</p> <p>files ^[4] - 25198:9, 25198:18, 25221:18, 25303:12</p>	<p>filing ^[6] - 25156:10, 25210:16, 25211:25, 25222:16, 25292:15, 25301:11</p> <p>film ^[1] - 25296:23</p> <p>final ^[2] - 25199:7, 25305:17</p> <p>finally ^[2] - 25190:11, 25237:6</p> <p>findings ^[2] - 25192:6, 25192:14</p> <p>fine ^[1] - 25246:23</p> <p>finished ^[1] - 25251:14</p> <p>fire ^[5] - 25279:6, 25290:19, 25290:25</p> <p>fired ^[3] - 25290:12, 25291:1, 25291:2</p> <p>firm ^[8] - 25198:6, 25205:22, 25213:1, 25222:17, 25226:7, 25227:23, 25288:22, 25289:10</p> <p>first ^[47] - 25167:4, 25167:22, 25182:18, 25190:8, 25192:23, 25198:22, 25202:9, 25203:24, 25208:2, 25210:17, 25212:1, 25214:24, 25217:12, 25222:23, 25225:2, 25225:8, 25225:12, 25225:15, 25226:7, 25227:20, 25227:21, 25228:3, 25229:10, 25233:19, 25233:21, 25233:22, 25235:9, 25244:7, 25252:10, 25253:8, 25254:11, 25257:2, 25263:22, 25265:5, 25271:15, 25274:23, 25283:13, 25286:12, 25286:25, 25292:9, 25292:15, 25302:4, 25305:6, 25305:13, 25305:18, 25306:2</p> <p>Fisher^[3] - 25156:1, 25204:17, 25283:10</p> <p>fists ^[1] - 25298:23</p> <p>fit ^[3] - 25199:16, 25265:11, 25271:25</p> <p>five ^[16] - 25160:1, 25168:4, 25168:25, 25169:16, 25169:20, 25177:4, 25180:1, 25180:2, 25214:15, 25214:18, 25232:7, 25232:8, 25232:9, 25232:11, 25232:12, 25275:10</p>	<p>fix ^[1] - 25155:14</p> <p>fixed ^[2] - 25183:16, 25273:12</p> <p>flashlight ^[2] - 25258:23, 25258:25</p> <p>flaw ^[1] - 25160:24</p> <p>fled ^[1] - 25298:25</p> <p>flexible ^[2] - 25258:14, 25279:14</p> <p>flexible-blade ^[2] - 25258:14, 25279:14</p> <p>flip ^[2] - 25200:22, 25224:11</p> <p>floor ^[1] - 25235:23</p> <p>flower ^[2] - 25182:1, 25182:4</p> <p>flowery ^[1] - 25182:10</p> <p>fluffed ^[1] - 25176:19</p> <p>fluffing ^[2] - 25172:12, 25236:5</p> <p>fluid ^[4] - 25234:17, 25235:15, 25235:21, 25239:11</p> <p>fluids ^[1] - 25239:17</p> <p>fob ^[1] - 25256:6</p> <p>focus ^[6] - 25171:20, 25232:1, 25232:3, 25232:5, 25282:23, 25291:13</p> <p>focused ^[5] - 25232:11, 25284:14, 25289:25, 25290:3, 25291:19</p> <p>follow ^[6] - 25152:22, 25188:13, 25201:6, 25203:9, 25251:2, 25285:9</p> <p>follow-up ^[1] - 25201:6</p> <p>followed ^[1] - 25156:3</p> <p>following ^[3] - 25151:11, 25207:7, 25219:24</p> <p>follows ^[1] - 25209:24</p> <p>foregoing ^[1] - 25307:4</p> <p>foresaw ^[1] - 25226:22</p> <p>forgive ^[1] - 25171:19</p> <p>forgiving ^[1] - 25250:9</p> <p>form ^[3] - 25212:22, 25235:1, 25289:22</p> <p>formal ^[3] - 25196:17, 25197:5, 25270:11</p> <p>formally ^[1] - 25209:14</p> <p>formed ^[2] - 25193:19, 25289:22</p> <p>former ^[3] - 25193:22, 25193:25, 25194:2</p> <p>formulate ^[1] - 25290:1</p> <p>formulated ^[1] - 25295:20</p> <p>forum ^[2] - 25158:9, 25161:19</p>	<p>forward ^[8] - 25197:12, 25204:22, 25219:4, 25238:4, 25253:18, 25270:20, 25272:9, 25272:11</p> <p>fought ^[1] - 25298:25</p> <p>foundation ^[1] - 25286:13</p> <p>Fox^[1] - 25181:17</p> <p>frame ^[3] - 25156:8, 25197:25, 25301:2</p> <p>Frank^[1] - 25278:20</p> <p>frankly ^[2] - 25180:8, 25244:6</p> <p>Framer^[1] - 25149:10</p> <p>free ^[1] - 25160:21</p> <p>freedom ^[2] - 25158:4, 25164:20</p> <p>fresh ^[4] - 25283:6, 25283:7, 25287:22, 25288:2</p> <p>friends ^[1] - 25264:5</p> <p>frivolous ^[1] - 25165:19</p> <p>front ^[1] - 25252:11</p> <p>frozen ^[2] - 25239:6, 25239:8</p> <p>fruit ^[1] - 25259:3</p> <p>Fruit^[1] - 25259:5</p> <p>fucked ^[1] - 25171:10</p> <p>fuel ^[1] - 25272:19</p> <p>full ^[7] - 25211:14, 25221:3, 25221:5, 25242:25, 25294:3, 25302:14</p> <p>fully ^[3] - 25191:14, 25207:8, 25209:6</p> <p>function ^[1] - 25287:22</p> <p>functioning ^[1] - 25287:10</p> <p>fundamental ^[1] - 25226:16</p> <p>Funding^[1] - 25150:7</p> <p>funding ^[3] - 25189:3, 25189:6, 25195:12</p> <p>funeral ^[1] - 25279:21</p> <p>future ^[1] - 25205:17</p>	<p>25298:23, 25302:24</p> <p>game ^[1] - 25157:6</p> <p>games ^[2] - 25226:20, 25226:23</p> <p>Gary^[2] - 25217:9, 25260:18</p> <p>gather ^[2] - 25220:9, 25221:6</p> <p>gathering ^[1] - 25189:24</p> <p>general ^[8] - 25153:8, 25155:24, 25195:23, 25196:6, 25201:8, 25216:13, 25228:17, 25264:25</p> <p>generally ^[18] - 25152:25, 25164:10, 25176:7, 25177:4, 25180:20, 25203:23, 25208:12, 25212:9, 25226:15, 25230:19, 25247:16, 25256:20, 25268:8, 25290:17, 25291:5, 25291:8, 25291:9, 25299:18</p> <p>Generally^[1] - 25230:16</p> <p>gentlemen ^[2] - 25211:5, 25211:23</p> <p>George^[1] - 25300:5</p> <p>Gibson^[1] - 25149:9</p> <p>given ^[12] - 25180:23, 25186:2, 25192:7, 25192:12, 25221:14, 25230:8, 25241:23, 25249:20, 25269:17, 25281:20, 25283:14, 25300:17</p> <p>glove ^[2] - 25240:21, 25241:10</p> <p>gloves ^[4] - 25154:24, 25155:3, 25157:4, 25193:24</p> <p>gonna ^[2] - 25154:22, 25236:1</p> <p>Gord^[1] - 25297:9</p> <p>Gordge^[1] - 25202:10</p> <p>gordge ^[24] - 25199:10, 25199:16, 25200:2, 25202:18, 25204:25, 25217:24, 25218:14, 25219:8, 25220:7, 25221:11, 25221:18, 25222:11, 25224:4, 25260:19, 25283:10, 25288:8, 25288:11, 25296:6, 25297:13, 25299:4, 25299:12, 25300:10, 25300:13, 25301:11</p> <p>gordge's ^[2] -</p>
G				
<p>Gail^[21] - 25168:21, 25179:1, 25179:3, 25184:24, 25185:6, 25206:15, 25237:1, 25242:18, 25242:19, 25242:22, 25244:3, 25259:17, 25264:12, 25266:1, 25266:11, 25266:23, 25279:16, 25298:13, 25298:16,</p>				



25293:12, 25295:12 Gordon [2] - 25219:1, 25220:13 govern [1] - 25161:13 government [1] - 25302:15 Government [1] - 25149:4 Governor [1] - 25206:21 grabbed [5] - 25170:8, 25178:21, 25241:12, 25275:9, 25278:15 grabbing [2] - 25170:12, 25240:23 gradual [1] - 25153:23 grain [1] - 25258:22 granted [4] - 25189:9, 25190:22, 25206:23, 25304:25 granting [1] - 25206:22 gras [1] - 25237:20 grasp [1] - 25288:22 greatly [1] - 25218:9 green [1] - 25298:2 ground [3] - 25192:23, 25193:2, 25303:24 grounds [2] - 25190:15, 25219:15 group [2] - 25289:22, 25292:20 grow [1] - 25195:2 guess [13] - 25152:6, 25160:11, 25165:17, 25166:3, 25180:13, 25206:12, 25210:22, 25211:1, 25214:23, 25223:25, 25271:3, 25293:3, 25294:25 guessing [3] - 25211:7, 25211:19, 25248:2 guidelines [2] - 25163:4, 25286:17 guilt [4] - 25187:16, 25247:1, 25270:11, 25282:15 guilty [7] - 25166:2, 25167:14, 25277:25, 25278:1, 25278:2, 25278:4, 25283:17 guy [2] - 25159:21, 25159:22 guys [4] - 25158:8, 25158:11, 25159:3, 25193:23	Hall [20] - 25156:11, 25168:10, 25171:1, 25175:8, 25232:25, 25233:15, 25234:1, 25236:8, 25237:4, 25238:14, 25238:15, 25238:18, 25238:23, 25270:12, 25270:25, 25275:3, 25275:21, 25278:21, 25286:14 Hall's [8] - 25171:9, 25176:3, 25177:2, 25233:16, 25234:24, 25236:21, 25274:5, 25278:17 hand [1] - 25235:21 handled [1] - 25258:15 hands [2] - 25161:5, 25191:22 handwriting [2] - 25245:25, 25297:9 handwritten [2] - 25245:21, 25246:3 hang [2] - 25163:14, 25297:20 hanging [1] - 25174:13 happy [1] - 25293:1 hard [1] - 25202:10 Harper [1] - 25199:24 hat [1] - 25174:13 hate [1] - 25285:22 head [3] - 25176:20, 25200:7, 25230:8 headed [1] - 25204:6 headlights [1] - 25298:10 headline [1] - 25283:16 hear [8] - 25152:18, 25164:2, 25190:23, 25193:14, 25193:18, 25209:22, 25215:1, 25282:16 heard [28] - 25151:16, 25152:17, 25159:19, 25164:23, 25168:10, 25170:5, 25173:21, 25178:17, 25178:18, 25187:6, 25187:8, 25193:13, 25200:2, 25220:17, 25233:21, 25236:16, 25245:4, 25254:18, 25261:2, 25262:18, 25263:2, 25268:1, 25268:10, 25268:20, 25272:23, 25278:11, 25302:24, 25303:2 hearing [8] - 25187:21, 25188:10, 25207:11, 25215:11, 25233:19,	25260:13, 25283:20, 25299:7 hearings [1] - 25187:20 held [2] - 25163:10, 25195:10 hell [1] - 25271:19 help [6] - 25160:21, 25204:14, 25217:25, 25261:10, 25262:11, 25288:6 helped [2] - 25189:23, 25262:20 helpful [2] - 25223:24, 25282:16 helps [1] - 25242:3 Henderson [1] - 25183:9 Henry [1] - 25206:7 hereby [1] - 25307:4 herein [1] - 25307:6 Hersh [8] - 25149:2, 25199:15, 25199:20, 25205:11, 25291:1, 25292:19, 25292:22, 25292:24 high [1] - 25277:12 highly [1] - 25164:11 himself [1] - 25158:15 hindsight [10] - 25151:25, 25164:16, 25177:13, 25177:16, 25177:22, 25255:18, 25277:21, 25282:19, 25285:13, 25301:24 Hinz [3] - 25148:9, 25307:2, 25307:13 hired [1] - 25283:2 Hodson [31] - 25148:2, 25150:4, 25150:9, 25151:6, 25158:19, 25158:21, 25159:15, 25163:1, 25169:25, 25178:5, 25178:14, 25180:22, 25182:14, 25188:5, 25188:16, 25188:20, 25195:17, 25195:20, 25200:18, 25201:1, 25214:14, 25214:21, 25215:3, 25218:22, 25218:24, 25252:21, 25253:3, 25253:18, 25273:7, 25283:19, 25305:5 home [3] - 25183:6, 25259:21, 25279:21 Hon [1] - 25149:11 honest [5] - 25231:15, 25231:20, 25255:22, 25282:13, 25287:4 Honourable [1] -	25147:6 hook [1] - 25285:22 hope [6] - 25154:15, 25162:2, 25204:13, 25288:21, 25294:25 hoped [5] - 25196:21, 25223:7, 25238:10, 25295:9 hopefully [2] - 25162:12, 25290:3 hopes [1] - 25289:15 hoping [1] - 25155:12 host [2] - 25204:1, 25204:5 hostilities [2] - 25156:24, 25157:1 hostility [1] - 25194:21 Hotel [1] - 25147:16 hour [1] - 25228:9 house [3] - 25265:17, 25266:24, 25280:3 hugely [1] - 25250:13 human [1] - 25225:19 humans [2] - 25154:13 hunting [1] - 25258:15 hurtful [1] - 25193:12	25228:22, 25229:2, 25229:7, 25232:5, 25250:4, 25258:4, 25264:9, 25272:13, 25274:18 impose [1] - 25162:2 impossibility [1] - 25297:20 impossible [4] - 25168:7, 25260:24, 25295:21, 25296:2 impression [3] - 25187:14, 25222:22, 25229:22 inappropriate [1] - 25268:17 incident [22] - 25171:5, 25172:24, 25173:11, 25175:15, 25176:15, 25234:2, 25235:11, 25238:19, 25266:4, 25267:6, 25273:21, 25275:8, 25276:6, 25276:8, 25276:9, 25276:14, 25276:15, 25276:23, 25278:6, 25278:10, 25278:14, 25280:5 includes [1] - 25234:22 including [6] - 25154:8, 25180:10, 25242:23, 25278:12, 25303:11 inconsistencies [1] - 25236:4 inconsistent [1] - 25269:2 incontrovertible [1] - 25183:2 incorrigible [1] - 25163:8 incredulously [1] - 25280:22 incriminating [17] - 25177:10, 25177:19, 25177:20, 25178:24, 25179:18, 25180:4, 25180:7, 25180:10, 25181:11, 25182:20, 25183:3, 25183:13, 25183:18, 25232:4, 25232:6, 25267:4, 25294:17 independent [3] - 25223:9, 25295:9, 25295:10 Index [1] - 25150:1 indicated [3] - 25232:17, 25232:23, 25243:19 indicates [3] - 25202:9,
H			I	
half [2] - 25228:9, 25279:25			Id [1] - 25218:21 idea [6] - 25155:24, 25240:5, 25240:8, 25287:5, 25296:9, 25296:17 identical [2] - 25275:13, 25275:15 identified [1] - 25285:6 identify [3] - 25158:7, 25159:2 identifying [1] - 25236:19 ignore [1] - 25165:22 imagine [1] - 25295:2 immediate [1] - 25204:20 immediately [1] - 25245:9 impacted [1] - 25187:8 impediment [1] - 25269:22 implicated [2] - 25181:25, 25182:11 implicating [1] - 25263:25 implies [1] - 25266:12 importance [1] - 25263:21 important [11] - 25164:21, 25170:21,	



25210:3, 25216:19 indictment [1] - 25215:8 individual [4] - 25158:5, 25164:20, 25239:14, 25239:16 inference [4] - 25178:25, 25242:17, 25264:18, 25266:9 inflicted [1] - 25275:2 influence [2] - 25166:11, 25275:11 influenced [2] - 25280:11, 25302:1 informally [1] - 25209:14 information [28] - 25151:14, 25151:19, 25156:1, 25160:18, 25161:25, 25162:21, 25163:2, 25163:3, 25163:22, 25189:24, 25190:3, 25190:6, 25192:4, 25192:13, 25197:12, 25197:14, 25208:13, 25208:20, 25208:21, 25212:21, 25249:22, 25251:8, 25280:9, 25284:12, 25284:15, 25291:23, 25294:19, 25303:3 informed [1] - 25249:6 initial [1] - 25219:25 initialing [1] - 25297:3 injustice [3] - 25207:10, 25209:7, 25216:23 Inland [1] - 25148:12 inmate [3] - 25245:21, 25245:22, 25246:5 innocence [7] - 25158:25, 25165:24, 25185:22, 25226:20, 25226:24, 25231:18, 25250:11 innocent [22] - 25154:6, 25167:19, 25167:25, 25169:9, 25177:7, 25177:23, 25179:8, 25181:9, 25181:22, 25185:25, 25186:4, 25186:12, 25187:4, 25205:19, 25226:17, 25227:11, 25238:1, 25281:18, 25282:5, 25287:6, 25287:15 Inquiry [6] - 25147:2, 25147:23, 25151:15, 25243:7, 25278:3, 25279:11 inquiry [9] - 25189:12,	25189:23, 25191:8, 25191:17, 25191:23, 25193:6, 25194:4, 25194:23, 25195:9 inquisitive [1] - 25160:22 insight [1] - 25292:8 insofar [2] - 25242:20, 25244:2 inspiration [1] - 25291:12 inspire [1] - 25162:12 Institution [1] - 25288:20 institutional [2] - 25187:19, 25289:24 instruction [1] - 25293:5 instructions [3] - 25255:4, 25292:4, 25293:9 instrumentality [1] - 25157:17 intend [1] - 25195:25 intended [1] - 25296:16 interest [9] - 25163:17, 25163:18, 25163:20, 25163:25, 25164:5, 25164:7, 25164:9, 25165:11, 25165:12 interested [6] - 25189:4, 25199:23, 25199:24, 25200:1, 25232:18, 25249:12 interesting [2] - 25271:10, 25277:5 interests [11] - 25161:6, 25163:12, 25163:13, 25163:19, 25164:21, 25164:25, 25165:8, 25189:14, 25191:6, 25191:9, 25194:4 interpreted [1] - 25194:11 interrogated [1] - 25182:13 interrogation [4] - 25182:6, 25271:12, 25271:15, 25273:17 interview [2] - 25222:18, 25225:20 interviewed [8] - 25204:11, 25268:5, 25293:15, 25299:13, 25299:14, 25299:25, 25300:10, 25300:14 interviewing [2] - 25200:12, 25293:24 interviews [9] - 25203:16, 25232:2,	25257:24, 25288:17, 25299:9, 25299:10, 25299:16, 25299:19, 25299:21 intransigence [1] - 25154:19 introductory [1] - 25225:25 investigate [1] - 25303:14 investigated [2] - 25154:9, 25159:14 investigating [1] - 25200:13 investigation [6] - 25162:13, 25189:21, 25202:21, 25238:11, 25283:3, 25302:25 investigative [2] - 25165:25, 25166:1 investigators [1] - 25303:5 invite [1] - 25194:15 invited [2] - 25160:17, 25196:24 involve [1] - 25190:5 involved [8] - 25191:4, 25202:17, 25203:24, 25213:2, 25224:12, 25225:21, 25230:9, 25278:5 involvement [7] - 25189:19, 25203:13, 25217:21, 25219:25, 25220:11, 25276:12, 25299:14 involving [1] - 25171:5 Irene [1] - 25148:8 irrespective [1] - 25229:8 Isabelle [1] - 25148:5 issue [16] - 25185:21, 25186:19, 25203:23, 25224:9, 25240:6, 25251:20, 25269:11, 25274:2, 25277:5, 25279:6, 25283:25, 25284:2, 25284:9, 25284:10, 25285:14, 25293:9 issued [1] - 25207:13 issues [10] - 25152:7, 25160:8, 25187:25, 25188:3, 25188:4, 25195:9, 25197:17, 25292:18, 25292:19, 25292:21 item [1] - 25267:17 itself [2] - 25176:15, 25272:18	Iv [2] - 25192:3, 25192:16 J jail [4] - 25166:11, 25185:23, 25187:25, 25226:21 January [8] - 25198:23, 25201:3, 25205:4, 25206:10, 25209:25, 25213:6, 25229:13, 25248:23 Jay [1] - 25149:6 Jerry [1] - 25148:11 Joanne [1] - 25149:3 John [22] - 25160:2, 25180:23, 25181:23, 25182:10, 25183:12, 25183:23, 25205:4, 25206:8, 25222:2, 25223:14, 25232:13, 25241:6, 25241:9, 25241:24, 25242:5, 25243:10, 25243:25, 25261:6, 25283:4, 25293:16, 25297:15, 25299:25 joined [1] - 25205:23 joke [23] - 25168:11, 25168:15, 25168:16, 25168:17, 25168:18, 25170:21, 25170:24, 25171:7, 25172:3, 25172:16, 25172:21, 25173:1, 25173:5, 25173:10, 25173:12, 25173:13, 25173:25, 25174:17, 25273:25, 25274:1, 25276:24, 25276:25 jokes [1] - 25176:22 joking [4] - 25174:23, 25175:2, 25236:13, 25236:15 journalism [2] - 25162:1, 25196:22 journalist [3] - 25166:1, 25199:17, 25219:8 journalistic [1] - 25162:1 journalists [3] - 25160:22, 25162:3, 25166:1 Joyce [22] - 25149:3, 25198:23, 25199:20, 25200:5, 25200:23, 25204:7, 25204:15, 25217:8, 25219:3,	25220:10, 25220:21, 25291:7, 25291:11, 25291:12, 25291:18, 25292:6, 25293:6, 25296:9, 25296:22, 25299:22, 25300:1, 25300:5 Joycés [1] - 25200:1 judge [1] - 25264:24 judgment [1] - 25207:12 judgments [1] - 25207:12 judicial [1] - 25161:15 June [4] - 25250:25, 25288:7, 25297:4 jurisdiction [1] - 25216:1 jury [11] - 25167:8, 25178:25, 25184:2, 25186:3, 25243:3, 25264:24, 25265:6, 25265:14, 25284:4, 25284:5, 25285:18 Justice [39] - 25147:6, 25149:10, 25149:12, 25156:7, 25158:16, 25158:23, 25161:4, 25166:6, 25194:8, 25196:12, 25197:13, 25205:5, 25205:25, 25206:1, 25206:18, 25210:2, 25210:8, 25210:16, 25211:11, 25212:22, 25213:5, 25213:14, 25213:20, 25213:25, 25214:1, 25215:6, 25221:1, 25229:8, 25238:4, 25238:11, 25256:2, 25283:3, 25285:24, 25295:15, 25302:21, 25303:22, 25304:21, 25305:4, 25305:13 justice [3] - 25158:5, 25207:1, 25287:7 justifiably [1] - 25255:4 justify [2] - 25157:10, 25191:23 K Kara [1] - 25148:5 Karen [3] - 25148:9, 25307:2, 25307:13 Karst [6] - 25149:8, 25158:14, 25159:6, 25159:7, 25181:18, 25268:15
---	---	--	--	---



Katie ^[1] - 25199:24 keep ^[5] - 25201:18, 25201:19, 25254:24, 25289:25, 25290:2 keeping ^[1] - 25282:4 kept ^[2] - 25291:19, 25305:16 key ^[10] - 25181:21, 25181:22, 25221:24, 25222:12, 25228:24, 25248:23, 25263:24, 25270:19, 25273:7, 25288:18 kick ^[1] - 25242:2 kid ^[2] - 25269:10, 25269:13 kill ^[1] - 25237:1 killed ^[4] - 25170:10, 25171:9, 25171:11, 25173:4 Killer ^[2] - 25283:16, 25285:6 killling ^[2] - 25175:19, 25240:23 kind ^[5] - 25249:12, 25250:16, 25256:8, 25287:10, 25287:19 kinds ^[1] - 25202:7 knife ^[11] - 25258:10, 25258:12, 25258:14, 25258:15, 25258:16, 25259:3, 25259:8, 25275:2, 25279:14 knowing ^[3] - 25154:4, 25282:18, 25283:19 knowledge ^[3] - 25223:23, 25291:14, 25307:6 known ^[4] - 25233:25, 25239:14, 25273:1, 25284:7 Knox ^[1] - 25149:5 Krogan ^[1] - 25149:4 Kujawa ^[1] - 25149:6	25170:5, 25172:10, 25174:22, 25175:24, 25176:6, 25232:13, 25235:22, 25235:24, 25236:8, 25236:16, 25236:18, 25238:17, 25274:14, 25274:23, 25276:16, 25278:13, 25278:19, 25300:5 Lapchuks ^[1] - 25235:19 lapse ^[1] - 25156:9 large ^[2] - 25171:17, 25255:3 Larry ^[3] - 25148:12, 25156:1, 25283:10 last ^[3] - 25152:23, 25186:19, 25288:3 late ^[2] - 25246:17, 25286:4 latter ^[2] - 25156:19, 25247:7 law ^[3] - 25198:6, 25213:1, 25288:3 lawyer ^[7] - 25181:8, 25191:11, 25207:19, 25210:5, 25250:25, 25281:6, 25289:6 lawyering ^[1] - 25292:18 lawyers ^[2] - 25197:22, 25292:13 lay ^[2] - 25226:18, 25286:13 leaned ^[2] - 25222:3, 25223:22 learned ^[2] - 25217:20, 25229:9 least ^[15] - 25168:10, 25194:12, 25235:9, 25238:9, 25251:10, 25253:10, 25265:23, 25268:4, 25270:19, 25290:11, 25293:20, 25293:23, 25294:18, 25296:1, 25301:4 leave ^[6] - 25154:1, 25165:21, 25187:14, 25188:11, 25192:8, 25198:9 leaving ^[2] - 25185:8, 25262:10 led ^[1] - 25183:6 leer ^[4] - 25260:4, 25261:5, 25262:2, 25263:16 left ^[6] - 25196:15, 25198:5, 25214:17, 25241:7, 25261:10, 25280:1	leg ^[4] - 25200:4, 25200:8, 25200:9, 25200:10 legal ^[4] - 25157:24, 25166:15, 25205:7, 25292:18 Legal ^[1] - 25207:21 legitimate ^[1] - 25193:2 lengthy ^[1] - 25286:5 less ^[2] - 25164:21, 25263:13 letter ^[39] - 25198:22, 25198:23, 25200:16, 25201:3, 25201:14, 25201:24, 25202:9, 25205:3, 25206:5, 25206:9, 25207:23, 25208:18, 25209:3, 25209:10, 25209:16, 25210:1, 25210:8, 25214:4, 25214:6, 25216:17, 25217:23, 25218:25, 25219:19, 25220:16, 25221:11, 25222:8, 25249:16, 25251:24, 25253:12, 25256:3, 25288:7, 25288:12, 25293:12, 25295:12, 25297:5, 25297:12, 25297:19, 25302:4 letters ^[4] - 25202:7, 25203:10, 25206:3, 25290:15 level ^[1] - 25256:4 Lewis ^[2] - 25208:19, 25208:25 liability ^[1] - 25192:15 liars ^[1] - 25193:21 Liberation ^[2] - 25153:4, 25153:5 liberation ^[4] - 25153:6, 25155:4, 25155:20, 25156:21 liberty ^[8] - 25153:3, 25158:5, 25163:18, 25163:20, 25163:25, 25164:9, 25165:11, 25282:25 lie ^[12] - 25170:17, 25175:5, 25176:7, 25183:20, 25184:4, 25184:5, 25184:7, 25184:12, 25184:15, 25185:11, 25277:5, 25277:25 lied ^[11] - 25160:6, 25168:3, 25168:6, 25169:1, 25169:17, 25181:11, 25181:23,	25181:24, 25182:3, 25277:7 lifers ^[1] - 25289:23 light ^[1] - 25156:1 likely ^[6] - 25201:11, 25212:4, 25224:6, 25228:2, 25298:9, 25300:8 limits ^[1] - 25194:15 Linda ^[1] - 25204:17 line ^[3] - 25244:7, 25272:15, 25294:13 lined ^[2] - 25245:25, 25246:13 link ^[1] - 25242:19 list ^[4] - 25181:18, 25226:4, 25253:23, 25301:4 listen ^[1] - 25281:7 listened ^[2] - 25190:12, 25193:16 lists ^[1] - 25253:20 live ^[1] - 25231:1 located ^[2] - 25242:22, 25263:10 look ^[23] - 25155:9, 25160:20, 25177:8, 25177:20, 25179:25, 25180:16, 25183:11, 25198:13, 25235:18, 25240:11, 25244:12, 25246:8, 25261:10, 25262:11, 25279:2, 25280:22, 25285:17, 25285:25, 25286:8, 25287:8, 25300:18, 25300:25, 25304:14 looked ^[25] - 25167:4, 25175:5, 25181:8, 25182:18, 25185:16, 25217:13, 25225:1, 25234:17, 25241:11, 25242:16, 25250:17, 25262:7, 25262:25, 25263:10, 25263:23, 25265:5, 25267:1, 25267:3, 25267:8, 25269:4, 25284:24, 25298:15, 25300:6, 25300:8, 25305:12 looking ^[11] - 25151:12, 25151:25, 25172:4, 25172:9, 25213:2, 25237:22, 25256:25, 25259:20, 25285:15, 25299:18, 25302:10 lookit ^[10] - 25222:12, 25238:18, 25239:25, 25248:7, 25272:10, 25273:21, 25280:6,	25285:17, 25296:17, 25304:16 looks ^[7] - 25203:13, 25221:11, 25222:11, 25233:13, 25288:12, 25289:12, 25297:12 Loran ^[1] - 25149:7 lose ^[2] - 25161:2, 25165:25 lost ^[1] - 25259:21 loud ^[2] - 25166:23 loved ^[1] - 25266:5 lurking ^[1] - 25287:11 lying ^[8] - 25176:5, 25226:25, 25242:5, 25242:10, 25242:14, 25244:1, 25276:16
M				
Maccallum ^[33] - 25147:7, 25151:3, 25158:17, 25158:20, 25159:2, 25159:5, 25159:7, 25159:9, 25159:11, 25162:22, 25168:23, 25169:11, 25169:15, 25169:19, 25169:22, 25169:24, 25178:1, 25178:13, 25182:4, 25182:7, 25182:12, 25188:5, 25188:17, 25188:21, 25188:25, 25200:16, 25200:25, 25215:1, 25218:20, 25218:23, 25252:25, 25305:3, 25306:7 Macfarlane ^[3] - 25211:2, 25211:20, 25212:5 mad ^[1] - 25290:19 maintain ^[2] - 25201:21, 25289:9 maintained ^[3] - 25172:8, 25281:5, 25283:13 major ^[2] - 25160:16, 25292:18 make-up ^[2] - 25241:10, 25242:23 Malling ^[1] - 25204:5 man ^[1] - 25190:21 manage ^[1] - 25289:25 Manager ^[1] - 25148:4 mandate ^[2] - 25185:23, 25189:15 Manitoba ^[2] - 25207:21, 25253:22				



<p>map [1] - 25263:16</p> <p>March [15] - 25155:5, 25156:3, 25198:25, 25205:23, 25206:6, 25209:25, 25210:1, 25214:6, 25220:5, 25227:23, 25251:19, 25252:17, 25253:11, 25268:7, 25288:11</p> <p>march [1] - 25272:11</p> <p>marks [1] - 25298:19</p> <p>marte [1] - 25195:12</p> <p>massive [1] - 25299:6</p> <p>master [1] - 25201:21</p> <p>material [20] - 25190:9, 25193:8, 25201:7, 25201:15, 25202:4, 25204:22, 25207:16, 25218:14, 25220:3, 25220:15, 25220:21, 25220:22, 25221:10, 25221:21, 25233:18, 25247:6, 25271:10, 25283:10, 25291:14, 25294:4</p> <p>materials [4] - 25192:24, 25204:25, 25286:19, 25296:1</p> <p>matter [10] - 25176:1, 25198:10, 25198:19, 25199:16, 25202:3, 25215:10, 25224:15, 25265:5, 25301:4, 25303:13</p> <p>matters [5] - 25179:19, 25189:17, 25230:21, 25230:22, 25291:22</p> <p>mature [1] - 25155:12</p> <p>Mclean [1] - 25149:3</p> <p>mean [46] - 25155:9, 25156:23, 25156:24, 25158:11, 25160:11, 25163:21, 25168:9, 25171:19, 25172:18, 25174:8, 25177:13, 25180:22, 25181:14, 25181:16, 25181:20, 25182:8, 25193:4, 25194:15, 25196:19, 25213:12, 25221:16, 25224:8, 25225:23, 25225:24, 25226:13, 25226:23, 25227:22, 25235:16, 25237:19, 25238:7, 25240:3, 25240:7, 25242:1, 25242:16, 25246:7, 25267:13, 25271:9, 25276:9, 25279:5, 25283:1, 25284:1,</p>	<p>25287:21, 25291:11, 25294:13, 25295:14, 25304:1</p> <p>meaning [2] - 25191:1, 25192:25</p> <p>means [5] - 25157:10, 25164:14, 25239:15, 25254:16, 25268:22</p> <p>meant [4] - 25154:6, 25173:17, 25181:23, 25196:6</p> <p>measured [1] - 25163:18</p> <p>meatier [1] - 25220:3</p> <p>media [13] - 25160:17, 25161:19, 25162:8, 25162:24, 25163:9, 25165:1, 25165:14, 25165:18, 25191:2, 25196:23, 25197:16, 25224:12, 25292:2</p> <p>meet [5] - 25154:16, 25171:22, 25192:18, 25204:20, 25251:17</p> <p>meeting [14] - 25171:18, 25199:7, 25217:12, 25229:18, 25230:12, 25249:2, 25251:22, 25253:8, 25288:9, 25304:25, 25305:13, 25306:3</p> <p>meetings [2] - 25229:20, 25231:21</p> <p>meets [1] - 25194:17</p> <p>Melnyk [25] - 25160:3, 25164:4, 25168:4, 25168:20, 25169:5, 25170:3, 25170:5, 25172:10, 25174:21, 25175:24, 25176:6, 25232:13, 25235:18, 25235:21, 25235:23, 25235:25, 25236:8, 25236:15, 25236:18, 25238:16, 25274:15, 25274:23, 25276:16, 25277:5, 25278:19</p> <p>Melnyk's [1] - 25277:21</p> <p>member [1] - 25194:7</p> <p>members [2] - 25193:22, 25194:7</p> <p>membership [1] - 25195:2</p> <p>memo [4] - 25227:19, 25228:2, 25232:15, 25248:2</p> <p>memorandum [5] - 25209:23, 25224:20, 25225:2, 25226:13, 25233:24</p>	<p>memory [14] - 25225:8, 25226:14, 25229:23, 25229:25, 25230:15, 25231:23, 25235:19, 25254:16, 25262:21, 25262:23, 25263:3, 25263:4, 25272:6, 25305:12</p> <p>men [1] - 25263:6</p> <p>Mental [1] - 25271:19</p> <p>mentally [1] - 25230:2</p> <p>mention [1] - 25258:2</p> <p>mentioned [5] - 25151:9, 25165:14, 25220:11, 25262:12, 25263:20</p> <p>Merchant [4] - 25217:10, 25217:18, 25245:5, 25300:1</p> <p>mercy [3] - 25206:17, 25210:4, 25215:6</p> <p>mere [1] - 25192:13</p> <p>merits [1] - 25213:3</p> <p>met [10] - 25154:19, 25156:11, 25187:12, 25202:14, 25225:9, 25228:16, 25243:8, 25243:18, 25251:18, 25253:16</p> <p>metaphor [1] - 25194:24</p> <p>metaphors [1] - 25199:19</p> <p>Meyer [3] - 25148:10, 25307:2, 25307:17</p> <p>mid [1] - 25200:6</p> <p>might [47] - 25152:2, 25155:23, 25166:8, 25166:14, 25175:9, 25178:25, 25179:19, 25179:21, 25179:23, 25185:6, 25191:22, 25192:22, 25193:13, 25194:10, 25194:11, 25208:18, 25214:1, 25217:15, 25218:3, 25218:8, 25231:7, 25233:6, 25240:13, 25250:17, 25251:9, 25252:5, 25254:16, 25257:5, 25267:14, 25268:11, 25268:25, 25269:5, 25269:11, 25269:13, 25269:14, 25272:7, 25273:1, 25276:2, 25276:5, 25278:18, 25280:11, 25280:12, 25283:6, 25283:8, 25284:13, 25294:10, 25294:23</p>	<p>Milgaard [112] - 25147:4, 25149:2, 25149:3, 25152:24, 25153:15, 25157:14, 25167:8, 25167:25, 25171:5, 25174:2, 25177:6, 25178:19, 25179:8, 25179:20, 25182:11, 25185:10, 25186:2, 25186:23, 25191:19, 25193:21, 25198:24, 25199:14, 25199:15, 25199:23, 25200:5, 25200:17, 25200:23, 25201:4, 25202:24, 25203:11, 25203:18, 25204:7, 25205:4, 25205:11, 25205:24, 25206:7, 25206:13, 25214:7, 25217:8, 25217:25, 25218:17, 25219:4, 25219:10, 25220:2, 25220:11, 25223:15, 25224:22, 25225:3, 25226:3, 25228:13, 25232:17, 25232:23, 25233:14, 25233:18, 25233:25, 25238:21, 25239:3, 25239:4, 25239:18, 25239:24, 25240:23, 25241:3, 25243:8, 25244:24, 25245:9, 25246:22, 25248:8, 25248:16, 25248:21, 25249:6, 25251:9, 25252:12, 25254:22, 25256:16, 25260:17, 25261:24, 25262:19, 25263:13, 25263:17, 25266:4, 25266:25, 25267:21, 25268:2, 25269:17, 25270:1, 25273:20, 25274:14, 25274:25, 25276:2, 25278:15, 25278:25, 25281:16, 25288:10, 25288:19, 25289:2, 25290:12, 25291:5, 25291:7, 25292:5, 25292:6, 25292:12, 25293:6, 25295:19, 25295:22, 25299:22, 25300:1, 25300:5, 25302:3, 25303:11</p> <p>Milgaard's [14] - 25178:10, 25179:6, 25200:13, 25209:25, 25210:7, 25214:11, 25224:3, 25228:23,</p>	<p>25229:22, 25243:23, 25245:12, 25247:15, 25270:10, 25279:2</p> <p>Milgaards [4] - 25191:12, 25249:9, 25255:5, 25301:18</p> <p>milieu [1] - 25191:3</p> <p>Miller [11] - 25168:21, 25179:3, 25184:24, 25185:6, 25206:15, 25237:1, 25242:18, 25242:19, 25264:12, 25266:12, 25302:25</p> <p>Miller's [10] - 25179:1, 25242:22, 25244:4, 25259:17, 25266:1, 25266:23, 25279:16, 25298:13, 25298:16, 25298:23</p> <p>Mind [1] - 25228:8</p> <p>mind [6] - 25155:10, 25212:14, 25280:23, 25282:4, 25295:1, 25301:14</p> <p>mindful [1] - 25196:19</p> <p>mindset [2] - 25301:14, 25301:16</p> <p>Minister [7] - 25149:10, 25205:5, 25205:25, 25206:18, 25215:5, 25220:25, 25287:2</p> <p>minister [5] - 25207:7, 25207:8, 25208:19, 25215:14, 25215:25</p> <p>Ministerial [1] - 25216:25</p> <p>minute [3] - 25163:14, 25171:16, 25214:15</p> <p>minutes [4] - 25214:18, 25261:11, 25261:18, 25261:20</p> <p>mired [1] - 25230:23</p> <p>miscarriage [2] - 25207:1, 25287:6</p> <p>miscellaneous [1] - 25246:12</p> <p>mischaracterize [1] - 25186:22</p> <p>misconduct [2] - 25192:4, 25192:6</p> <p>misperceived [1] - 25175:25</p> <p>mistaken [1] - 25301:16</p> <p>mistakes [5] - 25154:14, 25154:17, 25155:12, 25155:14, 25155:15</p> <p>misunderstood [1] - 25281:13</p> <p>mixing [1] - 25199:18</p>
---	--	---	---	---



mock [1] - 25187:22 mocked [1] - 25187:21 model [1] - 25187:18 modified [1] - 25271:6 moment [8] - 25154:3, 25171:8, 25173:11, 25181:3, 25198:5, 25221:22, 25268:4, 25272:25 moments [1] - 25264:11 month [2] - 25219:24 months [5] - 25156:2, 25156:3, 25156:9, 25156:16, 25257:23 mood [1] - 25294:20 morning [16] - 25151:3, 25151:8, 25177:20, 25178:3, 25178:4, 25178:10, 25195:23, 25234:8, 25235:18, 25237:23, 25259:12, 25265:24, 25273:15, 25279:13, 25280:15 Morning [2] - 25151:4, 25151:7 mortified [1] - 25283:12 most [2] - 25206:24, 25278:18 mostly [1] - 25219:6 Motel [1] - 25261:5 motel [18] - 25164:2, 25169:4, 25170:7, 25170:18, 25177:1, 25233:5, 25234:1, 25234:6, 25237:12, 25248:24, 25260:3, 25264:2, 25269:24, 25273:21, 25276:6, 25277:10, 25278:10, 25280:5 mother [4] - 25245:15, 25260:19, 25295:3, 25299:17 motion [5] - 25170:9, 25190:9, 25233:2, 25275:9, 25296:11 motions [2] - 25176:11, 25233:11 Mountain [2] - 25288:20, 25289:7 move [4] - 25154:17, 25247:19, 25270:20, 25293:4 moved [3] - 25167:16, 25262:9, 25293:20 multiple [2] - 25161:5, 25161:6 murder [38] - 25168:8, 25169:2, 25169:10,	25169:17, 25170:22, 25175:11, 25175:14, 25175:16, 25175:18, 25175:20, 25175:22, 25176:9, 25178:4, 25178:10, 25178:12, 25183:15, 25184:7, 25184:14, 25199:22, 25202:12, 25206:15, 25219:10, 25233:3, 25233:10, 25245:13, 25259:13, 25264:20, 25268:18, 25276:13, 25280:17, 25281:15, 25295:23, 25296:3, 25298:4, 25298:9, 25298:10 murdered [1] - 25264:12 murderer [1] - 25157:15 must [10] - 25169:2, 25177:10, 25179:2, 25181:11, 25182:21, 25192:21, 25194:23, 25207:7, 25209:9 <div style="text-align: center;">N</div> names [1] - 25159:13 narrative [1] - 25229:16 national [1] - 25160:17 nature [7] - 25160:22, 25171:11, 25183:17, 25284:3, 25285:9, 25286:20, 25291:23 navigating [1] - 25259:23 near [7] - 25183:5, 25205:17, 25239:6, 25239:9, 25259:17, 25260:2, 25279:21 necessarily [2] - 25201:12, 25230:13 necessary [2] - 25254:15, 25293:13 need [3] - 25191:3, 25200:22, 25268:3 needed [11] - 25157:23, 25158:2, 25215:18, 25215:19, 25222:23, 25289:16, 25289:24, 25290:2, 25293:7, 25294:13 negative [1] - 25269:21 neighbourhood [1] - 25261:20 nerve [1] - 25225:14 nerve-wracking [1] - 25225:14	never [13] - 25171:21, 25172:11, 25175:19, 25180:7, 25226:21, 25227:9, 25227:12, 25233:1, 25240:25, 25258:9, 25259:7, 25260:8, 25263:10 new [19] - 25186:2, 25186:7, 25206:19, 25209:11, 25209:15, 25212:15, 25212:16, 25215:10, 25219:15, 25222:23, 25222:24, 25229:9, 25232:20, 25238:8, 25238:9, 25238:19, 25285:16, 25285:25, 25287:18 New [1] - 25212:18 newness [1] - 25285:14 news [5] - 25161:5, 25162:2, 25170:7, 25233:3, 25233:9 next [15] - 25188:9, 25200:20, 25201:5, 25207:18, 25214:25, 25215:4, 25216:7, 25216:9, 25244:7, 25245:15, 25246:21, 25257:20, 25267:17, 25288:21, 25299:3 Nichol [5] - 25178:20, 25183:23, 25241:9, 25294:5, 25299:25 Nicholl [1] - 25293:15 Nicol [1] - 25222:2 None [1] - 25280:19 none [9] - 25160:21, 25161:10, 25189:20, 25264:4, 25277:9, 25277:13, 25279:3, 25280:16, 25305:25 nonetheless [1] - 25265:14 normally [1] - 25197:4 north [1] - 25289:8 not-so-good [1] - 25230:2 notably [1] - 25293:15 note [2] - 25213:24, 25220:8 noted [1] - 25152:6 notes [8] - 25201:19, 25203:10, 25239:3, 25245:21, 25246:3, 25246:12, 25299:15, 25307:6 nothing [8] - 25230:24, 25234:23, 25234:24, 25236:6, 25264:3, 25268:23, 25281:15,	25286:21 notice [1] - 25192:6 notices [2] - 25192:3, 25192:12 Notwithstanding [1] - 25281:10 notwithstanding [2] - 25179:1, 25265:13 November [10] - 25156:15, 25189:6, 25252:16, 25257:15, 25270:2, 25274:10, 25274:11, 25275:5, 25305:1, 25305:14 nu [1] - 25271:9 nuances [2] - 25271:9, 25271:24 number [13] - 25151:24, 25168:21, 25198:14, 25203:10, 25230:9, 25232:15, 25236:19, 25240:16, 25248:22, 25257:24, 25275:1, 25289:10 Number [1] - 25245:8 numbers [1] - 25246:14 nurse's [1] - 25298:18 <div style="text-align: center;">O</div> oath [2] - 25274:12, 25277:23 objective [1] - 25186:6 observations [1] - 25173:22 observed [2] - 25264:3 obstacle [1] - 25157:22 obstacles [1] - 25166:20 obtain [1] - 25218:2 obtained [1] - 25197:21 obtaining [1] - 25232:19 obvious [1] - 25173:14 obviously [6] - 25151:11, 25222:24, 25242:17, 25266:15, 25271:2, 25281:14 occasion [6] - 25172:1, 25172:2, 25172:23, 25186:23, 25235:17, 25290:12 occasions [6] - 25234:10, 25248:22, 25290:14, 25296:15, 25300:11, 25300:14 occur [3] - 25163:17, 25172:2, 25172:3 occurred [5] -	25154:21, 25170:19, 25172:12, 25266:9, 25271:15 odd [1] - 25213:16 odds [2] - 25289:17, 25289:23 offence [1] - 25206:12 offences [1] - 25187:19 offensive [1] - 25203:2 offer [1] - 25251:13 offered [1] - 25204:11 office [3] - 25160:17, 25214:17, 25218:18 officer [2] - 25194:6, 25266:19 Officer [1] - 25148:11 officer's [1] - 25194:4 officers [4] - 25193:22, 25193:25, 25265:21, 25268:10 Official [5] - 25148:9, 25307:1, 25307:3, 25307:14, 25307:18 official [1] - 25221:8 often [4] - 25187:20, 25288:25, 25289:17, 25289:23 old [1] - 25260:6 older [1] - 25260:9 once [3] - 25165:25, 25281:5, 25305:11 one [42] - 25152:6, 25152:9, 25158:22, 25159:17, 25162:11, 25164:3, 25166:12, 25191:4, 25194:2, 25194:6, 25195:9, 25197:4, 25207:20, 25209:4, 25214:5, 25214:24, 25219:21, 25221:21, 25221:25, 25222:14, 25223:6, 25223:7, 25232:25, 25233:14, 25235:21, 25235:22, 25235:23, 25248:9, 25253:22, 25254:18, 25254:19, 25257:2, 25266:19, 25268:20, 25274:6, 25276:8, 25276:10, 25283:15, 25284:20, 25285:5, 25290:16, 25301:6 One [1] - 25185:21 ones [1] - 25270:19 onwards [1] - 25269:16 op [1] - 25158:1 open [6] - 25190:4, 25194:21, 25196:15, 25202:21, 25269:16,
---	--	--	--	---



<p>25282:10 opened [5] - 25210:3, 25210:8, 25240:14, 25241:21, 25305:2 opening [14] - 25189:20, 25191:5, 25191:12, 25191:14, 25193:12, 25193:19, 25194:20, 25196:8, 25196:13, 25197:13, 25242:13, 25274:3, 25280:12, 25281:22 operated [1] - 25282:22 operating [1] - 25160:14 opinion [4] - 25157:21, 25199:8, 25215:13, 25284:10 opportunity [6] - 25264:15, 25266:6, 25273:10, 25273:11, 25289:11, 25300:18 opposed [7] - 25170:22, 25187:1, 25212:23, 25215:25, 25231:4, 25236:6, 25248:14 options [1] - 25215:10 oral [1] - 25190:10 order [7] - 25154:5, 25157:22, 25158:1, 25190:17, 25195:13, 25206:19, 25212:15 ordinary [1] - 25192:25 organization [1] - 25162:2 organizations [1] - 25161:6 original [2] - 25157:13, 25243:21 otherwise [1] - 25272:7 ought [2] - 25282:20, 25286:19 ourselves [1] - 25304:13 outlined [1] - 25281:19 outlining [1] - 25225:2 outset [3] - 25154:11, 25185:12, 25303:22 outsiders [1] - 25297:16 outstanding [2] - 25188:6, 25188:12 overcome [1] - 25157:22 overlooking [1] - 25283:9 overturn [1] - 25191:25 own [13] - 25173:20, 25173:24, 25179:19,</p>	<p>25191:23, 25198:18, 25198:19, 25200:9, 25201:18, 25201:19, 25221:21, 25267:14, 25296:22, 25298:22</p> <p style="text-align: center;">P</p> <p>pace [2] - 25289:16, 25292:25 package [1] - 25201:14 Page [1] - 25150:2 page [12] - 25180:2, 25200:20, 25201:5, 25207:18, 25208:2, 25214:25, 25215:4, 25216:7, 25216:9, 25246:21, 25257:20, 25299:3 pages [1] - 25307:4 pants [5] - 25178:10, 25178:11, 25179:5, 25179:6, 25179:11 paper [3] - 25201:23, 25226:1, 25246:13 paragraph [2] - 25208:13, 25296:13 paranoia [5] - 25255:9, 25255:10, 25301:18, 25302:1, 25302:7 paranoid [1] - 25255:5 pardon [3] - 25206:22, 25208:9, 25208:10 paring [2] - 25258:14, 25259:3 parked [1] - 25298:10 parole [9] - 25153:1, 25186:19, 25187:2, 25187:8, 25187:15, 25187:20, 25187:21, 25187:22, 25216:19 part [14] - 25156:19, 25158:6, 25185:11, 25186:7, 25187:12, 25197:13, 25209:21, 25224:12, 25230:23, 25237:14, 25271:6, 25294:17, 25300:23, 25305:19 Part [6] - 25171:15, 25189:8, 25192:3, 25192:16, 25249:9, 25289:5 partial [1] - 25300:12 participate [1] - 25250:1 particular [2] - 25229:18, 25279:13 particularly [3] -</p>	<p>25230:5, 25254:12, 25264:9 particulars [1] - 25206:11 parties [2] - 25191:22, 25192:20 partly [1] - 25165:23 partners [2] - 25213:1, 25213:2 parts [5] - 25176:5, 25181:13, 25183:1, 25205:8, 25232:4 party [6] - 25190:25, 25192:7, 25192:10, 25194:3, 25195:5, 25202:3 passed [2] - 25194:20, 25287:19 Pat [1] - 25149:7 patched [1] - 25291:3 pathology [1] - 25306:1 pause [5] - 25198:5, 25203:8, 25222:7, 25288:24, 25299:10 peace [1] - 25291:5 Pearson's [1] - 25303:18 pending [1] - 25210:10 penitentiary [4] - 25225:5, 25225:13, 25225:17, 25228:1 Penitentiary [1] - 25289:8 Penkala [1] - 25159:12 penny [1] - 25282:24 people [40] - 25151:16, 25153:9, 25153:10, 25154:7, 25154:8, 25154:14, 25157:18, 25157:23, 25158:1, 25158:16, 25158:22, 25159:24, 25160:4, 25160:12, 25164:23, 25164:24, 25166:10, 25166:22, 25168:3, 25170:12, 25173:19, 25206:4, 25210:15, 25211:15, 25211:16, 25211:17, 25222:18, 25223:4, 25223:10, 25262:20, 25263:1, 25264:2, 25267:14, 25273:24, 25275:10, 25277:15, 25293:19, 25299:19 people's [2] - 25158:4, 25163:13 perceive [1] - 25294:22 perceived [1] - 25273:24</p>	<p>perception [3] - 25173:20, 25173:24, 25174:3 perfect [1] - 25250:12 perfectly [2] - 25231:15, 25255:22 performed [1] - 25191:19 perhaps [10] - 25152:2, 25156:21, 25163:23, 25170:1, 25189:25, 25194:12, 25196:10, 25247:7, 25251:1, 25265:23 peril [1] - 25192:18 period [11] - 25172:7, 25185:8, 25185:18, 25191:20, 25195:24, 25203:10, 25213:6, 25214:13, 25230:6, 25230:18, 25242:13 periods [1] - 25286:23 perjury [1] - 25299:6 permit [1] - 25195:2 person [13] - 25160:23, 25163:8, 25167:18, 25173:12, 25173:16, 25187:4, 25202:15, 25215:7, 25226:6, 25226:7, 25247:19, 25256:8, 25295:3 personally [4] - 25210:15, 25210:18, 25225:9, 25304:7 persons [1] - 25189:9 perspective [5] - 25187:11, 25217:6, 25279:2, 25291:15, 25305:24 perspectives [3] - 25189:14, 25191:6, 25191:9 persuaded [1] - 25193:7 perusal [1] - 25199:5 pervaded [1] - 25301:17 Peter [15] - 25199:6, 25199:10, 25199:15, 25202:10, 25204:21, 25204:25, 25217:24, 25219:8, 25220:7, 25221:10, 25260:19, 25283:9, 25288:11, 25300:10 phantom [1] - 25163:6 phase [1] - 25195:8 philosophical [1] - 25157:11 phone [8] - 25220:18,</p>	<p>25251:21, 25251:23, 25251:25, 25253:12, 25256:1, 25299:22, 25300:4 photocopy [2] - 25246:10, 25246:11 physically [5] - 25264:6, 25274:24, 25286:11, 25295:21, 25296:2 pick [1] - 25277:17 piece [2] - 25162:20, 25246:24 pieces [5] - 25183:17, 25201:23, 25221:6, 25226:1, 25263:24 pillow [13] - 25170:8, 25170:13, 25171:6, 25172:12, 25172:25, 25176:10, 25176:19, 25233:11, 25236:5, 25273:23, 25275:9, 25276:11, 25278:15 pillows [1] - 25233:2 pin [1] - 25180:18 pinned [1] - 25204:12 pinpoint [2] - 25210:14, 25259:16 Pinx [1] - 25198:6 place [7] - 25170:18, 25183:10, 25221:7, 25249:3, 25251:6, 25259:25, 25292:1 placed [2] - 25164:19, 25251:4 placing [1] - 25296:9 plan [1] - 25217:2 plastic [1] - 25218:16 plausible [1] - 25266:18 play [2] - 25291:7, 25291:10 played [1] - 25162:6 playing [4] - 25226:19, 25226:23, 25279:5, 25279:6 pleasant [1] - 25225:24 pled [1] - 25277:25 Pm [6] - 25188:24, 25214:19, 25214:20, 25253:1, 25253:2, 25306:8 point [41] - 25152:9, 25153:20, 25153:22, 25155:16, 25155:18, 25155:20, 25156:15, 25163:13, 25164:10, 25167:12, 25167:15, 25167:24, 25171:21, 25178:15, 25180:22, 25185:15, 25205:1,</p>
--	--	--	--	---



<p>25215:23, 25217:11, 25217:16, 25236:23, 25237:3, 25239:1, 25243:13, 25243:19, 25249:14, 25256:20, 25260:25, 25261:1, 25261:8, 25285:14, 25290:2, 25291:25, 25293:13, 25293:21, 25293:22, 25294:1, 25301:6, 25302:20, 25306:4</p> <p>pointed [1] - 25284:18</p> <p>points [3] - 25185:20, 25230:17, 25246:25</p> <p>Police [3] - 25149:7, 25194:3, 25302:23</p> <p>police [16] - 25193:22, 25263:7, 25263:9, 25265:21, 25268:2, 25268:5, 25268:10, 25269:5, 25269:18, 25271:13, 25303:2, 25303:4, 25303:8, 25303:11, 25304:4</p> <p>political [1] - 25216:2</p> <p>portions [1] - 25220:1</p> <p>position [18] - 25164:13, 25167:17, 25173:17, 25176:8, 25203:3, 25243:23, 25244:2, 25249:20, 25267:24, 25267:25, 25270:10, 25270:21, 25271:3, 25271:14, 25276:15, 25276:22, 25277:8, 25304:21</p> <p>positions [2] - 25271:23, 25280:12</p> <p>possible [14] - 25154:12, 25179:7, 25179:17, 25180:3, 25201:24, 25205:17, 25219:19, 25219:21, 25233:17, 25233:20, 25247:3, 25253:25, 25283:16, 25285:6</p> <p>Possibly [3] - 25212:7, 25255:13, 25302:11</p> <p>postponed [1] - 25220:10</p> <p>Potentially [1] - 25276:7</p> <p>potentially [3] - 25163:24, 25209:11, 25216:2</p> <p>pound [1] - 25282:24</p> <p>power [4] - 25153:10, 25157:19, 25166:21, 25206:18</p>	<p>practice [1] - 25291:16</p> <p>practicing [1] - 25288:3</p> <p>precede [1] - 25156:25</p> <p>precise [1] - 25275:1</p> <p>precluded [1] - 25302:9</p> <p>prefer [1] - 25179:15</p> <p>preference [1] - 25297:21</p> <p>Prehodchenko [1] - 25148:12</p> <p>prejudicial [3] - 25163:3, 25163:11, 25163:12</p> <p>preliminary [3] - 25207:11, 25260:13, 25299:7</p> <p>prelude [1] - 25157:2</p> <p>premise [3] - 25174:11, 25177:6, 25179:8</p> <p>preparation [1] - 25252:15</p> <p>preparations [1] - 25260:12</p> <p>prepared [4] - 25197:1, 25234:18, 25286:5, 25296:16</p> <p>preparing [1] - 25152:8</p> <p>prerogatives [1] - 25206:23</p> <p>presentation [1] - 25216:25</p> <p>presented [3] - 25168:18, 25277:6, 25296:4</p> <p>presenting [1] - 25229:7</p> <p>Presley [1] - 25159:1</p> <p>presumably [1] - 25173:20</p> <p>presume [1] - 25162:8</p> <p>pretty [12] - 25153:11, 25154:20, 25162:18, 25162:24, 25211:10, 25226:16, 25226:19, 25249:10, 25250:9, 25282:10, 25301:14, 25301:15</p> <p>prevail [1] - 25166:24</p> <p>prevails [1] - 25163:20</p> <p>previous [3] - 25253:24, 25253:25, 25254:14</p> <p>previously [4] - 25217:9, 25217:19, 25222:25, 25223:11</p> <p>primarily [1] - 25286:6</p> <p>primary [1] - 25304:20</p> <p>principles [1] - 25162:1</p> <p>Pringle [1] - 25149:12</p> <p>prison [11] - 25153:1,</p>	<p>25157:17, 25171:24, 25186:24, 25227:9, 25230:10, 25250:15, 25255:8, 25282:22, 25289:17, 25289:23</p> <p>prisoner [2] - 25187:18, 25205:13</p> <p>privilege [1] - 25192:19</p> <p>probative [1] - 25275:16</p> <p>probe [1] - 25254:15</p> <p>problem [11] - 25154:16, 25177:18, 25184:10, 25220:23, 25230:23, 25247:5, 25247:13, 25247:15, 25247:16, 25248:16, 25249:9</p> <p>problems [3] - 25204:3, 25204:4, 25248:9</p> <p>proceed [2] - 25199:9, 25304:24</p> <p>proceeding [10] - 25161:13, 25161:14, 25161:15, 25196:17, 25197:5, 25197:6, 25197:19, 25206:19</p> <p>proceedings [1] - 25215:8</p> <p>Proceedings [4] - 25147:12, 25147:23, 25150:1, 25151:1</p> <p>process [13] - 25155:16, 25161:2, 25164:5, 25164:22, 25186:7, 25197:19, 25207:4, 25216:3, 25223:8, 25246:18, 25289:16, 25301:9, 25303:12</p> <p>produced [1] - 25190:6</p> <p>producer [2] - 25204:1, 25219:1</p> <p>Producer [1] - 25220:13</p> <p>product [1] - 25156:24</p> <p>professional [4] - 25191:21, 25196:21, 25211:4, 25283:2</p> <p>program [7] - 25203:24, 25204:6, 25204:14, 25205:15, 25220:10, 25220:13, 25245:6</p> <p>progress [1] - 25295:11</p> <p>prompted [1] - 25298:21</p> <p>proned [1] - 25163:8</p> <p>prongs [1] - 25288:4</p> <p>propose [1] - 25216:9</p> <p>prosecuted [3] - 25154:9, 25159:13</p>	<p>prosecution [1] - 25189:21</p> <p>prosecutor [3] - 25300:11, 25303:1, 25303:3</p> <p>prosecutor's [2] - 25301:1, 25302:21</p> <p>prosecutors [1] - 25157:14</p> <p>provide [6] - 25192:3, 25199:6, 25217:10, 25221:2, 25221:3, 25254:16</p> <p>provided [6] - 25194:17, 25201:15, 25207:24, 25252:2, 25291:12, 25299:12</p> <p>providing [2] - 25199:7, 25293:18</p> <p>Province [1] - 25307:3</p> <p>provision [1] - 25216:13</p> <p>provisions [1] - 25208:12</p> <p>provoked [2] - 25156:13, 25194:10</p> <p>psychiatric [1] - 25163:7</p> <p>public [7] - 25158:9, 25161:19, 25161:25, 25163:15, 25165:1, 25194:13, 25197:16</p> <p>publication [1] - 25189:24</p> <p>publicity [1] - 25203:2</p> <p>publicizing [1] - 25204:14</p> <p>publicly [1] - 25158:16</p> <p>published [1] - 25286:18</p> <p>pulled [1] - 25298:19</p> <p>punching [1] - 25276:11</p> <p>purposes [2] - 25166:12, 25232:19</p> <p>purse [6] - 25179:1, 25242:22, 25242:24, 25243:1, 25260:16, 25279:24</p> <p>pursue [1] - 25283:17</p> <p>push [1] - 25262:20</p> <p>pushed [1] - 25263:12</p> <p>put [47] - 25151:23, 25153:9, 25153:15, 25157:17, 25161:5, 25161:23, 25163:15, 25164:5, 25164:12, 25165:1, 25176:19, 25179:6, 25179:16, 25181:1, 25181:3,</p>	<p>25184:13, 25187:4, 25214:17, 25215:21, 25217:2, 25228:18, 25229:3, 25229:17, 25229:20, 25238:6, 25243:3, 25252:11, 25255:6, 25255:7, 25258:4, 25268:13, 25268:23, 25269:11, 25270:5, 25275:14, 25277:9, 25277:10, 25277:13, 25284:3, 25286:1, 25292:1, 25292:10, 25298:15, 25303:22, 25303:25</p> <p>Putting [1] - 25184:16</p> <p>putting [3] - 25171:7, 25197:12, 25242:24</p>
Q				
<p>Qb [1] - 25148:9</p> <p>Qc [4] - 25149:2, 25149:10, 25149:12, 25149:14</p> <p>qualifies [1] - 25190:15</p> <p>Queen's [4] - 25307:1, 25307:3, 25307:14, 25307:18</p> <p>quest [2] - 25240:13, 25241:21</p> <p>questioned [1] - 25266:7</p> <p>questioning [2] - 25171:18, 25183:8</p> <p>questions [4] - 25151:20, 25188:13, 25195:24, 25269:14</p> <p>quickly [1] - 25267:18</p> <p>quite [8] - 25180:3, 25203:25, 25204:13, 25231:19, 25237:14, 25267:13, 25289:19, 25292:20</p> <p>quote [1] - 25158:24</p>				
R				
<p>raise [1] - 25152:4</p> <p>rape [1] - 25264:19</p> <p>raped [1] - 25264:12</p> <p>rapist [3] - 25157:15, 25283:16, 25285:6</p> <p>rarely [1] - 25206:24</p> <p>Rasmussen [1] - 25264:1</p> <p>rather [2] - 25153:25, 25231:7</p>				



<p>Rcmp^[1] - 25149:9</p> <p>re^[22] - 25189:20, 25190:4, 25191:5, 25191:12, 25191:14, 25193:12, 25193:19, 25194:20, 25196:8, 25196:13, 25197:13, 25202:21, 25237:12, 25240:14, 25241:21, 25242:13, 25269:16, 25274:3, 25280:12, 25281:22, 25296:11, 25305:2</p> <p>re-enactment^[2] - 25237:12, 25296:11</p> <p>re-open^[3] - 25190:4, 25202:21, 25269:16</p> <p>re-opened^[3] - 25240:14, 25241:21, 25305:2</p> <p>re-opening^[14] - 25189:20, 25191:5, 25191:12, 25191:14, 25193:12, 25193:19, 25194:20, 25196:8, 25196:13, 25197:13, 25242:13, 25274:3, 25280:12, 25281:22</p> <p>reached^[4] - 25167:6, 25237:24, 25285:18, 25295:25</p> <p>reacted^[1] - 25294:6</p> <p>reaction^[5] - 25174:24, 25193:25, 25194:10, 25194:11, 25194:15</p> <p>read^[21] - 25167:9, 25175:13, 25189:1, 25191:21, 25209:10, 25215:25, 25233:13, 25233:22, 25237:19, 25237:20, 25240:7, 25244:8, 25247:14, 25248:6, 25248:12, 25279:9, 25284:4, 25297:3, 25297:11</p> <p>reading^[8] - 25218:5, 25219:19, 25222:13, 25228:20, 25230:20, 25230:21, 25248:14, 25248:17</p> <p>reads^[1] - 25175:10</p> <p>ready^[1] - 25292:17</p> <p>reality^[3] - 25238:7, 25287:13, 25287:14</p> <p>realized^[1] - 25154:21</p> <p>really^[7] - 25218:6, 25223:5, 25230:24, 25249:17, 25251:13, 25255:23, 25271:12</p> <p>reason^[2] - 25222:21,</p>	<p>25248:15</p> <p>reasonable^[2] - 25203:4, 25205:18</p> <p>Reasons^[1] - 25150:5</p> <p>reasons^[7] - 25189:1, 25207:12, 25223:6, 25250:20, 25254:18, 25254:19, 25269:8</p> <p>rebut^[1] - 25248:19</p> <p>rebutted^[2] - 25248:4</p> <p>recant^[3] - 25294:14, 25294:16, 25295:3</p> <p>recantation^[2] - 25222:23, 25271:11</p> <p>recanting^[1] - 25294:23</p> <p>receipt^[2] - 25206:17, 25207:15</p> <p>received^[5] - 25198:12, 25198:15, 25202:2, 25251:8, 25285:2</p> <p>receiving^[1] - 25208:18</p> <p>recent^[1] - 25293:21</p> <p>recently^[1] - 25225:1</p> <p>receptive^[2] - 25223:17, 25224:3</p> <p>recited^[2] - 25282:17, 25283:20</p> <p>recognize^[1] - 25155:13</p> <p>recollection^[1] - 25245:12</p> <p>recollect^[1] - 25275:12</p> <p>recollection^[54] - 25151:12, 25171:25, 25176:20, 25176:23, 25204:4, 25204:10, 25209:13, 25210:24, 25212:6, 25212:13, 25219:22, 25223:15, 25226:14, 25228:23, 25234:5, 25236:17, 25241:2, 25245:20, 25246:3, 25246:7, 25248:18, 25249:18, 25249:19, 25250:11, 25250:19, 25251:1, 25251:12, 25252:6, 25252:9, 25252:12, 25253:14, 25253:17, 25254:13, 25256:15, 25256:25, 25257:4, 25258:8, 25258:21, 25259:7, 25259:15, 25259:19, 25260:20, 25260:21, 25260:23, 25261:24, 25262:3, 25262:16, 25271:1, 25275:1, 25294:3, 25294:18, 25304:15,</p>	<p>25304:19</p> <p>recommend^[1] - 25206:21</p> <p>reconstruct^[2] - 25154:4, 25231:3</p> <p>reconstructing^[2] - 25231:7, 25295:1</p> <p>Reconvened^[4] - 25151:2, 25188:24, 25214:20, 25253:2</p> <p>record^[7] - 25151:17, 25177:9, 25189:1, 25208:5, 25209:21, 25210:2, 25215:21</p> <p>recorded^[2] - 25299:15, 25299:16</p> <p>records^[2] - 25267:14, 25299:11</p> <p>recount^[1] - 25229:12</p> <p>rectifying^[1] - 25154:16</p> <p>red^[1] - 25297:24</p> <p>reenacted^[2] - 25169:9, 25176:9</p> <p>reenacting^[1] - 25175:22</p> <p>reenactment^[8] - 25164:3, 25168:8, 25168:19, 25169:4, 25170:2, 25170:12, 25177:1, 25248:24</p> <p>refer^[3] - 25159:3, 25215:10, 25215:12</p> <p>reference^[6] - 25189:18, 25243:6, 25243:16, 25243:19, 25246:19, 25253:15</p> <p>referred^[3] - 25244:11, 25257:10, 25273:15</p> <p>referring^[7] - 25158:24, 25196:11, 25262:14, 25274:8, 25274:16, 25284:21, 25296:6</p> <p>refers^[2] - 25191:18, 25296:13</p> <p>reflect^[1] - 25151:18</p> <p>reflects^[1] - 25235:4</p> <p>refresh^[1] - 25235:19</p> <p>refreshed^[1] - 25254:17</p> <p>refusal^[1] - 25187:7</p> <p>refused^[1] - 25187:16</p> <p>regarding^[5] - 25161:16, 25197:21, 25210:3, 25224:21, 25301:7</p> <p>regardless^[1] - 25174:2</p> <p>Regina^[5] - 25219:13, 25257:3, 25259:6,</p>	<p>25271:16, 25271:21</p> <p>regret^[3] - 25159:19, 25164:11, 25164:18</p> <p>regrettable^[1] - 25164:11</p> <p>regulations^[1] - 25286:17</p> <p>reinforces^[1] - 25165:23</p> <p>rejected^[3] - 25223:11, 25305:6, 25305:19</p> <p>related^[6] - 25178:12, 25191:14, 25198:9, 25263:18, 25303:11, 25304:2</p> <p>relating^[3] - 25198:19, 25231:5, 25283:10</p> <p>relationship^[5] - 25156:7, 25210:24, 25211:4, 25289:13</p> <p>relatives^[1] - 25296:24</p> <p>relayed^[2] - 25249:23, 25251:11</p> <p>relevance^[1] - 25194:18</p> <p>relevant^[4] - 25215:23, 25218:2, 25220:20, 25244:3</p> <p>reliability^[1] - 25230:15</p> <p>reliable^[2] - 25161:21, 25251:1</p> <p>relief^[2] - 25207:7, 25287:2</p> <p>relive^[1] - 25231:1</p> <p>reluctance^[1] - 25255:14</p> <p>rely^[1] - 25161:25</p> <p>remain^[1] - 25283:11</p> <p>remained^[1] - 25271:23</p> <p>remark^[1] - 25151:10</p> <p>remarkable^[1] - 25202:14</p> <p>remedies^[1] - 25217:15</p> <p>remedy^[3] - 25192:11, 25216:5, 25216:8</p> <p>remember^[23] - 25159:12, 25218:16, 25225:11, 25225:15, 25226:11, 25231:4, 25236:24, 25240:19, 25245:17, 25254:22, 25258:11, 25262:24, 25263:15, 25266:8, 25271:5, 25288:4, 25291:24, 25294:4, 25297:18, 25298:21, 25299:23, 25300:6, 25304:18</p> <p>remembered^[3] -</p>	<p>25236:11, 25239:23, 25267:22</p> <p>remembering^[1] - 25231:8</p> <p>reminded^[1] - 25187:19</p> <p>remove^[1] - 25238:3</p> <p>renumbered^[2] - 25208:7, 25216:11</p> <p>rephrase^[1] - 25281:12</p> <p>reply^[6] - 25169:1, 25169:12, 25169:14, 25206:6, 25206:9, 25220:6</p> <p>report^[4] - 25233:3, 25233:9, 25240:12, 25286:14</p> <p>reported^[1] - 25218:5</p> <p>reporter^[1] - 25224:5</p> <p>Reporters^[1] - 25307:14, 25307:18</p> <p>Reporters^[2] - 25148:9, 25307:3</p> <p>Reporters^[1] - 25307:1</p> <p>reports^[2] - 25163:7, 25303:2</p> <p>Represent^[1] - 25189:13</p> <p>represented^[1] - 25246:9</p> <p>Represents^[1] - 25191:6</p> <p>reproduce^[1] - 25221:9</p> <p>reputation^[9] - 25163:23, 25163:24, 25164:20, 25191:22, 25192:18, 25193:1, 25193:15, 25194:14, 25195:6</p> <p>reputations^[1] - 25164:25</p> <p>request^[3] - 25192:8, 25195:15, 25195:16</p> <p>requested^[1] - 25218:1</p> <p>requesting^[1] - 25208:20</p> <p>require^[2] - 25208:14, 25209:11</p> <p>required^[1] - 25209:8</p> <p>reread^[1] - 25235:18</p> <p>research^[1] - 25199:6</p> <p>researcher^[1] - 25219:12</p> <p>researching^[1] - 25199:25</p> <p>reserve^[1] - 25180:16</p> <p>reserved^[1] - 25192:20</p> <p>resolve^[1] - 25236:3</p> <p>resolved^[1] - 25244:6</p> <p>resort^[1] - 25164:13</p>
--	--	--	--	--



resources [2] - 25162:14, 25282:23 respect [7] - 25189:17, 25210:9, 25255:2, 25255:3, 25280:5, 25301:23, 25303:8 respond [2] - 25156:16, 25192:9 responded [2] - 25221:1, 25256:3 responding [1] - 25297:14 responds [1] - 25297:4 response [3] - 25161:22, 25214:2, 25214:4 rest [2] - 25184:9, 25271:7 result [2] - 25210:7, 25290:24 resulted [1] - 25290:23 retained [2] - 25217:9, 25217:19 retaining [1] - 25232:18 Retired [1] - 25149:13 retroactive [1] - 25189:6 retrospect [1] - 25280:10 returned [1] - 25261:21 revealing [1] - 25299:5 reverse [1] - 25190:17 review [3] - 25232:2, 25277:20, 25279:9 reviewing [2] - 25271:10, 25286:5 revive [1] - 25204:15 rial [1] - 25195:12 righteously [1] - 25277:6 rightly [2] - 25164:12, 25291:18 rise [1] - 25192:5 risk [16] - 25160:16, 25160:25, 25161:7, 25165:15, 25165:17, 25165:23, 25165:24, 25166:3, 25166:7, 25166:8, 25224:12, 25224:19, 25226:22 risks [2] - 25161:8, 25190:7 road [1] - 25233:5 robbery [2] - 25235:25, 25277:22 robbing [2] - 25260:15, 25279:23 Robert [1] - 25297:2 Roberts [1] - 25182:1 Roberts [1] - 25273:16	Robin [1] - 25297:10 rocked [1] - 25262:9 role [4] - 25281:16, 25289:1, 25291:6, 25291:10 roles [1] - 25191:24 rolling [1] - 25260:25 Ron [10] - 25184:21, 25185:7, 25210:5, 25261:9, 25261:10, 25262:10, 25263:6, 25293:16, 25294:5, 25299:21 room [25] - 25164:3, 25169:4, 25170:7, 25170:18, 25173:19, 25174:25, 25175:10, 25177:1, 25225:20, 25233:5, 25234:2, 25234:6, 25237:12, 25248:24, 25250:14, 25269:24, 25273:21, 25275:10, 25276:2, 25276:6, 25277:10, 25278:10, 25278:12, 25280:5, 25280:7 Rosetown [2] - 25241:8, 25259:4 Rossmo [3] - 25296:15, 25296:16, 25296:25 roughly [1] - 25156:8 route [3] - 25166:14, 25220:18, 25221:24 Rpr [4] - 25148:10, 25307:2, 25307:16, 25307:17 rule [2] - 25188:21, 25213:22 Rules [2] - 25189:9, 25192:4 rules [29] - 25157:5, 25157:8, 25157:12, 25160:9, 25160:13, 25161:1, 25161:10, 25161:11, 25161:13, 25161:15, 25161:20, 25162:6, 25162:15, 25193:24, 25196:5, 25196:7, 25196:9, 25196:16, 25196:18, 25196:20, 25196:22, 25197:4, 25197:5, 25197:18, 25197:20, 25197:21, 25303:24 ruling [1] - 25189:1 Ruling [1] - 25150:5 run [5] - 25166:19, 25203:12, 25203:18, 25245:1, 25245:2 running [1] - 25213:7	rut [1] - 25262:6 Rutherford [3] - 25211:2, 25211:19, 25212:4 S salt [1] - 25264:9 Sandra [2] - 25148:4, 25219:13 Saskatchewan [4] - 25147:17, 25149:4, 25206:14, 25307:4 Saskatoon [19] - 25147:17, 25149:7, 25181:15, 25181:16, 25194:3, 25233:6, 25241:8, 25257:4, 25259:2, 25259:6, 25259:10, 25259:12, 25268:21, 25271:13, 25271:14, 25280:4, 25283:14, 25302:23 sat [2] - 25252:10, 25303:20 satisfaction [1] - 25290:23 satisfied [6] - 25186:12, 25186:15, 25186:16, 25186:18, 25195:5, 25272:17 saw [17] - 25164:17, 25173:21, 25174:24, 25184:6, 25220:16, 25225:15, 25233:9, 25245:4, 25246:8, 25246:16, 25251:15, 25278:14, 25279:14, 25294:5, 25297:17, 25298:8, 25300:9 say's [6] - 25233:1, 25239:19, 25240:25, 25247:1, 25247:4, 25247:12 scan [1] - 25303:18 scanned [1] - 25303:16 scanning [1] - 25303:16 scared [1] - 25224:13 scars [1] - 25225:18 scenario [2] - 25158:6, 25276:8 scene [3] - 25183:5, 25184:13, 25184:16 scribbler [6] - 25245:11, 25245:18, 25245:23, 25246:1, 25246:6, 25246:9 scroll [4] - 25204:19, 25206:16, 25207:2,	25216:20 search [1] - 25204:16 searched [1] - 25267:14 Sears [1] - 25260:2 sec' [1] - 25297:20 second [4] - 25168:23, 25219:23, 25227:21, 25305:19 secreter [3] - 25239:5, 25239:15, 25239:20 secrets [1] - 25239:16 secretor [4] - 25239:25, 25240:6, 25283:25, 25284:2 Section [3] - 25157:25, 25208:8, 25209:8 section [5] - 25208:6, 25208:9, 25208:10, 25215:16, 25303:12 sections [1] - 25214:16 security [1] - 25227:24 Security [1] - 25148:11 see [22] - 25155:23, 25156:14, 25178:9, 25203:8, 25206:9, 25226:5, 25229:5, 25237:9, 25249:10, 25252:21, 25255:21, 25264:14, 25269:9, 25269:20, 25287:16, 25288:19, 25289:2, 25291:8, 25291:20, 25302:3, 25302:16, 25303:10 seeing [8] - 25179:5, 25201:16, 25208:21, 25225:15, 25225:18, 25245:23, 25246:17, 25267:12 seek [1] - 25191:23 seeking [6] - 25186:6, 25186:11, 25186:13, 25215:18, 25282:25, 25290:24 seem [7] - 25208:17, 25218:16, 25220:3, 25242:21, 25242:23, 25245:7, 25266:18 semen [3] - 25239:6, 25239:14, 25239:18 send [2] - 25208:25, 25220:14 senior [1] - 25213:1 sense [12] - 25153:8, 25158:4, 25160:5, 25177:17, 25180:13, 25186:4, 25196:6, 25196:16, 25231:12, 25250:10, 25254:13, 25303:19	sent [3] - 25207:8, 25219:12, 25305:14 sentenced [1] - 25215:9 separate [2] - 25152:9, 25208:18 separated [1] - 25273:10 separately [1] - 25219:12 Serge [1] - 25149:6 Sergeant [1] - 25303:18 series [4] - 25229:20, 25233:10, 25245:20, 25266:22 serious [4] - 25170:22, 25172:18, 25174:25, 25291:25 seriously [1] - 25231:19 Service [2] - 25149:7, 25194:3 services [1] - 25232:18 set [16] - 25165:25, 25185:24, 25194:15, 25201:18, 25201:19, 25202:21, 25231:16, 25233:4, 25235:24, 25271:25, 25283:7, 25285:1, 25299:1, 25303:24 setting [1] - 25296:11 seven [1] - 25257:23 seventeen [1] - 25205:14 several [2] - 25158:16, 25288:18 sex [1] - 25163:8 sex-proned [1] - 25163:8 shape [2] - 25230:1, 25230:2 shared [1] - 25202:5 shocked [2] - 25175:10, 25225:18 shocking [1] - 25168:19 short [8] - 25185:17, 25193:17, 25242:2, 25252:22, 25261:17, 25261:21, 25262:11, 25280:2 shorthand [2] - 25247:21, 25307:5 shortly [1] - 25280:1 Shorty [1] - 25259:20 shots [2] - 25292:6, 25292:19 show [9] - 25189:23, 25204:2, 25205:17, 25209:20, 25214:23, 25216:22, 25224:5, 25245:24, 25296:12
--	---	--	--	--



<p>showed [1] - 25210:2 shown [1] - 25193:8 side [2] - 25224:11 sift [1] - 25257:8 sight [1] - 25266:15 sign [1] - 25214:4 signaled [2] - 25193:10, 25216:1 signature [2] - 25200:21, 25201:5 signed [1] - 25200:23 significance [1] - 25298:15 significant [3] - 25216:10, 25238:24, 25238:25 similar [6] - 25236:14, 25236:15, 25237:4, 25243:3, 25274:14, 25295:24 similarly [3] - 25165:22, 25173:19, 25202:2 siminal [1] - 25239:11 simply [5] - 25157:24, 25161:3, 25187:15, 25255:23, 25256:25 sincerely [1] - 25159:19 single [1] - 25158:7 sit [3] - 25230:25, 25304:24, 25305:13 sit-down [1] - 25305:13 sitting [1] - 25147:15 situation [2] - 25185:16, 25262:7 situations [1] - 25152:16 six [4] - 25191:20, 25195:24, 25257:23, 25290:6 six-year [1] - 25195:24 skeptical [1] - 25160:23 skill [1] - 25307:6 slip [2] - 25247:18, 25274:22 small [1] - 25171:17 smell [3] - 25287:11, 25287:14, 25287:19 snow [1] - 25298:23 snowbank [1] - 25171:10 so-called [1] - 25169:4 soft [1] - 25258:13 soft-bladed [1] - 25258:13 solve [1] - 25154:17 someone [8] - 25163:22, 25186:11, 25210:25, 25256:10, 25260:25, 25262:25, 25264:19, 25304:16</p>	<p>something [1] - 25236:14 sometime [2] - 25245:9, 25252:15 Sometimes [3] - 25213:18, 25230:1, 25230:4 sometimes [10] - 25160:23, 25194:21, 25213:19, 25214:3, 25230:1, 25230:4, 25230:5, 25234:9, 25289:14, 25292:24 somewhere [5] - 25185:6, 25212:14, 25233:5, 25259:12, 25279:19 Somewhere [1] - 25212:13 soon [3] - 25247:2, 25289:5, 25304:22 soon-to-be [1] - 25289:5 sooner [6] - 25156:8, 25190:4, 25254:4, 25254:7, 25255:12, 25292:17 Sorochan [1] - 25149:14 Sorry [7] - 25175:14, 25184:15, 25247:24, 25247:25, 25257:19, 25260:8, 25301:13 sorry [19] - 25153:19, 25158:21, 25172:15, 25172:22, 25187:13, 25188:6, 25214:10, 25218:22, 25225:8, 25226:23, 25254:23, 25259:2, 25269:13, 25277:18, 25282:18, 25283:22, 25287:25, 25295:14, 25300:21 sort [20] - 25156:19, 25157:9, 25170:12, 25184:9, 25195:24, 25213:16, 25225:19, 25226:3, 25230:14, 25245:25, 25247:18, 25251:9, 25259:2, 25272:3, 25272:8, 25272:15, 25285:15, 25288:8, 25298:14 sought [1] - 25283:2 soul [1] - 25282:14 sounds [1] - 25287:9 sparked [1] - 25296:9 speaks [1] - 25271:12 special [2] - 25189:16, 25206:23</p>	<p>Special [1] - 25190:18 specific [4] - 25160:8, 25236:11, 25236:19, 25253:19 specifically [4] - 25191:10, 25201:16, 25208:21, 25258:18 specifics [4] - 25167:1, 25197:9, 25283:24, 25291:9 spend [3] - 25171:1, 25247:8, 25291:21 spending [1] - 25173:8 spent [3] - 25228:9, 25228:13, 25290:8 spin [1] - 25266:7 spinning [1] - 25259:24 split [1] - 25213:16 spoken [2] - 25236:7, 25273:23 spooked [1] - 25294:11 spot [2] - 25298:11, 25306:5 spring [1] - 25229:23 stab [1] - 25298:19 stabbed [8] - 25168:22, 25170:11, 25171:8, 25173:4, 25176:10, 25176:22, 25236:20, 25276:13 stabbing [6] - 25170:9, 25233:2, 25233:11, 25273:22, 25275:9, 25276:10 Staff [2] - 25148:1, 25148:7 stage [2] - 25189:22, 25256:8 stalled [1] - 25265:19 stamped [1] - 25206:6 stand [3] - 25251:16, 25261:19, 25301:22 Standing [1] - 25150:6 standing [19] - 25188:7, 25188:15, 25189:2, 25189:6, 25189:9, 25190:10, 25190:13, 25190:22, 25191:2, 25192:11, 25192:21, 25193:3, 25194:2, 25194:6, 25194:9, 25195:2, 25195:5, 25195:7, 25256:1 stands [1] - 25265:10 start [6] - 25152:21, 25153:19, 25168:4, 25177:6, 25196:2, 25231:3 started [6] - 25198:24, 25204:16, 25227:22,</p>	<p>25264:14, 25271:4, 25287:21 starting [2] - 25290:1, 25293:21 state [6] - 25153:14, 25155:10, 25157:17, 25244:9, 25244:20, 25270:16 statement [11] - 25183:25, 25184:5, 25232:25, 25243:14, 25268:6, 25268:11, 25269:5, 25270:25, 25271:11, 25271:16, 25275:5 statements [2] - 25268:2, 25269:17 states [1] - 25190:19 staying [1] - 25289:1 steadfastly [1] - 25280:23 stealing [2] - 25260:15, 25279:24 step [4] - 25154:20, 25177:11, 25229:10, 25302:1 sterile [2] - 25249:13, 25254:24 Stewart [3] - 25219:1, 25220:13, 25297:10 still [3] - 25187:2, 25247:5, 25299:2 Stony [3] - 25224:22, 25288:20, 25289:7 stopped [9] - 25184:18, 25185:5, 25213:10, 25260:9, 25260:14, 25261:7, 25261:14, 25261:25, 25279:22 stopping [2] - 25184:22, 25260:5 store [1] - 25260:2 stories [7] - 25174:7, 25174:8, 25182:9, 25275:7, 25275:14, 25275:15, 25277:11 story [7] - 25170:7, 25203:12, 25203:18, 25244:10, 25244:16, 25244:21, 25257:25 straight [1] - 25227:2 strain [1] - 25230:7 strategy [4] - 25272:14, 25291:22, 25292:1, 25292:2 stray [1] - 25201:22 street [1] - 25266:2 strength [1] - 25165:24 strewn [1] - 25266:22 strictly [1] - 25172:4</p>	<p>striking [2] - 25170:13, 25171:6 strong [2] - 25165:11, 25237:14 struck [1] - 25278:15 stuck [15] - 25185:7, 25185:14, 25185:15, 25261:3, 25261:4, 25261:8, 25261:15, 25261:25, 25262:4, 25262:6, 25263:17, 25265:22, 25265:23, 25273:9, 25279:24 student [2] - 25255:24, 25289:5 study [1] - 25298:5 stuff [2] - 25266:18, 25300:7 style [1] - 25194:16 subject [1] - 25166:25 submissions [2] - 25190:10, 25305:17 submits [1] - 25190:14 submitted [1] - 25193:8 subrogated [2] - 25163:25, 25164:8 Subsequent [2] - 25211:24, 25211:25 subsequent [3] - 25211:20, 25211:22, 25270:2 substance [2] - 25239:9, 25279:10 substantially [4] - 25189:11, 25191:16, 25193:5, 25195:6 success [2] - 25222:5, 25223:1 successful [3] - 25191:7, 25212:16, 25224:6 sudden [1] - 25182:9 suffer [1] - 25191:22 suffered [2] - 25249:11, 25250:13 suffering [1] - 25250:14 suggest [2] - 25206:25, 25207:21 suggested [3] - 25165:6, 25245:14, 25295:20 suggesting [2] - 25169:6, 25281:24 suggestion [3] - 25156:5, 25180:14, 25223:1 suggests [1] - 25251:24 summaries [1] - 25230:25 summary [2] -</p>
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25202:22, 25276:20 Support [1] - 25148:7 support [7] - 25190:9, 25192:22, 25193:3, 25193:11, 25195:12, 25195:15, 25289:22 suppose [2] - 25173:24, 25270:24 supposed [1] - 25184:1 Supreme [10] - 25243:5, 25243:16, 25246:19, 25252:14, 25252:15, 25253:15, 25261:13, 25278:22, 25279:11, 25305:15 surprised [1] - 25289:13 surrounding [1] - 25249:18 suspect [1] - 25287:9 suspicious [12] - 25179:20, 25179:21, 25180:11, 25249:10, 25254:22, 25265:22, 25266:3, 25267:7, 25267:8, 25268:12, 25269:6, 25269:10 switch [1] - 25153:24 switched [1] - 25153:23 sworn [3] - 25183:25, 25184:4, 25270:11 synopsis [1] - 25298:1 system [15] - 25153:8, 25153:14, 25154:12, 25154:24, 25155:11, 25155:12, 25164:12, 25227:5, 25227:6, 25249:11, 25255:7, 25255:11, 25289:16, 25301:19 system's [1] - 25187:1 systemic [4] - 25152:6, 25195:9, 25224:9, 25305:24	25245:10, 25247:21, 25249:5, 25249:15, 25249:16, 25249:24, 25250:23, 25251:5, 25251:7, 25251:11, 25251:12, 25251:14, 25252:7, 25253:5, 25253:9, 25253:10, 25254:4, 25254:20, 25255:12, 25256:2, 25256:11, 25256:23, 25258:12, 25260:6, 25260:11, 25261:12, 25261:18, 25261:22, 25262:18, 25262:25, 25263:12, 25264:23, 25265:20, 25266:20, 25268:1, 25268:11, 25268:24, 25272:23, 25273:20, 25278:11, 25278:20, 25280:6, 25281:19, 25282:16, 25283:20, 25284:13, 25301:23 Tallis [7] - 25159:18, 25243:13, 25252:11, 25254:11, 25267:20, 25279:10, 25284:1 tape [4] - 25278:13, 25296:20, 25299:15, 25299:16 Taylor [1] - 25297:10 Tdr [1] - 25149:5 teachers [1] - 25289:21 team [4] - 25166:1, 25290:2, 25291:6, 25292:7 Technician [1] - 25148:12 telephone [3] - 25219:7, 25249:15, 25249:23 television [1] - 25233:4 temperatures [1] - 25298:6 ten [1] - 25279:19 tended [1] - 25249:2 tent [2] - 25162:5, 25162:6 term [5] - 25153:13, 25157:3, 25164:23, 25170:1, 25182:8 termed [1] - 25237:13 terms [14] - 25154:16, 25157:12, 25186:25, 25187:1, 25187:3, 25189:18, 25190:21, 25194:5, 25229:7, 25240:8, 25255:6, 25263:25, 25264:6,	25305:25 test [7] - 25194:17, 25286:19, 25287:1, 25287:11, 25287:19, 25287:23, 25288:2 testified [15] - 25181:15, 25193:20, 25194:1, 25241:7, 25243:7, 25243:11, 25256:24, 25260:11, 25261:12, 25264:22, 25272:4, 25277:23, 25279:20, 25299:13, 25303:19 testifies [1] - 25190:24 testify [2] - 25178:19, 25231:11 testifying [1] - 25251:15 Testimony [1] - 25147:14 testimony [4] - 25194:11, 25194:17, 25222:4, 25223:22 theatrical [1] - 25292:2 themselves [3] - 25204:11, 25242:1, 25247:18 theory [4] - 25264:11, 25295:20, 25296:10, 25297:19 thereabouts [2] - 25208:25, 25261:11 therefore [1] - 25239:5 thinking [8] - 25160:1, 25203:17, 25209:3, 25220:24, 25230:21, 25235:2, 25270:15, 25301:21 third [1] - 25247:19 thoughts [1] - 25166:13 three [12] - 25190:15, 25213:6, 25215:9, 25221:25, 25222:13, 25222:18, 25241:23, 25252:21, 25275:6, 25275:22, 25288:3, 25293:24 threshold [2] - 25163:14, 25287:20 threw [5] - 25178:21, 25241:12, 25242:6, 25243:12, 25280:4 throughout [1] - 25242:9 throw [2] - 25155:23, 25266:17 throwing [2] - 25180:5, 25240:24 thrown [2] - 25241:1,	25243:9 timing [2] - 25256:10, 25298:6 tires [4] - 25185:13, 25259:22, 25262:5 today [2] - 25168:3, 25302:3 Toews [1] - 25149:11 together [2] - 25217:3, 25270:6 tone [1] - 25174:25 Tony [2] - 25217:9, 25299:25 took [11] - 25154:11, 25156:16, 25166:22, 25170:18, 25225:4, 25227:22, 25227:23, 25231:19, 25235:17, 25255:8, 25265:17 tooth [1] - 25246:23 top [2] - 25200:7, 25297:9 Toronto [2] - 25220:19, 25221:23 torpedoed [1] - 25295:4 torture [2] - 25271:18, 25271:19 touch [2] - 25289:1, 25290:16 touched [3] - 25241:16, 25244:23, 25267:17 tough [1] - 25299:2 toward [2] - 25246:25, 25266:24 town [1] - 25221:23 traceable [1] - 25239:13 track [2] - 25156:6, 25290:1 trail [1] - 25183:6 transcribe [1] - 25246:5 transcribed [2] - 25245:22 transcript [8] - 25167:5, 25174:20, 25219:11, 25220:2, 25220:14, 25237:19, 25299:7, 25299:8 Transcript [2] - 25147:12, 25151:1 transcription [1] - 25307:5 transcripts [18] - 25199:5, 25207:10, 25209:1, 25218:2, 25218:9, 25218:15, 25218:17, 25219:6, 25219:20, 25221:3, 25221:4, 25221:5, 25221:8, 25230:21, 25230:25, 25288:16,	25298:5, 25300:12 trappings [1] - 25281:10 Trav [4] - 25260:4, 25261:5, 25262:2, 25263:16 Trava-leer [4] - 25260:4, 25261:5, 25262:2, 25263:16 travelling [1] - 25181:19 treated [1] - 25154:10 tree [1] - 25226:2 trial [62] - 25168:3, 25168:6, 25168:12, 25168:18, 25170:4, 25170:16, 25172:4, 25172:5, 25174:19, 25174:22, 25175:10, 25179:9, 25183:24, 25184:1, 25184:8, 25186:2, 25193:21, 25206:19, 25207:11, 25214:24, 25215:10, 25219:11, 25219:15, 25220:14, 25228:18, 25229:4, 25229:11, 25229:21, 25232:20, 25232:24, 25235:19, 25239:21, 25240:19, 25241:14, 25241:18, 25242:5, 25243:2, 25243:21, 25244:1, 25245:10, 25247:4, 25247:12, 25247:22, 25254:1, 25254:10, 25254:14, 25260:13, 25261:6, 25261:11, 25263:11, 25264:22, 25270:14, 25272:18, 25277:7, 25277:14, 25277:21, 25278:24, 25286:6, 25288:16, 25296:4, 25299:8 tried [8] - 25152:8, 25183:8, 25201:21, 25229:25, 25231:20, 25263:1, 25270:12, 25296:23 trigger [1] - 25238:10 trip [3] - 25184:9, 25259:1, 25261:1 trouble [2] - 25259:23, 25290:3 True [1] - 25202:4 true [10] - 25179:22, 25179:23, 25179:24, 25182:16, 25193:4, 25250:22, 25272:25, 25273:23, 25285:11,
T				
table [2] - 25303:23, 25303:25 tactics [1] - 25162:11 talks [6] - 25202:24, 25214:7, 25216:21, 25220:8, 25223:18, 25297:14 Tallis [56] - 25149:12, 25152:19, 25159:16, 25178:18, 25178:23, 25180:11, 25243:3, 25243:7, 25243:18,				



<p>25307:5 truth [4] - 25169:7, 25231:13, 25282:25, 25294:16 truthful [2] - 25179:10, 25180:5 try [18] - 25152:13, 25155:2, 25184:11, 25188:17, 25188:22, 25218:13, 25230:2, 25230:16, 25231:11, 25238:2, 25238:3, 25241:22, 25256:14, 25256:17, 25269:19, 25281:18, 25286:13, 25296:23 trying [32] - 25165:6, 25166:10, 25177:16, 25180:18, 25180:20, 25181:4, 25182:15, 25182:17, 25184:13, 25187:11, 25188:13, 25202:20, 25210:13, 25222:4, 25223:19, 25230:9, 25231:13, 25236:2, 25238:1, 25238:8, 25255:19, 25257:8, 25259:15, 25269:15, 25281:20, 25286:8, 25288:18, 25289:18, 25289:22, 25291:16, 25303:6 turn [2] - 25192:21, 25194:25 turned [1] - 25156:20 turns [1] - 25228:11 Tv [3] - 25203:1, 25220:9, 25224:4 twice [1] - 25265:23 twig [1] - 25285:8 two [15] - 25174:13, 25211:16, 25211:22, 25262:20, 25263:1, 25263:6, 25264:2, 25274:24, 25276:9, 25277:14, 25283:15, 25285:5, 25299:21, 25300:11, 25300:12 type [6] - 25164:7, 25165:8, 25197:14, 25217:14, 25239:18, 25258:16 typing [1] - 25239:5</p>	<p>25221:7, 25296:25 umm [3] - 25242:1, 25242:9, 25244:5 Umm [24] - 25153:8, 25154:4, 25157:9, 25157:11, 25159:12, 25159:17, 25159:25, 25160:21, 25224:2, 25224:16, 25224:18, 25225:12, 25229:3, 25229:25, 25231:25, 25235:20, 25244:5, 25247:17, 25247:22, 25271:8, 25284:10, 25287:4, 25287:5, 25290:19 unable [1] - 25207:20 under [15] - 25157:25, 25160:14, 25190:15, 25191:19, 25192:3, 25192:22, 25196:20, 25209:8, 25210:4, 25217:14, 25222:22, 25223:10, 25274:12, 25275:11, 25277:23 undermine [3] - 25238:2, 25241:22, 25245:6 undermining [2] - 25166:15, 25241:25 underpinnings [2] - 25270:3, 25272:9 understood [4] - 25169:11, 25169:15, 25180:7, 25209:8 undertaken [1] - 25177:11 unfolded [1] - 25306:1 unfortunate [1] - 25165:10 uniform [1] - 25298:18 university [1] - 25289:19 unless [2] - 25162:9 unlikely [1] - 25194:23 unlikely [2] - 25298:3, 25298:7 unreasonable [1] - 25272:19 unreasonableness [1] - 25270:17 unsubstantiated [1] - 25165:20 untoward [1] - 25264:3 unusual [2] - 25264:18, 25299:1 up [28] - 25152:20, 25152:22, 25171:3, 25184:9, 25185:20,</p>	<p>25197:11, 25197:23, 25198:1, 25201:6, 25215:22, 25216:17, 25224:5, 25241:10, 25242:23, 25246:14, 25253:7, 25257:7, 25257:13, 25259:3, 25268:3, 25275:19, 25277:17, 25279:18, 25285:9, 25286:24, 25291:3, 25294:23, 25303:3 upset [1] - 25204:8 uses [1] - 25275:3 Ute [1] - 25278:20 utilized [1] - 25157:16 uttered [2] - 25275:10, 25278:16 uttering [1] - 25276:12</p>	<p>25182:19, 25182:23, 25188:9, 25193:19, 25194:19, 25194:21, 25235:11, 25236:12, 25236:23, 25237:2, 25237:15, 25238:21, 25238:23, 25241:17, 25242:4, 25242:13, 25242:15, 25243:22, 25248:1, 25254:11, 25263:21, 25268:12, 25270:16, 25276:3, 25278:17, 25294:25 viewed [11] - 25170:14, 25175:23, 25176:4, 25176:7, 25180:9, 25183:2, 25185:10, 25265:21, 25266:2, 25267:7, 25269:6 visit [9] - 25199:4, 25224:21, 25225:3, 25226:6, 25226:7, 25227:20, 25228:3, 25289:7, 25289:9 Volume [1] - 25147:22</p>	<p>weight [1] - 25249:3 western [1] - 25199:22 whatsoever [1] - 25242:19 wheels [1] - 25259:24 whereas [1] - 25275:3 white [1] - 25218:16 whole [6] - 25154:7, 25158:6, 25253:18, 25287:7, 25288:22, 25300:22 Wilde [1] - 25148:11 Williams [14] - 25156:11, 25158:14, 25159:10, 25159:11, 25213:15, 25251:19, 25270:25, 25274:12, 25275:6, 25275:22, 25275:25, 25276:1, 25278:22, 25304:16 willingness [1] - 25154:23 Wilson [24] - 25160:2, 25180:24, 25181:23, 25182:9, 25183:12, 25184:21, 25185:8, 25222:1, 25223:14, 25232:13, 25241:6, 25241:24, 25242:5, 25243:10, 25243:25, 25261:6, 25261:15, 25262:10, 25263:6, 25283:4, 25293:16, 25297:15, 25299:22 Wilson's [1] - 25261:10 window [5] - 25180:6, 25240:24, 25241:13, 25242:7, 25273:11 Winnipeg [2] - 25211:17, 25289:8 wish [4] - 25164:14, 25164:15, 25203:1, 25207:19 wishes [1] - 25195:14 witness [10] - 25179:18, 25188:8, 25189:22, 25190:25, 25191:15, 25192:17, 25193:17, 25195:4, 25195:18, 25264:15 witness' [2] - 25168:24, 25188:15 witnesses [30] - 25151:16, 25151:24, 25152:18, 25154:8, 25159:23, 25160:1, 25164:3, 25169:1, 25169:16, 25169:20, 25170:10, 25174:14, 25180:1, 25180:2,</p>
V				
<p>valid [1] - 25268:25 value [2] - 25172:11, 25250:17 Vancouver [1] - 25233:6 varied [2] - 25170:9, 25229:25 various [3] - 25170:10, 25206:4, 25261:2 vehicle [10] - 25184:21, 25185:7, 25185:8, 25240:22, 25261:3, 25261:8, 25265:22, 25265:23, 25279:24, 25280:1 verdict [1] - 25270:17 version [6] - 25236:21, 25250:5, 25251:10, 25252:11, 25272:3, 25278:17 versus [1] - 25152:9 vibrant [1] - 25225:19 Vic [1] - 25149:11 vicinity [4] - 25184:11, 25185:2, 25279:15, 25279:17 victim [2] - 25233:12, 25295:8 victims [1] - 25239:9 video [3] - 25296:14, 25296:22, 25296:24 view [38] - 25154:12, 25155:17, 25156:19, 25157:5, 25157:12, 25169:16, 25169:22, 25170:17, 25171:3, 25171:12, 25173:12,</p>				
W				
<p>wade [1] - 25288:15 waited [1] - 25283:3 walk [3] - 25256:14, 25256:22, 25256:23 walked [1] - 25225:14 walking [1] - 25184:25 wallet [2] - 25266:1, 25266:20 want's [3] - 25244:9, 25244:15, 25247:2 wants [1] - 25203:11 war [13] - 25153:3, 25153:6, 25153:7, 25153:13, 25155:3, 25155:4, 25155:20, 25156:20, 25156:24, 25157:2, 25157:4, 25160:15 warden [1] - 25230:11 warfare [1] - 25193:24 warning [1] - 25283:13 waste [1] - 25294:10 Watson [1] - 25149:6 wavered [1] - 25281:4 weapon [1] - 25273:12 Wednesday [1] - 25147:21 week [1] - 25247:7 weekly [3] - 25288:19, 25289:3, 25289:12 weeks [1] - 25288:21</p>				



<p>25181:15, 25193:10, 25193:20, 25194:22, 25200:12, 25209:22, 25219:9, 25222:1, 25224:13, 25232:8, 25232:9, 25232:12, 25241:25, 25278:23, 25288:18, 25293:14 Wolch [47] - 25149:2, 25191:20, 25198:6, 25198:12, 25198:15, 25198:23, 25199:15, 25199:25, 25200:24, 25201:5, 25201:10, 25201:18, 25201:24, 25202:2, 25205:11, 25210:19, 25211:18, 25212:4, 25212:22, 25213:5, 25213:19, 25216:20, 25217:23, 25218:12, 25219:2, 25220:7, 25224:21, 25226:5, 25243:18, 25249:8, 25249:15, 25249:22, 25250:2, 25251:3, 25251:4, 25251:18, 25252:7, 25253:9, 25255:25, 25288:11, 25288:14, 25290:13, 25292:14, 25301:5, 25304:19, 25304:20 Wolch's [1] - 25213:11 woman [11] - 25184:19, 25184:22, 25185:5, 25260:6, 25260:9, 25260:14, 25261:7, 25261:14, 25262:1, 25279:15, 25279:22 woman's [1] - 25240:20 women [1] - 25283:14 wondering [6] - 25175:3, 25196:9, 25203:20, 25214:15, 25244:12, 25278:25 word [7] - 25172:17, 25180:12, 25180:25, 25196:7, 25235:15, 25271:17, 25285:22 words [41] - 25153:2, 25155:1, 25168:2, 25170:9, 25170:13, 25171:4, 25171:7, 25171:8, 25171:9, 25172:10, 25174:23, 25175:1, 25176:21, 25177:12, 25186:11, 25186:22, 25187:1, 25193:11, 25196:8, 25235:24, 25235:25,</p>	<p>25236:7, 25236:22, 25237:4, 25241:11, 25254:21, 25254:23, 25260:6, 25260:15, 25260:25, 25261:16, 25273:23, 25274:13, 25274:14, 25274:25, 25275:10, 25276:12, 25277:13, 25278:16, 25280:7 world [1] - 25191:2 worth [1] - 25294:8 worthy [1] - 25165:20 wounds [1] - 25275:2 wracking [1] - 25225:14 wrist [1] - 25225:18 wrists [2] - 25225:15, 25225:16 write [3] - 25213:24, 25213:25, 25302:4 writing [8] - 25195:16, 25199:19, 25199:21, 25200:10, 25205:24, 25206:3, 25286:17, 25288:13 written [4] - 25192:23, 25207:14, 25268:6, 25268:19 wronged [1] - 25301:19 Wrongful [1] - 25147:3 wrongful [2] - 25253:23, 25303:14 wrongfully [3] - 25190:21, 25278:4, 25282:6 wrongly [1] - 25164:12 wrote [5] - 25201:25, 25202:7, 25208:25, 25247:10, 25288:11</p>	<p>25280:16 Young [4] - 25217:9, 25217:13, 25217:18, 25260:18 young [1] - 25222:1</p>
	<p>Y</p>	
	<p>year [5] - 25167:22, 25195:24, 25213:6, 25257:18, 25268:22 years [8] - 25191:20, 25205:14, 25230:22, 25250:12, 25250:15, 25275:22, 25281:4, 25290:7 yelled [1] - 25166:23 yellow [1] - 25239:8 yesterday [13] - 25151:9, 25152:22, 25160:2, 25167:3, 25168:2, 25181:17, 25185:20, 25186:20, 25208:3, 25223:8, 25241:16, 25265:4,</p>	

