

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
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Volume 126

Inquiry Proceedings



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<i>Mr. Chris Boychuk, Esq.,</i>	for Mr. Eddie Karst
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<i>Mr. David Frayer, Q.C.,</i>	for Minister of Justice (Canada), The Hon. Vic Toews
<i>Mr. Donald J. Sorochnan, Q.C.,</i>	for David Asper



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- BY MR. HODSON

25312



Transcript of Proceedings

(Reconvened at 9:04 a.m.)

COMMISSIONER MacCALLUM: Good morning.

MR. HODSON: Good morning.

DAVID ALAN ASPER, continued:

BY MR. HODSON:

Q Good morning, Mr. Asper. I just want to pick up where we left off yesterday just to recap. We were talking, I think left off about the letter you got from Peter Carlyle-Gordge and some gathering of information, but you talked yesterday a little bit about, we spent some time going through your dealings with David Milgaard, your dealings with Joyce Milgaard and you told us about, I think when we talked about your decision not to go see Mr. Caldwell and Mr. Tallis or to get information from them, you said one of the factors was a paranoia that David and Joyce Milgaard had about, and I can't recall your words, I think it was about people involved or the people who may have been involved in the original trial. Is that --

A Yes.

Q Is that a fair statement?

A Yes.



1 Q Can you tell us, what was the paranoia, just give
2 us an idea of what was their mindset at the time,
3 being David and Joyce Milgaard?

4 A From their perspective, something had gone
5 terribly wrong in the system. David had been
6 wrongly convicted and they didn't know why or who
7 would have been responsible for causing that to
8 happen and they were suspicious of everyone.

9 Q And so suspicious of everyone, of all the
10 authorities, of everybody who was involved in the
11 investigation and trial; is that --

12 A Pretty much, yes, pretty much.

13 Q And when you say suspicious, suspicious that they
14 had done something deliberately wrong?

15 A I think there was an element of that, yes.

16 Q And so would that be police, prosecutor, defence,
17 judge, jury, sort of everybody involved?

18 A Yes.

19 Q And was that something that --

20 A Jurors, I mean everybody, Court of Appeal,
21 everybody.

22 Q And again, just so that I'm clear, when you say
23 paranoia, that apart from having made a mistake,
24 sort of something beyond that, something -- was it
25 a fear that someone had done something to



1 deliberately convict and imprison an innocent
2 person or to do deliberate wrong, was that the
3 type of concern?

4 A Yes, there was clearly that element to it, but I
5 think also the inability to find redress, to find
6 relief of any kind from any source had soured the
7 Milgaards on the system even more.

8 Q And so we talked about those who were involved in
9 investigating and involved in the process that
10 resulted in David Milgaard being in jail, you said
11 yes, they had paranoia that there was wrongdoing
12 there. Let's now turn to the people or to the
13 authorities who were able to undo the damage, if I
14 can call it that, and namely the Federal Justice,
15 and perhaps other authorities as well, did they
16 have the same paranoia that the people who could
17 undo this also may be acting with improper motives
18 or trying to do deliberate wrong?

19 A Yes, there was certainly that element.

20 Q And did that, is that something from 1986 to 1992,
21 did that thinking, if I can call it that, pervade
22 or was it, did it get worse? Maybe that's a bad
23 term. Did the paranoia increase over the course
24 from 1986 to 1992 that the authorities and others
25 involved in the original investigation and trial



1 and in the re-opening were intending to do wrong?

2 A I'm sorry, what was the last part of the question?

3 Q Intending to do wrong, was the paranoia that --
4 let me maybe rephrase it. I think what you've
5 said is there was a paranoia that people involved
6 in the process that caused David to be convicted,
7 there was a paranoia that they had done deliberate
8 wrong and as well that the authorities or people
9 who could undo that also were doing deliberate
10 wrong or may be doing deliberate wrong. My
11 question was over the course from '86 to '92 in
12 your dealings with the matter, did that paranoia
13 increase, was it -- did it get worse in the
14 sense --

15 A Yes, I think the scope of paranoia covered the
16 possibility of deliberate wrong as well as the
17 possibility of covering up what might have even
18 been just an honest mistake and preserving the
19 integrity of the conviction, and yes, as things
20 went on, I think the latter, the desire to
21 preserve the integrity of the original conviction
22 probably drove the paranoia more than anything
23 else.

24 Q Okay. So just on the latter point, that would be
25 a case of okay, the authorities who can now --



1 either the authorities who can now do something
2 about it or in fact those who were involved in the
3 original investigation and trial, that neither
4 group was prepared to admit a mistake?

5 A Yes. I think Mr. Kujawa actually said that
6 explicitly.

7 Q And so that would be something over the course of
8 '86 to '92, I think you are saying that latter
9 paranoia maybe got worse, but it always existed;
10 is that fair?

11 A Yes, yes.

12 Q In your role as legal counsel for David Milgaard
13 -- and is it fair to say that you were also legal
14 counsel to Joyce Milgaard or was it -- I don't
15 want to get into fine distinctions, but I take it
16 that in a way she was your client as well?

17 A Yes.

18 Q What were your thoughts or views about sort of
19 this paranoia that, and let's talk about both of
20 them, that one, that someone had deliberately done
21 wrong to convict David and that deliberately did
22 not want to let an innocent person out of jail,
23 what were your thoughts, how did you deal with
24 that?

25 A I didn't want to believe it. I understood very



1 much where they would be coming from and to be --
2 I didn't want to believe it, I don't want to
3 believe it and I hope to this day that it's not
4 true.

5 Q And when you say it's not true, that someone
6 would, had done deliberate wrong?

7 A Yes.

8 Q And as far as your dealings with your client, can
9 you tell us, did that -- was that a positive, was
10 that a negative in the re-opening efforts, the
11 fact that this paranoia existed that someone had
12 done deliberate wrong?

13 A It didn't affect my thinking.

14 Q Not your thinking, but the work that you did, your
15 efforts to re-open?

16 A That there was a possibility of deliberate
17 wrongdoing?

18 Q No, let me rephrase it. The fact that there was
19 this paranoia or thinking that someone had done
20 something deliberately to put David in jail
21 knowing he was innocent or to deliberately cover
22 it up, did that thinking either positively or
23 negatively influence your re-opening efforts; in
24 other words, the work that you were doing?

25 A No, no. I was not and am still not prepared to



1 allow that to guide my thinking. What others did
2 and their motives were not relevant to me.

3 Q If we can then go back to I think where we left
4 off, and I'll just call it up quickly, 162430, and
5 this was the letter that we finished off, June
6 18th, '86 I think we established from Mr.
7 Carlyle-Gordge, and I think what you told us
8 yesterday, Mr. Asper, is that you would have
9 received a fair bit of information from Mr.
10 Carlyle-Gordge in addition to other sources and
11 that you would have had most or all of it at the
12 time and reviewed it; is that fair?

13 A I think so. I think so, yes.

14 Q And then if we could go through, if I could call
15 up 174037, and I think you also mentioned
16 yesterday that you now, going back and looking at
17 this, recognize, and we've already heard some
18 evidence of this, that in Mr. Carlyle-Gordge's
19 work in 1983 the name Larry Fisher came up on a
20 few occasions; is that correct?

21 A Yes.

22 Q And maybe we'll just go through a couple of those.
23 We've been through these with Mr. Carlyle-Gordge,
24 so I don't propose to spend a lot of time with
25 them, but these were notes that he had from Mr.



1 Caldwell's file and there's a couple of things
2 that I just want to point out. One, and I'll come
3 back to this later, Mr. Asper, because I think you
4 had some dealings with Mr. Pearson on this, one is
5 a February 3rd police report dealing with Audrey
6 Odnokon, her name was then, her married name was
7 Boutin:

8 "... walk north on Ave. O toward 22nd
9 St. On a number of occasions she'd seen
10 a man just behind 20th St. standing in
11 about the mid alley. He would start to
12 come towards her and she always ran. On
13 one occasion her boyfriend was with her
14 and this man came out of the alley and
15 then walked past her going towards
16 20th."

17 And again, I just point this out, we'll come up
18 with it later, do you have any recollection of
19 this item and dealing with it?

20 A Not specifically, no.

21 Q Okay. I just point it out and I'll come back and
22 show you a few letters where you deal with that.
23 Now, the next page is the reference, and I think
24 what we heard from Mr. Carlyle-Gordge is that he,
25 in looking at the prosecutor's file, there was a



1 report that they stopped Larry Fisher and I think
2 what Mr. Carlyle-Gordge said in evidence here is
3 that the address, being the Cadrain house, was of
4 interest to him and he basically put down that the
5 police had checked him out, that he took the same
6 bus stop, wearing a yellow hard hat and had no
7 information to offer. Now, I think this
8 handwriting on the side, and I stand to be
9 corrected, but I believe Mr. Carlyle-Gordge said
10 that likely happened at a later date, not in 1983,
11 but just -- do you have any recollection -- let me
12 ask you this, Mr. Asper. When did you first
13 realize that the name Larry Fisher would be
14 significant in this matter?

15 A Well, certainly when we got the tip, the anonymous
16 tip, and my -- when we got the anonymous tip I
17 think that Joyce Milgaard and I immediately went
18 to this document, because Joyce had an
19 encyclopaedic knowledge of the case and just knew
20 where the names were, and I think it was -- I
21 think she zeroed in directly on this document, and
22 of course then it became significant to us.

23 Q Okay. So I think that's February 28th, 1990,
24 we'll see that a bit later, and that's when Sidney
25 Wilson or Bud, or whoever, phoned your office with



1 the information?

2 A Yes.

3 Q And so prior to that, Mr. Asper, did the name
4 Larry Fisher mean anything to you?

5 A Well I would have read this document and would
6 have been aware, and not have taken note of it, so
7 it would have had no significance to me.

8 Q And what about, again generally -- and we'll see
9 some documents later that sort of get into this in
10 the 1990s -- what about the fact that there was --
11 or let me back up a step. Would it be fair to say
12 that, as part of your re-opening efforts in 1986
13 and onwards, that in trying to say that David
14 Milgaard was wrongly convicted and trying to
15 establish why the evidence should not have
16 convicted him or that he was innocent, would one
17 of the matters that you would be pursuing would be
18 to try and identify who might have committed the
19 crime?

20 A No.

21 Q So that wasn't your focus initially, "let's find
22 the real killer and, when we do, that will show
23 that David didn't do it", or did that come later?

24 A At no time did we believe that we had to identify
25 either an alternate suspect or the true killer.



1 Q Okay.

2 A At no time.

3 Q So when -- let me back up then. I asked you about
4 Larry Fisher and I think you said February 28th or
5 thereabouts it became significant. Are you able
6 to tell us when you first realized that the person
7 who killed Gail Miller may have been the person
8 who committed some other rapes; when did you first
9 become aware of some rapes that occurred around
10 the time of Gail Miller's killing, or appreciate
11 the significance of them, maybe is a better way to
12 put it?

13 A I think it probably would have been shortly after
14 we got the anonymous tip, we got -- we were led to
15 this particular document, and I believe some
16 investigative journalists helped us immediately
17 after that.

18 Q And so, prior to the information about Larry
19 Fisher, is it your evidence that -- or your
20 recollection that the significance of --

21 A Sorry, I think -- sorry. I believe I got a CPIC,
22 I think I got a CPIC on Larry Fisher from a
23 friend.

24 Q Okay. That indicated his record?

25 A Yes.



1 Q Yeah, and we'll come to that a bit later. I think
2 you write a letter in mid-March that identified
3 the offences as being in Regina and Winnipeg, is
4 that right, the CPIC?

5 A Yes.

6 Q And again I think in fairness, when we go through
7 the correspondence, that may assist you in
8 identifying the dates and times. But just
9 generally, would that have been the first time
10 when Larry Fisher's name came to your attention,
11 that you would have realized the significance of
12 rapes that had occurred? Actually if you are
13 telling us, Mr. Asper, that when you heard about
14 Mr. Fisher, you thought they were Regina rapes, is
15 that fair, for a while?

16 A That's where we started, yes.

17 Q What I am trying to identify is when you realized
18 the significance of the fact that rapes had
19 occurred within the few months prior to Gail
20 Miller's murder?

21 A Umm, they -- Mr. Hodson, the significance would
22 have hit me like a lead pipe as soon as I learned
23 that the person who had committed all the rapes
24 was the same person, whenever that was.

25 Q Okay. And we'll go through the documents.



1 A Yes.

2 Q So that it wouldn't be before Larry Fisher's name
3 came to your attention; is that fair?

4 A I don't think so.

5 Q Okay. And then, here, we go to 225006. And this
6 is a note, again from Mr. Carlyle-Gordge's
7 interview with Mr. Caldwell from 1983, and it
8 details talking about, I think Mr. Caldwell is
9 talking about a case where I think he is being
10 asked to describe Mr. Tallis, and then he says:

11 "In fact, we combined forces to put away
12 a guy called Leslie Klassen ... It's a
13 long story, but Tallis did what turned
14 out to be a manslaughter ...",
15 and then here:

16 "... between us we got him locked away
17 forever. ... we've been allies on
18 various things."

19 And then you see this 'important':

20 "Caldwell on tape",
21 'important' or "N.B."; Do you have a recollection
22 of this information?

23 A I don't have a specific recollection, but this is
24 the kind of thing that fuelled the paranoia in the
25 Milgaard family. I -- clients often -- it's



1 difficult, sometimes, for lawyers to explain to
2 clients when two lawyers, who may seem to be
3 adversaries within the courtroom, actually go and
4 work together collaboratively on other things, on
5 other matters, because clients want to see their
6 counsel as a partisan for all purposes and all
7 reasons and the counsel on the other side of the
8 dispute as the counsel on the other dispute for
9 all matters and all purposes.

10 The reality of practicing law,
11 as you well know, is that lawyers work together on
12 all kinds of things, and I think that this kind of
13 note would fuel the type of paranoia that I've
14 described.

15 Q We have seen in the RCMP investigation in '93,
16 which I think was after you were involved or
17 finished your involvement in the file, an
18 allegation that Mr. Caldwell and Mr. Tallis
19 colluded and worked together to put -- to convict
20 David Milgaard. Are you able to shed any light as
21 to -- would this be the genesis of that theory or
22 allegation; are you able to shed any light on
23 that?

24 A I don't know, I really don't know.

25 Q And, again, that -- was that an issue that you



1 looked at all at, Mr. Asper, as to whether or not
2 Mr. Tallis and Mr. Caldwell had colluded or worked
3 together at all?

4 A No.

5 Q Was it something you were aware of that the
6 Milgaard family had raised or had concerns about?

7 A Yes.

8 Q And what would you have done to advise them on
9 that, other than what you have told us?

10 A In general, Mr. Hodson, I was not -- I did not
11 share the level of confidence that others did in
12 terms of making those assertions, and I would -- I
13 -- I didn't make them.

14 Q Okay. And again, I had asked you this question a
15 bit earlier, but did -- in your efforts to re-open
16 the case did these types of things, you know, the
17 suggestion of collusion, which I think you would
18 agree would be a pretty strong allegation; is that
19 fair?

20 A Yes.

21 Q Did the fact that those types of allegations were
22 there somewhere in the fabric of what was being
23 put forward, can you tell us whether -- what your
24 views were as to how that might have affected
25 other information you were putting forward



1 regarding your efforts to re-open?

2 A Well I don't accept that they were there as part
3 of the fabric of what we were putting forward.
4 I -- we -- I would not -- and we never claimed, in
5 any of our applications, that there was collusion,
6 that this -- that the verdict was made even more
7 perverse as a result of collusion between Crown
8 and defence.

9 Q In fairness I think where it comes up, at least
10 where we see it in writing, is in the RCMP
11 investigation in 1993, which, again, is after,
12 after the Supreme Court decision. So, again, are
13 you telling us that that, this collusion issue,
14 was not part of what you put forward to Federal
15 Justice?

16 A It had nothing to do with anything I was doing.

17 Q Now we'll call up 325653, and we have been through
18 these, I don't propose to go through them. There
19 are two transcripts, the next one I'll call up
20 just to show you, 050033. And these are --
21 actually, I think these were prepared by the RCMP
22 in '93 of transcripts from interviews of
23 Mr. Carlyle-Gordge. Would you have, back in
24 '86-'87, that time frame, read the transcripts or
25 interviews of Mr. Carlyle-Gordge?



1 A Yes, I think so.

2 Q I'm done with that document. Now you had
3 mentioned earlier that you had received
4 information from either Joyce Milgaard or Peter
5 Carlyle-Gordge. I want to show you three
6 memorandums that are from Mr. Tallis' original
7 file. The first is 153491, and this is a memo
8 that Mr. Tallis prepared on June 10th, 1969, and I
9 think the handwriting on the top, I think, is
10 Mr. Carlyle-Gordge's. I stand to be corrected on
11 that, I think he testified that that was his, and
12 the J.M. I think he said he believed to be Joyce
13 Milgaard's initials. And there are in our
14 records, Mr. Asper, Commission's records, there
15 are three memo, only three memos from Mr. Tallis
16 from his original file, and the evidence -- and
17 the third one is incomplete, it's only the first
18 page. The evidence we've heard from Mr. Tallis is
19 that he would have prepared numerous memos of this
20 nature on his original file, I can't recall if he
21 said a number but I think it was probably in
22 excess of 50, that would express his thoughts. We
23 heard from Gary Young, who testified that in 1980
24 he was given access to Mr. Tallis' file and was
25 given copies, or allowed to look at the file on



1 condition that he return it back to the former law
2 firm, but that on the file there were no internal
3 memorandums, and we showed him these three and he
4 said "no", he did not think those were on the file
5 that he received, and Mr. Tallis has said that he
6 would have never provided these memos to either
7 David Milgaard or Joyce Milgaard, and I wonder if
8 you can shed any light as to (a) where these memos
9 came from, and (b) whether you ever saw any other
10 memorandums that Mr. Tallis had to his file?

11 A I don't know where these came from and I don't
12 think I saw anything else.

13 Q Okay.

14 A I don't recall.

15 Q And would you have seen this document, back at the
16 time, from Mr. Carlyle-Gordge; are you --

17 A I may have, I -- it doesn't ring a bell.

18 Q And we'll see a bit later, Mr. Asper, I think in
19 '89 or '90 a formal request is made to Mr. Tallis
20 and he gets back to you and says that his file is
21 gone?

22 A Correct.

23 Q It was, I think, destroyed by his former firm; is
24 that your understanding?

25 A Yes.



1 Q Yeah. And again just for the record, 224933 was
2 the August 20th memorandum, and again is that
3 something you think you would have looked at back
4 at the time, or had access to?

5 A As I say, I may have, I don't recall specifically.

6 Q If it was included in what Peter Carlyle-Gordge
7 sent you or Joyce Milgaard provided, presumably
8 you would have read it at some point, is that
9 fair?

10 A Yes, I would assume so.

11 Q Yeah. And just the last one, 048305. And this is
12 a September 8th, 1969 memo, this is one that we
13 only have the first page. And so again, same
14 answer for that, if it -- do you have a
15 recollection of looking -- of reviewing this?

16 A I don't have a specific recollection, no.

17 Q Okay. But again, if it was in the files that
18 Mr. Carlyle-Gordge provided or Joyce Milgaard
19 provided, you likely would have read it?

20 A Yes, yes.

21 Q Yeah. If we can then go to 333001. And I think
22 you told us yesterday that --

23 A I think that I -- well, okay, I'm guessing. The
24 -- there was a point on that previous document
25 related to disclosure, and it rings a bell, but I



1 can't be specific.

2 **Q** Okay. And that's -- so is there a part there that
3 --

4 **A** The point number 3 in the memorandum seems to ring
5 a bell with me as having seen that, but I can't be
6 more specific.

7 **Q** Okay. In 333001 I think you told us yesterday
8 that you would have received information from
9 Mr. Carlyle-Gordge, and including some interviews,
10 and Mr. Carlyle-Gordge went through these with us
11 when he testified and they're just references
12 where he questioned Albert Cadrain's mother,
13 Estelle Cadrain, Albert Cadrain, and Dennis
14 Cadrain about Mr. Fisher, and I just want to go
15 through parts of these. And I think the date, I
16 think the date of this is 1983, this one may have
17 been a bit earlier, I'm not sure if -- it was
18 certainly prior to 1983 where he phones
19 Mrs. Cadrain trying to find Linda Fisher, lived in
20 the basement with her husband -- and then just
21 scroll down again -- trying to find Linda Fisher.
22 Maybe I'll just go through all of these and ask
23 you a question or two at the end, I'll just point
24 out these items. So here again, trying to locate
25 and trace a Linda Fisher, then if we can go to the



1 next page Mrs. Cadrain indicates that he had lived
2 there, and what, "I said what's he doing in P.A.",
3 and "well he's making time", so he is in jail at
4 the time, so advises Mr. Carlyle-Gordge that, at
5 some point, Mr. Fisher is in jail.

6 And then if we can go to 333013,
7 this is an interview between Peter Carlyle-Gordge
8 and Albert Cadrain, I think it's February-March of
9 '83 and it's after Mr. Carlyle-Gordge has reviewed
10 Mr. Caldwell's file that has the mention of Larry
11 Fisher, and he says "I'm still doing some research
12 and trying to trace anybody who was involved back
13 in '69, one of the names that I have come across
14 who was interviewed by police is Larry Fisher, and
15 he has given the same address as yours, do you
16 know where he is now?", and Albert says "I
17 wouldn't have no idea". And then if we can scroll
18 down a bit, a bit further, and Albert says, "Yeah,
19 he was a, didn't even know the guy, he lived down
20 in the basement", and just -- and then Peter
21 Carlyle-Gordge says, "I just wondered if you had
22 anything to add?" And then down at the bottom
23 Albert describes him as a gangster type, and then
24 on the next page "pressed further, a criminal",
25 and Albert says, "I guess they caught him years



1 later, or I don't know how much longer, in rapes
2 and shit like that".

3 And then the last one, if we can
4 go to 325634, and this is an interview with Dennis
5 Cadrain --

6 A The passages you just read --

7 Q Yes?

8 A -- are very painful to see.

9 Q And why is that?

10 A Because, as counsel, we had Fisher at that moment.
11 We had a rapist living in the basement of
12 Cadrain's home --

13 Q At --

14 A -- and missed it.

15 Q At what moment?

16 A When we got the material of this interview. It's
17 painful to see that.

18 Q And did that -- do you have any recollection of
19 this information; would it be fair to say that you
20 would have read it?

21 A Yes.

22 Q And that the significance didn't, it did not
23 become significant, is it fair to say it didn't
24 become significant to you when you read it?

25 A No.



1 COMMISSIONER MacCALLUM: What was the date
2 on the memo, please, Carlyle-Gordge, the Cadrain
3 parents and Dennis?

4 MR. HODSON: I think 1983, February or
5 March I think was his estimate of the timing of
6 that.

7 COMMISSIONER MacCALLUM: All right.

8 BY MR. HODSON:

9 Q And so just one further one here. If we can go to
10 644, and again, this is just a questioning, here,
11 of Carlyle-Gordge, and questioning about Fisher
12 living in the basement, and again let me just --
13 just pause there.

14 Do you have any recollection, in
15 any of your dealings with Mr. Carlyle-Gordge,
16 where he would have relayed to you the fact that
17 there was a fellow who had committed some rapes
18 who lived in the basement of the Cadrain house at
19 the time -- at the time of Gail Miller's murder?

20 A No, I -- umm, I sus -- I seem to recall the issue
21 with Cadrain was I don't think anybody believed
22 anything he was saying, and --

23 COMMISSIONER MacCALLUM: This is Albert?

24 A Albert, yes. And, you know, I sus -- Mr. Hodson,
25 I think that when he refers to Fisher as a weirdo



1 and a gangster and a rapist, probably we didn't
2 take what Albert was saying seriously, and nor did
3 Carlyle-Gordge.

4 BY MR. HODSON:

5 Q Okay. Well he -- I'll show you 159890. And
6 again, we heard this evidence from
7 Mr. Carlyle-Gordge, that he put an ad in the paper
8 in March 26 -- starting March 26, 1983. Are you
9 able to tell, whose writing is that at the top,
10 are you able to identify that?

11 A I don't know.

12 Q Is it Robert Bruce, was he --

13 A I don't know.

14 Q Bob Bruce?

15 A Yeah.

16 Q Okay. I think it is, but that's fine, if you are
17 not able. So here's the ad that he put in the
18 paper:

19 "LINDA FISHER - Would anyone knowing the
20 recent whereabouts of Linda Fisher (who
21 was married in 1969 to Larry Fisher) and
22 has a daughter, Tammy, please contact
23 Box ...",

24 number:

25 "The advertiser has important



1 information which may be to her
2 advantage and is anxious to contact
3 Mrs. Fisher as soon as possible."

4 And then we have 213943, which is a letter that
5 Mr. Carlyle-Gordge received after that ad. And
6 213946, this is a letter from Brian Wright, who
7 was Linda Fisher's common law husband in 1983
8 where he wrote back, it appears to Mr.
9 Carlyle-Gordge, saying you can contact him:

10 "For further information as I am her
11 common law husband ...",
12 what this is about:

13 "... and if she will need a lawyer etc."
14 And then 213947, this is Linda Fisher's letter
15 back March 27, '83 to Mr. Carlyle-Gordge that
16 provides her address and contact information.

17 Would you have been aware of
18 that information, Mr. Asper?

19 A I don't recall seeing that.

20 Q And the fact that -- did you discuss with Mr.
21 Carlyle-Gordge, do you have any recollection of
22 him telling you his efforts to find Linda Fisher
23 or Larry Fisher back in 1983?

24 A I don't recall any specific -- I -- we may have,
25 but I don't recall anything specific. It may have



1 arisen, I -- my -- I think Mrs. Milgaard, in 1980,
2 had put up posters looking for information
3 relating to the murder, the Gail Miller murder,
4 and it may have -- we may have discussed the Linda
5 Fisher matter in the context of Joyce's search for
6 witnesses, not knowing that Linda Fisher had
7 actually gone to the police.

8 Q Okay. I think just back in 1980, at least the
9 evidence we've heard is that Mrs. Milgaard put out
10 some flyers in December of 1980, that Linda Fisher
11 went into the city police on August 28th, 1980,
12 which appears to be prior to the flyers although
13 Linda Fisher's recollection, in fact, at this
14 Inquiry was that it was the flyers or information
15 like that that prompted her, but there is a police
16 report, and we've heard evidence about that. But
17 that it -- it would appear from Linda Fisher that,
18 at least from her evidence, that she didn't talk
19 to anybody further about that until 1990 when Paul
20 Henderson and Joyce Milgaard called upon her after
21 you received the information from Sidney Wilson;
22 does that sound -- and that's the evidence we've
23 heard, --

24 A I --

25 Q -- does that sound correct --



1 A Yeah, I --

2 Q -- from your perspective?

3 A Yes, that sounds correct. And I think I may have
4 discussed with Mr. Carlyle-Gordge the Linda
5 Fisher, or the attempt to locate Linda Fisher, in
6 the context of Joyce's efforts in 1980 to
7 distribute the flyers and locate a whole bunch of
8 witnesses.

9 Q Right. And I think what Mr. Carlyle-Gordge said
10 in his evidence before the Commission was that in
11 1983 he had, I can't recall his words, whether he
12 was frustrated, but then he ended up moving to
13 England and didn't follow up on matters, and I'm
14 wondering whether or not he would have had any
15 discussion with you about where he had left off
16 when he sort of ceased his direct involvement?

17 A No, I -- there was no discussion with Mr.
18 Carlyle-Gordge that he was, to the effect that he
19 was on the trail of Linda Fisher and on the trail
20 of Larry Fisher, and this is where he ended off,
21 no.

22 Q If we could call up 331993. And this is a
23 transcript of a phone call between Joyce Milgaard
24 and Ron Wilson January 26 of '81, and I think
25 there is a tape of that as well; would this be



1 information that you would have received from
2 either Joyce Milgaard or Peter Carlyle-Gordge?

3 A Umm, I would think so. Is this the interview
4 where he starts backing off the blood and says it
5 might --

6 Q Yes.

7 A -- have been Kool-Ade?

8 Q Kool-Ade, yes, and I'll go through parts, yes.

9 A Yes, yes, yes, I'm aware of this.

10 Q So you would have been aware of -- and I think you
11 told us earlier that you had -- were aware that
12 Joyce Milgaard had interviewed some of these
13 people?

14 A Yes.

15 Q So I just want to go through parts of this. If we
16 can go to the next page -- and when we go through
17 this did you have the impression, at the time when
18 you read through these, that Mr. Wilson was not
19 being cooperative with Mrs. Milgaard; is that your
20 recollection? And if you want we can go through
21 them and you can answer at the end, if you'd
22 rather go through them with me?

23 A I don't recall specifically, but as I said
24 yesterday, I was concerned in terms of what we
25 were going to -- what we were gonna do when we



1 took on the case; that however far they had
2 gotten, Joyce had gotten or Peter Carlyle-Gordge,
3 with the key witnesses, the five, the Milgaard
4 five, the civilian witnesses, that it was unlikely
5 that they were going to get to where we needed
6 them to be in the face of the mum of the person
7 they torpedoed.

8 Q What -- and I don't want to jump ahead --

9 A Although in this interview he starts to back off.

10 Q Yeah. What changed in May of 1990 when Mr.
11 Henderson then went out to see him, and again I
12 don't want to jump ahead and we'll get to those
13 documents, but at some point Paul Henderson was
14 sent to interview Ron Wilson?

15 A Yes.

16 Q Was there a reason -- what changed to cause that
17 interview to happen?

18 A Well, Mr. Henderson was, first of all,
19 independent, he wasn't Joyce Milgaard, number 1;
20 number 2, he had experience, he was an
21 investigative journalist and had experience
22 interviewing people, and number 3, I think he
23 provided Mr. Wilson a framework within which he
24 could back off his incriminating evidence.

25 Q And what do you mean by framework?



1 A He -- he made it easier for him to do it.

2 Q And how?

3 A Without threat, without judgment, without fear
4 that -- without fear that by telling what he
5 believed to be the truth would have some adverse
6 consequence.

7 Q Okay. And we'll deal with that when we get to
8 that part of the chronology. Just back on this
9 comment here, and I think you said that he, in
10 this interview, seems to back off a bit, and D is
11 for Dale, I think he was going by Dale Wilson at
12 this time, and he's describing the polygraph:

13 "And they were asking questions Yes and
14 No. Like I don't know how to read this
15 machine. And ... whatever they said
16 that I hadn't said Yes to, came out
17 'okay, I'm telling the truth.' And to
18 me, up until they came and got me in
19 May, and I had that lie detector test
20 ..."

21 And then it says:

22 "... showed me pictures & stuff. My
23 mind was blank. I had a mental block or
24 whatever--I don't know. They asked me
25 some questions and showed me the



1 pictures and stuff. You know, things
2 started coming back. You know."

3 Etcetera. Now, let me just back up for a minute,
4 Mr. Asper. When you, in 1986 when you had gone
5 through and reviewed matters and come to the
6 conclusion that David was, should have been
7 acquitted and then at some point that he was
8 innocent, and I think you said that the five
9 witnesses lied, what was your thinking as to what
10 had happened, what were your theories as to what
11 happened that caused these people in your mind to
12 lie at trial, the five?

13 A I think I, and if I can refer to my brief, the
14 draft that I prepared, I'm pretty sure we were
15 aware, because it had been the subject of
16 questioning, of the infamous May 24th sleep-over
17 with Mr. Roberts and Detective Mackie and Karst
18 and something happened.

19 COMMISSIONER MacCALLUM: Sleep-over?

20 A The weekend, or the few days that they spent in
21 police custody and being interrogated.

22 BY MR. HODSON:

23 Q And that's Wilson and John?

24 A Yes.

25 Q That's fine, we'll spend some time on your '86



1 brief and go through that. So that would be --

2 A So when Wilson says in here that things started
3 coming back to him, that would just be symptomatic
4 of the general view that we had.

5 Q Did you become of the general view, if I can put
6 it that way, that the police had played a role in
7 influencing these witnesses to give what you
8 viewed to be false testimony?

9 A Yes.

10 Q So here, if we can go to the next page, and he
11 says:

12 "I don't even know at the trial I don't
13 think I said he had blood on his
14 clothes."

15 And this is the comment:

16 "You had said to George--"

17 Lapchuk,

18 "--you were so stoned, that, you know,
19 you didn't know if it was blood or if it
20 was Kool-Aid, or whatever."

21 And he says:

22 "Whatever."

23 And at this point, just a read of this, and I
24 think you told us that he's backing off the
25 sighting of blood?



1 A Yes.

2 Q And I guess is that, did you ever consider in your
3 application materials under 617 to say Ron Wilson
4 has said now he doesn't, he doesn't recall seeing
5 blood, for example? I'll maybe ask more
6 generally. Did you consider using the information
7 in this interview to include in your application
8 or to cause you to do some further work to include
9 in your application?

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

11 Q And then if we can go to 332001, and again this
12 is, Mrs. Milgaard says, and they are talking about
13 the polygraph:

14 "And in other words they could almost
15 lead you down the garden path if they
16 wanted to, by them."

17 Wilson:

18 "Basically they could, because you don't
19 know what that machine is telling them.
20 They're telling you what that machine
21 says. So you're taking the technician's
22 words for----"

23 Joyce:

24 "That is a lie or that is a lie, so you
25 must have--"



1 Dale:

2 "Well, right."

3 Joyce:

4 "--so you must have seen blood, or you
5 must have seen this because you're
6 saying that and it's not true."

7 And Dale:

8 "You know it does this funny thing on
9 the machine and then they, "OK, you told
10 a lie," or "OK, we'll keep on going."

11 Again, did you -- the information here, do you
12 recall looking at this issue and what might have
13 happened with the polygraph session back in '86,
14 '87, '88?

15 A I'm not sure what the question is.

16 Q Oh, sorry. In looking at this interview, it
17 suggests here, and certainly what Ron Wilson said
18 in May of 1990, that the polygraph session with
19 Mr. Roberts is where he ended up changing his
20 evidence and it was the polygraph session in part
21 that he says caused him to change his story.

22 A Yes.

23 Q And I'm wondering whether that's something that
24 you considered or pursued prior to the filing of
25 the first application?



1 A I don't recall specifically, no.

2 Q Okay. And in particular, and I don't think
3 there's anything in the application, and we'll go
4 to that later on today, about Inspector Roberts
5 and the polygraph. What's your recollection of
6 what your thinking was on that, when did that --
7 how did that figure into matters and when did that
8 become significant?

9 A Well, I suspect, and I don't have a specific
10 recollection, but I suspect again this goes back
11 to what our expectations were with the filing of
12 the 617 application, because certainly from my
13 perspective we were -- I certainly expected that
14 we would file an application. If it attracted the
15 attention of the Department of Justice, which it
16 did, and there was a moment where we were aware
17 that they were looking into it, I think we got a
18 letter to that effect from the Department of
19 Justice, that we would then, again as Sergeant
20 Pearson hoped would happen, we would all get
21 together and bring everything that we had and
22 talk -- and basically have a case conference, and
23 I suspect that we believed that when that would
24 occur, that's when we would bring all our pieces
25 of paper, and in fact the initial draft of the



1 brief under 617 that I had done was far more
2 expansive factually than what we wound up filing
3 because for some reason the view was that we
4 should be more succinct, just get the process
5 started, and then we would have a much more
6 expansive phase of disclosure.

7 Q And was that an internal view in your law firm, is
8 that what you are talking about?

9 A Yes, but it may have -- yes. I can't say where it
10 came from, but it was certainly the view in the
11 firm.

12 Q And so that on behalf of David Milgaard, the
13 decision was to make the first application more
14 concise; is that what you are saying?

15 A Yes.

16 Q And do I take it from your answer that you might
17 have wanted to include more, you, David Asper,
18 might have wanted to include more in that
19 application than others?

20 A Yes.

21 Q If we can go to page 332002 and down at the bottom
22 Mr. Wilson is asked:

23 "... do you really think that David did
24 it, yourself?"

25 Wilson says:



1 "Honestly speaking?"

2 And it says M, which I'm assuming is

3 Mrs. Milgaard, and then he says:

4 "No. I don't know."

5 And then at the bottom, I can't find a version
6 that doesn't have that cut off. Again, is that
7 type of information that Mr. Wilson is saying in
8 1981, would that have been helpful in your
9 efforts to re-open the investigation?

10 A I don't know, I really don't know. From my
11 perspective, absolutely.

12 Q In the sense that he's saying 10 years later that
13 I don't know that David had committed the crime,
14 whereas at trial he said that he admitted to me
15 that he had done it; right?

16 A Yes. That would have been -- yes, I mean, it
17 would help me certainly. I don't know what the
18 view of the Department of Justice would be.

19 Q But from your perspective, this would be helpful
20 information in favour of David Milgaard's case to
21 re-open?

22 A Absolutely.

23 Q If we can go to the next page, and there's some
24 suggestion here, and I think from the tape, and I
25 hope I don't mischaracterize it, but I think



1 Mr. Wilson is saying here that he wasn't aware of
2 what Nichol John had actually said at the trial or
3 had not said, and I can't recall what he told us
4 at this Commission about this subject, but he says
5 here:

6 "When I got there--From what I
7 understood she was supposed to be more
8 of a witness than I was."

9 And then Joyce:

10 "But I think they probably told you
11 that, but she didn't witness anything."

12 And he says:

13 "Well...I..don't know."

14 And then goes on. And then if we can go to the
15 next page, the top, he's asked the question, and
16 I think he's talking -- sorry, there's the green
17 colour there that -- about:

18 "I was sick when I saw the pictures."

19 And then Joyce says:

20 "Yeah. And plus that'd taken her coat
21 off and put it back on."

22 Talking about Gail Miller.

23 "Do you really think that you and Dave
24 were separated that long?"

25 Answer:



1 "For what was done--Actually, no."

2 And again, would that be information that would
3 be helpful to David Milgaard's re-opening, the
4 fact that Ron Wilson, in 1981, is saying I don't
5 think David was gone long enough to do what was
6 supposedly done to Gail Miller?

7 A That would have been helpful, but I think he
8 effectively testified to that at the preliminary
9 inquiry.

10 Q Well, the preliminary inquiry, I think his
11 evidence was, and it changed from the prelim to
12 the trial --

13 A Yes.

14 Q -- but it was anywhere from about 10 minutes to 15
15 minutes, went for two and a half blocks to five
16 blocks, but I think his evidence at trial, if I'm
17 not -- I think was about 15 minutes would be the
18 time that David was away from the vehicle, and
19 actually his first statement to the police, or his
20 second statement of May 23rd, he had it at 15
21 minutes, so that was sort of the time frame, and
22 here he appears to be saying that I don't think he
23 was gone long enough. Is that a fair read of
24 that?

25 A Yes. Clearly this would have been helpful.



1 Q And then the next page, Mrs. Milgaard says:

2 "Look, Dale, I'm not trying to cause
3 anybody any embarrassment or any
4 problem...This what is what I tried
5 to--"

6 And he says:

7 "If you find something I'm not going
8 thru another trial."

9 Joyce says:

10 "Well, I don't think it's going to be
11 necessary. I think if we find
12 something, we'll be able to--like I'm
13 hoping we'll be able to prove it
14 scientifically that this is just
15 impossible. There was no defence given
16 to David, and we can't turn back now
17 Dale. We're into it too heavy and we're
18 going ahead."

19 "Because I really DO NOT BELIEVE that he
20 is guilty."

21 That's Mrs. Milgaard, and then Wilson says:

22 "Because I will not go on that stand for
23 nobody."

24 And then to the next page, he asks -- Mrs.
25 Milgaard says:



1 "But if you think of anything that will
2 help--This is what I'm interested in
3 right now, Dale. I'm not interested
4 in--"

5 And then Wilson says:

6 "Can you ... get me a transcript of the
7 trial?"

8 And question:

9 "Get you a transcript of the trial?"

10 Answer:

11 "My testament."

12 Joyce says:

13 "I'm sure I could. Why?"

14 And he says:

15 "Just like to look it over."

16 And she says:

17 "Yes."

18 And then he says:

19 "Maybe there's something in there
20 that...I can't tell...Maybe-----the
21 trial, and I can look over and even look
22 at some discrepancies that I said from
23 one to the other. And study them for
24 awhile. If I can I'll give them to
25 you."



1 Now, it would appear from this that Mr. Wilson is
2 offering to go through his evidence and point out
3 discrepancies and co-operate?

4 A Yes.

5 Q And I don't -- and maybe just actually scroll
6 down, it says:

7 "Well, even if I can sit down with you
8 and the transcripts and what I have and
9 show you what I've--what I think are
10 discrepancies, and see where you--where
11 something you might say might be able to
12 help. That would be super."

13 And then goes on about:

14 "... going to Saskatoon this weekend,
15 but I'll try to get up the following
16 weekend and maybe we can sit down and
17 I'll give you the copy and you can look
18 it over, and then by then maybe I'll
19 have some other thoughts or maybe I'll
20 find out something when I'm up there."

21 And says:

22 "Okay."

23 Now, I don't, and I don't think -- I think
24 Mr. Wilson's evidence before the Inquiry is that
25 he never did get any transcripts until he met



1 with Mr. Henderson in 1990. Again, do you recall
2 looking at this, at these interviews or looking
3 at providing this information to the authorities
4 or going to Mr. Wilson with his transcripts as he
5 requested?

6 A Well, I never went to Mr. Wilson with transcripts.
7 I don't think we provided this information to the
8 authorities and I do recall seeing this.

9 Q And I think your -- well, the documents certainly
10 suggest that it was not, this information was not
11 provided to the authorities. Can you tell us why
12 it would not have been given to them?

13 A No, I can't tell you why. I seem to recall,
14 though, that there was another attempt, may have
15 been before this date, but I seem to recall that
16 at some point Wilson was antagonistic and was not
17 receptive to further contact.

18 Q We'll go to 331978 -- and sorry, where would that
19 information be from?

20 A I don't know. I can't tell you.

21 Q Someone internal, and when I say internal --

22 A Yes.

23 Q -- Mr. Wolch, Mrs. Milgaard?

24 A Yes, yes. I may be mistaken on that, but I seem
25 to recall that he didn't want to be contacted any



1 further.

2 Q This is a second interview, this is April 15th,
3 '81, so a couple of months after the first one,
4 and I'll just go through parts of it. It's a
5 little bit hard to read.

6 COMMISSIONER MacCALLUM: 331, what was
7 that?

8 MR. HODSON: 331978.

9 COMMISSIONER MacCALLUM: Thank you.

10 BY MR. HODSON:

11 Q And again Mrs. Milgaard just refers to the fact
12 that, I think this is where she's interviewed
13 Nichol in the intervening time, and says:

14 "Well I never knew anything--"

15 Actually, just sort of go up a bit, please. She
16 talks here:

17 "Well, this was very close after--"

18 And, I'm sorry, I can't read that,

19 "--in prison... The first statement that
20 I had.. they were all identical and they
21 all sort of agreed. And then the next
22 thing that we had was a statement when
23 Shorty went to the police and this was
24 sort of thru--"

25 And I think she's describing the statements of



1 Wilson, John, Cadrain. Wilson says:

2 "Well I never knew anything about it,
3 Mrs. Milgaard, till after Shorty went to
4 the police, cuz I was doing time in jail
5 and I never heard anything about it
6 until May. I didn't know nothing about
7 it--"

8 "Until May?"

9 And then:

10 "--about what was going on until May."

11 And again, from that answer it appears that
12 Mr. Wilson is saying he didn't know anything
13 about the murder until May. Is that a fair
14 reading of that?

15 A Yes.

16 Q And again, would that be something that would be
17 helpful -- similar to the other information from
18 the previous interview, would that be helpful to
19 Mr. Milgaard's cause in trying to address Ron
20 Wilson's damaging evidence?

21 A Well, I think by that point, though, he had given
22 two statements in which he said he had no
23 knowledge of the murder. I'm not sure this was
24 new information.

25 Q Okay. If we can then scroll down, it says:



1 "Well, maybe what I'd like to do is,
2 when I'm up in Regina, is come and see
3 you and show you--There are from
4 Mr. Tallis's files that he got from the
5 police dept."

6 And I think those are the statements. Do you
7 have any recollection, again I asked you this
8 earlier about Mr. Tallis' file, but presumably
9 would you have had Ron Wilson's statements in
10 '86?

11 A Yes, I believe so.

12 Q And did those come from Mr. Tallis' file do you
13 know, or where?

14 A I don't know.

15 Q And then the next page, I want to ask you some
16 questions about Father Murphy and the priest.
17 Mrs. Milgaard says:

18 "... everything was exactly right, and
19 then along came Cadrain on Mar. 2, the
20 police talked to him, and at that point
21 they contacted his priest, Father Murphy
22 ..."

23 And Wilson says:

24 "What's the priest got to do with it?"

25 Joyce:



1 "Well, believe it or not, Fr. Murphy
2 called Shorty in and he told him that he
3 knew he was involved and that he was in
4 a great deal of trouble and that he was
5 going to maybe end up in prison, and he
6 convinced Shorty that the only 'out' for
7 him was to really co-operate, plus the
8 fact that he would be eligible for a
9 \$2,000 reward if he did co-operate."

10 And Wilson says:

11 "What did Shorty do? give the priest a
12 confession, or something?"

13 And then again, do you have a recollection about
14 what role Shorty Cadrain's priest played in all
15 of this?

16 A No.

17 Q This doesn't ring a bell with you, this suggestion
18 here about --

19 A That would be the same bell that Nichol John
20 apparently heard. No, there's no bell.

21 Q So no recollection of the priest being involved in
22 getting Albert Cadrain to go into the police?

23 A No.

24 Q Go down to, scroll down a bit. Just go to the
25 next page. Actually, the next page, 981, and he



1 says here:

2 "It could have been....Like I told you
3 before, I'll come and talk to you. I'll
4 help you as much as I can. I
5 guess--like that was a long time ago,
6 and, you know, like I was pressured a
7 bit, but I wasn't pressured to the point
8 where I'd convict your son."

9 "No. I realize that. You know--"

10 "Actually, I will agree with you he was
11 convicted on circumstantial evidence."

12 "He certainly was."

13 "Because, uh, there was no eye witness
14 or nothing. There was just all of us
15 stoned people and we maybe, possibly got
16 in our heads at that the time. I don't
17 know. To this day I don't know. I've
18 been thinking about it ever since I
19 talked to you last time, and I'm totally
20 confused now."

21 And again, would that be the type of information
22 that would be helpful to give to the authorities
23 or to assist in David's re-opening efforts?

24 A I guess it could be. Yes, it could be.

25 Q And go to page 982.



1 A I think part of the problem here is that -- well,
2 we know what he is as a witness and I think he's a
3 bit all over the map in the excerpts that you've
4 read to me, he doesn't know, he knows, he doesn't
5 know, which speaks to -- in some measure he tries
6 to recant some of the things, incriminating things
7 here. On the other hand, this could be read as a
8 credibility, attack on the credibility of a
9 witness, which would have been a trial issue, and
10 I'm trying to reconstruct why we wouldn't have
11 used this and as I, as you take me through it, I'm
12 remembering that we were looking at this as, well,
13 okay, Wilson is not credible, Wilson may not be
14 credible, he's contradicting himself, he's
15 contradicting himself internally in these
16 statements.

17 Q But to get someone to recant, by nature he would
18 contradict?

19 A Except he's not fully recanting here.

20 Q So the concern, sorry, about the credibility issue
21 would be that --

22 A We're re-arguing the trial and we were searching
23 for something new, something really new. He
24 doesn't come out in this document and say I lied
25 at the trial.



1 Q So if we can go down to 982, and I just mentioned
2 earlier there was some reference where he said he
3 didn't know that Nichol John had not adopted her
4 statement at trial, and then he says:

5 "I never heard nothing, and then when
6 the trial came I was out of custody, but
7 they left me in town do my testimony--I
8 think I was on the stand for 2 days or
9 something--and then they shipped me back
10 home. And the only thing I heard in
11 what I read in the paper. Like, I don't
12 know what any of the other testimony was
13 or nothing. I don't know what any of
14 the other witnesses said--police or
15 doctors or anybody else."

16 And again it would appear from here that at the
17 time of trial that he didn't know what Nichol
18 John had said. If we can just go to the next
19 page --

20 A That's true, except I believe that we knew by that
21 point that Melnyk or Lapchuk had talked to Wilson
22 about the evidence they were going to give at the
23 trial, so when Wilson says here he didn't know
24 anything about the trial --

25 Q I'm sorry, I think the question I had asked, that



1 at trial when Nichol John testified, that she did
2 not repeat her sworn statement.

3 A Right.

4 Q And I think, and I stand to be corrected about
5 what Mr. Wilson told us at this Commission, I
6 think it was that he didn't know when he
7 testified -- in fact, I think he testified before
8 Nichol John, that she was not going to repeat her
9 incriminating statement in her evidence, that was
10 the point.

11 A Okay.

12 Q So here, the next page, there's a discussion about
13 the transcripts, and Mrs. Milgaard says:

14 "None of that came out in court. Not
15 one iota. I mean, we've gone thru these
16 transcripts with a fine toothed comb
17 ..."

18 And I think this is -- sorry, there's a reference
19 here about Ron Wilson thinking that they found
20 blood in his car, that the police found something
21 in his car physically matched to Gail Miller,
22 which was not the evidence, but -- and then she
23 says we've gone through them, and then Wilson
24 says:

25 "Okay, you've got the transcripts?"



1 "Mm-hmm."

2 "Okay, other than my lie detector test,
3 did I, on the stand, say that Dave did
4 it?"

5 And again, did you find that question to be odd,
6 that Mr. Wilson would be asking whether he
7 implicated Mr. Milgaard or not, or whether he
8 said he did it at trial?

9 A I might have, yes. I don't recall my reaction to
10 that.

11 Q And then:

12 "No, I don't--You didn't actually say
13 that David did it, no."

14 And then Wilson says:

15 "But that I believed that I thought he
16 did?"

17 "Yes."

18 And he said:

19 "Okay. That's what I wanted to know."

20 And then he says, scroll down:

21 "Well, like the main point I got--that
22 stupid lie detector test: they ask you
23 blah-blah questions; you're saying yes
24 and no to these. You don't know what
25 that machine is saying! I'm not a lie



1 detector technician. They show you a
2 picture: 'Does this look familiar?'
3 'Yes.' Okay, it could have end up a
4 'no' on the machine, but you don't know.
5 I can't read it. You know, plus, okay,
6 all this was about 4 or 5 months
7 afterwards. You know, like--I'll tell
8 you what: Go for a new trial, dear."

9 And again, did you -- I think you said earlier
10 that you at some point heard from somebody that
11 he would not be -- that Wilson would not be
12 co-operative. Would that have been after this
13 interview do you know?

14 A Yes.

15 Q And then he goes on, he says:

16 "--I agree with you, solely--Like
17 there's shit for evidence, actually."

18 And again, that would appear to be favourable to
19 your position wouldn't it, this information that
20 Mr. Wilson is giving, subject to the credibility
21 issue you talked about?

22 A Yes.

23 Q Now, I'm done with that document. I don't propose
24 to bring up -- as well Carlyle-Gordge, Mr.
25 Carlyle-Gordge interviewed Albert Cadrain I think



1 in 1983, a fairly lengthy interview. Presumably
2 you would have listened to that or read that at
3 the time?

4 A Yes, I think so.

5 Q Anything jump out at you today as a recollection
6 of that interview, whether it was any, played any
7 significance in what you were doing from '86 to
8 '88?

9 A No. I seem to recall Cadrain clung to his story.

10 Q And then as well Nichol John, there was an
11 interview by Tony Merchant and Joyce Milgaard of
12 Nichol John in 1981 and some suggestion and
13 efforts to try and get her hypnotized. Do you
14 remember hearing about that?

15 A Yes.

16 Q So again, let's just go back then, as far as
17 Wilson, John, Cadrain, you would have had
18 information that Mr. Carlyle-Gordge and Joyce
19 Milgaard had gathered from them and I think you've
20 told us, and please correct me if I'm wrong, but
21 number 1, you decided not to contact them again
22 for reasons which you've stated, and I think one
23 is you didn't think they would be co-operative,
24 and two, you thought that Federal Justice would be
25 doing that after you filed; is that correct?



1 A Yes.

2 Q And secondly, that the information that you
3 gathered from them, being these interviews,
4 Wilson, John and Cadrain, were not filed with the
5 authorities in the first application in 1988; is
6 that correct?

7 A They were not filed?

8 Q They were not filed.

9 A That's correct. I should add that although I'm
10 not sure what role it played, but we didn't have
11 the resources actually at that point, even if we
12 had wanted to go and find the three witnesses, we
13 didn't, Legal Aid had refused us and the Milgaards
14 didn't have the resources, and we were, I think,
15 early enough in the case that we weren't, we
16 didn't know how much we were going to have to be
17 in as a law firm in terms of financial commitment
18 and that may have played a role as well.

19 Q If you would have had a private investigator at
20 your disposal, 1986 to 1988, and cost wasn't an
21 issue, are you able to tell us whether you would
22 have gone out and had these people interviewed or
23 were there other -- you've given us a couple of
24 reasons why you didn't and I'm wondering if you
25 had an investigator would you have done it?



1 A Well, I've told you that in hind -- number 1, in
2 hindsight, I would -- I would go get to these
3 three people, to Wilson, John and Cadrain on day 1
4 probably, or tried to get them. Number 2, I would
5 have an experienced investigator review the file,
6 every aspect of the file to determine and make a
7 list of the priority areas of investigation, and I
8 would assume that, again in hindsight, there are
9 many areas that would have been investigated for
10 the purpose -- for the purposes of our
11 application.

12 Q If we can now go to -- I think you told us earlier
13 that -- actually, let me just back up. You would
14 have been aware that Mr. Young and Mr. Merchant
15 had acted for David and/or Joyce Milgaard?

16 A Sorry, can I just --

17 Q Yes.

18 A If I can sort of clarify that last point?

19 Q Yeah.

20 A Bearing in mind that there were two parts of the
21 information that we received that needed
22 investigating. One, the Fisher information was
23 capable of having been investigated at the time of
24 David's -- at the time of his conviction and
25 subsequent appeals, the second part was the new



1 information, and a professional investigator I
2 think could have been very helpful in evaluating
3 and prioritizing how to approach the task.

4 Q So just back, I think you told us Gary Young and
5 Tony Merchant, you were aware that they had done
6 some work prior to your involvement?

7 A Yes.

8 Q And I don't believe, at least from the records, it
9 looks as though it wasn't until a number of years
10 later that Mr. Merchant's file was requested and I
11 don't think Mr. Young's file was ever requested.
12 Do you recall -- is that -- does that sound
13 correct?

14 A Sounds correct. I don't recall specifically.

15 Q And again let's talk about, about both of the
16 files. Do you recall discussing that with Mr.
17 Wolch or with anybody or as to any reason that
18 those files were not obtained?

19 A I don't recall.

20 Q In Mr. -- and I don't think we need to bring it
21 up, but Mr. Young in 1980 or '81 corresponded with
22 the Saskatoon City Police about getting some
23 information and I think looking at the file, and
24 the police chief basically got back to him and
25 said -- actually, maybe I will bring it up, it



1 might -- if I can put my hands on it. 331961.
2 And is this January 6, '81 to Mr. Young and he
3 had, both he and I think Chris O'Brien had made
4 requests of the police to get information, and
5 call out that bottom part. What the chief of
6 police told him is that -- actually, just scroll
7 up a bit right to the top paragraph, it says
8 about:

9 "... whether this case was going to be
10 re-opened or perhaps more specifically
11 what the actual reason for wanting to
12 have access to our file and to interview
13 those officers involved in the
14 investigation is and you could not
15 supply that."

16 So Mr. Young had made a request to access the
17 police file and interview investigators, and then
18 the chief says:

19 "If there is some justification for
20 re-examining this conviction I feel that
21 the reasons for that must be presented
22 to the Attorney General's Department
23 and, if necessary, we will certainly be
24 prepared to discuss our file with a
25 representative of the Attorney General's



1 Department and, of course, have our
2 members interviewed by a representative
3 of the Attorney General's Department.
4 If the Attorney General sees fit to
5 acquaint you with the information he has
6 at his disposal, then I would have no
7 objection to that. In the meantime, I
8 can only advise you I am not prepared to
9 have our file made available to yourself
10 or members of the Milgard family, nor am
11 I prepared to have the members involved
12 in the investigation available for
13 interviewing."

14 And I think what Mr. Young told us is that he had
15 made this request and that he intended to pursue
16 it to, and I can't recall what, I think he said
17 he thought he may have been able to get access to
18 the police file through the Attorney General's
19 Department and the chief, and do you recall
20 whether you would have been aware of his efforts
21 to access the police file back, '86 to '90, '92
22 when you were involved?

23 A I don't recall --

24 Q And --

25 A -- specifically.



1 Q And do you -- did you and Mr. Wolch and others in
2 your firm, or Joyce or David Milgaard, have any
3 discussions about requesting the police file, or
4 did you in fact ask the Saskatoon City Police to
5 provide access to their file?

6 A No. Again, we -- I come back to our belief that
7 if we could engage the Federal Department of
8 Justice, it would act as a neutral Crown, and that
9 we felt that it would be the funnel through which
10 disclosure would occur.

11 Q And so that, after you filed your application, was
12 it your expectation that the Saskatoon City Police
13 files would be made available, through Federal
14 Justice, to you?

15 A Yes, yeah.

16 Q What about --

17 A Now, knowing what I now know, I would take this
18 letter, I may write a follow-up letter just to
19 confirm that it remains the position of the
20 Saskatoon Police or the, or of the Attorney
21 General, and file it in a 67 -- or a 690
22 application, and be specific.

23 Q And what about contact of the Provincial Attorney
24 General and your dealings, I think you've told us
25 about going through Federal Justice who was the



1 appropriate Minister under 617, did you discuss or
2 consider going to the Provincial Attorney General
3 who actually prosecuted Mr. Milgaard and ask them
4 for (1) their file, being Mr. Caldwell's file, he
5 was their agent, and (2) similar to what Mr. Young
6 discussed with the police chief, "Attorney
7 General, can you go and get the Saskatoon Police
8 file so we, the lawyers, can go and look at it and
9 interview some police officers"?

10 A My recollection is that our view was even more
11 firm on the matter of the Federal Department of
12 Justice intervening between us and the Provincial
13 Department of Justice or the Attorney General,
14 given that it was the original prosecuting
15 authority, and we felt that we were not going to
16 have the A.G., in effect, start to gather and
17 investigate, potentially, itself, and we hoped
18 that the Federal Department of Justice would be
19 the fulcrum between that.

20 Q And so are you telling us that you did not want
21 the Provincial Attorney General to be out sort of
22 actively engaged in reinvestigating this matter?

23 A That's correct.

24 Q And would that be -- I think -- I take it from
25 your answer, would it be because they had been



1 involved in the original conviction?

2 A It -- not just that they had been involved in the
3 original conviction, but Mr. Caldwell had
4 certainly reveled in the conviction and been
5 active in pursuing David's continuing
6 incarceration.

7 Q Did you conclude that you may not get cooperation
8 from the Attorney General of Saskatchewan?

9 A I -- it -- we may have had that in mind, but just
10 as a matter of principle and a matter of
11 philosophy, we didn't want the Saskatchewan
12 Attorney General looking into the conduct of
13 itself.

14 Q And what about just getting access to documents
15 and files, were you -- did you consider going to
16 them to say "lookit, we don't want you to
17 reinvestigate but we would like to use your
18 offices, Attorney General, to allow us to look at
19 the police file"?

20 A I think our view was that, at the time, the
21 dramatic nature of the wrongful conviction
22 militated in favour of involving a third party.

23 Q And that being Federal Justice?

24 A Federal Justice, yes.

25 Q Now, as well, let's move to Tony Merchant and his



1 file. I think you told -- I think there is a
2 record, in 1992, where Mr. Merchant, a request was
3 made for his file, and 173964. And this is an
4 interview, I don't propose to go through it, it's
5 an interview -- maybe we can just call out the top
6 part -- in Regina May of '81 at Tony Merchant's
7 home with Joyce Milgaard and Peter Carlyle-Gordge,
8 and I think as well Susan Milgaard, David's
9 sister, I think was present as well. And in this,
10 and we went through this with Mr. Merchant, and
11 his evidence at this Inquiry was that his advice
12 to the Milgaards at that time about getting the
13 case re-opened was that they needed, I think his
14 words were, "a bombshell". And if we see it down
15 here, that basically "don't go through picking
16 apart the trial evidence, you need something new
17 and big". And I'm wondering, do you have any
18 recollection of that being -- being aware of that
19 advice from Mr. Merchant, or being aware, I mean
20 Mrs. Milgaard or David or Peter Carlyle-Gordge
21 saying to you "lookit, we're looking for the
22 bombshell or new evidence", or did any of that
23 play in your thinking as to what you needed?

24 A I'm not sure if the thinking that we had came from
25 Mr. Merchant, but we certainly felt we needed



1 something that was pretty significant, I don't
2 think we used the word "bombshell".

3 Q Then as well on Mr. Merchant's file, 216089. And
4 we've seen these documents before, in fact there
5 -- this is March 23rd, '83, and you recall I
6 showed you where Mr. Carlyle-Gordge put an ad in
7 the paper March 26th, '83 looking for Linda
8 Fisher. I think the evidence we've heard to date
9 is that in addition I believe he asked Mr.
10 Merchant to do a tracing, through a tracing
11 company, of Linda Fisher on that date.

12 And then as well, 213627 is an
13 October 12, 1983 letter from Mr. Merchant to a
14 process server, this is a different process -- a
15 different tracing company, and asking to locate:

16 "LINDA FISHER - In 1969 she lived at 334
17 Avenue O South, Saskatoon, Saskatchewan.
18 She married Larry Fisher who is
19 presently in prison for a rape charge."

20 And I don't think this letter would have been --
21 I'm not sure whether Mrs. Milgaard had this, or
22 not, at the time. This document we received from
23 Joyce Milgaard, the Commission did; do you recall
24 having this document on your file or being aware
25 of it?



1 A I don't recall.

2 Q And again, this information, would this type of
3 information -- I mean I -- it's a difficult, we're
4 now looking back on it with hindsight, Mr. Asper,
5 but are you able to tell us whether that would
6 have raised a flag with you, being the address and
7 the rape charge, if you would have seen it?

8 A It certainly may have.

9 Q Okay. This is probably an appropriate spot to
10 break, Mr. Commissioner.

11 *(Adjourned at 10:24 a.m.)*

12 *(Reconvened at 10:43 a.m.)*

13 BY MR. HODSON:

14 Q Mr. Asper, we had talked about, we were just going
15 over Mr. Young and Mr. Merchant's file and
16 efforts, and as well I went through the letter
17 where Mr. Young went through the Saskatoon City
18 Police as far as getting access to the police
19 file. He also made a request of Mr. Caldwell to
20 review his file, 331926, and Mr. Young's evidence
21 was that he -- this is actually February 2, '81,
22 and if we can just call that up. We've heard from
23 both Mr. Caldwell and Mr. Young on this, and it
24 talks about giving statements:

25 "... to Tallis - however he is prepared



1 to go over his file with me, but will
2 not release copies to Mrs. ..."

3 Milgaard. And Mr. Young's evidence was that,
4 although he asked for and was advised by Mr.
5 Caldwell that he could go and look at the file,
6 he doesn't recall and doesn't think he did. Mr.
7 Caldwell's recollection is that he made his file
8 available and that he did look, but that there
9 was no dispute between the two of them as to
10 whether or not he would have access.

11 Were you aware, back in
12 '86-'87, that time frame, that Mr. Caldwell would
13 have -- that Mr. Caldwell had told Mr. Young,
14 your predecessor, that he could review the file?

15 A I may have been. I don't recall specifically.

16 Q And if you would have been aware of that would
17 that have changed -- I mean you told us earlier as
18 to reasons you did not go to the Crown and the
19 Attorney General; would that have made any
20 difference to you if you had been aware that Mr.
21 Caldwell was prepared to let you look at the file?

22 A I don't believe so.

23 Q If we can go ahead to --

24 A And I should say I, we didn't believe, my answer
25 isn't driven by any belief of -- that there was



1 some nefarious mindset at play on the part of Mr.
2 Caldwell or anyone else at that point, it was
3 simply a philosophical perspective that where a
4 conviction was being challenged, the prosecuting
5 authority ought not -- we ought not to be dealing
6 directly, and use a third party, as we tried to
7 do.

8 Q And so are you telling us that -- let me ask it
9 this way: Would the information on Mr. Caldwell's
10 file, forget how you get it, but the information
11 on his file, would that have been important
12 information to you, as Mr. Milgaard's lawyer, in
13 trying to re-open the case?

14 A Certainly, it would have been, and I would have
15 wanted an independent authority to assure that it
16 was all of the information.

17 Q Then if we can go to 213600, and this is a letter,
18 I'm not sure of the date, and from David Milgaard
19 to his mother, that just talks about -- I think
20 it's around the spring of '86, early in your
21 involvement. If you can go to page 3 -- oh, I'm
22 sorry, just go to page 2, and you'll see a -- no,
23 213602, please. I think this is the second page.
24 And just at the bottom:

25 "... I called David to find out if Hersh



1 got my message about how I wanted to
2 handle the 5th Estate thing ...".

3 And so if we can go to the next page. And so it
4 looks as if it's around early in your
5 involvement, and then he says:

6 "So we can find out if the obstructions
7 of justice with suppressed statements
8 (Debbie Hall) possible Tallis/Chief
9 Justice) (lots of evidence in
10 transcripts suggest he did not address
11 what was a must to address)".

12 And again, I'm not sure, are you able to shed any
13 light as to would this be part of the, I think
14 the paranoia you described earlier, that there
15 may have been something nefarious going on?

16 A Yes. I mean you have to remember this is a person
17 who is innocent trying to figure out why, if he
18 was innocent, this happened.

19 Q And so would this come up from time to time where
20 David Milgaard, where you would meet with him,
21 where he would have these thoughts or concerns
22 that -- trying to figure out who, who may have
23 done what to put him in jail for something he said
24 he didn't commit; was that what he was saying to
25 you?



1 A Yes. Yes.

2 Q If we can then go to 213604. This is May 28th,
3 1986, so this would be -- I think your meeting
4 with him was in April, and I'm not -- I asked you
5 if I could bring you -- this up, Mr. Asper, and
6 you said you didn't mind, it's where you are
7 referred to as, "the legal thing with Hersh Wolch,
8 actually with his flunky lawyer David Asper has
9 gone nowhere fast, and I've been told I'd be seen
10 and the thing discussed but so far nothing. I
11 called Hersh and told him and he said he'd get on
12 it. Time will tell".

13 And the reason I'm bringing this
14 up is to ask you about the -- were you getting
15 pressed, in a sense, by David and Joyce Milgaard,
16 the time, was there impatience to actually do
17 something, were you getting pressured to do
18 something?

19 A Yes, without question, every day. And yes, they
20 pressed, and I think anyone with a conscience who
21 comes to the view that David was innocent, or at
22 least deserving of a new hearing, would have
23 suffered some for every day that he continued to
24 be incarcerated, and -- and there was a lot of
25 pressure from David and Joyce.



1 Q And let's just go back. At this time this would
2 be a *pro bono* file, I take it, for -- I mean you
3 were doing this without compensation; is that
4 correct?

5 A Yes.

6 Q And I'm just trying to get an understanding of
7 what type of, I mean were there calls every day,
8 every week, every month, tell us a bit about what
9 your experience was in trying to, at least at the
10 initial stages, get things going?

11 A Well there were, there were a lot of calls. When
12 David, certainly when David got a sense that we
13 were committed to assist him, he -- he, as I said
14 before, even in the first meeting he got very
15 excited and wanted to get very active and wanted
16 things to happen very quickly.

17 Q And did he, from time to time, express
18 disappointment in the pace at which things were
19 going?

20 A Routinely, he fired us.

21 Q And would that be, I think you told us yesterday
22 on a number of occasions that happened, would one
23 of the reasons be he didn't think you were doing
24 things fast enough?

25 A Yes.



1 Q If we could go to 157000. And this is a letter --

2 A You know, he -- David -- David was -- and he said
3 they moved a mountain to put him in, how come we
4 can't move a mountain to get him out, and he
5 didn't understand the process, didn't under -- he
6 had no sense of, I don't think he had any sense of
7 what we were up against.

8 Q As far as the de -- as far as what you had to put
9 in place to make it happen; is that what you are
10 --

11 A Yes, yes. What seemed to be just the right thing
12 to happen had no relationship, in his mind, to
13 what you actually had to do to make that happen.

14 Q And here's a letter May 28th, 1986 from
15 Mr. Fainstein; and did you come to know
16 Mr. Fainstein as being involved in this matter?

17 A Yes.

18 Q You did? And what was your understanding of his
19 role on behalf of Federal Justice?

20 A I didn't know, in looking at the documents that
21 you provided me, I didn't know that Mr. Fainstein
22 had been involved with this matter prior to the
23 Supreme Court reference. I came to know him
24 through the Supreme Court process.

25 Q Okay. Here -- and, again, we've -- I've shown you



1 a couple of letters where Mr. Milgaard is writing
2 directly to the Minister, and here Mr. Fainstein
3 is writing back saying:

4 "We look forward to receiving
5 Mr. Wolch's representations in
6 connection with your application for
7 mercy.",

8 and referring to a letter that Mr. Milgaard wrote
9 to John Crosbie. So it appears, from here, that
10 at least May of '86 Federal Justice is waiting
11 for your application, is that fair, or were you
12 aware of that?

13 A It would seem so, yes. I believe that's referring
14 to David's letter in which he says that Mr. Wolch
15 will be providing a presentation. I don't think
16 we had had any direct contact with Justice at that
17 point.

18 Q Yeah, and I don't believe there's any, there's any
19 correspondence to that effect. You had said
20 yesterday you thought, at some point, Mr. Wolch
21 would have talked to some of the people he knew at
22 Justice about process, and is it possible in one
23 of those discussions he might have said, "lookit,
24 we're preparing an application"?

25 A It's possible.



1 Q If we can then go to 213552. And this is David
2 Milgaard's letter to I think the *Fifth Estate*, and
3 we talked a bit about this yesterday, about some
4 concerns David and Joyce Milgaard had with the
5 *Fifth Estate*, and there is a paragraph here I just
6 want to get you to comment on. One, he wants
7 Mr. Carlyle-Gordge to be involved and to get
8 credit for the work that he has done; and:

9 "The second consideration was that I be
10 given some room to express my opinion
11 about prisoners and their treatment by
12 the Criminal Justice System."

13 And we see this in a number, later on, a number
14 of documents from David Milgaard relating to the
15 media, and we will touch on them, on some of them
16 when we go through later. But just generally I'd
17 like you to comment on what Mr. Milgaard's
18 desires were as far as the media exposure on this
19 case and his concern, expressed here, about
20 prisoners and their treatment by the criminal
21 justice system?

22 A I think it's -- well, I think they're separate
23 issues. Umm, the *Fifth Estate* matter I think was
24 of interest to David and Joyce and the family for
25 a couple of reasons. The first was, or is, that



1 it offered the hope that somebody other than the
2 family and Peter Carlyle-Gordge would have looked
3 at the case and validated the perspective that it
4 might have been an unsafe conviction, at least, or
5 even that David was innocent, and that was
6 third-party validation, that's very important to
7 them to sort of have a sense that somebody else
8 agrees.

9 The second part was that I think
10 Joyce correctly, and David, had it in their mind
11 that exposure of the case might provoke some
12 action by somebody, whether it was a witness to
13 come forward or someone to come forward and help
14 in another way and to somehow get relief, and
15 those were very important drivers to the *Fifth*
16 *Estate* broadcast, very important.

17 The second part of the sentence,
18 the second sentence here dealing with criminal
19 justice, was something that David -- was a cause
20 that David had begun to champion while inside the
21 prison. He had created a prisoner, a lifer's
22 self-help group within the Stony Mountain
23 Penitentiary, and was actually quite successful in
24 helping people rehabilitate themselves, and he
25 felt that the system itself, without these kinds



1 of support groups, wasn't helping prisoners in the
2 way he felt it should.

3 Q And so did that cause, if I can call it that, in
4 later dealings with the media did Mr. Milgaard
5 continue to try and put that forward as one of the
6 things that ought to be in media exposure about
7 his case?

8 A Yes, I -- there, you know, there was some, there
9 were some anomalies about how -- about David's
10 perspectives. He was quite selfless, in some
11 respects, about his work on behalf of others at a
12 time when you'd think he would be pretty focused
13 on his own situation, and he always wanted -- he
14 called it The Justice Group and he always tried to
15 have its interests advanced.

16 Q And so when you were looking at media exposure for
17 his cause, being his re-opening cause, then was
18 this issue, this other cause, part of your
19 considerations as -- or part of his
20 considerations; is that a fair way to put it?

21 A It was part of his considerations, yes.

22 Q If we can go to the next page. And, again, this
23 is a letter -- actually, I think I had said it's a
24 letter to CBC, it may have actually been a letter
25 to the Minister of Justice. But in any event --



1 A No, I think it's to the CBC.

2 Q The CBC?

3 A Because it says:

4 "... I don't know how important your
5 show is to ..."

6 Q Thank you. So then he says:

7 "My presentation to the Minister of
8 Justice is almost done and I have been
9 advised to wait until the show airs, if
10 it airs. Personally I do not know how
11 important your show is to people unless
12 my considerations are ever considered.
13 Do you? Who will benefit? My legal
14 presentation can stand on its own and I
15 should be out soon.

16 More to the point, I feel that
17 I have been slieghted responsbility wise
18 and I do not know what is being done to
19 encompass the "why" of it all. (it is
20 possible you could even be an
21 obstruction of justice, I do not know
22 but I sure wish you could help me find
23 out just where and when the obstructions
24 in this case stop if they do at all and
25 why they exist.)"



1 Now let me just pause there. There's a couple of
2 points; one, and we'll see this in some later
3 correspondence, that in addition to the work that
4 you and Mr. Wolch are doing as far as putting
5 forward an application to the Minister, it
6 appears that David Milgaard and Joyce Milgaard
7 were preparing their own family presentation; is
8 that correct?

9 A Yes.

10 Q And so something to supplement, or in addition, or
11 different than what you and Mr. Wolch were putting
12 forward?

13 A We were working on parallel paths, as I recall. I
14 think they were working on a deconstruction of the
15 trial, of the facts at trial, and demonstrating
16 the absurdities or impossibilities, as they saw
17 it, of the trial evidence, whereas we were working
18 on that, but also trying to focus ourselves on
19 something new.

20 Q And then the second point here is about the CBC,
21 was there -- and we talked about this a bit
22 yesterday. The concern, I think you told us when
23 you initially became involved, that both David and
24 Joyce Milgaard were upset with the *Fifth Estate*
25 and the failure to broadcast the show, and we



1 heard some evidence, I think when Mr. Merchant was
2 on the stand, that they had blamed him for causing
3 the show not to run; do you recall, do you recall
4 those discussions?

5 A I, yes I do, but not specifically.

6 Q And, here, here it suggests that there might be
7 concerns that the CBC and the *Fifth Estate* were
8 part of the obstruction of justice, or the people
9 out there trying to do wrong to him; was that, was
10 that expressed to you?

11 A I think at some point. You know, you really have
12 to understand, and I say it over and over again
13 and I probably can't say it any better; to
14 encapsulate their mindset is a line from a song
15 "*no one cares about something you didn't do*", and
16 that was their perspective, that -- that -- that
17 -- and when the CBC sort of walked away from the
18 show that really solidified their view.

19 Q Did --

20 A That view, that view that not only had the system
21 conspired, but that no one cared.

22 Q And again, just on that point, so that when the
23 CBC walked away from running the program did David
24 or Joyce Milgaard impute sinister motives to that,
25 or that somehow someone had gotten to them, or



1 that they were part of something --

2 A Yes.

3 Q -- working against them?

4 A Yes.

5 Q If we can then go to 213438. And this is a letter
6 from Mr. Milgaard to you that -- and I only show
7 the envelope because it's got the date, August 8th
8 of '86. Go to the next page.

9 A He didn't address me as "flunky" directly,
10 apparently.

11 Q Actually, here you are Mr. David Asper.

12 A Yes, I'm a Mr. now.

13 Q And to be fair, I looked for a memo where he
14 called Mr. Wolch a flunky and I wasn't able to
15 find it, or I'd put it up as well.

16 A And whatever I'd say would be hearsay; is that
17 correct.

18 Q And this is a letter August 8th of 1986 from -- to
19 you, and it talks about, "For our next visit I
20 would like you to lay out all that you have done
21 for me so I can see what we have got at this
22 point, both parole board wise and Minister of
23 Justice wise. Have you talked to Peter? Has
24 Hersh mentioned to you the certificate re:
25 Federal Court parole board policy has been issued?



1 Time is becoming a factor now and I feel we have
2 to work together more on this whole thing to put
3 it all together. Can you figure a way clear to do
4 this?"

5 And I take it this would be an
6 example of what you talked about earlier, that the
7 time pressure that -- would it be fair to say that
8 his view of timeliness or timing might have been
9 different than yours, as counsel, in light of what
10 you had to do; is that --

11 A Yeah, there is no question about that. And I
12 think that whether it was David speaking with
13 people at the prison, or the fact that all of a
14 sudden myself and Hersh were coming up to see him,
15 you know, word started to get out that we had
16 taken the case, and that we were looking into
17 reviving the case, and certainly David made no
18 secret of that fact, and so people inside the
19 prison didn't make it particularly easier for him
20 and chided him, and I think that exacerbated his
21 sense of patience and his sense of time, because
22 he was getting it from all sides inside the
23 prison.

24 Q If we could go to 182120. And this is an August
25 11th, '86 telephone note from Sandra Bartlett, and



1 I think the documents show Sandra Bartlett was a
2 CBC employee who had worked on the *Fifth Estate*
3 programming; is that right?

4 A Yes.

5 Q And I think what the documents suggest -- and
6 please tell me if this was your understanding --
7 that she had, had done some legwork on, on the
8 proposed *Fifth Estate* show, had talked to some
9 people, interviewed some witnesses, and had done
10 some work on the file; is that right?

11 A Yes.

12 Q And I think, here, we'll see that she had actually
13 talked to Deborah Hall or maybe interviewed
14 Deborah Hall?

15 A I believe so, yes.

16 Q Hall? And would this be -- if we can just scroll
17 down, please, oh, sorry, that's the -- would this
18 be the -- actually, go to the next page. And, I
19 think, is that your handwriting?

20 A Looks like it, yes.

21 Q Yeah, so, "Debbie Hall, Bartlett says she sounds
22 credible. Agreed to be interviewed by *Fifth*
23 *Estate* to say that nothing happened in hotel room
24 in Calgary. *Fifth Estate* also wanted one of
25 Melnyk or Lapchuk", and then something about,



1 "Regina armed robbery, 3 months or 6, both were
2 facing charges which were dropped or dealt out".
3 And would this be a note of your telephone call
4 with Sandra Bartlett then?

5 A Looks like it, yes.

6 Q And, again, would this be the first information
7 that you received about Deborah Hall? I think I
8 showed you earlier in one of the notes with David,
9 in your interview note of David Milgaard, where he
10 told you --

11 A We he mentioned it, yes. I don't recall. I may
12 have asked Sandra about it on the basis of my
13 interview with David.

14 Q Okay. And again, you would have had some dealings
15 with her then as far as finding out from her what
16 information she obtained from various people; is
17 that fair?

18 A Yes, yes.

19 Q And was she an investigative journalist, would
20 that be a fair name for her?

21 A She was a researcher and a journalist. I think
22 she was attached to the program.

23 Q And they were trying to find out information that
24 might bear on David's case; is that fair?

25 A Yes.



1 Q And so to the extent that she gathered
2 information, was she willing to share it with you?

3 A She shared some. I don't know how much of what
4 she knew.

5 Q But can we take it from this that -- do you know
6 whether she would have initiated this call to you
7 or you initiated it to her where you talked to her
8 about the Deborah Hall information?

9 A I have a feeling that David or Joyce might have
10 given her my name and that she called me.

11 Q And was it your understanding that Joyce and David
12 Milgaard had some dealings directly with Sandra
13 Bartlett?

14 A I think so, or Gordon Stewart who was the producer
15 I think.

16 Q If we can go to 182096, and this is your note,
17 memorandum to Hersh of August 12th, you tell him:

18 "Please be advised that I spoke to
19 Sandra Bartlett, who is the researcher
20 for CBC's Fifth Estate program. I
21 called long distance and spoke with her
22 for approximately 45 minutes on August
23 11th, 1986."

24 And then:

25 "Insofar as the substance of my



1 conversation is concerned, Ms. Bartlett
2 advised that there is a witness named
3 Debbie Hall who was present in the hotel
4 room in Calgary when David allegedly
5 went through the stabbing motions as he
6 watched a television account of the
7 murder. She is prepared to swear that
8 David did no such thing. Moreover,
9 Ms. Bartlett has discovered that the two
10 witnesses who did testify to this event
11 made sweetheart deals with the Crown in
12 return for their evidence. Apparently
13 the witness named Melnyk entered a plea
14 bargain on a charge of armed robbery and
15 received a 3 month sentence."

16 Let me just pause there. Would that be an
17 accurate recording of -- I mean a general
18 recording of what was discussed with respect to
19 Debbie Hall in your conversation with Sandra
20 Bartlett.

21 A Probably, yes.

22 Q And would this, in reading that, would this --
23 would this be your first account of what evidence
24 you thought Debbie Hall might be able to say about
25 the motel room incident?



1 A Yes.

2 Q And again, do you have a recollection, was this
3 something that you thought might be significant at
4 the time when you got this information that she
5 was saying it didn't happen?

6 A Yes.

7 Q And that Melnyk and Lapchuk got sweetheart deals?

8 A Yes.

9 Q And were you suspicious at this point that there
10 might have been something nefarious with respect
11 to the evidence on the motel room reenactment?

12 A Yes.

13 Q And is it fair to say that this call, and perhaps
14 Mr. Milgaard mentioning it to you, would have
15 prompted you to follow up with Debbie Hall, which
16 I think you did in November?

17 A Absolutely.

18 Q And just so that we're clear here, it looks like
19 Ms. Bartlett is telling you, based on her
20 discussions with Debbie Hall, that Debbie Hall is
21 prepared to say that David did no such thing;
22 correct?

23 A Yes.

24 Q And then the next paragraph says:

25 "Also, the Fifth Estate has located Ron



1 Wilson, who was the driver of the
2 vehicle that fateful morning in
3 Saskatoon. They are awaiting the return
4 of Eric Malling from holidays to make
5 contact with Wilson to set up an
6 interview. They expect him to say that
7 nothing happened. Apparently the view
8 of the Fifth Estate editorial board is
9 that once they have interviews with
10 Debbie Hall and Ron Wilson, they would
11 want to come to speak to us and clean up
12 the rest of the story."

13 Do you have -- what information did they get from
14 Ron Wilson, did you ever find out?

15 A I don't recall.

16 Q And you had talked earlier about at some point you
17 became aware that Ron Wilson got, I don't know
18 what your words were --

19 A Spooked.

20 Q Spooked. Do you know if this --

21 A This may have been it, yes.

22 Q The Fifth Estate interview with him. Are you
23 saying that --

24 A I don't know, and I can't confirm, my recollection
25 is that at some point Wilson got spooked. I may



1 be wrong in my recollection, but if he did get
2 spooked, this may have been it.

3 Q And so the contact with the CBC. Presumably if
4 the CBC had an interview with Ron Wilson that said
5 nothing happened that morning, do you think that
6 information would have been provided to you by
7 Ms. Bartlett of CBC?

8 A I suspect that we would not have known what was in
9 the show and what the witnesses would have said
10 until the show aired. I doubt they would have
11 shared that information with us prior to its
12 airing.

13 Q And I think we'll see some documents later where
14 the CBC ended up saying they can't run the program
15 because they couldn't prove, couldn't establish
16 enough towards innocence; is that your
17 recollection, and I'll show you the document a bit
18 later.

19 A I don't remember.

20 Q Go to 182097. This is now September 2nd and I
21 think it's from 1986 based on the contents, and
22 you are advising Mr. Wolch to look at section 617
23 of the code and you say:

24 "Our opinions appear to be in a 617
25 application but it seems to me that if



1 we can get a T.V. show done first to get
2 some support we would be far better
3 off."

4 Can you explain what your thinking was there?

5 Oh, I'm sorry, Mr. Wolch has told me this is from
6 him to you.

7 A Yes.

8 Q Sorry about that. Mr. Wolch, would you like to
9 get up and explain -- no.

10 A He wanted to be on TV I think.

11 Q So here, maybe just -- I'm sorry, I misread that.
12 This is from Mr. Wolch to you saying that, talking
13 about getting a TV show done first to get some
14 support. Would this have been something you
15 discussed with him or shared the view with him?

16 A Yes. I think the idea was that I think the
17 thinking certainly was that if we could have
18 something favourable in the media, in the public
19 concurrent with the filing of an application, it
20 might help things.

21 Q In what way? Let's just talk about -- I know
22 later on we're going to -- and you mentioned some
23 of this yesterday -- to talk about how the media
24 might influence politicians, but let's go back to
25 1986. At this point would there be a different



1 purpose in this type of media exposure than we see
2 in 1990 and 1991 when you go to the media with
3 information?

4 A Yes. I mean, the Fifth Estate was a very, is a
5 very reputable program, very reputable
6 investigative journalism program, and, you know, I
7 don't think we were looking to knock over any huge
8 obstacles at this point, not at all, it was more
9 for interest sake, probably to hopefully have some
10 people in the Department of Justice see the
11 program and say gee, that's kind of interesting,
12 and now we've got this application, you know,
13 maybe let's have a look at it.

14 Q And would one of the purposes be to try and
15 cultivate some public support?

16 A I don't know that there would necessarily be
17 public support. I think there would be, you know,
18 support from within the legal community and the
19 Department of Justice potentially that, you know,
20 there's an interesting case, we saw it on
21 television, perhaps look at some of the witnesses
22 if in fact they had gotten some major evidence
23 from witnesses, you know, recantations or whatever
24 in order to get the Department of Justice to look
25 at it.



1 Q And I note in the starting point that Mr. Wolch is
2 telling you --

3 A Sorry, just --

4 Q Sorry?

5 A And just remember, there were many points along
6 the way, and this could have been one of them, and
7 this could have been motivating the thinking,
8 where from a political perspective there was only
9 a win in it for the Department of Justice to
10 re-open the case because it absolved the
11 Department of Justice at that point of
12 responsibility, that Justice would have done what
13 we were asking them to do, which was give David a
14 new hearing, and politically it was a win-win,
15 because if the new hearing upheld the conviction,
16 justice had done its part. If David was acquitted
17 as a result of a new hearing, justice had done its
18 part.

19 Q And just so I'm clear, when you say new hearing,
20 would that be either a reference to a court or a
21 new trial?

22 A Yes.

23 Q So one of the two, an opportunity to be heard in a
24 court in some form; is that a fair way to put it?

25 A Yes.



1 Q And whether that be a new trial or a reference or
2 an opinion, whatever 617 at the time would allow
3 for, that's what you were -- when you talk about a
4 hearing, that's what you are talking about?

5 A Yes.

6 Q At the start of the memo Mr. Wolch indicates that
7 David, who I'm assuming is David Milgaard, called
8 and was very anxious to see you. Did you become
9 the primary contact as between you and Mr. Wolch
10 as far as meeting with David Milgaard and spending
11 time with him, was that sort of more your role
12 than Mr. Wolch's?

13 A Yes. I got lots of speeding tickets going up
14 highway 7 to Stony Mountain Penitentiary.

15 Q Go to 162423, and this is just a memorandum from
16 you to Mr. Wolch, September 8th, '86, the facts of
17 the case. I don't propose to go through it, but
18 all of it appears to be just a summary you
19 provided to Mr. Wolch of your work to date and
20 what you had found to date?

21 A Yes.

22 Q If we can go to 162426, and we see here, and I
23 think this is based on transcripts and other
24 documents you've reviewed, you are talking about
25 Gail Miller and which route she takes, and you



1 say:

2 "If she went to the bus stop at Avenue N
3 and 20th, there are three possible
4 routes. First would be to walk straight
5 south on Avenue O to 20th Street and
6 then east, on the south side of 20th
7 Street to Avenue N. Secondly, she could
8 walk east on 21st Street to Avenue N and
9 then south, on the west side of Avenue N
10 to the south side of 20th Street.
11 Finally, she could enter the T-shape
12 alley from 21st, walk south to the
13 east-west intersection, head east to
14 Avenue N and then south to the bus
15 stop."

16 And we seen in the documents, and we've heard a
17 fair bit of evidence about this issue about which
18 route Gail Miller either might have taken or did
19 take, and again, is that something, Mr. Asper,
20 that became part of your efforts in looking at
21 that, or can you tell us the significance of the
22 route?

23 A Yes, it factored in very heavily, and I believe at
24 that point I was either unclear or unaware of the
25 bus stop at Avenue O and 20th, so we were working



1 with, I believe, trying to reconcile Wilson's
2 evidence putting them on avenue -- or the Crown's
3 theory that they were on Avenue N.

4 Q If we can just scroll up here, I think actually
5 you refer to the bus stop at Avenue O. I should
6 have read that to you, I'm sorry, you say there
7 are bus stops located at the corner of Avenue O.

8 A Oh, sorry, okay.

9 Q At this time, was there a point prior to this
10 where you weren't aware that there was a bus stop
11 at Avenue O, do you have a memory of --

12 A Perhaps right at the outset and then we dug into
13 it, but this is trying to explain the Crown's
14 theory that the car was stuck on Avenue N, and if
15 it was stuck on Avenue N how Gail Miller would get
16 there given that she lived on Avenue O.

17 Q Okay. And we will see that in some of the
18 application materials, and that figured
19 prominently, didn't it, in your timing possibility
20 theory, that if the Crown witnesses had her on
21 Avenue N, that it didn't make sense that her route
22 likely, or was down Avenue O; is that a fair way
23 to put it?

24 A Yes.

25 Q If we can go to the next page, page 428, here you



1 say:

2 "Though I do not have the actual
3 transcripts of the Danchucks evidence,
4 using the Court decisions and interviews
5 done subsequent to the trial --"

6 And I think Mr. Carlyle-Gordge interviewed the
7 Danchuks, didn't he; is that what you would be
8 referring to there?

9 A Possible, yes.

10 Q And so at this time it looks like you did not have
11 all of the transcripts; is that a fair --

12 A Clearly, yes.

13 Q If we can go to 182098, September 15th of '86, a
14 memo from you to Mr. Wolch, and you indicate that
15 you were at Stony with David and his mother on
16 September 12th, 1986 and:

17 "... as I was walking out Mrs. Milgaard
18 mentioned to me that David was getting
19 very very impatient and was
20 contemplating using another lawyer. He
21 apparently feels that his case is not
22 receiving our full attention.

23 I think that you should make
24 your presence felt."

25 And again, you've talked about this earlier, was



1 this an example then of the, I guess, time
2 pressure that was being placed upon you to do
3 something?

4 A Yes.

5 Q 213588, and again this is a letter from David
6 Milgaard to Hersh Wolch, September 15th, '86, it
7 talks about the, I think you called them the
8 parallel presentations, he says:

9 "Since my mother, Peter and myself can
10 apply ourselves to this a lot I suggest
11 we put a presentation together ourselves
12 and when you and David need us to work
13 on yours with you, we'll do so. The
14 benefit is two products to consider."

15 And again, is that, and I think you've told us
16 already, that's what was happening, you were each
17 putting together a package, or a presentation?

18 A Yes, and I will say that, and I think Mrs.
19 Milgaard was part of this, it was helpful to have
20 David busy and focused and not fretting, not
21 sitting with nothing to do and fret, so we, you
22 know, he's sitting in a prison cell with nothing
23 to do. It was useful for this parallel process to
24 be going on to keep him occupied.

25 Q And was it your intent to have that, to have his



1 filed or was it his intent to have it filed with
2 the federal minister?

3 A I think he intended it. I think that we weren't
4 sure what to do with it.

5 Q Okay. Go to 162421, and this is a memorandum from
6 you to Hersh dated October 24, 1986, just call out
7 the top part, it says your memo dated October
8 21st, and we can't locate the October 21 memo, so
9 I'm not sure what went from you -- from Mr. Wolch
10 to you, but you say I spoke to David at Stony,
11 advises as follows, some information about Howard
12 Shannon. Do you know what significance that
13 played, Howard Shannon?

14 A No.

15 Q And then you say:

16 "We do not need a change in Nicole's
17 story but it would be very helpful to
18 explain the discrepancies in her
19 statements. Her original statement said
20 in effect that she saw David rape, kill
21 and then drag the body down the
22 back-lane. At trial, she then recanted
23 but clearly, the jury either did not
24 believe the recanted version or chose
25 not to believe anything she said at all.



1 Subsequent investigation revealed that
2 Nicole had been incarcerated under very
3 trying circumstances (i.e., she was
4 hallucinating or suffering from some
5 other drug-type problem) and this
6 information would tender to subvert the
7 validity of the original statement and
8 therefore rehabilitate her evidence as a
9 whole. Without her original statement,
10 the only really damning evidence against
11 David is the evidence at the scene and
12 the evidence of the motel room in
13 Calgary. We have at least one person
14 who was present in the hotel room in
15 Calgary, who did not testify but who,
16 apparently gave the police a statement
17 at the time stating that nothing
18 happened. This is Debbie Hall and Peter
19 Carlyle-Gordge knows where she is and
20 has spoken to her."

21 So again I think the Calgary thing may have come
22 from the conversation with Sandra Bartlett. I
23 think the motel room was in Regina; is that
24 correct?

25 A Yes, of course.



1 Q Just back, are you able to elaborate on what this
2 would have related to, about not needing a change
3 in her story, Nichol's story?

4 A I don't know. It sounds to me like we may have
5 been talking about needing to, needing a
6 recantation.

7 Q About whether you had to get her to recant?

8 A Yes.

9 Q And are you saying here lookit, she recanted at
10 trial, we don't need to get her -- we don't need a
11 change in her story because her story at trial
12 wasn't damaging; is that a fair reading of that?

13 A In part I think, yes. My view all along was that
14 her evidence regarding where they were was
15 unreliable as well.

16 Q Okay. So yes, at trial she did testify and adopt
17 that they were on Avenue N and stuck behind the
18 funeral home and then I think the next evidence
19 she gave was that they were at the Trav-a-leer.

20 A Right.

21 Q So part of her evidence you had some issues with
22 as far as the location?

23 A Yes.

24 Q And let me ask this, if -- and we heard from
25 Mr. Tallis about the difficulties he faced at



1 trial in trying to challenge the credibility and
2 validity of a very incriminating statement that's
3 not adopted by the witness; in other words, how do
4 you say 'Nichol John, what you saw doesn't make
5 sense,' because she says I don't recall saying it,
6 I don't recall seeing it. Was that a similar
7 problem that you faced in trying to figure out
8 what, how do you deal with her statement and her
9 evidence put together?

10 A Yes. I took the view at all times that
11 notwithstanding she had not adopted that portion
12 of her statement, it was a rat on the table, it
13 was out there and it was -- you know, I suppose
14 like any jury member you hear it and it's very
15 difficult to just pretend you didn't hear it and
16 she said that she had seen David commit the
17 murder.

18 Q And I think what Mr. Tallis told us is his
19 observation at trial was that, and I think he used
20 the words a reasonable bystander or a reasonable
21 observer, based on the examination of Nichol John
22 and the reaction of the trial judge, might
23 conclude that she was holding back and trying to
24 help David Milgaard when she did not repeat and
25 adopt the incriminating parts of her statement,



1 and so I think Mr. Tallis' view was that the jury
2 may have been persuaded by the unadopted portions
3 of her statement. Is it fair to say, Mr. Asper,
4 that in your re-opening efforts, that even though
5 Nichol John didn't adopt the incriminating parts
6 of her statement at trial, it was the substance of
7 the statement that you had to challenge; in other
8 words, that even though it was not adopted, it was
9 still there and had to be addressed?

10 A Oh, without a doubt, and, you know, you never ask
11 a question you don't know the answer to I guess,
12 but I would love to know the percentage of time
13 and money the federal Department of Justice spent
14 on that portion of Nichol John's statement, the
15 admission, trying to establish that she actually
16 had seen him commit, Milgaard commit the murder
17 versus the time and money that was spent on every
18 other part of the case and the investigation
19 undertaken by the Department of Justice that they
20 ultimately undertook. I mean, there's just no
21 question, you can't avoid the fact that she said
22 she saw him do it.

23 Q And so when you go to re-open the case, and let's
24 try and compare your situation with Mr. Tallis' at
25 trial, and we've heard from him that even though



1 the judge says to the jury disregard what she
2 didn't adopt, when you go to the re-opening is it
3 fair to say that notwithstanding the fact that it
4 wasn't evidence against Mr. Milgaard at trial, it
5 was evidence that you felt you had to meet in the
6 re-opening?

7 A Yes, absolutely, and as you'll see, the Department
8 of Justice fixated on it.

9 COMMISSIONER MacCALLUM: What did you mean
10 by recantation, sir, you said she recanted the
11 evidence that she had given in her statement. Do
12 you mean to say the fact that she couldn't
13 remember was for you a recantation?

14 A She didn't adopt it, yes.

15 COMMISSIONER MacCALLUM: That's what you
16 meant by recantation?

17 A Yes, in expert language. Yes, she didn't adopt
18 the portion where she sees him, or says she saw
19 him commit the murder.

20 BY MR. HODSON:

21 Q And so again you talked a bit about what Federal
22 Justice's view was on the matter and we'll see
23 this in some later documents, that if, obviously
24 if Nichol John, if that part of her statement, the
25 very incriminating part of the statement was



1 somehow viewed to be reliable in the re-opening
2 stage, then that would have to be something you
3 would have to address; is that fair?

4 A Yes.

5 Q And there's some mention here about Nichol's
6 treatment by the police and I'm wondering, and we
7 see this in a number of occasions about her stay
8 in the police cells before and during the
9 interviews with Inspector Roberts and the giving
10 of the statement, and in her transcript at the
11 preliminary hearing and trial Mr. Tallis
12 cross-examines her on that and goes through what
13 happened in jail. Apart from that, were you aware
14 of any other information or evidence from either
15 her or anybody else that expanded upon what she
16 had said at trial regarding her treatment by the
17 police?

18 A I don't think so.

19 Q And --

20 A I seem to recall something about the matron who
21 had custody of Nichol John, but I don't recall
22 specifically.

23 Q And we have seen -- you'll see in the documents
24 sort of different descriptions of how Nichol John
25 was treated by the police in jail that are



1 different in some respects with what she actually
2 said at the trial, and I think Nichol John didn't
3 ever subsequently say anything further about the
4 matter, maybe expanded upon it a bit, but were you
5 aware of any other evidence other than what she
6 had said at trial then that would add to or
7 elaborate on her treatment while she was with the
8 police May 23rd, 24th of --

9 COMMISSIONER MacCALLUM: You are speaking
10 about documents which went to the Department of
11 Justice?

12 BY MR. HODSON:

13 Q The documents that are before the Commission I
14 think. I think what I'm -- what I'm trying to get
15 at is this, is that we see in various subsequent
16 reports people talking about how Nichol John's
17 treatment by the police may have affected her
18 giving of the statement and it's characterized in
19 different words by different people, and when I've
20 gone back to go through the documents and find
21 out, okay, where does this all come from, where
22 does the initial version of events come from,
23 because obviously only Nichol John and the matron
24 or whoever else was in that room can say what
25 actually happened to her, and apart from what



1 Nichol John said at trial about how she was
2 treated, were you aware of any other version of
3 events, statement or anything from her that talked
4 about her treatment by the police other than, and
5 I think she may have in a couple of interviews
6 talked about it briefly, but --

7 A I'm not aware of anything from her, but I seem to
8 have a recollection of a description either of or
9 by the matron who had custody of Nichol during the
10 evening that she was in the cells describing her
11 having a, I think freaked out were the words,
12 reaction while she was in custody and that the
13 matron had to physically console Nichol while she
14 was in custody, but I don't recall where that is
15 or where that came from.

16 Q And so something that came from the matron as
17 opposed to from Nichol John?

18 A Yes, I think so.

19 Q Now here, number 3, we get into the secretor issue
20 that, I take it, at this point had become, on your
21 radar screen, as something that ought to be looked
22 at?

23 A Yes.

24 Q If we can go to the next page, you say here:

25 "I was with David for approximately 20



1 minutes this week and I have also made
2 arrangements to meet with Joyce and
3 Peter to start assembling the written
4 brief that we will have to file."

5 And so this would be Peter Carlyle-Gordge?

6 A Yes.

7 Q And was he back in Winnipeg then at this time do
8 you recall?

9 A I think so, yes.

10 Q And you had touched on this earlier, did you and
11 Joyce and Peter then get together and talk about
12 matters and go through statements, etcetera?

13 A Oh, yes.

14 Q And so would you have had access then to Joyce
15 Milgaard's files and Peter Carlyle-Gordge's files
16 and documents?

17 A Yes.

18 Q And the brief that you then put together, would
19 that have been -- and we'll go to that shortly --
20 would that have been your product based on input
21 from Joyce Milgaard and Mr. Carlyle-Gordge, David
22 Milgaard and others?

23 A Yes.

24 Q And then here you say:

25 "Joyce and Peter can literally go



1 through the transcripts line by line and
2 contradict much of the evidence.

3 Perhaps you might want to give me some
4 direction as to how the written material
5 ought to be presented."

6 So at this stage, what -- we're now into October
7 of 1986. What was your thinking as to when you
8 would file an application, what the file -- what
9 the application would include and what were you
10 preparing a brief for?

11 A Well, I think we -- we knew, I knew that whenever
12 and whatever, whenever we filed and whatever
13 material we were going to file would have to
14 contain some recitation of the facts as well as
15 some analysis of the facts as presented at trial,
16 and I believe that at this point that's where I
17 was at and that's what I was beginning to prepare.

18 Q Okay. If we can call up 164556. This is a letter
19 from Mr. Wolch to Allan Fineblit at Legal Aid,
20 Manitoba, and I think this is the first
21 application for Legal Aid, and there are many
22 others on the file that I won't go through with
23 you, I just want to go through parts of this. He
24 says:

25 "More important, we have reviewed the



1 evidence of his case, obtained the
2 transcripts and obtained assistance from
3 a journalist who has been investigating
4 the matter and we are of the opinion
5 that Mr. Milgaard was wrongfully
6 convicted. The evidence was far from
7 conclusive and we feel we can
8 demonstrate Mr. Milgaard's innocence.
9 It is incredible that he has spent 17
10 years in custody but we feel that there
11 has been a miscarriage of justice
12 although we fully appreciate how up hill
13 the road will be."

14 And again, this is November 7, 1986, so about
15 six, seven, eight months after you became
16 involved. You told us earlier that at some point
17 you moved from saying "he shouldn't have been
18 convicted" to "convinced of his innocence"; would
19 this indicate that, by November of 1986, you and
20 Mr. Wolch were convinced of his innocence, is
21 that fair?

22 A Probably, yeah.

23 Q And then if we can scroll down:

24 "There is a procedure in the *Criminal*
25 Code to appeal to the Minister of



1 Justice for a review. I have spoken to
2 the Minister's assistant and am advised
3 that they will be receptive to a fully
4 documented brief which they could
5 review.

6 We are prepared to work on this
7 brief and submit same to the Minister of
8 Justice. In the event that we were to
9 receive an unfavourable reception, the
10 brief could be used for parole since the
11 main stumbling block to parole has been
12 Milgaard's constant insistence on his
13 innocence."

14 So at this point it appears that Mr. Wolch has
15 talked to somebody at the Federal Minister of
16 Justice and been advised that they would be
17 receptive to an application; is that correct?

18 A Yes.

19 Q And then, the next page, there is a discussion
20 here about:

21 "... seeking a Certificate to apply to
22 the Minister of Justice for review and
23 the Minister of Justice has the power to
24 either refer the matter to a Court or to
25 direct further investigation or to grant



1 clemency."

2 And this part about 'directing further
3 investigation', what was your understanding about
4 that, as to what -- what they could do to direct
5 further investigation?

6 A I think that the third prong of Section 617 allows
7 for the Minister of Justice to refer any question
8 to a Court of Appeal, and I think that may have
9 been in Mr. Wolch's mind.

10 Q That, as part of a reference or as part of a
11 review, that they would do some investigation; is
12 that --

13 A Yeah, yes.

14 Q 156756. This is November 12th, '86, a letter to
15 the Court of Appeal trying to get the factums, I
16 don't think we need to go through it. You later
17 heard back from the Court of Appeal that factums
18 weren't filed at the Court of Appeal; is that
19 right?

20 A Yes.

21 Q If we can go to 162888A. This is November 17th,
22 '86, a letter to the *StarPhoenix* trying to track
23 down articles in the newspaper, and so you asked
24 for everything in the paper published in relation
25 to Mr. Milgaard's hearing as well as any other



1 stories relating to the murder of Gail Miller in
2 Saskatoon on January 31, 1969, and I'm not able to
3 identify in the records -- we have many, many
4 newspaper stories from 1968-1969 that we have
5 received from both Mr. Wolch and counsel for
6 Mrs. Milgaard -- but would you have received a
7 response to this, do you think, with newspaper
8 clippings?

9 A I believe I did. One of the anomalies of this
10 case was that the coverage, the newspaper coverage
11 of the preliminary inquiry was extensive, as I
12 recall, with some fairly torqued and bold
13 headlines as witnesses disclosed damning evidence
14 about David. The rules in the *Criminal Code*
15 respecting the publication of evidence at a
16 preliminary inquiry changed shortly after David's
17 preliminary inquiry began, providing for a ban on
18 publication of evidence given at preliminary
19 inquiries, and David wasn't given the benefit of
20 that. So one of the things I wanted to look at
21 was the possibility that the jury pool for the
22 trial had been tainted, the evil that was se --
23 which was attempting to be redressed by the
24 amendments to the *Criminal Code* may well have
25 happened to David, and so I was looking for those



1 clippings and I believe I got them.

2 Q And we'll see, in a couple of your subsequent
3 documents, a brief reference made to this fact,
4 but I don't think it ultimately was in the
5 application that was filed; is that correct?

6 A That's correct.

7 Q And was that something that was then put aside or
8 abandoned as a ground to go forward, or do you
9 recall what happened to that argument?

10 A I don't.

11 Q If we can go to 162420. And this is a memo
12 November 17th, '86 from you to Hersh:

13 "Just a quick memo that perhaps you
14 could put in your file.

15 Craig Melnyk, who was one of
16 the guys who said that David re-enacted
17 the stabbing in the motel room in
18 Regina, is now apparently charged with
19 murder in REGina. I spoke with Sandra
20 Bartlett, who is a CBC researcher, over
21 the weekend, and she told me that he was
22 in custody on what she thought was a
23 drug related killing.

24 Perhaps on my trip west I might
25 see if I can see him and whether, given



1 his current predicament, he would be
2 prepared to retract any of his evidence.

3 I'll discuss this with you further."

4 And, from this, would it have been Sandra
5 Bartlett who initiated this contact, are you able
6 to tell us, to let you know that she had heard
7 something about Craig Melnyk?

8 A Possibly, yes. I can't say, though. Looks to me
9 like I was probably headed toward a Grey Cup in
10 November of '86 and probably stopping, or offering
11 to stop, in Regina or Saskatoon --

12 Q Okay.

13 A -- on a trip west.

14 Q And do you know if you ever went and saw Craig
15 Melnyk?

16 A No I didn't.

17 Q If we can go to 164564. I want to turn, now, to
18 the Deborah Hall affidavit, and the affidavit --
19 at 164564. This might give you some assistance,
20 Mr. Asper, in recounting the steps that were taken
21 to get the affidavit sworn. The affidavit was
22 sworn on November 23rd, 1986, the day before, in
23 Regina. This is a letter to Legal Aid, and
24 Mr. Wolch says, "We have put the evidence
25 together. It seems to be physically impossible



1 for Milgaard to have committed the offence given
2 the time sequence. Furthermore, there was certain
3 physical evidence, namely semen, that was found at
4 the scene of the crime that we are endeavouring to
5 show that could not possibly have come from
6 Milgaard. I am also enclosing for your assistance
7 a copy of an Affidavit which we expect to have
8 signed shortly. The Affidavit from Miss Hall
9 contradicts certain key evidence led at the trial.
10 Mr. Asper is currently on his way to Saskatoon and
11 Regina to have the affidavit signed and to obtain
12 additional evidence that will assist us."

13 And so it looks like, from this,
14 that the affidavit had been prepared in Winnipeg,
15 by you, and then you took it out to Regina; is
16 that correct?

17 A Yes.

18 Q Can you tell us -- and again, if you'd like me to
19 go through the affidavit, which I will first, but
20 can you just tell us your general recollection of
21 your dealings with Deborah Hall and how it came
22 about getting the affidavit signed, what you
23 recall of that? And I'll certainly go through the
24 affidavit with you and allow you to comment
25 further, but just a general recollection of how it



1 came about, your impressions of her and what
2 happened?

3 A I don't, to be honest, I mean I don't have a lot
4 of specific recollection. I think I contacted her
5 by telephone, you know, according to her interview
6 with Mr. Williams we spoke for an hour or so over
7 the telephone, that may or may not be true, it was
8 probably for some period of time, and I basically
9 went through what would ultimately become the
10 substance of the affidavit with her, probably, and
11 had a conversation with her. I then went to
12 Regina, met with her, had her go through the
13 affidavit, she made one or two, I think, small
14 corrections, and then signed it. I found her
15 pleasant and we had a good conversation.

16 Q Do you recall, at this time, whether you would
17 have had the transcripts of Craig Melnyk and
18 George Lapchuk's trial evidence?

19 A I don't recall.

20 Q Now the Court of Appeal decision, which you
21 referred to in some of your earlier memorandums, I
22 think in the Court of Appeal decision they recite
23 some of the evidence, I think it's of Mr. Melnyk,
24 but they certainly talk about it; is it possible
25 that that would have been all that you had



1 regarding their evidence, or do you think that you
2 would have had the transcripts?

3 A I don't recall.

4 Q And, again, I think at this time -- and let's go
5 back to the time when you met and talked to
6 Deborah Hall. What was your understanding, if I
7 can put it that way, of the evidence that came
8 from Melnyk and Lapchuk at trial?

9 A They had given, they had given evidence that David
10 -- that there had been an incident in a motel room
11 in which David had admitted the murder of Gail
12 Miller and had made some actions that were
13 consistent with stabbing motions.

14 Q Okay. And what was it that -- well, we'll go to
15 the affidavit in a minute. What about Chris
16 O'Brien, do you have any recollection of talking
17 to Chris O'Brien, did you know Chris O'Brien at
18 the time?

19 A I'm pretty sure I spoke with Chris, and he
20 ultimately wound up in Winnipeg as a journalist,
21 and I certainly knew him afterwards.

22 Q And so in 1986 though, before you went to see
23 Deborah Hall, do you think you would have talked
24 to Chris O'Brien?

25 A I think so, yes.



1 Q And would you have been aware, then, that he had
2 talked to Deborah Hall in 1980, or in 1981, and
3 gone over some of the transcripts?

4 A Oh sure, I knew the background, yes.

5 Q If we can call up 204444. Here's the affidavit,
6 and presumably this was intended to be used in the
7 application that you planned on filing, is that
8 correct?

9 A Yes.

10 Q If we can go to the next page. I think you said
11 there was a few corrections, I think the spelling
12 of the name. Can you tell us, what was your
13 practice at the time, then, as far as preparing
14 affidavits, and in this case I think you said you
15 did it over the phone?

16 A Yes. Umm, ah, I'm not sure what you mean by "what
17 was my practice?"

18 Q Well did you phone her up and have her recount her
19 story, then type it up, read it to her over the
20 phone; or can you tell us what -- how this product
21 came to be?

22 A Yes, I would have talked to her over the
23 telephone, obtained as much information in
24 narrative form as I could from her, I would have
25 then drafted it in the terms -- in the form that



1 you see in the exhibit here. I probably would
2 have called her, I may have, I don't recall if I
3 called her and read it to her over the telephone,
4 but I would have had it typed up, and take it to
5 her and have her read it, and ask her if it was
6 the truth.

7 Q If we can go to the next page. Paragraph 9 --
8 well paragraph 7 talks about Chris O'Brien, and
9 paragraph 9 says:

10 "THAT until Chris O'Brien showed me the
11 transcript of the evidence of George
12 Lapchuk and Craig Melnyk I had no idea
13 that they had so testified."

14 Do you remember whether you would have gone over
15 the Melnyk/Lapchuk transcripts with her either on
16 the phone or in person with her when you met with
17 Deborah Hall?

18 A I don't think I did, but I, I certainly don't
19 recall it if I did.

20 Q And then she goes on to say:

21 "THAT as soon as I read the evidence of
22 George Lapchuk and Craig Melnyk I
23 immediately remembered the evening in
24 question and was shocked at how it was
25 described by them."



1 And she's referring to when Chris O'Brien showed
2 her the transcripts?

3 A Yes.

4 Q If we can go to the next page, there is a couple
5 paragraphs here where, basically, she says that
6 was a night to remember because it:

7 "... was the first time I had taken what
8 I considered to be a strong drug. I
9 ingested what I believed to be a tablet
10 of THC, which I was advised at the time
11 was some kind of synthetic marijuana."
12 "THAT the taking of this drug did not
13 affect my memory and in fact it seemed
14 to make the events much clearer in my
15 mind."

16 Do you have a recollection of her discussing that
17 with you or --

18 A Yes, oh yes.

19 Q And then if we can go to the next page, actually
20 go to page 449, we see here just -- and, again,
21 we'll go through this part -- but we see in a
22 couple spots here, Mr. Asper, a blank. Do you
23 know what -- what -- or whether anything was in
24 there and deleted or how that came about?

25 A I've looked at that and I don't know. I just



1 don't know. I have a feeling that the blanks
2 existed before I left.

3 Q And why do you say that?

4 A Because I would not have been in a position to
5 delete anything sitting -- I think we sat in a
6 restaurant where she reviewed the affidavit and
7 then swore it.

8 Q And we see, and I showed you on the first page,
9 the --

10 A And I would absolutely have not deleted anything
11 after it had been sworn.

12 Q And so we saw earlier, in the first page, where
13 her name was spelled wrong and that was changed
14 and initialed, and so I presume that if there had
15 been changes at the time they would have been
16 changed and initialed?

17 A Yes.

18 Q If we can go back to just her account of events,
19 and we've been through this a number of times, Mr.
20 Asper, with a number of witnesses, so I will try
21 and go through the key parts. And she says:

22 "As Craig Melnyk was saying this, David
23 Milgaard was punching the pillow trying
24 to fluff it up. I remember him saying,
25 in response to Craig Melnyk, 'oh yeah



1 right.' in a sarcastic or joking manner.
2 David Milgaard then put the pillow back
3 against the head-board and leaned back
4 and crossed his arms against his chest.
5 I believe his response to the comment
6 made by Craig Melnyk was in a joking
7 manner. At no time did David Milgaard
8 use the pillow to re-enact the murder.
9 My interpretation of David Milgaard's
10 response was that it was a completely
11 innocent and perhaps crudely comical
12 comment. I know that if I had thought
13 he was serious I would have left
14 immediately. No one in the room thought
15 anything of that particular
16 conversation."

17 And so here, when she says -- where she remembers
18 what David Milgaard said in response, she says
19 "'oh yeah right'", and then says it was a
20 "crudely comical comment". And you know, Mr.
21 Asper, from when she was interviewed by Mr.
22 Williams later and testified at the Supreme Court
23 of Canada, that she added some additional words
24 that were, if taken seriously, would have been an
25 admission; is that fair?



1 A Yes.

2 Q You know the words that she added?

3 A Yes.

4 Q Again, when you met with Deborah Hall, did she
5 tell you any of that?

6 A No.

7 Q Would you have probed with her at all and asked
8 her, "Lookit, what did David say, it's important,
9 tell me what he said, what you remember him
10 saying?"

11 A Yes, that would have been over the telephone
12 conversation, and I would have asked her to tell
13 me exactly what happened. Umm, I don't know that
14 I would -- I can't tell you what I probed, or
15 which sentence or what words I might have probed
16 more than others, but I certainly wanted her to
17 tell me exactly what had happened.

18 Q And would the "crudely comical comment", would
19 those have been her words then, that -- you said
20 it was in a narrative?

21 A She may have used the word "crude", I can't
22 recall.

23 Q And then, if we can scroll down, it says:

24 "Craig Melnyk and George Lapchuk both
25 lied when they stated in their evidence



1 at trial that David Milgaard re-enacted
2 the murder by going through a series of
3 stabbing motions against the pillow."

4 And let me just pause there. And we spent some
5 time on this issue before, but the evidence of
6 Melnik and Lapchuk at trial was describing an
7 incident where there was David Milgaard stabbing
8 or doing something to a pillow, coupled with
9 words, they're a little bit different, but where
10 he admitted stabbing or killing Gail Miller,
11 or --

12 A Yes.

13 Q -- the nurse?

14 A Yes.

15 Q And so was it your understanding at the time,
16 after meeting with Deborah Hall, was that she was
17 saying "lookit, that didn't happen, all that
18 happened is that he fluffed up a pillow and said
19 the words "oh yeah right" in response to the
20 accusation that "you killed her"; was that your
21 understanding?

22 A Yes.

23 Q And so that, if that version was correct from
24 Deborah Hall, then what did you understand to be
25 the lie when she says here that Melnik and Lapchuk



1 both lied?

2 A Okay. My recollection of Melnyk and Lapchuk's
3 evidence is that David made a grand gesture, in
4 the case of one, by grabbing the pillow, putting
5 it between his knees, and embarked in a series of
6 wild stabbing motions declaring that he had killed
7 the nurse, and in the case of the other witness
8 essentially done the same thing but with the
9 pillow on the floor, standing above it, making
10 stabbing motions, that the room was paralysed and
11 froze momentarily in shock as he did this, and
12 that when the shock subsided the party continued.
13 That was what Melnyk and Lapchuk -- my -- I think
14 that's what Melnyk and Lapchuk said at the trial.

15 Q So just back, and again you're trying to go back
16 to 1986, to the time when you got the affidavit;
17 would the lie, then, of Melnyk and Lapchuk be,
18 number one, their description of what David
19 Milgaard did with the pillow?

20 A Yes.

21 Q Number two, the lie would be the words that they
22 attributed to David Milgaard, i.e. "I stabbed her,
23 I fixed her, I killed her", or whatever words they
24 said and attributed to him?

25 A Yes.



1 Q So that your understanding was that those words
2 that they said they heard, they were lying when
3 they said that, based on what Deb Hall told you?

4 A Yes.

5 Q And, third, the description in the room, was that
6 something that -- their description of the
7 reaction in the room; was that something that you
8 believed to be a lie?

9 A Yes. And I think that Melnyk said that
10 immediately after this he left, he and Deb Hall
11 left.

12 Q I think that with Lapchuk there was, yeah, there
13 was some -- actually, if we can go to the next
14 page --

15 A Okay.

16 Q -- in paragraph 15:

17 "That I have not ...",
18 oh, I'm sorry, go back to the previous page. And
19 then she said, the very last line:

20 "Also, I am advised that George Lapchuk
21 said at the trial that he had driven me
22 home that night but, the truth is that I
23 lived approximately 4 blocks from the
24 motel and walked home."

25 So that I guess another lie would be that Lapchuk



1 said he drove Deborah Hall home and Deborah Hall
2 says "no, he didn't, I walked home"; is that what
3 you are referring to?

4 A Yes. But at the -- in his trial evidence Melnyk,
5 at page 1021 of the transcript -- I have it here,
6 Mr. Hodson -- the question is:

7 "Q Now, what happened when this took place?

8 A The room sort of - just everybody just
9 sat there and sort of looked in a daze
10 like.

11 Q And what happened then?

12 THE COURT:

13 Just a minute please; was there anything
14 more said?

15 A No

16 Q Yes?

17 A And the subject was dropped.

18 MR. CALDWELL:

19 Q And after that did some people
20 eventually leave - did some of the
21 people leave eventually?

22 A Yes; Debbie Hull asked George to drive
23 her home.

24 Q And did they leave?

25 A Yes."



1 Q Maybe just call up 002145 --

2 A Right.

3 Q -- just for the record?

4 A That's the page. Sorry.

5 Q No, that's fine. And so that's your reference to
6 the lie being that when she said that she was
7 driven home by George Lapchuk, that she said that
8 didn't happen?

9 A Yes.

10 COMMISSIONER MacCALLUM: What's the doc. ID
11 of that one?

12 MR. HODSON: The doc. ID of that transcript
13 is 002134.

14 COMMISSIONER MacCALLUM: Thank you.

15 MR. HODSON: And, again, I think that's the
16 part Mr. Asper read.

17 BY MR. HODSON:

18 Q So that the, in addition to the description by
19 Melnyk and Lapchuk of what --

20 A Starting at line 10, sir.

21 Q I'm sorry?

22 A Starting at line 10.

23 Q At line 10, yeah. So in addition to Melnyk and
24 Lapchuk's description of what David Milgaard did
25 to the pillow; number two, the words he spoke;



1 number 3, the demeanour in the room; number 4, the
2 fact that they said Lapchuk drove Hall home, those
3 were the four lies, if I can call it that, that
4 Deborah Hall was saying --

5 A Yes.

6 Q -- existed at trial?

7 A Yes.

8 Q Okay. That's probably an appropriate spot to
9 break.

10 *(Adjourned at 11:59 a.m.)*

11 *(Reconvened at 1:36 p.m.)*

12 BY MR. HODSON:

13 Q Good afternoon, Mr. Asper. We finished off on the
14 affidavit of Deborah Hall November 23rd, 1986,
15 that affidavit, and would you, you said you would
16 have talked to her on the phone and got the
17 information. Would you have had notes of the
18 discussion or anything like that or what was your
19 practice at the time as far as --

20 A Yes, I would have had notes, yes.

21 Q And would they have been left on the file or would
22 you have sent them to her or do you recall?

23 A I don't know what happened to the notes. I don't
24 recall if I sent her anything in advance.

25 Q If we could then -- I just want to skip ahead



1 chronologically because I think in November of
2 1989 Deborah Hall was examined by Eugene Williams,
3 and did you become aware of that around that time?
4 Let me just back up. November, '86 is when you
5 get the affidavit, it's filed the end of December,
6 '88, and then in November of '89 Mr. Williams
7 interviewed her or examined her under oath about
8 the affidavit.

9 A Yes, I think we were told that he was going to
10 examine her and I think I communicated with her.

11 Q Right.

12 A And --

13 Q If we -- sorry, go ahead?

14 A I just advised, I think I recall I advised her
15 that he was coming to see her and that she should
16 tell him the truth.

17 Q And 166262, if we could call that up, please, and
18 this is your letter June 23, 1989 to Deborah Hall,
19 it looks like there was a conversation, you send
20 her a copy of her affidavit:

21 "As I mentioned to you a Mr. Eugene
22 Williams from the Federal Department of
23 Justice maybe contacting you and making
24 enquiries as to the contents of this
25 Affidavit. I would encourage you to



1 speak freely with him as it would appear
2 that your Affidavit is assisting in the
3 process of having the Milgaard case
4 re-opened. As indicated to you, if you
5 have any questions whatsoever, please
6 feel free to contact me."

7 So was that -- I take it at this point you would
8 have been aware that Mr. Williams was going to
9 talk to her; is that fair?

10 A Yes.

11 Q Then if we can go to 001285, and this is the
12 November 6th, 1989 transcript of the examination,
13 and I'm jumping ahead of bit here in our
14 chronology, Mr. Asper, but this is after you filed
15 the application, about 11 months later. Did you
16 have any concerns at the time that Mr. Williams
17 would be examining or questioning Ms. Hall on her
18 affidavit back at that time?

19 A I can't recall. We, I think, at some point raised
20 with the Department of Justice the concern that we
21 would be allowed to be present during the
22 questioning of witnesses, but I can't recall
23 whether it was this early in the proceeding.

24 Q Okay. And I think -- I think this is the first
25 interview, I think Nichol John was interviewed the



1 next day, but at some point you are telling us you
2 raised that concern and whether or not you had it
3 at this time you can't recall; is that a fair
4 summary?

5 A Yes, that's true.

6 Q And --

7 A And I seem to recall, we didn't know the nature of
8 how Justice was going to proceed, whether it was
9 under oath and whether it was, what approach they
10 were taking with the witnesses, we just didn't
11 know, and I just don't know whether we raised that
12 with Justice, as I say, this early in the
13 proceeding.

14 Q There are some letters later on that we'll look at
15 where you do raise the concern about certain
16 witnesses, only certain witnesses being
17 interviewed under oath whereas others weren't and
18 you not being present.

19 A Well, and I recall, I think Ms. Hall contacted me
20 shortly after Mr. Williams had left which -- and
21 that contact may have given rise to the subsequent
22 communication.

23 Q We'll come to that. If we could go to the, page
24 297, please, and just -- no, sorry, 001287, it
25 should be page 2, and so it looks to be an



1 examination with respect to your affidavit. Would
2 you have had any discussions with Eugene Williams
3 about this evidence or this affidavit do you
4 recall?

5 A I don't recall that we had, no.

6 Q Then if we can skip ahead --

7 A I don't think we had any -- as I say, we may have
8 had the general knowledge that Mr. Williams may be
9 interviewing the witnesses, but we had no precise
10 knowledge of when or under what circumstances or
11 what he was going to be putting to the witness.

12 Q If we can go to page 001300, please, and I want to
13 go through -- this is Mr. Williams questioning
14 Deborah Hall about her dealings with Chris
15 O'Brien, and:

16 "Q Now in 1981 Chris O'Brien approached
17 you?

18 A Yes.

19 Q What transpired then?

20 A Chris had kind of put two and two
21 together as to who I was, I guess.
22 I'd been cutting his hair for some
23 time, and he saw my name on a mirror."

24 And then goes on to talk about Ute Frank. And
25 then if we can go to the next page, and then:



1 "Q As a result of your conversation with
2 this Mr. O'Brien, what did you learn?

3 A Well, I was quite surprised to find
4 out that this so called gossip that I
5 thought was happening at the time Ute
6 told me about Dave, was true; that he
7 was in jail and I was quite shocked by
8 it all. I couldn't really believe
9 that it had actually happened."

10 Next page:

11 "Q Did you learn anything else?

12 A He took me by his place, because he
13 wanted me to read over the Court
14 transcripts of the night that we were
15 all together at the party. And when I
16 read what Melnyk and Lapchuk said, it
17 just sort of like shocked me, because
18 it just - it was like a slap in the
19 face. I couldn't believe that they'd
20 said what they did.

21 Q How long did you take to read the
22 transcript?

23 A He only - he only flipped it to the
24 area where I was pertaining - you
25 know, I didn't read - it was quite



1 large, and the only part that I read
2 was Lapchuk's and Melnyk's testimony.
3 So, it took me a matter of five, ten
4 minutes, or whatever to read through
5 it."

6 And again the next page, and then I think he goes
7 through the size of the transcript of Melnyk and
8 Lapchuk, the length of the transcript and looks
9 at it -- actually, just go back to the previous
10 page, she's asked:

11 "Q Did you read all of Melnyk's and
12 Lapchuk's testimony?

13 A Yes.

14 Q You're certain of that?

15 A Unless there was something further
16 along in the trial where they had him
17 brought back again, or something, I
18 don't know. But he opened it to one
19 particular area and I read through
20 that area of the transcripts."

21 Then he shows here the actual transcript and she
22 says:

23 "A I didn't read any of the - no, none of
24 this about Mr. Melnyk's name or anything
25 like that.



1 Q So, you didn't read the entire
2 transcript?

3 A I guess I didn't, no.

4 Q To read fifty-six pages would take a
5 little longer than five minutes?

6 A Yes. He just - he just opened it to
7 where they were talking about the
8 night in question itself."

9 I just want to pause there, Mr. Asper. So when
10 Mr. Williams examined her she said that she had
11 not read the entire -- she thought she had read
12 the entire transcript of Melnyk and Lapchuk, but
13 I think then when shown it said no, I didn't. Do
14 you recall in your discussions with her as far as
15 preparation of the affidavit, what was your
16 understanding of what she had read as far as
17 Melnyk and Lapchuk's evidence?

18 A I don't recall, I don't recall, you know, other
19 than she had read something of their evidence.

20 Q And then if you can go to page 00130 -- or 310.
21 Pardon me, 311. And here's where she talks about
22 how it came to be that she provided the affidavit.
23 She says:

24 "A David Asper phoned me and asked me if I
25 would be willing to sign an Affidavit.



1 He explained that they were trying to
2 get the case re-opened, because they
3 felt there were just too many
4 conflicting things in evidence, et
5 cetera.

6 Q Yes?

7 A And that he had talked to Chris
8 O'Brien about me and what I'd talked
9 to him about at the time, and would I
10 be willing to sign this Affidavit and
11 I said sure. So, like I say, we
12 talked over the phone; I told him what
13 I could remember over the phone, and
14 then he flew out and had me --

15 Q Sign the Affidavit.

16 A ... read it over and sign it all,
17 yeah."

18 So does that -- and I think you told us earlier
19 that you think you did talk to Chris O'Brien
20 before you talked to Deborah Hall; is that
21 correct?

22 A Yes, yes.

23 Q And then:

24 "Q I take it you didn't refer to any
25 testimony, other than - did you refer to



1 any transcripts of evidence in preparing
2 for that Affidavit?

3 A Did I mention to him that I had read
4 the transcripts, do you mean?

5 Q Well, did you read any transcripts
6 before you signed the Affidavit?

7 A No, that - only that time with Chris
8 O'Brien."

9 Next page:

10 "Q And that was five years before?

11 A Right.

12 Q And that, as you've told me, was a five
13 minute glance at a portion of the
14 transcript?

15 A About ten minutes maybe, yeah."

16 So she tells Mr. Williams that you did not show
17 her the transcripts.

18 A Right.

19 Q And would you agree with that?

20 A I'll accept that as true.

21 Q And then --

22 A I don't recall.

23 Q You don't dispute it though?

24 A No, I don't.

25 Q I appreciate you don't recall.



1 A No, I don't dispute it.

2 Q Down to 174, scroll down, please:

3 "Q Between your talk with O'Brien in 1981
4 and Mr. Asper calling you, I take it
5 shortly before the Affidavit was
6 prepared and completed in 1986, did you
7 read or review or refresh, or think
8 about it at all, during that period of
9 time?

10 A No."

11 So again, I think that would confirm that
12 according to her she didn't have the transcripts
13 between Mr. O'Brien and your meeting with her.
14 If we can go to the next page, 001315, we've been
15 through this before, Mr. Asper, I don't want to
16 -- I'll just sort of give parts of this, she goes
17 and describes the fluffing of the pillow and the
18 bouncing, and I think vigorous bouncing, vertical
19 movement, etcetera. Do you have a recall of
20 going through the same type of thing with her and
21 describing what she observed Mr. Milgaard do with
22 the pillow or do you have any recollection of
23 that?

24 A No. I think we were sitting in a restaurant at
25 the time. I don't think we sort of -- I don't



1 think I had her show me at all.

2 Q And then if we can go to 001317, and again here's
3 where she -- Mr. Williams asks her:

4 "Q And do you recall him saying anything at
5 the time that he was making this
6 sideways and vertical motion?

7 A Something like oh, yeah sure, or oh,
8 yeah, right, in a sarcastic tone. You
9 know, I mean it was something to that
10 effect."

11 And I think that's close to what is in the
12 affidavit that you took from her; is that
13 correct?

14 A Correct.

15 Q And then if we can go to page 001320 -- actually,
16 go to the previous page, just at the bottom,
17 Mr. Williams goes through about people's reaction
18 in the room and who was laughing and who was
19 giggling and who was not, and she talks about:

20 "A Yeah, smiling, laughing, sort of
21 snickering under their breath ..."

22 And then the next page he says:

23 "Q All right. You didn't believe it?

24 A No.

25 Q You, at that time --"



1 And then she says:

2 "A I thought he was a bit sick for his
3 remark, you know, because he said
4 something about - excuse my language but
5 I remember it as such - "fucking her
6 brains, oh, yeah right. I stabbed her I
7 don't know how many times and then I
8 fucked her brains out. Right." You
9 know, something like in that respect.
10 It was crude; it was crude and it was,
11 you know, sarcastic."

12 And was anything of that nature in that answer in
13 question 238 provided to you in your interview
14 with Deborah Hall and at the time when you had
15 her sign the affidavit?

16 A No.

17 Q When did you first become aware of this
18 information that she provided to Mr. Williams?

19 A I don't know.

20 Q Would it have been around the time of her
21 interview with Mr. Williams?

22 A No, no, no, no.

23 Q Would it be sometime later?

24 A Yes.

25 Q Would it be possibly when Kim Campbell provided --



1 A Yes, it may not have been until the decision
2 turning down the first application.

3 Q And we'll go through some documents that might be
4 able to assist us on that, but again, at some
5 point did you become aware of what Deborah Hall
6 had, if I can use the term, added as far as words
7 spoken compared to what was in her original
8 affidavit?

9 A I don't recall, I'm sorry.

10 Q Yeah. If this answer, this information had been
11 provided to you in 1986, if Deborah Hall had said
12 here are the words, although I take it as a crude,
13 sarcastic joke, can you tell us what if anything
14 you would have done differently with respect to
15 this evidence?

16 A Probably wouldn't have used it as something new in
17 terms of the application, the 617 application. It
18 would -- taken on its own, it tends to corroborate
19 at least what Melnyk and Lapchuk said.

20 Q Okay.

21 A Now, you have to -- but -- and I still maintain
22 that you have to look at those words in the
23 context of the entirety of what Deborah Hall said
24 in her statement to Mr. Williams, which contains
25 several internal contradictions, and I'm not --



1 and I don't propose to go after, or to attack
2 Ms. Hall's credibility, but, you know, if you go
3 back to -- I'm just looking -- as I followed you
4 through with the statement --

5 Q Yes.

6 A -- I've just been reminded, just on one page, of
7 how Ms. Hall said, (a), and then says something
8 completely opposite at the bottom of the same
9 page.

10 Q And what page is that?

11 A 001319.

12 Q Yes.

13 A So at the top:

14 "Q Your response to that wasn't a giggle,
15 was it?"

16 "... Melnyk wasn't a giggle ..."

17 Line 227, 228, 229.

18 Q Yes.

19 A And then if you go to 235:

20 "A But everybody was laughing at his
21 response ...

22 Q They were?

23 A Yeah. Smiling, laughing, sort of
24 snickering under their breath,
25 whatever."



1 That's the same page.

2 **Q** So did you have concerns about Deborah Hall's
3 credibility?

4 **A** Well, unfortunately, yeah. She was my witness
5 and, you know, she was our witness, and by the
6 time we saw this statement, it had become so
7 embellished, but carried internal contradictions
8 that yes, credibility became a concern.

9 **Q** Was credibility an issue with her in 1986 when you
10 received her affidavit?

11 **A** No.

12 **Q** And so are you telling us that once you -- at some
13 point, and we'll see when we go through the
14 documents if we can identify a time frame, but at
15 some point you would have become aware of what she
16 told Mr. Williams; is that right?

17 **A** Yes.

18 **Q** And when you got that, is it at that point you had
19 concerns about her credibility? Was it what you
20 learned from what she told Mr. Williams that
21 caused you to have concerns about her credibility?

22 **A** Yes.

23 **Q** Did you ever have a discussion with Eugene
24 Williams about this information that he obtained
25 from Deborah Hall in this examination?



1 A I don't recall if I did. I don't think I did. We
2 may have discussed it in the meeting we had in
3 Ottawa, Mr. Wolch and I had in Ottawa with justice
4 officials prior to the reference, but I don't
5 recall discussing it with anybody before that.

6 Q Now, you mentioned earlier that you would have --
7 I think you said that Deborah Hall contacted you
8 after her interview with Eugene Williams?

9 A I believe she contacted me. She was quite upset.

10 Q And would that have been shortly after the
11 interview do you know?

12 A I don't recall.

13 Q And what do you recall her telling you?

14 A She was very upset, she felt that Mr. Williams had
15 been aggressive with her, that he had seemed
16 doubting and sarcastic and she did not feel very
17 comfortable with the way the interview had gone.

18 Q And did she tell you about the additional
19 information she had provided to Mr. Williams that
20 was not in her affidavit?

21 A I don't think so.

22 Q What was your reaction when you learned of what,
23 the words that she had attributed to Mr. Milgaard
24 in her interview with Mr. Williams?

25 A What was my reaction?



1 Q Yes.

2 A I guess by that point, and I think it was much
3 later in the process, I really wasn't surprised by
4 anything that anybody had said or embellished or
5 had added to whatever they had said at the trial
6 or in statements that we had obtained after the
7 trial.

8 Q And did you view Deborah Hall's evidence or
9 version of what David had said as provided to Mr.
10 Williams as being an embellishment?

11 A Yes, to -- in terms of the original, the affidavit
12 that I had taken from her? I'm not sure, an
13 embellishment of what?

14 Q Well, I mean, I think that was your word,
15 embellishment. What did you mean by --

16 A That's what I meant, she had given an affidavit in
17 1986 and said one thing and what she said to Mr.
18 Williams embellished what she had said to me.

19 Q And did you doubt the credibility of the
20 embellishment, if I can call it that?

21 A I guess that's probably the best way to put it.
22 As I say, by the time we found out, there was such
23 a blizzard of contradictory and embellishing
24 stories, I just really had no idea what to believe
25 from anybody.



1 Q And so again if Deborah Hall, and I appreciate
2 this is asking you to go back in hindsight with
3 information you didn't have at the time, but if in
4 1986 Deborah Hall would have told you what she
5 told Mr. Williams in the 1989 interview, and in
6 particular the words she attributed to Mr.
7 Milgaard, would you have taken the position on
8 behalf of Mr. Milgaard that Melnyk and Lapchuk
9 lied at trial about the incident occurring at the
10 hotel?

11 A I'm not sure because at that time David seemed to
12 be pretty emphatic that it hadn't, that it didn't
13 happen, so I can't say, I may not have taken a
14 position at all.

15 Q Next if we can go to 218988, and this is the
16 affidavit of David Edgar Milgaard marked draft.
17 Is that your handwriting?

18 A Yes.

19 Q And if we can call up 301675, I think this is the
20 typed version, November 25, 1986, so this would be
21 two days after Deborah Hall's affidavit it looks
22 as though you had David Milgaard swear an
23 affidavit; is that correct?

24 A Yes.

25 Q And was there -- were you contemplating filing an



1 application at this time or what was the purpose
2 of getting the affidavit at this time or at this
3 point?

4 A Well, I'm not sure actually when I would have
5 given, or made the notes of David's affidavit. He
6 may have had this in his possession for some time
7 before the 25th, before we actually swore it, but
8 yes, we were putting together the basic material
9 for an application and we felt that part of the
10 application should contain at least an affidavit
11 from David swearing to his innocence.

12 Q Now, the application was filed December 28th,
13 1988, a little over two years after that. Was
14 there something that happened -- was there an
15 intent in late '86 to file the application and
16 then it was delayed for a reason or can you
17 explain the timing of both the affidavit and the
18 application, if I can put it that way?

19 A I can't explain it.

20 Q Okay. So at the time this affidavit was sworn,
21 would it be an application as pending, we're
22 working on it, let's get the affidavit done?

23 A Yes.

24 Q And the reason I ask is it's two days after the
25 Deborah Hall affidavit and I was wondering if



1 there was something that happened that caused you
2 to pursue other avenues before an application was
3 filed. Is there anything you can --

4 A No, and I would have had to -- I'm not sure when
5 the typed version would have been given to David,
6 but I'm guessing it would have been sometime
7 before November 23rd because at some point I had
8 to make the notes, I had to get the information
9 for the affidavit, have it typed up and then take
10 it up to the prison.

11 Q So you would have started preparing it prior to
12 November 25 obviously?

13 A I would think so, oh, yeah.

14 Q And then if we can go to page 301677, and there's
15 a comment here:

16 "THAT I have always denied having
17 committed this offence and since I have
18 exhausted all appeal remedies I have
19 instructed counsel to pursue an
20 application to the Minister of Justice."

21 And:

22 "THAT I have been repeatedly denied
23 parole for reasons which I believe to be
24 improper, and in particular my assertion
25 of innocence, and am currently



1 incarcerated in Stony Mountain
2 Institution."

3 I think we've touched on both of those subject
4 matters; have we not?

5 A Yes.

6 Q If we can skip ahead to page 679. Now, would you
7 be -- actually, just go to the previous page, down
8 at the bottom. Would you be trying to put forward
9 a narrative of sort of his recollection of the
10 events of January 30 and 31, would that be the
11 purpose?

12 A I'm not sure it's so much a narrative as to
13 establish the basis for the relationship, why he
14 was with these two people when he went to
15 Saskatoon.

16 Q If we can go to the next page, he says:
17 "THAT insofar as the trip to Saskatoon
18 is concerned my recollection of the
19 events has faded somewhat."

20 And I think you told us yesterday that from time
21 to time you noticed that Mr. Milgaard did have
22 some troubles with recollections; is that fair?

23 A Yes.

24 Q Did he also -- did you also observe any
25 difficulties between his recollection, I mean,



1 what he remembered happening versus what he may
2 have read somewhere or been told by someone as to
3 what happened?

4 A Well, that's the difficulty, that was profoundly
5 the difficulty with this case, is that -- and as I
6 said yesterday, I mean, I'm having the same
7 difficulty, you've got so many different sources
8 of information and at this point David would have
9 had the transcripts, he probably had copies of
10 what Peter Carlyle-Gordge had done, and yes, I
11 mean, reading this material you try to remember as
12 best you can, but it affects your memory.

13 Q And then here we see about the affidavit:

14 "... a photocopy of a narrative that I
15 made for my lawyer shortly after my
16 arrest. I recall that I had written
17 everything down in a notebook, but I
18 also recall that because my handwriting
19 was poor I dictated the same information
20 to a fellow prisoner and had him write
21 it down. I cannot recall whether
22 Exhibit "A" is the notebook in my
23 handwriting or not but nonetheless I
24 adopt it as the truth."

25 And we've heard some evidence about the notebook



1 and the scribbler and Mr. Tallis said at the
2 Supreme Court and before the Commission that the
3 notebook that's attached is not one that he
4 received and that the information I think was
5 different than the information he received and
6 that he thought he had some different notes. Do
7 you have any recollection or are you able to help
8 us out at all about this scribbler document,
9 where it may have come from, other than what's in
10 the record?

11 A No.

12 Q Then the next page, he says:

13 "THAT I deny absolutely any allegation
14 of my admitting to committing the
15 offence to anyone.

16 THAT I deny ever having blood on any of
17 my clothes that day.

18 THAT I deny throwing a woman's compact
19 out of the car in between Saskatoon and
20 Rose Town or anywhere else.

21 THAT I deny ever reenacting the crime in
22 a hotel room in Regina in May, 1969 or
23 anywhere else at any other time."

24 So I take it this would be the denials, sort of
25 his evidence as to some of the incriminating



1 things that were put forward against him at
2 trial; is that fair?

3 A Yes.

4 Q And then down at the bottom, paragraph 20, he
5 talks about co-operating with the police,
6 providing blood, hair, saliva samples, and:

7 "THAT I am prepared to undergo any and
8 all tests relevant to the discovery of
9 the truth as I am innocent and have
10 nothing to hide."

11 In your dealings with Mr. Milgaard over the six
12 years, was that his attitude or approach as far
13 as co-operating with the authorities as far as
14 tests, medical tests or any kind of tests?

15 A Absolutely. At one point he had actually
16 researched -- I'm not sure if it's sodium
17 pentothal?

18 Q Pentothal, yes.

19 A He had done some research on it and he wanted, you
20 know, he showed up at a meeting all excited that
21 he could be administered a needle and the truth
22 would come out.

23 Q If we can go to 213821. And this is November
24 26th, 1986 to the parole board, which is the
25 same -- or the day after the affidavit. And,



1 again, the first paragraph simply says they're
2 acting and putting together, your firm is putting
3 together an application. Then scroll down,
4 paragraph 2:

5 "The final brief that we intend to file
6 with the Minister of Justice is in its
7 final stages of preparation and we
8 anticipate having it completed before
9 Christmas. We are, however, enclosing a
10 copy of the Affidavits of Deborah Hall
11 and David Milgaard. Miss Hall directly
12 contradicts evidence that Milgaard
13 re-enacted the murder in a hotel room in
14 Regina. Milgaard has, for the first
15 time, sworn to his innocence in his
16 Affidavit."

17 I referred to this earlier, Mr. Asper, and maybe
18 I should have brought this document up. This
19 letter suggests that it is contemplated the
20 application was going to be filed in December of
21 1986, and do you know of -- again, and I know I
22 asked you this question before, but in light of
23 this letter -- whether something, what caused the
24 application to be filed in 1988, December of '88,
25 as opposed to an earlier date; was there



1 anything?

2 A I don't recall.

3 Q And then if we can scroll down:

4 "Basically ...",

5 and this is Mr. Wolch's letter:

6 "Basically, our position on the evidence
7 is that the Crown's theory of how the
8 murder occurred is untenable and, in
9 particular, unsupported by the physical
10 evidence. Also, the evidence of
11 Milgaard's associates is demonstrably
12 false or highly questionable. Even
13 though the Jury accepted such evidence
14 we will be advancing the position that
15 Milgaard had been condemned long before
16 his trial due to vivid daily newspaper
17 accounts during the preliminary
18 inquiry."

19 And I think on this latter point, that's
20 something you referred to this morning, was that
21 something you were pursuing as a ground for the
22 re-opening?

23 A I was, yes, I felt very strongly about that.

24 Q And then, as well, the --

25 A I was overruled, ultimately, but I felt strongly



1 about it.

2 Q Who overruled you and when did that happen?

3 A The older people in the firm, Mr. Wolch and
4 Ms. Leonoff.

5 Q And as far as the evidence of Mr. Milgaard's
6 associates, is that the five people we have talked
7 about before presumably, I know this is
8 Mr. Wolch's letter but is that --

9 A Yes.

10 Q That would be the position?

11 A Yes.

12 Q And then the next page. And again, this is a
13 letter to the parole board, it says that:

14 "Obviously, Milgaard's claim of
15 innocence has caused him great
16 frustration, especially since it is only
17 recently that any lawyer has agreed to
18 advocate his cause. We now echo that
19 claim of innocence and ask that the
20 Parole Board conduct its 'paper review'
21 of Milgaard's case in that light. We
22 take the view that Milgaard ought to be
23 released forthwith and begin a slow
24 process of adjusting to life on the
25 outside. Regular treatment by



1 behavioural specialists and close
2 supervision are clearly conditions that
3 could attach to a release on parole. We
4 are not asking the Parole Board to
5 declare David Milgaard innocent but,
6 rather, to keep an open mind on the
7 point and to direct the focus toward the
8 terms of release instead of reasons to
9 detain."

10 And would that fairly summarize the position that
11 you and Mr. Wolch were taking on David's behalf
12 on parole matters?

13 A Yes.

14 Q 164560. Again, this is December 19th, 1986, this
15 is to Mr. Harold Pick, Saskatchewan Legal Aid, and
16 I think we have seen from the documents that both
17 Manitoba and Saskatchewan Legal Aid you applied
18 to, I think on more than one occasion, and were
19 turned down, I think, in every instance; is that
20 correct?

21 A Yes.

22 Q And here Mr. Wolch -- I think this is Mr. Wolch --
23 says, "I have spoken with S.R. Fainstein, who is
24 the general counsel to the Minister of Justice,
25 and he indicates to me that he will receive from



1 us what would amount to a full argument for Mr.
2 Milgaard, and from that the Minister of Justice
3 has the option of either ignoring our application,
4 referring the matter to a Court for review, or
5 referring it to a police force for an independent
6 review prior to making a decision."

7 And this part here, Mr. Asper,
8 about "referring it to a police for an independent
9 review prior to making a decision"; do you have a
10 recollection of that? It's not one of the options
11 specifically stated in 617, do you have a
12 recollection of hearing about this as an option
13 from either Mr. Wolch or indirectly from Federal
14 Justice?

15 A No, I can't say that I do.

16 Q You will be happy to know we're moving into 1987.
17 218974.

18 A The Bombers win the Grey Cup in '88.

19 Q We'll probably get there soon.

20 A Let's hurry up.

21 Q This is a letter January 16th, 1987 to Susan
22 Martineau, who I understand is David Milgaard's
23 sister, is that correct?

24 A Yes.

25 Q And I just show you this because it refers to



1 sending her page 35 of the factum, and here's the
2 date, January 16th, 1987. And I then want to call
3 up 157552. And this is a document that I think
4 you are familiar with, if we can maybe just go to
5 the second page, and I think this is a brief -- is
6 it a brief that you prepared, Mr. Asper?

7 A Yes.

8 Q And if we look down here, in addition to the
9 letter to Susan Martineau it says:

10 "David Milgaard has been in prison for
11 over 17 years.",

12 which I think puts this in late '86/early '87 as
13 being a preparation date; is that correct

14 A Yes.

15 Q Does that sound right?

16 A Yes.

17 Q Now we'll go through parts of this, it's 69 pages.
18 Was this brief ever filed with the Minister of
19 Justice?

20 A No.

21 Q And do you know why not?

22 A Umm, this was my first draft of the 617
23 application, and I believe that Mr. Wolch and
24 Ms. Leonoff looked at it, it was revised, it was
25 drafted, it was winnowed down and, I think, formed



1 the basis for what we ultimately filed but this
2 was the first cut of it.

3 Q And you've mentioned a couple of times in giving
4 evidence, when I asked you questions about what
5 you thought in 1986 or what information did you
6 have in '86, and I think on a couple of occasions
7 you referred to this brief as being a good
8 indication of what you were thinking at the time;
9 is that correct?

10 A Yes.

11 Q And so late '86-early '87, this brief would
12 reflect sort of your understanding of the facts
13 and your position at the time; is that fair?

14 A Yes.

15 Q Now, at this time, do you know if you had all of
16 the trial transcripts and the preliminary hearing
17 transcripts?

18 A I'm obviously very confused on this. I don't
19 know, I can't say. I'm starting to think -- I
20 remember I described to you seeing the transcripts
21 in a plastic bag and I'm starting to think that
22 that may have been actually in the exhibit box
23 that I saw when I came to see the exhibits at the
24 courthouse here, I'm -- so I'm confused on that.

25 Q That's fine. Maybe we'll come back to that, Mr.



1 Asper. We'll go through, there are some letters
2 to the Court for some transcripts and some --
3 there is a record of your visit to the Court, and
4 that might assist in your memory. Let -- is it
5 fair to say that you would have had at least some
6 of the transcripts that we --

7 A Yes, oh yes, yes.

8 Q And whether you had them all or not you can't say
9 now, and we will maybe find some documents that
10 might assist, is that fair?

11 A Right, yes.

12 Q And as far as witness statements, at this time is
13 it correct that you did not have anything from Mr.
14 Tallis' file other than what Joyce Milgaard would
15 have obtained and provided to you, is that right?

16 A That's correct.

17 Q Or Peter Carlyle-Gordge?

18 A That's correct.

19 Q And nothing from the Crown file, the prosecutor's
20 file; correct? I don't --

21 A I think we have, we --

22 Q I'm sorry, Mr. Carlyle-Gordge had reviewed Mr.
23 Caldwell's file, so it's perhaps -- is it possible
24 that he made copies of --

25 A Yes, I was going to say I think we had the Nichol



1 John and Ron Wilson statements at this time.

2 Q Okay. And do you -- and were those -- remember I
3 showed you earlier this morning where there was a
4 reference to Joyce Milgaard getting Ron Wilson's
5 statement from Mr. Tallis' file, I think when we
6 were --

7 A Yes.

8 Q So it would appear you would have had Mr. Wilson's
9 statement and you think, as well, Nichol John's?

10 A Yes, the May 24th statement.

11 Q Yes. That statement, by the way, I think was on
12 the Court file, it was marked as an exhibit for
13 identification, so it's possible that it was
14 obtained on the Court file; is that --

15 A That's possible, yes.

16 Q -- a fair assumption? And you would have had your
17 interview of Deborah Hall and the affidavit, and
18 as well, the affidavit from David Milgaard; is
19 that correct?

20 A Yes.

21 Q If we can just go through parts of this, if we can
22 go to the next page, and just at the -- no, sorry,
23 page 53. And in reading this, Mr. Asper, and I
24 asked you this question earlier about your initial
25 reaction, is it fair to say that a good part of



1 this is that, when you analyse the evidence that
2 the jury analysed or should have analysed, that
3 Mr. Milgaard, in your view, shouldn't have been
4 convicted on that evidence?

5 A That's correct.

6 Q Yeah. And so I know that there is some reference
7 to some additional evidence, but for the most part
8 would it be fair to characterize this as reviewing
9 it all and saying "how could the jury have reached
10 this conclusion on the basis of all this evidence,
11 they shouldn't have found guilt, and here's why"?

12 A That's correct.

13 Q Is that a fair general characterization?

14 A Yes.

15 Q And in fact, if we go to the next page, I think
16 you say that:

17 "He seeks to plead his case to show why
18 a common-sense reading of the evidence
19 discloses the injustice of his
20 conviction and supports his claim of
21 innocence."

22 If, and you've told us on a couple of occasions
23 the requirement for new evidence or fresh
24 evidence, if that had not been the criteria or
25 had not been your understanding of the criteria



1 was this something -- and, again, subject to some
2 refinement -- was this a product that you thought
3 could establish why, on a reading of the
4 evidence, he shouldn't have been convicted?

5 A Yes.

6 Q And so the new evidence, you've got the Deborah
7 Hall evidence which is new, and the Dr. Ferris
8 stuff which you don't have yet but it's coming,
9 would it be fair to say that "here's the starting
10 point, now we better go find some -- something
11 that's new so that it's a hook", I think was your
12 word, "so that Federal Justice will look at it";
13 in other words the new evidence will be the hook
14 for them to look at the rest of it?

15 A Yes.

16 Q The --

17 A Yes.

18 Q And am I characterizing your evidence correctly do
19 you think?

20 A Yes, yes.

21 Q And so here you say the application is in five
22 parts; the facts:

23 "It also raises the issue of pre-trial
24 publicity which likely had a profound
25 effect on the trial. Part two ..."



1 is the blood typing.

2 "The third part deals with the physical
3 science aspect ... to the lack of
4 opportunity that David Milgaard had to
5 kill and possibly rape Gail Miller. The
6 fourth part illustrates just how
7 inconsistent and sometimes physically
8 impossible it is to reconcile much of
9 the evidence in a manner consistent with
10 David Milgaard's guilt. Finally, part
11 five summarizes the application by
12 raising the fundamental question; was it
13 consistent with any concept of
14 'reasonable doubt' and the presumption
15 of innocence ..."

16 And then, if we can scroll down, and then I think
17 as you attach the affidavit, or it says it's
18 attached, of David Milgaard, never testified at
19 trial, so I suppose in some respects that would
20 be fresh evidence; is that fair, that his
21 statement under oath that "I didn't commit the
22 crime" would be evidence that wasn't before the
23 trier of fact?

24 A Yes.

25 Q And, secondly:



1 "... the affidavit of Deborah Hall,
2 which is 'fresh' evidence ... never
3 interviewed by the police and never gave
4 evidence at trial but states in her
5 Affidavit that certain very damning
6 evidence that was given at trial was, in
7 fact, not the truth."

8 And then, last, a videotape showing the exhibits,
9 which I don't think we've come across. Then --

10 A Those are my missing tapes.

11 Q And that was of the exhibits from the courthouse?

12 A Yes. I took a trip here and I had my own video
13 camera and laid out all the exhibits, commented
14 on, I think I recall doing some commentary as I
15 was showing the exhibits, and then I went and
16 portrayed the crime scene and the various
17 landmarks around the crime scene, Gail Miller --
18 such as Gail Miller's home, the Cadrain home, the
19 bus stop, location of the bus stop.

20 Q If we can then go to the next page. And I don't
21 want to go through this in detail, Mr. Asper, but
22 would you -- actually, sorry, go to page -- the
23 previous page. The statement of facts, and I've
24 gone through this, and there are some -- there are
25 some areas where the times might be a little bit



1 different than what the judge's charge to the jury
2 was or the evidence, but again, would you be
3 trying to put the facts in the most favourable
4 light to Mr. Milgaard's position?

5 A I may have done that subconsciously, but I think
6 we were trying to be objective.

7 Q Okay.

8 A We had run these facts through so many different
9 people and presented the facts to so many
10 different people as objectively as we could to
11 test, as I said yesterday, whether we were out of
12 our minds or not, based -- because what we were
13 embarking on was such a large endeavour, and so I
14 --

15 Q And let me just, for example, go to the next page.
16 And I think on the timing issue, which you spend a
17 bit of time, you say:

18 "At trial Wilson pin-pointed this
19 intersection as being at Avenue N and
20 20th Street. He also estimated that the
21 car became stuck at 6:30 AM."

22 And I think, from there, you developed the
23 timing, saying that if they got stuck at 6:30,
24 that he was gone from the car for 15 minutes, he
25 was back in at 6:45 and Gail Miller hadn't left



1 home yet.

2 And I don't want to get into a
3 debate on the timing issue, but at trial I think
4 Mr. Wilson's evidence was that he arrived into
5 Saskatoon, or somewhere, at 6:30 approximately,
6 but I think in the charge to the jury the trial
7 judge said the window of opportunity was 6:45 to
8 7:10, and in fact it was actually narrower than
9 that because what he said is 6:45 is when Gail
10 Miller -- the earliest that she would have left
11 her home and 7:10 was where the judge, I think,
12 directed, based on Mr. Rasmussen's evidence who
13 said the Milgaard group got from there from 7:00
14 'til as late at 7:30. So there's different views
15 on the times, and I'm not saying you are wrong or
16 right or anything, but when you are putting
17 together the timing would you be trying to sort
18 of put it, with some basis, but in the most
19 favourable light as you could?

20 A I don't -- I don't recall doing that.

21 Q Okay.

22 A I thought we were trying to be as objective as
23 possible.

24 Q And again on the impossible, I guess on the
25 impossibility argument, the fact -- I mean if in



1 fact -- or let me go back. The trial judge's
2 charge to the jury, though, said 6:45 to 7:10 on
3 the basis of all of the evidence; were you aware
4 of that or did you -- where did that fit in with
5 the other timing evidence?

6 A I'm not sure.

7 Q Now I'll point out, in fact I think later on you
8 indicate in a brief that if he was there later,
9 then you go through the same scenario. And I
10 think what Mr. Tallis, what his view at trial was
11 was that the window, based upon the evidence and
12 the trial judge's charge to the jury, the maximum
13 amount of time that would have been available is
14 ten minutes, and there was an argument that there
15 was nil, no time, that it was physically
16 impossible. And let me just go through that.

17 His evidence was, Mr. Tallis',
18 that the trial judge said Gail Miller left at 6:45
19 so it would take some time before she would have
20 been accosted by the attacker, if we assume that
21 she was the woman that David Milgaard stopped that
22 it would take some time for that, so that it might
23 be 6:50, 6:55 before the physical act could take
24 place, the assault; 7:10 is when the judge
25 indicated the outside window was, and that's when



1 they were at the Trav-a-leer, and that it would
2 take, I think Mr. Tallis said, at least five
3 minutes to get there, so you move it back and sort
4 of narrow the time frame. And I think Mr. Tallis
5 said that he thought, based on the judge's charge
6 to the jury, that ten minutes was the most, and
7 that if people are out a bit on the times it could
8 be, it could be nil, it could be no time.

9 And is that something that is --
10 sounds consistent with what you were looking at at
11 the time, when you analysed the timing part? And
12 I appreciate --

13 A Well, it depends on -- yes.

14 Q Okay.

15 A I mean whether you are saying, whether you start
16 at 6:30 or 7:00 or wherever you start, yes, pretty
17 much, I would agree with that.

18 Q And is it fair to say that what you were doing is
19 looking at the evidence and saying "if this person
20 is believed on this time and this person is
21 believed on that time, then if those are both
22 true, there is no way he could have committed the
23 crime"?

24 A Yes, and I would add, as we did, "comma, outside
25 in minus 40 degree weather", which is an important



1 fact that must attach to any analysis of the time.

2 Q And I think as well one other point that's in your
3 brief, and that Mr. Tallis referred to, is the
4 condition of her clothing that would suggest the
5 coat being removed, the dress being removed, the
6 coat put back on, so that the time -- and, again,
7 would it be fair to say that what you are raising
8 here would be similar arguments that Mr. Tallis
9 was raising at the trial about this issue?

10 A Yes.

11 Q If we can go to, then, page 56 -- 157566. And
12 there is reference, and earlier on you talk about
13 the argument that the preliminary hearing and the
14 publicity might have influenced the jury, and in
15 the materials that we have I don't think we ever
16 found an Exhibit B, being the attachment, but it
17 talks about:

18 "... a series of newspaper articles at
19 or leading up to the time of the
20 preliminary inquiry. The coverage is
21 obviously quite substantial and it was
22 within that atmosphere that David
23 Milgaard was committed to stand trial
24 and ultimately convicted."

25 Can you tell us what, would those have been



1 newspaper articles that you gathered from the
2 file or from your request from the *StarPhoenix*?

3 A Yes, there was a compendium of perhaps a couple of
4 dozen newspaper clippings with large headlines.

5 Q If we can go down to the bottom, and would they be
6 related to what, the -- what time period would
7 those have covered?

8 A It would, I believe it was, well I think the date
9 -- the preliminary inquiry occurred over the
10 summer, and I believe it's in the brief, I think
11 the rules were changed on August -- came into
12 effect August 10th, 1970, just after David's
13 preliminary inquiry started.

14 Q Yeah.

15 A The rules banning publication of evidence on a
16 preliminary inquiry.

17 Q Yeah. I think we may have heard some evidence
18 that in fact it was within the same month, I think
19 his prelim started August 18th, '69?

20 A Yes.

21 Q And, I mean I can maybe check on that, we may have
22 heard some evidence. But in and around, shortly
23 after that, the *Criminal Code* was changed to ban
24 it. But as far as the time frame of the newspaper
25 articles that you would have had in this



1 compendium, can you give us an idea of what, would
2 they be just related to reporting on the
3 preliminary hearing or other matters relating to
4 the investigation?

5 A I have a feeling that this is where my clipping
6 file started and it may, it may have been
7 clippings that dated back to the murder, to the
8 date of the murder.

9 Q And you kept your own clippings file, did you?

10 A I think this, no, I think this is what I got from
11 the *StarPhoenix*.

12 Q Oh, I see, okay.

13 A I had been -- when I was here, when I was in
14 Saskatoon I had certainly been to the library, I
15 was looking at video archives of the news
16 reporting from the time, I wanted to get a sense
17 of -- and I think we're all familiar now with the
18 black and white CBC reporting, we can see the
19 officers in the back lane. I believe that day,
20 that same trip, I was in the library looking at
21 the microfiche and got some reports and then wrote
22 directly to the newspaper to try to get the
23 others.

24 Q And so some reports around the time of the murder?

25 A Yes.



1 Q And we had earlier --

2 A And the preliminary inquiry.

3 Q And we had earlier looked at those two articles,
4 one being the December 12th, '68 about the rapes,
5 and then the February 4th, '69 article shortly
6 after the murder saying *Killer possible rapist*; is
7 that when -- did you get those articles at that
8 time do you think, or --

9 A I don't know, I -- I don't recall.

10 Q Would you have searched for articles from around
11 the time of the murder?

12 A Yes. I believe there's one from February 1st
13 reporting the murder, and that's where, I think
14 where I started.

15 Q Yeah, okay. And I think, actually, there is a
16 newspaper article that might assist us putting a
17 date on your visit to the courthouse, which we
18 will get to. Now down at the bottom is the
19 secretor issue, and we have been through this with
20 --

21 A There was a newspaper report of my going to the
22 courthouse?

23 Q There is actually -- we -- there is a picture of
24 you and Mrs. Milgaard on the courthouse steps, I
25 think, that --



1 A Okay.

2 Q -- we will get to at some point.

3 A Okay.

4 Q The secretor issue here, and we've heard a fair
5 bit of evidence about it from many, many people,
6 and if I could try maybe just summarize what your
7 position here is and you tell me if I have it
8 right. I think in this brief what you are ending
9 up saying is that the frozen semen, if it's from
10 the perpetrator, had A antigens and had to come
11 from an A secretor, or semen had to be
12 contaminated by a person's blood and that person
13 had to have type A blood, that David Milgaard, at
14 trial the evidence was that he was a non-secretor,
15 that the semen could not have come from David
16 Milgaard unless his blood somehow found its way
17 into the semen, and there is no evidence of him
18 having bled in his semen and there was no evidence
19 detected blood in the semen; is that a fair
20 summary of the position?

21 A And, therefore, the sample eliminated David.

22 Q And therefore, in that scenario, that that
23 would -- that the sample could not have come from
24 him.

25 A Yes.



1 Q And we've heard from Mr. Tallis his evidence that
2 that is similar, or that that was the argument
3 that he put forward at trial, and in fact argued
4 at the preliminary hearing and at trial and in his
5 closing address to the jury. Did you -- were you
6 aware, or at what point did you become aware that
7 that was a position that he had put forward at the
8 trial, and I think his words were he thought it
9 was -- it exonerated Mr. Milgaard and that it
10 should have, I think on its own, resulted in an
11 acquittal?

12 A Well the trial transcript is very clear where Mr.
13 Tallis tries to make this point. In fact the
14 judge interrupts Mr. Caldwell, as I recall, during
15 his examination, because Mr. Caldwell kept trying
16 to pursue this "well he's a non" -- he -- if the
17 antigens, if the A antigens, if he's not a
18 secretor and the A antigens couldn't get into the
19 blood, Mr. Caldwell was trying to establish this
20 other means of the A antigens getting into the
21 blood by virtue of actual blood being in the semen
22 sample, and Justice Bence interrupted, I think,
23 Mr. Caldwell during his examination because -- to
24 remind him that there was no evidence of the blood
25 being in.



1 Q Right.

2 A So Mr. Tallis pursued it, and I was well aware of
3 that, at the trial.

4 Q So when, when you are putting this together in
5 your argument, what; is it fair to say that you
6 would have known that that issue was put forward
7 on David Milgaard's behalf at trial before the
8 jury with the same evidence you are referring to
9 here, but that not -- I guess what, what were you
10 trying to do different than what was put before
11 the jury, if anything?

12 A My opinion was, and I'm probably -- umm, when I,
13 when I write here that there was confusion, I'm
14 not sure that even with Mr. Tallis' efforts -- and
15 I don't think we had his jury address at the time
16 that this was, this brief was presented, I don't
17 think we got that until the Supreme Court so we
18 didn't know what he had actually said to the jury
19 -- but my reading of the evidence certainly was
20 that this evidence, this part of the evidence had
21 been obfuscated and it wasn't clear, and had it
22 been presented -- and through no fault of Mr.
23 Tallis because he made the point -- but I don't
24 know what one could have done about it.

25 I was very uncomfortable with



1 the way Mr. Caldwell kept trying to get A antigens
2 into the blood with no evidence that there was a
3 means for A antigens to be in the blood.

4 Q And so just, just going back as far as you talked
5 about the closing addresses, and I think the --
6 Mr. Tallis' closing address was transcribed in
7 early 1992 --

8 A Uh-huh.

9 Q -- from shorthand notes, and I think Mr.
10 Caldwell's closing address, at least his typed
11 version of it, was on the file that Mr.
12 Carlyle-Gordge looked at, and I think the evidence
13 we've heard is that in the closing address to the
14 jury Mr. Caldwell said "the frozen semen does not
15 eliminate -- does not identify David Milgaard as
16 the killer, but it doesn't eliminate him, it's
17 neutral", and Mr. Tallis' position was that this
18 excludes Mr. Milgaard as a suspect. Do you know
19 if you would have been aware of the final position
20 taken by the Crown and defence before the jury?

21 A I'm pretty sure that we had seen Mr. Caldwell's
22 closing address, and I would consider that, and I
23 did consider that, to be -- there were sort of two
24 big what I would call nudge-nudge-wink-winks that
25 Mr. Caldwell did with the jury. The first was --



1 and he was fortunate as to how Justice Bence
2 handled it -- the Nichol John statement, so the
3 jury heard that Nichol John allegedly saw David
4 commit the murder. The second was as you've just
5 described, this -- the forensic science, the semen
6 sample didn't implicate him but it didn't
7 eliminate him. Well, according to the evidence,
8 it did.

9 Q And so it was a case of looking at the transcript
10 and saying -- and once you understood it, the
11 science of it, saying "well this evidence should
12 have exonerated him, it should have been enough,
13 on its own, to lead to an acquittal"; is that a
14 fair summary of what you thought?

15 A On its own?

16 Q Yes?

17 A I'm not sure I could say that, but I would hope
18 so, but I'm not sure I could say that.

19 Q There is something -- let me rephrase it this way;
20 that if the evidence said "this frozen semen could
21 not have come from David Milgaard, and if it's the
22 perpetrator", I think you said, "that eliminates
23 him"?

24 A Yes, yes.

25 Q And was your question, then, "okay, well why



1 didn't the jury acquit on that?"

2 A Yes, and I believe they didn't acquit on that
3 because the issue had been obfuscated.

4 Q Okay. So it was a question that it was put
5 forward, and was it an assumption -- and, again,
6 none of us here know what the jury thought and why
7 they did what they did -- but was it an assumption
8 that, based on your reading of the record, that
9 since it should have eliminated him, and that it
10 didn't, something must have gone wrong, or either
11 the jury didn't understand it or it got confused;
12 is that a fair way to put it?

13 A Yes.

14 Q Okay. And again over the next page, I don't
15 propose to go through this, but a significant part
16 of this brief is going through the evidence of Dr.
17 Emson and Mr. Paynter, and in particular the
18 reference, as you pointed out, to the judge
19 identifying or saying that there was no evidence
20 of blood. If we can actually go to 157578, and
21 this is the comment you were referring to, I
22 think, when Mr. Caldwell was examining
23 Mr. Paynter, the Court says:

24 "Well there is no proof of any blood."

25 That was the remark you referred to earlier?



1 A Yes. If you look at the bottom of the page, the
2 Court interrupts and says:

3 "...Excuse me, but there was no blood."

4 Mr. Caldwell:

5 "Well, My Lord..."

6 And the Court says, I'm sure you can follow it:

7 "...you just can't ask hypothetical
8 questions like that..."

9 Q And then if we can go to 157584, and again I think
10 at the top you say this eliminates David Milgaard
11 as the donor of the semen sample, and then if we
12 can scroll down, you say:

13 "Unfortunately, this evidence was very
14 confusing. Indeed, the Saskatchewan
15 Court of Appeal gave only passing
16 mention to the issue. More important,
17 however, is the fact that the Crown
18 posited the theory that Milgaard was not
19 eliminated when, in fact, he was. The
20 confusion over this key piece of
21 evidence must have worked prejudicially
22 against Milgaard when, on careful
23 analysis, it was exculpatory."

24 And again, you are referring to the Court of
25 Appeal decision which I think talks about the



1 blood types, but doesn't specifically deal with
2 the antigen issue and whether or not it
3 implicated or exonerated. Were you aware, back
4 at the time or at any time in your re-opening
5 efforts, that Mr. Tallis had argued this point
6 before the Court of Appeal specifically, that I
7 think his evidence was that he raised it saying
8 the jury should have acquitted on this piece of
9 evidence?

10 A I don't think I would have been aware of that.

11 Q Go to the next page, 585, and again I don't, this
12 document I think we've been through with some
13 other witnesses, or it's on the record, so I don't
14 want to go through it line by line, but on the
15 timing here, and we also heard from Mr.
16 Carlyle-Gordge, we heard from Mr. Tallis and I
17 think from some other witnesses, that if you look
18 at the timing factor, that it's difficult, and
19 some witnesses have said if not impossible, to fit
20 all the pieces together, and would you be putting
21 forward a similar type argument, but based upon
22 your review and analysis?

23 A Yes.

24 Q 157592, you indicate:

25 "Walter and Olesia Danchuk were also



1 very critical witnesses in this case."

2 And go on and talk about that, and I think

3 Mr. Tallis shared that view. How did you deal

4 with the fact, Mr. Asper, that they both

5 testified and the jury heard their evidence about

6 what they observed, and Mr. Rasmussen, what they

7 observed of Mr. Milgaard after the crime, and

8 obviously the jury did not, it did not cause the

9 jury to find Mr. Milgaard not guilty.

10 A How did I deal with that?

11 Q Yeah. Let me put it this way, you raised it.

12 Could someone in authority just say, well, that's

13 not new, the jury heard it, it wasn't enough -- it

14 wasn't enough for the jury to acquit?

15 A No. I think what we were trying to do here was we

16 were trying to create, or certainly I was in this

17 draft document, we were trying to, I was trying to

18 create the air of uncertainty as to the safety of

19 the conviction. I don't think in and of itself

20 this was intended to overturn the conviction, this

21 was -- these kinds of facts were set out, in my

22 view, to help the Department of Justice accept

23 that maybe something was wrong with the

24 conviction.

25 Q And so when you say unsafe verdict, would that be



1 similar then in an appeal, an unreasonable verdict
2 saying lookit, even though the jury reached this
3 conclusion, look at all these factors, it's not
4 safe?

5 A Yes, and hopefully to add some new things that
6 would -- but, you know, that would cause a fresh
7 look at the case, and I felt it was very, very
8 important to, as I said yesterday, to put brackets
9 around Wilson and John with Danchuk and Rasmussen,
10 two credible witnesses, three credible witnesses
11 who saw David before and after he was alleged to
12 have committed the murder.

13 Q And I guess on that point I think we've seen that
14 the, not only did Mr. Tallis put that forward, but
15 the trial judge actually in his charge to the jury
16 said similar things?

17 A Yeah.

18 Q And again, just back to the point, Mr. Asper,
19 about how did you -- I mean, I think I understand
20 you saying lookit, in your mind you said lookit,
21 this is pretty important, how could David Milgaard
22 have committed the crime and show up there shortly
23 after and then see nothing, then how do you take
24 that and say okay, he's been convicted and that
25 evidence was before the jury, but I have to



1 somehow get the authorities to do something about
2 this, and I'm wanting to get your comments, and
3 you've covered it I think on this unsafe verdict
4 business about how it is you can use information
5 that's already before the jury and apparently
6 discounted to try and further your case with the
7 authorities, does it come down to this, basically
8 lookit, the jury got it wrong?

9 A I wish that would have been all, but -- and that's
10 a very -- that's a very big systemic question and
11 I don't think you can cavalierly, you know,
12 disregard jury verdicts, but in terms of how we
13 prepared for this case, I felt it was important as
14 an introduction to looking at anything new that we
15 provided, to give credibility to anything new that
16 we provided by establishing that the trial itself
17 had a questionable result.

18 Q And so it would be part of everything else you put
19 forward to say lookit, the Danchuk evidence,
20 although the jury heard it and still convicted,
21 it's something to be looked at by an authority as
22 something that is maybe, might question the
23 safeness of the verdict; is that a fair way to put
24 it?

25 A Yes.



1 Q If we can go to page 602 --

2 A And, you know, on a systemic level, I mean, if you
3 look at the obstacle that an applicant has to
4 overcome, you've got -- a jury has obviously made
5 a finding as to the evidence, the Court of Appeal
6 has looked at it, and we now know that they were
7 probably telling -- they were probably the most
8 honest witnesses in the trial.

9 Q So I guess on the flip side, when you say a big
10 systemic issue, and we'll deal with this a bit
11 later, but I guess on the flip side is that if
12 every person convicted and who had their appeals
13 exhausted went and said lookit, the jury was
14 wrong, here's how they were wrong, that there
15 might be some systemic issues going that way; is
16 that fair?

17 A Yes. I'm very leery of what if everyone did that
18 argument because not everyone does do it, whatever
19 it is.

20 Q Okay.

21 A And like I said, this notion that somehow the
22 prisons are full of people proclaiming their
23 innocence and the flood gates would open I just
24 don't accept, but it is a big issue, it is a big
25 problem.



1 COMMISSIONER MacCALLUM: Well, I understand
2 by this exchange, sir, that it's a Court of
3 Appeal issue, not necessarily a flood-gate
4 argument, or are you just trying to make a
5 further appeal to the Minister of Justice which
6 has already been dealt with in the regular appeal
7 system?

8 A That is a big problem, where the Department of
9 Justice, at least in our case, wasn't prepared to
10 entertain just a re-arguing of the case.

11 COMMISSIONER MacCALLUM: No.

12 A You had to get something new.

13 COMMISSIONER MacCALLUM: Right.

14 A So all I was saying in my evidence is we were
15 trying to re-argue the case, in effect, to
16 establish with the Department of Justice that
17 anything new might be worthwhile looking at
18 because there really were some questions about the
19 original trial, not that those questions alone
20 should overturn it --

21 COMMISSIONER MacCALLUM: No.

22 A -- but that it makes whatever new we were
23 providing worth looking at.

24 BY MR. HODSON:

25 Q Here we get into Part IV, and I just want to go --



1 this touches on Albert Cadrain's evidence, and it
2 talks about the chronology, about Albert Cadrain
3 going in to see the Saskatoon police on March 2nd.

4 A I'm sorry, what page are you on?

5 Q I'm sorry, page 50.

6 A Gotcha.

7 COMMISSIONER MacCALLUM: 602?

8 BY MR. HODSON:

9 Q Yeah, 602, 157602. And you talk here about Albert
10 Cadrain's visit with the Saskatoon police on March
11 2nd and as well his earlier arrest in Regina and
12 the evidence at trial that he first learned about
13 the murder by police questioning in Regina, and we
14 went through that with Mr. Tallis, his
15 cross-examination of Mr. Cadrain about basically
16 what did the Regina police question you about and
17 why didn't you tell them about your suspicions
18 about Mr. Milgaard and why didn't you tell them
19 about the blood, and so would that be -- would
20 that be where you got that from, this part of the
21 brief?

22 A Yes.

23 Q And then if we scroll down, it says here:

24 "One would assume that whatever he told
25 the police on March 2nd, 1969 caused



1 them to suspect Milgaard. It may well
2 be that he simply told them that he had
3 left Saskatoon on the day of the murder
4 with Milgaard. At some point, however,
5 Cadrain told the police that he had seen
6 blood on Milgaard's pants on the morning
7 of the murder."

8 Let me pause there. Is it fair to conclude from
9 that, Mr. Asper, that you would not have had
10 Mr. Cadrain's March 2nd, 1969 statement at the
11 time you prepared this brief?

12 A Yes, that looks to be the case.

13 Q Because in that statement, I think you would have
14 learned later that in that statement he does go in
15 and goes in voluntarily and does say I think David
16 Milgaard is involved and I saw blood on his pants
17 and some other things, so do you know when you
18 would have received or become aware of Albert
19 Cadrain's statement to the city police?

20 A I can't tell you. Sorry.

21 Q Then you go on to say:

22 "Cadrain's evidence at trial is very
23 relevant."

24 Then you go through that about the blood. Go to
25 page 157606, and then it says here:



1 "Apparently Cadrain told the police
2 about having --"

3 This is in Regina,

4 "-- having left Saskatoon with Wilson,
5 John and Milgaard but indicated that he
6 sort of laughed at the suggestion that
7 anyone in the group had anything to do
8 with the murder.

9 Also, it should be noticed that
10 one or more of the police officers told
11 Cadrain at this time that he better not
12 walk around the streets because he could
13 wind up dead in an alley."

14 And then:

15 "Finally, beginning at page 601 of the
16 trial transcript it becomes clear that
17 Cadrain was taken back to Regina by the
18 Saskatoon police officers for further
19 questioning after Cadrain's report of
20 March 2nd, 1969. Under questioning by
21 Mr. Tallis one concludes that at least
22 some of what Cadrain ultimately agreed
23 with was literally fed to him by the
24 police officers.

25 The point is simple. Cadrain



1 was intensively interrogated in Regina
2 within two weeks following the murder.
3 He was facing a criminal charge of
4 vagrancy at the time and knew that he
5 might be a suspect in this murder. Yet,
6 at that point, when his memory would
7 have been best he had no information to
8 give. As the investigation continued,
9 however, Cadrain was "reminded" of
10 certain things by the police officers.
11 This resulted in the end with Cadrain
12 saying that he saw blood on Milgaard's
13 pants and that when Milgaard arrived at
14 Cadrain's house that morning he appeared
15 to be in a hurry to get out of town."

16 And again, I think you've told us this would have
17 been prepared without the benefit of Albert
18 Cadrain's March 2nd statement?

19 A Yes.

20 Q And in that statement, as I noted, he does provide
21 that information to the Saskatoon City Police and
22 the evidence of the Saskatoon City Police
23 officers, at least before the Inquiry, is that he
24 came in voluntarily and gave that information that
25 he saw blood and that that was in his first



1 statement as opposed to coming at a later date,
2 and I'm wondering, if you would have had that
3 information at the time you drafted the brief,
4 would that have changed your position at all?

5 A I think the point I'm trying to make in the brief
6 was that he was in custody and interrogated in
7 Regina, advised of the murder, asked -- and under
8 circumstances where the police were aware that he
9 had left town the day of the murder and at that
10 time, I think the point I'm trying to make here is
11 that at that time when his memory would have been
12 freshest he said nothing to implicate David and it
13 wasn't until he got back to Saskatoon that he
14 remembered there was blood on the pants and I, you
15 know, that is the chronology, he walked into the
16 police station.

17 Q And that's one point. The next point that I took
18 when I read this was that in addition, that it
19 wasn't until after a few meetings with the
20 Saskatoon City Police that the blood story got in
21 and that, if we could just scroll up:

22 "... that at least some of what Cadrain
23 ultimately agreed with was literally fed
24 to him by the police officers."

25 And I guess the second point, my question is if



1 you would have had the statement of March 2nd,
2 would that have changed that thinking at the
3 time?

4 A Perhaps, yes, but I'm not sure -- I can't recall.
5 There was obviously a trip back to Regina at some
6 point, an interrogation.

7 Q Yeah. The evidence, I think it was in March, or
8 maybe April of 1969, the -- I think it was
9 Detective Karst and Short took Albert Cadrain down
10 to Regina and met with Nichol John and they tried
11 to reach Ron Wilson, I don't think the Regina City
12 Police were involved in the interrogation, they
13 may have been present at the time, but is that the
14 incident you are thinking of?

15 A Perhaps, yes.

16 Q And I think that came out at the, in the
17 cross-examination of Mr. Cadrain at trial.

18 A Uh-huh.

19 Q Is it fair, Mr. Asper, that when you were doing
20 this brief, you were relying primarily on the
21 transcripts, but that you didn't have -- you
22 didn't have any police reports; is that fair?

23 A I think that's true, yes.

24 Q And it would appear you didn't have Mr. Cadrain's
25 statement?



1 A Yes.

2 Q The first one. And again we see 157608 and you
3 made the comment here that:

4 "But Wilson and John were both
5 "reminded" of certain facts in the same
6 way as Cadrain."

7 And now certainly the evidence the Commission has
8 heard is that Wilson and John, their first
9 statements to the Saskatoon City Police or the
10 RCMP were not, did not incriminate directly Mr.
11 Milgaard, later ones did, but the statements, at
12 least the written statements Mr. Cadrain gave the
13 Saskatoon City Police, his very first statement
14 was incriminating, and so at this time, when I
15 read this, it looks as though you have lumped, or
16 viewed Mr. Cadrain the same as the others, and
17 maybe you did based on the Regina --

18 A I did, yes.

19 Q Now if we can go to 157609, just the bottom,
20 there's a reference here, and you go through an
21 analysis here about Nichol John's May 24th
22 statement, and if we go to the next page, I don't
23 propose to go through it, but I think this is
24 where you outline where what she saw couldn't be
25 true because, (a), the condition of Gail Miller's



1 clothing, if she saw David grab her and stab her
2 how did he get the dress off first, right handed
3 versus left handed and a few other things, and so
4 again you had mentioned earlier that part of --

5 A Well, but -- okay, I know you don't want to go
6 through it, but I just want to make the point that
7 in coming to my -- and I want to emphasize the
8 point, in coming to my own conclusions, we did
9 place models of where the car would have to be
10 facing which way, on which side of the car people
11 would have to be, and I try to outline it here,
12 and it's -- I don't want to go into all the
13 detail, but I really did think this through.

14 Q I mean, we can go through it if you like.

15 A No, no.

16 Q And I didn't mean to downplay it.

17 A No, I know.

18 Q And I think what, the point you had made earlier,
19 that even though it wasn't evidence that she
20 adopted at trial, I mean, the eye witness, I think
21 you told us you still felt it important to let the
22 authorities know in the re-opening that lookit,
23 the statement has some problems with it, I think
24 you say it's impossible, it couldn't have
25 happened, it doesn't fit with the other facts; is



1 that fair?

2 A I just felt that we couldn't ignore it.

3 Q And then the next page you indicate that:

4 "Nonetheless ... the jury heard all of
5 the damaging evidence in that statement.
6 Even though Nicholl was unable to recall
7 making many of the assertions of fact,
8 or to confirm what she could remember as
9 being true, the testimony must have been
10 very damaging."

11 Now, do you, in the materials, at least in the
12 briefs and what was filed, do you have a
13 recollection of considering section 9(2) of the
14 *Canada Evidence Act* and how it was applied at
15 trial and that that being a basis of seeking
16 relief from the authorities; in other words,
17 saying lookit, that was a problem, that
18 procedure, in addition to what you said about
19 Nichol John's statements?

20 A Well, again -- in terms of the brief do you mean?

21 Q Well, just generally. When you filed -- when we
22 get into '88 and the applications, I don't
23 believe -- I mean, there's certainly reference to
24 the fact that the jury heard Nichol John's
25 incriminating statement and even though it wasn't



1 adopted they heard it and it might have influenced
2 them, but as far as the fairness of the
3 proceeding, if I can call it that, and how the
4 section 9(2) proceeding went, and what we heard
5 from Mr. Tallis was that that was the turning
6 point of the trial and that even though the Court
7 of Appeal said Chief Justice Bence did it wrong,
8 it wasn't a reversible error, and what Mr. Tallis
9 said is that that basically was the trial because
10 of not only what was done, but the tone of the
11 voice used by the judge and what he thought the
12 jury took from that, and I'm wondering, was that
13 something that you considered as part of your
14 re-opening arsenal?

15 A No, not other than the way we argued it. Again,
16 on the check list of how to, how one would do this
17 different today, I don't want to be facetious, but
18 all you would have to do is call Mr. Williams in
19 the Department of Justice as evidence of how
20 important that statement was, because that's what
21 the Department of Justice focused on, and I think
22 it's just human nature, it would just be human
23 nature, if you hear this statement, I think to be
24 very concerned, and out of an abundance of caution
25 almost, convict even though you are admonished to



1 ignore the statement, I think that would be human
2 nature, and I would spend much more time, and I
3 wish we had spent more time in this application
4 pursuing that avenue.

5 MR. HODSON: This is probably an
6 appropriate spot to break.

7 (Adjourned at 2:58 p.m.)

8 (Reconvened at 3:19 p.m.)

9 BY MR. HODSON:

10 Q If we can go back to Mr. Asper's brief, 157552,
11 and go to page 613. Again, this is just finishing
12 off, we talked a bit about Nichol John's statement
13 and you told us that, I think on a couple of
14 occasions, that it's something that you had to
15 deal with in the authorities and you had to
16 challenge it in some way, and then you go on here
17 to say:

18 "One must wonder whether that statement
19 was the product of Nicholl John simply
20 acceding to the police theory of how
21 Milgaard committed the murder. While it
22 is true that the jury knew the
23 circumstances surrounding the taking of
24 the statement, by that time the damage
25 had been done. The statement was



1 probably not voluntarily given and most
2 importantly, as is the case with much of
3 her other evidence, is to a large
4 degree, demonstrably false. It should
5 not form part of the case against David
6 Milgaard."

7 Just on this issue about the circumstances
8 surrounding the taking of the statement, what
9 Mr. Tallis told us is that as a result of the
10 failure of the judge to properly apply section
11 9(2), that he didn't get a chance to fully get
12 into, in the absence of the jury, the
13 circumstances surrounding the giving of the
14 statement, and I want to ask you about Inspector
15 Roberts and the polygraph. Do you remember, Mr.
16 Asper, how -- sort of what -- what efforts or
17 what thoughts you had about his role in the
18 taking of the statement for both Ron Wilson and
19 Nichol John and whether you did any pursuit or
20 tried to get information from him about what
21 happened?

22 A In 1986?

23 Q '86 right through to 1992.

24 A No, no, no. Umm, no. I think it's one of the
25 things we would have hoped and assumed would have



1 been one of the elements that Justice would have
2 looked into.

3 Q Now, he did testify at the Supreme Court
4 reference; correct?

5 A Yes.

6 Q And did the polygraph session, if I can call it
7 that, the interviews -- well, with Mr. Wilson
8 there was a polygraph, with Nichol John there was
9 not, but the interviews by Inspector Roberts of
10 Ron Wilson and Nichol John, where did they figure
11 in in your view as to, when you looked at this, as
12 to what might have contributed to Wilson and John
13 giving statements that you thought to be false?

14 A The -- you mean in terms of our thinking in 1986?

15 Q Yeah, '86.

16 A Well, we were aware that on May 24th, in and
17 around those days, something happened to cause
18 Nichol and Wilson to implicate David. We were
19 aware that she, that certainly she had been
20 incarcerated and that she had gone from not
21 implicating David to actually seeing him commit
22 the crime in a way that it couldn't have been
23 committed, at least in our opinion, and that gives
24 rise to a high level of suspicion as to the
25 circumstances surrounding why she changed her



1 tune, and that was our view.

2 **Q** Then if we can go to page 157616, and here's where
3 you talk about the compact or the cosmetic bag and
4 you finish up here saying:

5 "Again, this part of the evidence seems
6 to have been fabricated."

7 And this is about David throwing the compact out.
8 You would have had David Milgaard's affidavit
9 where he says that didn't happen. Would that be
10 the basis of that argument?

11 **A** Yes. I would have taken that position and gone
12 back to the evidence to see if it fit and
13 obviously I've got -- if you give me a minute I'll
14 look at this.

15 **Q** Now, in fairness in your brief you also talk about
16 the fact that Gail Miller's purse was full of
17 makeup and that it couldn't come from her and you
18 say that's:

19 "... even if he kept the bag after
20 killing Gail Miller, Milgaard had no
21 opportunity to put it in the glove
22 compartment. Again, this part of the
23 evidence seems to have been fabricated."

24 But in part at least that would be based on David
25 Milgaard telling you he didn't do it?



1 A Yes.

2 Q And then here you say:

3 "Another key point which deserves
4 mention is the evidence of Craig Melnyk
5 and George Lapchuk. If any evidence
6 sealed Milgaard's conviction it was
7 their's. There may have been doubts
8 among the jurors as to Milgaard's guilt,
9 but after hearing these witnesses
10 describe his reaction to a T.V. news
11 piece by re-enacting the stabbing, that
12 doubt probably vanished."

13 Now, would this have been your, sort of your own
14 take on the evidence, or did you talk to David or
15 Joyce Milgaard or anybody about the role that
16 that evidence might have played?

17 A I think I spoke with both Joyce and David and I
18 think they felt that, as I said yesterday, this
19 was the kind of *coup de gras* evidence. Now, I've
20 heard Mr. Tallis' view on it and I don't think he
21 puts that kind of emphasis on it, but that was my
22 view at the time.

23 Q And so that it was, and again in comparison it may
24 be difficult to put them, to compare it to some
25 other of the evidence, but would it be right up



1 there, if I can put it that way, as far as
2 damaging evidence that hurt David Milgaard at
3 trial, the motel?

4 A That was my view, yes.

5 Q Okay. And based on your read of the evidence but
6 as well as input that you had from David and Joyce
7 Milgaard who were actually present at the trial?

8 A Yes.

9 Q If we can go to the next page. And, again, I
10 think, on this point, is it fair to summarize that
11 they are relying on the affidavit of Deborah Hall,
12 you are saying the incident didn't happen and that
13 Melnik and Lapchuk were lying?

14 A Yes.

15 157617

16 Q And here you put:

17 "... she not only refutes such evidence
18 but calls it a lie and expresses her
19 outrage that it might have been
20 believed."

21 And then the next page, again I think we've
22 touched on this, was convicted on the evidence of
23 Wilson, John, Cadrain, Melnik, and Lapchuk, and
24 then you go on to say how this cannot be
25 believed.



1 So is it fair to say, at this
2 time, your position was "lookit, the evidence of
3 these five people, they were lying, and that is
4 one of the bases to say give us some relief"?

5 A Yes. As I say, it's part of the introduction to
6 new information that ought to be considered in
7 light of the weakness of the trial evidence, at
8 least as I saw it.

9 Q Then to the next page. You say:

10 "Attached to and forming part of this
11 Application ... is a photocopy of notes
12 made by the Crown attorney for his
13 address to the jury. This was obtained
14 by Peter Carlyle-Gordge, a journalist
15 who, in the course of investigating the
16 case met with Mr. Caldwell."

17 And I think this is the closing address; is that
18 right?

19 A Yes.

20 Q So you --

21 A I believe so, I think so, yes, although I think I
22 had -- also had his opening address as well.

23 Q Yeah. If I'm not mistaken I think his opening
24 address to the jury was part of the trial
25 transcript and the closing address --



1 A Right, okay.

2 Q -- may not have been?

3 A Okay, okay, okay.

4 Q Does that sound right?

5 A Yup, yup.

6 Q Okay. And I'll maybe just double-check this
7 quote, I think this is from the closing address.
8 Is that your memory, that you would have had the
9 closing address --

10 A Yes.

11 Q -- from Mr. Carlyle-Gordge?

12 A Yes.

13 Q Now if we can go to 222350. This is, it's called
14 a Personal Statement By David Milgaard, and
15 putting in the date '87, and I'm wondering if this
16 might be part of what he is working on as far as
17 his presentation; are you able to tell us?

18 A No.

19 Q And --

20 A I can't recall what --

21 Q It says --

22 A -- what we were doing there.

23 Q It says, "I will be 35 years old in 1987 ...", and
24 it goes on to talk about the crime, but down at
25 the bottom he says, talks about Nichol John, and



1 says, "She was the Crown witness ruled adverse
2 under the *Canada Evidence Act*. The loophole in
3 the relevant section was later closed by a
4 judgement given on my case and yet it was
5 inappropriately not applied to it."

6 Is that something you would have
7 discussed with him, do you know, or -- on the 9,
8 or do you have any memory of the Section 9(2)
9 proceedings being an issue that you looked at?

10 A No, I don't recall that. Somebody would obviously
11 have discussed this with him, that's not his
12 language.

13 Q 218972, please. Here's the letter that I referred
14 to earlier, February 25, 1987, it's a letter to
15 the Court. And you say:

16 "On a recent trip to the courthouse, I
17 discovered that complete transcripts of
18 the hearing were located in the box
19 containing the Exhibits from the trial.
20 Somehow the copy of the transcript that
21 was forwarded to this office is missing
22 pages 798 through 804 as well as page
23 1034."

24 Now, from this letter, I -- can we take it that,
25 at some time shortly prior to February 25, 1987,



1 in maybe the weeks, the month prior, you would
2 have visited the courthouse to look at the
3 exhibits? I think it says "on a recent trip".

4 A Well I, yes, I would have been there and had
5 ordered -- have ordered a copy of it, yes.

6 Q A copy of the transcript?

7 A Yes.

8 Q So when you went to the courthouse to look at the
9 exhibits you would have ordered a complete copy of
10 the transcript?

11 A That's what this letter looks like, yes.

12 Q And would that have been the same trip when you
13 went through the newspaper archives as well?

14 A Probably, yes. Although I think I made a couple
15 of trips and I was -- one of the trips was
16 actually on January 31st. I recall being here on
17 a January 31st.

18 Q Of 1986?

19 A I don't recall which year. It would have been
20 early in the process, might have been '86 -- no,
21 no, it would have been '87, probably.

22 Q So January 31, '87 --

23 A Yes.

24 Q -- you think you were in Saskatoon?

25 A Yes.



1 Q If we can go to 182122. And this is just a memo
2 from you to Hersh February 26th, 1987 indicating
3 that you should also consider Section 683 and
4 pardons and the granting of royal mercy. Can you
5 elaborate at all on that, or was this just
6 something you reviewed and thought should be
7 included in an application, or does anything turn
8 on that?

9 A Well I think we were looking for anything to which
10 we might attach an effort to get relief for David.
11 I don't recall doing much work on Section 683,
12 though, or if any.

13 Q If we can go to 182095. This is a memo February
14 6th, '87 and it refers to a phone call you had
15 with Joyce Milgaard on February 25, 1987.

16 A By the way, --

17 Q Yes?

18 A -- there was just one question that you asked, Mr.
19 Hodson, about why, in November '86, having gotten
20 the affidavit from Deborah Hall and from David
21 Milgaard ostensibly in aid of preparing for an
22 application?

23 Q Yes.

24 A I thought about that, and I think my recollection
25 of that is -- because we're getting into this next



1 area -- is that the feeling was that the Deborah
2 Hall affidavit and David's affidavit were not
3 sufficient and that we needed to find something
4 more.

5 Q Okay.

6 A And I think that -- I don't, I don't know where we
7 went in terms of looking for something more, but
8 the feeling was that, in and of itself, we didn't
9 have enough.

10 Q Okay. So that there was a decision made that "we
11 need some more information before we file"?

12 A Yes.

13 Q And so here we see the introduction of Dr. Ferris,
14 and genetic fingerprinting, it's called, and the
15 DNA, and do you have a recollection of how this
16 came about and your dealings with Dr. Ferris?

17 A Umm, I'm not sure what --

18 Q Let me just back up. It looks as though
19 Mrs. Milgaard had either talked to or found out
20 about Dr. Ferris from somewhere, and about the
21 possibility of doing DNA?

22 A I think she read an article.

23 Q All right.

24 A I think there was an article that she had read,
25 and then she had tracked him down and gotten his



1 numbers, she may have even spoken with him.

2 Q And then I take it, and we'll see some documents
3 over the following number of months and even into
4 the next year, efforts were made to have Dr.
5 Ferris look at exhibits and provide a report?

6 A Yes.

7 Q So this would be the starting point for that
8 exercise?

9 A Yes.

10 Q Next if we can go to 182373. And we've touched on
11 this subject before, just on the *Fifth Estate*, and
12 I think this is where -- this is a letter from
13 David Milgaard to Hersh Wolch February 27, '87,
14 and that he was a friend of Eric Malling, and it
15 goes on to the next page. And I think this is
16 where he tells Mr. Wolch that he thinks that Tony
17 Merchant kiboshed the deal with the CBC or the
18 *Fifth Estate*, and do you recall that being an
19 issue that David had raised from time to time,
20 that he thought somehow Mr. Merchant had been
21 involved in having the *Fifth Estate* back off of
22 their show?

23 A Yes.

24 Q And did you have any information to suggest that
25 that's what happened, that Mr. Merchant somehow



1 caused the *Fifth Estate* not to run its show on
2 David Milgaard?

3 A I had no information to that effect, no.

4 Q If we can go to 218938. And I'm wondering if
5 this, this is a March 19th, 1987 letter from David
6 Milgaard, and I think it is "Dear Rysta", and it
7 talks at the bottom about -- or let me just go to
8 the top. It says:

9 "Thank you for helping me with my
10 personal statement."

11 And that's the one that I read to you a bit
12 earlier about the Section 9(2). And then down at
13 the bottom he says:

14 "How I see this applicable to sec. 9(2)
15 is a reversal of it ...";

16 do you know who Rysta was or what this relates
17 to?

18 A I'm trying to think if it's a phonetic spelling.

19 Q Yeah, I couldn't find anything that --

20 A Yeah.

21 Q It looks as though someone was helping him with
22 this 9(2) issue; is that --

23 A No, it doesn't ring a bell.

24 Q 182124. This is a memo May 15th, '87 from you to
25 Herhsh, you say you "spoke with Gord Stuart from



1 CBC, apparently they are prepared to revive the
2 show on the basis of the genetic testing, they're
3 very interested, and I simply told him that we
4 would keep them posted as to what is happening."

5 Now, at this point, I don't
6 think there had been any contact made or any
7 arrangement made with Dr. Ferris; do you know how
8 this came about with the *Fifth Estate*?

9 A Well obviously somebody spoke with them, I don't
10 know who. They were -- you have to appreciate
11 that *Fifth Estate*, CBC had invested a fair bit of
12 time and money into the production and they were
13 really, they were keeping abreast of the
14 developments in the case in the event that
15 something happened that would give them a higher
16 level of comfort, because they had already spent a
17 fair bit of money producing a fair bit of the
18 program.

19 Q Did they ever run the show?

20 A Eventually a different producer, yes, ran a show
21 using, I believe, some of the material that had
22 been taped during this go-round.

23 Q And do you remember when that was in relation to
24 the applications and --

25 A Umm, it might have been in 1990-'91.



1 Q If we can go to 162418, and this is July 3rd, '87,
2 and a memo from you to Hersh, and it looks though
3 -- as though you are having trouble getting ahold
4 of Dr. Ferris; is that a fair reading of this?

5 A Yes.

6 Q And had you been trying to reach him for some
7 time, do you remember, or --

8 A Yes, we took quite a while to connect.

9 Q Then if we can go to 162414. This is a letter
10 July 15th, 1987 from Joyce Milgaard to you.

11 A No, it's to Mr. Wolch.

12 Q Or, I'm sorry, to Mr. Wolch:

13 "I am enclosing drafts of Police
14 Procedures.

15 These drafts should have been
16 with the adversity argument that I gave
17 you. David has asked me to tell you
18 that the trial transcripts will still
19 have to be gone over relative to the
20 Police Procedures & Nichol for the
21 Federal Court of Canada."

22 Departure information. And if we go to the next
23 page, there is a number of pages here dealing
24 with "Police Procedure Picture/Nichol John", and
25 goes through some of the evidence about Nichol



1 John and how she was treated during the giving of
2 the statement. And it appears this may be David
3 Milgaard's document, is that right, was he -- was
4 this part of the work that he was doing for his
5 presentation?

6 A Yes, I suspect that these are transcribed notes
7 that David would have made, these are just
8 typed-up notes.

9 Q And we see this a bit later on, some references to
10 police procedure and the Nichol John; was this a
11 part of the, a part of the drafting of the
12 application and various pieces coming from various
13 sources?

14 A Yes. I mean as we got into it, for example, David
15 would raise the issue of how the police treated
16 the witnesses. We would ask David to spend his
17 time and focus in and do some work and review all
18 of the evidence, both within the trial and
19 preliminary transcripts as well as the collateral
20 things that we had collected, and do briefs on
21 what that evidence was. That kept him busy. It
22 also yielded some good information but it kept him
23 busy.

24 Q If we can go to 155420. And this looks to be the
25 first contact in writing between your office and



1 Dr. Ferris July 16th, '87, and it talks in the
2 first paragraph -- this is Mr. Wolch's letter, who
3 says it's his understanding that he was contacted
4 by you and by Joyce Milgaard in regard to certain
5 genetic testing. Do you have a recollection of
6 your sort of initial discussions with Dr. Ferris
7 and, in particular, what was it that you
8 understood he could do for you?

9 A No, I -- well I did have, I did have a
10 conversation with him and I, you know, I have to
11 confess that I didn't have the faintest idea what
12 they were talking about with genetic testing. I
13 had a conversation with Dr. Ferris and I just had
14 no -- it just went right above my head. Umm, the
15 only thing that stuck was the idea that what he
16 did might yield fingerprint-quality inclusion or
17 exclusion based on this new technology and science
18 that was developing, umm, and then I turned it
19 over to Mr. Wolch.

20 Q And then would Mr. Wolch have followed up, then,
21 on the dealings with Mr. or Dr. Ferris?

22 A I think he had primary contact, yes.

23 Q And then down at the bottom he says:

24 "I have a meeting arranged later on this
25 month with the Saskatchewan Prosecutor's



1 Office and I am hopeful at that time to
2 address the issues of continuity of
3 exhibits and the actual matter of
4 handling the matters to be tested."

5 Do you know what that -- was that a meeting with
6 Mr. Caldwell, or was it in relation to getting
7 the exhibits, or do you know?

8 A I'm not sure.

9 Q I think we'll see in the documents he dealt with a
10 Fred Bain (ph), who was a prosecutor, is a
11 prosecutor that assisted in getting the exhibits;
12 do you have any recollection of dealing with him?

13 A I didn't deal with him personally, but yes, I
14 recall he facilitated the release of the exhibits.

15 Q And do you recall there being any difficulties in
16 getting the exhibits from the Court out to Dr.
17 Ferris?

18 A I don't think so. We retained an agent here and I
19 think it was pretty smooth.

20 Q 163076.

21 A Having said that, we did have to get an order.

22 Q A court order, right.

23 A Yes.

24 Q I think that's on the record.

25 A Yes.



1 Q So here we have the *Fifth Estate* sending you an
2 article from *The Sunday Times* of London and talks
3 about the physical evidence, and again expressing
4 their interest in the show, and I think you've
5 already talked about that. 112033 I think is the
6 article, just for the record. And so I take it
7 that the *Fifth Estate* had some interest in this
8 new DNA testing, and that it might be part of the
9 show that they might run on David Milgaard; --

10 A Yes.

11 Q -- is that correct?

12 A Yes.

13 Q 267809. This is a letter August 24th, '87 from
14 Dr. Ferris to Mr. Wolch, and he goes on to talk
15 about the DNA genetic typing, and then down at the
16 bottom about the stains. Did you get involved in
17 the DNA side of this, Mr. Asper, or was this
18 something that someone else handled as far as the
19 dealings with Dr. Ferris?

20 A I -- Mr. Wolch primarily dealt with Dr. Ferris.

21 Q Did you come to understand, again '86-'87 or I
22 guess '87-'88, about what DNA testing was or what
23 it was he was trying to do or what might be able
24 to be done?

25 A Umm, I had a very superficial understanding, I



1 would say, at best.

2 Q And for example, if we compare that to the
3 secretor issue, would it be fair to say that on
4 the secretor issue you would have dug into that
5 and had an understanding about how that evidence
6 fit together?

7 A I probably had a better understanding of the
8 secretor issue.

9 Q Then the next page Dr. Ferris talks about having:
10 "... spoken to Mrs. Milgaard on a number
11 of occasions by telephone and I have
12 cautioned her about expecting too much
13 from these results."

14 And do you recall having discussions with
15 Mrs. Milgaard about these dealings, or was that
16 something that --

17 A Oh, sure, I -- any time there was anything that
18 gave hope everybody got pretty excited about it,
19 so Mrs. Milgaard was very enthusiastic about this,
20 wanted to get it done, as did David. And again,
21 you know, it was very helpful, as counsel, to know
22 that your client is prepared to submit to
23 something that may have some conclusivity to it,
24 thumbs up or thumbs down, and when your client
25 says "I'm okay, I'm okay with that" it gives



1 confidence to counsel that your client is telling
2 the truth. And I think, for me, that was the best
3 -- that was the biggest value that came out of
4 this, the -- certainly the initial discussions.

5 Q If we can then go to 162412. And this is a
6 letter, a letter September 15th, 1987, and this is
7 from Joyce Milgaard, Joyce and David, to you. And
8 we had talked the other day about, I think you
9 said you took leave from the firm or left the firm
10 to pursue or to work with one of the, was it CKND;
11 is that right?

12 A CKND, yes, it's a television station in Winnipeg.

13 Q Okay. And I think you said '87-'88?

14 A Yes.

15 Q Do you remember when, would it have been at this
16 time, September 15th, '87 or were you with --

17 A Yes. Yes. I can't say exactly when I would have
18 commenced, but September '87 I was there.

19 Q So you were not with the law firm, you were
20 working elsewhere?

21 A Right.

22 Q And I think you said that was for a ten-month time
23 frame?

24 A Approximately, yes.

25 Q And when you, when you left the law firm to go



1 work there were you planning on coming back, was
2 it -- in other words was it a defined leave, or
3 had you left and you weren't sure if you were
4 going back?

5 A Umm, I thought it was, I thought I was leaving
6 permanently. The law firm, one of the partners
7 gave me a bag of marbles and said when I was ready
8 to come back to just send it and they'd have an
9 office ready for me, and it lasted ten months and
10 I went back.

11 Q So when you left you had decided to leave the
12 practice?

13 A Yes.

14 Q You went elsewhere to work and then decided to go
15 back; is that right?

16 A Yes, yes.

17 Q And when you left, then, who took over looking
18 after David Milgaard's file?

19 A Umm, I think for all intents and purposes
20 Mr. Wolch, I don't know that there was anyone else
21 on the file.

22 Q And what about Heather Leonoff, did she have some
23 --

24 A Yeah, I mean, Heather had maintained an ongoing
25 relationship with the file in an advisory



1 capacity.

2 Q And as far as your dealings with Joyce and David
3 Milgaard did you, when you left the firm, did you
4 agree to continue to assist them or how was that
5 left?

6 A Umm, probably by that time we were -- we had a
7 relationship that if I was within reach of a
8 telephone, we would be in contact with them, and I
9 maintained contact with them.

10 Q And so when you left the Wolch Pinx law firm you
11 would have stayed in contact, and would you have
12 continued to help them, then?

13 A No, no, I was very -- I was fully occupied
14 working.

15 Q And so, here, I think the letter talks about being
16 written when she's at Stony Mountain, "Are you by
17 any chance missing all the rushing around and fast
18 pace you had here or are you finding it even more
19 accelerated where you are." It says, "My David
20 says, whichever way it is going for you, slower is
21 better. We decided you might like to be updated
22 as to what has been happened. It is not too
23 difficult, it can be put in one word. Nothing.
24 At least until yesterday when I visited Herish and
25 got him to phone Ferris' office re his letter as



1 well as to dictate the letters re: the exhibits
2 to Saskatoon."

3 And, again, do you recall this
4 letter or recall these dealings?

5 A Yes. I was really, really hoping to join our
6 family business and be in business, and this
7 letter stuck very firmly with me and made me feel
8 guilty, and I left business in I think the
9 following May and came back to finish what I had
10 started. This was a troubling letter.

11 Q If we can go to the next page and, again, we see
12 some reference to the CBC. It says, "Since things
13 seem to be standing still we still may need your
14 help with CKND."

15 And was that your family's
16 television station?

17 A Yes.

18 Q "Both David and the rest of the family are now in
19 agreement to distance ourselves from the CBC. You
20 are, I know, aware that Gordon Stuart is pushing
21 to film the exhibits coming and going, etcetera,
22 but we feel we will get the tests done and then
23 make a decision on how to go."

24 And I take it that would be the
25 exhibits going out to Dr. Ferris; is that right?



1 A Yes, I think so.

2 Q And then down at the bottom, "We think of you
3 often and wish you well in your new endeavours but
4 would still enjoy seeing you."

5 So I take it, just as far as
6 timing, you said you went back in May of 1988?

7 A I think so.

8 Q And so August of '87, would that have been when
9 you, when you left? I'm trying to think, ten
10 months.

11 A Roughly, roughly.

12 Q Roughly?

13 A May or June.

14 Q And then 163101. Here's a letter to Mr. Wolch
15 September 29th, '87, and so this would be with
16 your CKND company; is that right?

17 A Yes.

18 Q And it talks about running into Joe Penkala and
19 getting some information. And then, scroll down,
20 it says:

21 "Once you have arranged for the genetic
22 testing to get underway I would
23 appreciate your giving our news people
24 first crack at the story. CBC has done
25 little or nothing for David and I think



1 that through our affiliates across the
2 country we could do justice to the
3 story. Moreover, I would like to make
4 sure that the firm gets full credit
5 where due - it certainly won't be
6 getting a full fee! If the testing
7 works in David's favour then we could
8 probably work substantial national
9 exposure for yourself. If it doesn't
10 work, no matter, because you would still
11 be newsworthy as a pioneer in the field.

12 Please keep me up to date."

13 And, again, anything to elaborate to what's
14 stated there?

15 A I was trying to get a scoop, that's what it was.

16 Q And this related to the DNA testing?

17 A Yes.

18 Q And, as far as your meeting with Mr. Penkala, it
19 states that he actually gave you a copy of the
20 Court of Appeal case. Is there anything else, not
21 stated in the letter, that you remember from your
22 meeting with Mr. Penkala?

23 A No. We had launched a, what are now Global
24 Saskatoon and Global Regina that fall, September
25 1st, and I believe I ran into him at the launch



1 celebration and it was just a very cursory
2 discussion.

3 Q And then if we can go to 001639. And again, this
4 is September 22, so actually right after the
5 letter that Joyce Milgaard sent you on July --
6 September 15th and before your other letter
7 about -- a letter to the Crown about getting the
8 exhibits. Would you have had any -- I take it you
9 would have had no involvement with that, you were
10 not with the firm?

11 A That's true.

12 Q Now the next document that -- in the fall of '87,
13 I think the court order is obtained January of '88
14 and the exhibits are sent out to Dr. Ferris, but I
15 take it you wouldn't have been involved in any of
16 that; is that correct?

17 A That's right.

18 Q And then when you got back to the firm do you
19 recall, when you got back, where things were at on
20 the Milgaard file or what steps you undertook?

21 A I don't recall specifically, no.

22 Q It looks like the next document, at least from the
23 files that we have, is September 13th, 1988.
24 That's 002486. And this is the written report
25 from Dr. Ferris dealing with the forensic



1 evidence. And then -- let me just back up. His
2 evidence, and I think from other documents that
3 were put in, is that in January, February, March,
4 April, perhaps even May of 1988 they were
5 undertaking tests to try and extract samples from
6 Gail Miller's clothing to do a DNA sampling, and I
7 think that was verbally communicated in March
8 and/or April of 1988, and I think Dr. Ferris
9 indicated he could not do a DNA sample, and then
10 he was asked to undertake a forensic review of the
11 exhibits at trial, and I think that information
12 was sent out to him. And so would that be
13 something that would have been done sort of while
14 you were not at the law firm, and that is that
15 Mr. Wolch or someone else would have dealt with
16 that, or do you have a recollection of any of
17 that?

18 A As I say, I do recall our disappointment that the
19 DNA tests were not -- that it couldn't be done,
20 and I do recall the discussion of what, what other
21 value Dr. Ferris might have to our case, since we
22 had him why not -- and I remember that
23 conversation -- why not have him look at the
24 forensic evidence presented at the trial and tell
25 us what he thought about it.



1 Q And who would that have been a discussion with?

2 A Probably Joyce and Hersh.

3 Q And so, while you were away from the firm, would
4 you continue to have some involvement, then, in
5 those discussions?

6 A I must have, because I do recall those
7 discussions.

8 Q Now this opinion, we've gone through this opinion
9 with Dr. Ferris, and you are fairly familiar with
10 it I take it?

11 A Yeah.

12 Q The, just as far as the documents that were sent
13 to him, the one thing that Dr. Ferris indicated he
14 didn't have was the -- was Mr. Tallis' closing
15 address to the jury, and I don't believe he had
16 Mr. Caldwell's closing address to the jury either.
17 Do you recall any efforts to try and get those
18 documents back at the time? And just to assist
19 you on this, Mr. Asper, the evidence we've heard
20 is that in early 1992, I think through Federal
21 Justice, they were able to get the shorthand notes
22 of the court reporter, who had since died, they
23 found someone who could read her shorthand and had
24 them transcribed. Do you recall being part of any
25 of those efforts?



1 A I may have been. I don't recall.

2 Q Can you tell us, and again we'll go through parts
3 of this document, but as far as Dr. Ferris, what
4 was the, what was your understanding of what Dr.
5 Ferris was telling you when he gave this opinion
6 of September 13th, 1988?

7 A What was he -- what was the purpose of the report?

8 Q No, what was your understanding of what his
9 opinion was as far as the semen and David
10 Milgaard?

11 A Well, as I recall, there's two parts to it. One
12 is the, where he comments on the integrity of the
13 evidence, where he raised real questions about the
14 integrity of the evidence, the totality of the
15 evidence, how it was handled, the contamination of
16 the scene and the potential contamination of the
17 exhibits.

18 COMMISSIONER MacCALLUM: You're talking
19 about forensic evidence, are you, sir?

20 A Yes.

21 COMMISSIONER MacCALLUM: Yes.

22 A Yes. And if you'll just give me a moment.

23 BY MR. HODSON:

24 Q Sure, and, you know, in fairness, we can go
25 through it if you like. Perhaps if we can just go



1 to 002489, which is the fourth page, and let's
2 just deal with the he frozen semen, what he says
3 here:

4 "I have real concerns as to the
5 integrity and continuity of the samples
6 of alleged semen."

7 And then down at the bottom, it talks about:

8 "In view of the extensive disturbance of
9 the scene ..."

10 And:

11 "However, it would be most unusual for
12 this semen not to have been contaminated
13 by all of the tampering which had gone
14 on with the evidence around the scene.
15 I am surprised that with this clear
16 inability to prove either the continuity
17 or integrity of these seminal samples,
18 they were considered admissible
19 evidence."

20 And is that what you were referring to about
21 the --

22 A Yes, the integrity.

23 Q Right.

24 A Yes.

25 Q And in fact what Dr. Ferris told this Commission



1 of Inquiry a couple of weeks ago, that in his
2 opinion the frozen semen was of no value in
3 assessing the guilt or innocence of anybody
4 because of the integrity of the sample, the
5 contamination and that it should not have been
6 used either to implicate or to exclude anybody.
7 Would that have been your understanding at the
8 time, Mr. Asper, about what -- what he was saying?

9 A Probably.

10 Q And then the second part of his opinion as he goes
11 through, and again we've been through this and I
12 think it's similar to what was in your brief that
13 we went through earlier, and he ended up saying
14 that if there's no evidence of David Milgaard
15 bleeding in his semen and there's no blood --
16 there's none of his blood in that frozen semen,
17 then it couldn't have come from him because he's a
18 non-secretor?

19 A Right.

20 Q And go to page 002491, there's a couple of parts
21 here, and he goes through, and I think what he
22 told us or what the opinion states is that if you
23 assume there's no contamination, in other words,
24 assume that there is integrity with the sample and
25 that it is from the perpetrator and it has not



1 been contaminated, he says:

2 "I also note that this opinion
3 completely excludes David Milgaard as
4 being the source of the seminal fluid."

5 And then on the next page, he says:

6 "On the basis of the evidence that I
7 have examined, I have no reasonable
8 doubt that serological evidence
9 presented at the trial failed to link
10 David Milgaard with the offence and that
11 in fact, could be reasonably considered
12 to exclude him from being the
13 perpetrator of the murder."

14 And what Dr. Ferris told the Inquiry when asked
15 the question in your opinion does the frozen
16 semen exonerate David Milgaard, his answer was
17 no, because it is of no value, and I think he
18 said if you assume that it is of value, which he
19 opined it wasn't, but if you assume it is, then
20 it would exonerate Mr. Milgaard, and was that
21 your understanding of his opinion back then?

22 A Yes. That's the position we've been taking --
23 that's the position we had been taking as to the
24 evidence presented at trial except that -- except
25 that Mr. Caldwell had tried to insert this theory



1 of how it could have been David's semen that
2 wasn't accepted, but nevertheless the jury heard
3 it.

4 Q Let me just go back to what Dr. Ferris, and I
5 think what he told the Inquiry is again what we
6 will see when we get into some of the media
7 reports, Mr. Asper, is that this part in
8 particular, this section of his opinion being
9 reproduced saying that the opinion exonerates
10 David Milgaard, proves his innocence, what Dr.
11 Ferris told us is that no, that's not his opinion;
12 although that's in his report, it has to be read
13 in conjunction with the first part which is don't
14 rely on the sample?

15 A Right.

16 Q And I wouldn't mind your comment on what value you
17 thought you could place on the entirety of Dr.
18 Ferris' opinion back when you got it in September
19 of 1988.

20 A Anything we had was of great value is the simple
21 answer.

22 Q Okay. Can you explain that?

23 A Well, we didn't have anything else, we had to find
24 something -- as I say, something new, and anything
25 that could be remotely considered new was of



1 significance, and the opinion, leaving aside the
2 issue of the exclusion of David, the part of the
3 opinion dealing with it being, that the sample had
4 no value, the possibility that the sample, because
5 of how it was handled had no value, was new.

6 Q And was it your understanding of the trial
7 evidence that the frozen semen was used as
8 evidence to link David Milgaard to the crime as
9 incriminating evidence?

10 A That's what Mr. Caldwell attempted to do, yes.

11 Q And so to the extent that Dr. Ferris was saying,
12 (a), you can't link it to him, that was of value?

13 A Yes.

14 Q And I think what he told us is that you can't link
15 it to him for two reasons, one, you can't because
16 it's of no value; right?

17 A Right.

18 Q Because of the contamination, and two, even if it
19 was uncontaminated, it would exclude Mr. Milgaard
20 rather than link him?

21 A Right.

22 Q And so again from I think Mr. Tallis' perspective,
23 as far as what Dr. Ferris said, I think in his
24 view it was nothing different than what was
25 presented at trial, perhaps stated in a different



1 way, and I think he conceded that others might
2 argue it differently than him, but again, did you
3 view it as being something different than what was
4 before the jury, what Dr. --

5 A Yes, it was clearer than what I think was before
6 the jury.

7 Q And did the fact that it came from an expert with
8 significant credentials provide some assistance to
9 you?

10 A Certainly.

11 Q Now, Dr. Ferris testified before the inquiry that
12 he had some concerns that the last part of his
13 opinion, sort of get it out in the media saying it
14 exonerates David, when in fact I think he said you
15 can't read that unless you read the whole opinion,
16 and again when asked the basic question, does, in
17 your opinion does this sample exonerate David
18 Milgaard or prove his innocence, his answer was
19 no, and I wouldn't mind -- you said this was of
20 assistance. How did you -- how did you deal with
21 the fact that his opinion, although the back half
22 was favourable, the front half tended to say don't
23 rely on the back half, if I can put it that way?

24 A Well, I guess it depends how you see the same
25 event. If the sample is of no value, then one



1 could argue it should never have been proffered as
2 evidence or, at the very least, that at the trial
3 it should have been abundantly clear that this
4 piece of evidence is really of no value, which of
5 course begs the question why would you tender it.

6 Instead, at the trial, as I've
7 said, and we've looked at the passage, there was
8 an attempt by the Crown to find a theory by which
9 David's antigens would be in the sample and I have
10 to assume that the jury, who had also heard Nichol
11 John's statement and had been told to disregard
12 it, may have been influenced by the Crown's
13 attempt to provide a physical link to David, from
14 David to the scene of the crime. Dr. Ferris was
15 much clearer than the evidence at trial.

16 Q And so what we heard from Mr. Tallis was that at
17 trial, I think what he said is lookit, there were
18 concerns about the integrity, but before the
19 preliminary hearing I identified that this was
20 exculpatory and favourable so I didn't raise it, I
21 wanted this evidence in, and were you aware of
22 that position being taken at the time of trial?

23 A Yes, I heard Mr. Tallis testify to that.

24 Q But prior to hearing that, were you aware of that
25 back at the time in 1988, 1989, that that was the



1 position he had taken at trial?

2 A I don't recall.

3 Q And so again let's just go back. So the value
4 would be, number 1, in a clearer way it says
5 lookit, this can't link David Milgaard?

6 A It's not evidence.

7 Q It's not evidence?

8 A It's not evidence. If you take that out, if you
9 pretend that that is never tendered at trial
10 because it's not evidence, can you ask yourself
11 could that have affected the verdict.

12 Q So that was an important piece there?

13 A I'm guessing. I wasn't a jury --

14 Q No, sorry, from your perspective --

15 A Yes, it was important.

16 Q I'm sorry, an important piece to have in 1988?

17 A Yes.

18 Q Here's a doctor that says lookit, that sample
19 should not have been before the jury, it's of no
20 value and it doesn't link David Milgaard to the
21 crime?

22 A Yes.

23 Q And then secondly, tell us about what value, if
24 any, you thought you could place on the second
25 part of his opinion being that it could be



1 reasonably considered to exclude him from being
2 the perpetrator of the murder?

3 A If you want -- if you want to use the sample and
4 call it evidence, then it excludes David.

5 Q And so did that have additional value --

6 A Of course.

7 Q -- to the first --

8 A Of course, and it's crystal clear, I mean, as
9 presented by Dr. Ferris.

10 Q Now, this was also premised on the assumption that
11 David Milgaard was a non-secretor, which was the
12 evidence presented at trial?

13 A Yes.

14 Q Did you have any concerns about whether,
15 notwithstanding that that was the evidence at
16 trial, that maybe he wasn't a non-secretor?

17 A Well, yes. I mean, at some point we had to find
18 out and I don't recall when that was. At this
19 point we were dealing with the evidence.

20 Q In Dr. Ferris' letter, I think in 1993 to the
21 RCMP, he indicates that when he, around the time
22 he gave the report, that he would have advised,
23 and I think it was Mr. Wolch, that the procedure
24 for testing for secretors in 1969 may not have
25 been accurate; in other words, might not be



1 reliable. Would you have been aware of that
2 around the time you got the opinion, that the
3 secretor test of David Milgaard done in '69 may
4 not be reliable?

5 A I think I recall seeing something like that.

6 Q And so I think, and I stand to be corrected on
7 this, I think the only document that we have that
8 shows the secretor test being done was February 5,
9 1992, during the Supreme Court reference the RCMP
10 did a test, and that's -- that's the only test
11 that I've seen, the first one, anyway, that says
12 that David is a secretor. Are you aware of any
13 tests prior to that?

14 A I don't think so.

15 Q And so is there -- did you consider getting a test
16 done around the time you got the opinion to
17 confirm his non-secretor status?

18 A I don't recall us considering that, no.

19 Q And would it be fair to say that once the test was
20 done that showed that David was a secretor, that
21 the second part of Dr. Ferris' opinion was no
22 longer valid; in other words, it didn't exonerate
23 him, he would be in a group of people that
24 wouldn't be excluded? Is that fair?

25 A Yes. Nothing about this case was easy.



1 Q So then 155426, and I don't think we need to spend
2 much time, there's just some follow-up letters
3 about some blood information on Mr. J, and we've
4 heard about this, but after the Ferris opinion
5 comes in, I think Mr. Wolch writes back and
6 basically says lookit, if I can summarize it this
7 way, saying if the frozen semen that Paynter
8 tested didn't have enough blood to trigger the
9 hemostix or the blood test, would it have enough
10 to trigger the antigen test, and I think the
11 advice was no, it wouldn't; in other words, you
12 couldn't use the minute trace of blood that might
13 have been in the frozen semen to say, well, that's
14 where the A antigens came when you did the
15 secretor test. Is that --

16 A Right.

17 Q So that's that point, and again, I think we've had
18 that clarified by Dr. Ferris, or confirmed, pardon
19 me. Now, 218964, and this is a letter from, or a
20 memo from Herish to you and Heather, I presume
21 that's Heather Leonoff, and it says:

22 "Attached is a copy of a recent letter
23 from Dr. Ferris. May I please have your
24 views in terms of following this up."

25 And then about getting the charge to the jury.



1 Can you tell us, what was your recollection back
2 when you got Dr. Ferris' opinion, was this
3 something that you viewed as being sort of a
4 significant breakthrough, or what was your
5 reaction?

6 A Yes, we did consider it to be a bit of a
7 breakthrough. It certainly was the triggering
8 piece of "evidence" for our 617 application,
9 section 617 application.

10 Q Now, we know that in December of 1988, a couple of
11 months after the opinion, that's when it was
12 filed, was this the piece of new evidence then
13 that you were looking for to rely on?

14 A Yes.

15 Q If we can then go to 182082, here's a memo
16 December 19, 1988 from Mr. Wolch to you, and at
17 this time, and I'll go through these in a moment,
18 there are at least three different drafts of an
19 application, there is a draft prepared by you, Mr.
20 Asper, there's a draft prepared by Heather
21 Leonoff, and there looks to be a draft that is
22 prepared by I think David Milgaard, or it might be
23 his version of an application. Does that sound
24 right, that there was a number of different
25 versions out there, one of which was yours?



1 A Yes.

2 Q Of the application?

3 A Yes.

4 Q And the memo says:

5 "David, do you want to pursue this
6 letter to the Minister of Justice."

7 I'm wondering if that might be peruse, but in any
8 event:

9 "It is not in final form --"

10 And I'll show you on the next page is the draft
11 covering letter.

12 "It is not in final form and you may
13 want to change a few things in it.

14 Joyce wants it faxed to her so she can
15 look at it. In any event what I would
16 like you to do is take Heather's copy
17 and their copy --"

18 Which I presume is David and Joyce; is that
19 right?

20 A It looks like that, yes.

21 Q "-- and make one final copy which should
22 be Heather's copy with any grammatical
23 errors corrected, with any facts that
24 you deem to be important added in, none
25 of this Nicole John crap in there; I



1 want it basically to be Heather's, no
2 criticisms of Tallis; but any brief
3 additional, relevant facts which they
4 have put into their material you can add
5 into Heather's and when I get back I
6 would like to meet with you to see what
7 the bottom line is in that regard.

8 Basically though it should be
9 Heather's with her factual errors
10 corrected, Nicole John not added in with
11 all that stuff, but any important facts
12 which in your opinion were left out and
13 that are brief and to the point."

14 Can you tell us what -- do you have a
15 recollection of this memo and dealing with it and
16 can you elaborate on what was happening?

17 A Yes, the senior partner was going away on holidays
18 and the rest of us were staying at the office and
19 working. Yeah, we were driving to a deadline to
20 file a 617 application, we were trying to merge
21 several documents into one. Herish wanted it lean
22 and not particularly argumentative and that was
23 what this memo was instructing us to do.

24 Q And Heather's copy would be Heather Leonoff, her
25 draft of the application as opposed to yours?



1 A Yes.

2 Q And what -- can you shed any light on what the
3 "Nicole John crap" and stuff is, what that would
4 be referring to?

5 A Well, that was the subject of, you know -- I mean,
6 I lost the debate, but I, as I said before, I
7 thought we had to deal with her statement head on
8 and illustrate facts that showed it couldn't
9 have -- that her statement where she claims to
10 have witnessed David committing the murder just
11 couldn't have been true.

12 Q And then what about the reference to no criticisms
13 of Tallis, do you know what that relates to?

14 A David certainly, and I believe that was coming
15 from David, just general conduct of the trial.

16 Q And so then if we can go to 218953, and this
17 appears to be your draft, is that right, David
18 Asper's draft?

19 A Yes.

20 Q And I think this is 10 pages. If we can just go
21 through parts of it. So this would have been
22 your -- your version --

23 COMMISSIONER MacCALLUM: Can I ask you to
24 allow me to clear something up?

25 MR. HODSON: Yeah.



1 COMMISSIONER MacCALLUM: So the difference
2 of opinion between you and Mr. Wolch at the time,
3 Mr. Wolch, by describing the "Nicole John crap",
4 do you think he was speaking about the
5 impossibility of what she said happened having
6 actually happened, the physical impossibility
7 arising from what, sir, the time limit, or would
8 it have had to do with the arrangement of the
9 clothing on the deceased or what was the problem?

10 A All of it. We had --

11 COMMISSIONER MacCALLUM: See, I just wanted
12 to know whether it was that aspect of the matters
13 or the section 9(2) aspect of matters.

14 A It wasn't the latter.

15 COMMISSIONER MacCALLUM: It was not 9(2)?

16 A No.

17 COMMISSIONER MacCALLUM: Okay.

18 A As I say, we had constructed, and I did it in my
19 draft brief from 1986, a very long and verbose
20 analysis of the position of the car and the state
21 of the clothing.

22 COMMISSIONER MacCALLUM: Right.

23 A And Hersh didn't want that in the application.

24 COMMISSIONER MacCALLUM: Okay.

25 BY MR. HODSON:



1 Q And I think I might be able, if I can just go
2 through this, perhaps, Mr. Asper, you can identify
3 the part of your brief dealing with Nichol John
4 that didn't find its way into the final
5 application.

6 A That did or did not?

7 Q Did not.

8 A Right.

9 Q And if we can go to 218955, and you start here:

10 One of the most common comments
11 about this case is that there was an eye witness
12 in the murder, namely Nichol John. Prior to the
13 trial, and under arguable oppressive
14 circumstances, Ms. John provided a statement in
15 which she described seeing Milgaard intercept,
16 grab hold of and stab a woman wearing a black
17 coat. At trial she either repudiated or could not
18 recall the making of much of this statement. This
19 led to her being cross-examined pursuant to
20 section 9(2) of the Canada Evidence Act.

21 Irrespective of how one weighs
22 this evidence, the physical facts disclose that
23 Ms. John could not possibly have been an eye
24 witness. Firstly, she described Milgaard grabbing
25 the woman and, in effect, struggling to get her



1 purse. Evidence of the investigating police
2 officers was unequivocal that there were no signs
3 of a struggle in the alley, from either direction,
4 leading up to where the body was found.

5 Furthermore, the deceased was
6 found with the top of her dress down around her
7 waist. She was wearing her overcoat, with arms in
8 the sleeves, but not so with the dress. Stab
9 wounds inflicted in her back matched cuts in the
10 overcoat but there was no cuts in the dress.
11 Therefore the deceased was stabbed after the dress
12 had been removed and her overcoat replaced.

13 In order for Nichol John to have
14 seen Milgaard stab this woman, she had to also see
15 him remove the overcoat, take down the top of the
16 dress, replace the overcoat including putting the
17 deceased's arms through the sleeves and then stab
18 her; all at the eastern end of the east/west
19 portion of the t-shaped alley where the body was
20 found.

21 The absurdity of this suggestion
22 is sealed by the fact that there was no blood
23 whatsoever found at that location or in any other
24 location leading up to where the body was found.
25 Moreover, the amount of blood found on the coat



1 suggests that the back wounds would have been
2 inflicted once the deceased had been immobilized
3 because the location of the blood is localized to
4 the area of the cuts as opposed to being spread
5 about as a result of movement during a struggle.

6 It is very troublesome indeed
7 that such problems with Ms. John's evidence were
8 not emphasized by counsel and that, anecdotally at
9 least, there is a lingering belief that Ms. John
10 was an eye witness. Careful review of all of this
11 evidence provides even further support that Ms.
12 John's evidence was worthless, yet very likely
13 highly prejudicial to the defence.

14 Finally, it is important to note
15 that the learned trial judge did not charge the
16 jury that it was factually unlikely if not
17 impossible for this ostensible eye witness
18 evidence to be true. The jury was cautioned with
19 respect to credibility as it related to the making
20 of inconsistent statements but never so with
21 respect to the fact that the evidence could not be
22 true due to other credible evidence in the case.

23 So I think I've read that
24 portion, Mr. Asper. So that was your position on
25 Nichol John and that's the part that was not to be



1 included in the application that was filed; is
2 that right?

3 A I think so, yes.

4 Q And again -- so in part, number 1, you are saying
5 lookit, deal with it head on, I think as you said,
6 consider that the authorities or Justice are going
7 to look at that as a factor in deciding whether or
8 not David Milgaard is probably innocent or had a
9 miscarriage of justice and here's why you
10 shouldn't rely on it because if you look at it,
11 even though it wasn't before the jury as an
12 adopted statement, it's unlikely that it happened
13 or couldn't have happened based on other evidence,
14 and then secondly, the fact that that was not put
15 before the jury, in other words, that it wasn't
16 challenged, in other words, it wasn't pointed out
17 to the jury, lookit, even though you are not
18 supposed to believe it, if you were it doesn't
19 make sense, and I think what Mr. Tallis told us is
20 that because of the proceedings he was precluded
21 from challenging the credibility of the statement
22 because there was no one for him to cross-examine
23 on that, and thirdly, what you are saying, I
24 think, is that the jury heard it and may have
25 relied on it. Is that a fair summary?



1 A Yes, yes.

2 Q If we can then go to page 218962, and again this
3 is where you deal a bit with the secretor issue,
4 and you say the trial judge, the scientific
5 evidence was presented at the trial but was not
6 understood. Perhaps it was too new an issue for
7 counsel and for the judge. And again, would you
8 have had any discussions with Mr. Tallis about his
9 views on the subject?

10 A No.

11 Q And then you go on to acknowledge it is true that
12 the science was available at the time, but David
13 Milgaard should not have to pay for the fact that
14 people do not understand it, and when you talk
15 about people who would -- not understanding it,
16 who would you be referring to there?

17 A Jurors I would assume.

18 Q And then if we can go to 182083, this is the
19 December 19th, '98 letter, that was the draft that
20 was attached to the memo of the same date from Mr.
21 Wolch to you, being 182082, and we'll go through
22 the final version of that.

23 Then if we can just identify
24 182085 -- actually, when I looked at your draft,
25 Mr. Asper, there's nothing in there regarding the



1 motel room incident; is that correct? I didn't
2 see it in there.

3 A It doesn't appear to be there, no.

4 Q And was that something that you took out do you
5 remember?

6 A I don't recall.

7 Q This is a similar document, although it's got
8 different language in it, it's got Heather's
9 draft. Would this have been Heather Leonoff's
10 draft?

11 A Yes.

12 Q And again if we go through just parts of this --

13 A Now, you can see, it could very well be the case
14 that we did not intend to file Deborah Hall's
15 affidavit in this first application because this
16 draft doesn't refer to it either.

17 Q Actually, if we go a bit further, it does a bit
18 further on.

19 A Okay.

20 Q Not on the first page.

21 A Okay.

22 Q If we go to 182 -- do you recall --

23 A Maybe it was just our lead argument was the
24 science and Deborah Hall was secondary.

25 Q Do you remember thinking about excluding her from



1 the application?

2 A I don't recall that. I find it odd that we didn't
3 put it on the face page, but --

4 Q I think when we see the actual application that
5 it's -- well, we'll go to that. It's certainly in
6 the application that's filed, but here, if we can
7 go to page 182088 -- actually, sorry, go to the
8 next page, here it is, it's submitted the
9 strongest piece of evidence tying David Milgaard
10 to the offence was the evidence of the witnesses
11 Melnyk and Lapchuk and the evidence of the
12 forensic expert which purported to tie David
13 Milgaard to the offence, etcetera, and then the
14 basis for the review is Deborah Hall and advances
15 in scientific technology.

16 And then if we go to the next
17 page, we'll just quickly go through this, it's got
18 the evidence of Deborah Hall, the forensic
19 evidence, and then I think if you go through to
20 the end, 182094, this point here about the
21 secretor, the frozen semen and the comment is the
22 Court of Appeal of Saskatchewan appeared to
23 believe that the evidence was a strong factor in
24 convicting David Milgaard. There is no discussion
25 from the Court of Appeal as to how the evidence



1 could exonerate him.

2 Was it your view that the Court
3 of Appeal believed that the frozen semen was a
4 strong factor in convicting David Milgaard?

5 A I was just, Mr. Hodson, going to review that. I
6 can't recall --

7 Q Why don't we --

8 A We said it enough in the documents that I think
9 that was our reading of the Court of Appeal
10 decision.

11 Q Why don't we do this, let me just finish up with
12 this document and perhaps tomorrow we can come
13 back and tonight you can just take a look at the
14 Court of Appeal decision.

15 A Okay.

16 Q So just to finish up on this point before we
17 break, I don't think there was anything in this
18 draft, going through it, dealing with Nichol
19 John's evidence at all or the section 9(2)
20 proceedings, and so Heather's draft did not have
21 that in there I take it?

22 A That's correct.

23 MR. HODSON: This is probably an
24 appropriate spot to break for the day.

25 (Adjourned at 4:29 p.m.)



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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



\$	'98 [1] - 25558:19 'directing [1] - 25420:2 'does [1] - 25364:2 'fresh' [1] - 25475:2 'important' [2] - 25324:19, 25324:21 'nichol [1] - 25410:4 'no' [1] - 25364:4 'oh [2] - 25430:25, 25431:19 'okay [1] - 25341:17 'out' [1] - 25358:6 'paper [1] - 25465:20 'reasonable [1] - 25474:14 'yes [1] - 25364:3	126 [1] - 25308:22 12th [4] - 25394:17, 25405:16, 25420:14, 25483:4 13th [2] - 25534:23, 25537:6 15 [5] - 25350:14, 25350:17, 25350:20, 25435:16, 25476:24 153491 [1] - 25328:7 155420 [1] - 25523:24 155426 [1] - 25548:1 156756 [1] - 25420:14 157000 [1] - 25382:1 157552 [2] - 25468:3, 25507:10 157566 [1] - 25480:11 157578 [1] - 25489:20 157584 [1] - 25490:9 157592 [1] - 25491:24 157602 [1] - 25497:9 157606 [1] - 25498:25 157608 [1] - 25503:2 157609 [1] - 25503:19 157616 [1] - 25510:2 157617 [1] - 25512:15 159890 [1] - 25335:5 15th [8] - 25355:2, 25405:13, 25406:6, 25520:24, 25522:10, 25528:6, 25528:16, 25534:6 162412 [1] - 25528:5 162414 [1] - 25522:9 162418 [1] - 25522:1 162420 [1] - 25422:11 162421 [1] - 25407:5 162423 [1] - 25402:15 162426 [1] - 25402:22 162430 [1] - 25318:4 162888a [1] - 25420:21 163076 [1] - 25525:20 163101 [1] - 25532:14 164556 [1] - 25417:18 164560 [1] - 25466:14 164564 [2] - 25423:17, 25423:19 166262 [1] - 25439:17 16th [3] - 25467:21, 25468:2, 25524:1 17 [2] - 25418:9, 25468:11 173964 [1] - 25374:3 174 [1] - 25448:2 174037 [1] - 25318:15 17th [2] - 25420:21, 25422:12 182 [1] - 25559:22 182082 [2] - 25549:15, 25558:21 182083 [1] - 25558:18 182085 [1] - 25558:24 182088 [1] - 25560:7 182094 [1] - 25560:20 182095 [1] - 25517:13 182096 [1] - 25394:16 182097 [1] - 25398:20 182098 [1] - 25405:13 182120 [1] - 25391:24 182122 [1] - 25517:1 182124 [1] - 25520:24 182373 [1] - 25519:10 18th [2] - 25318:6, 25481:19 19 [1] - 25549:16 1968-1969 [1] - 25421:4 1969 [11] - 25328:8, 25330:12, 25335:21, 25375:16, 25421:2, 25461:22, 25497:25, 25498:10, 25499:20, 25502:8, 25546:24 1970 [1] - 25481:12 1980 [8] - 25328:23, 25337:1, 25337:8, 25337:10, 25337:11, 25338:6, 25368:21, 25427:2 1981 [6] - 25348:8, 25350:4, 25365:12, 25427:2, 25442:16, 25448:3 1983 [12] - 25318:19, 25320:10, 25324:7, 25331:16, 25331:18, 25334:4, 25335:8, 25336:7, 25336:23, 25338:11, 25365:1, 25375:13 1986 [34] - 25314:20, 25314:24, 25321:12, 25342:4, 25366:20, 25380:3, 25382:14, 25390:18, 25394:23, 25398:21, 25399:25, 25405:16, 25407:6, 25417:7, 25418:14, 25418:19, 25423:22, 25426:22, 25434:16, 25438:14, 25448:6, 25451:11, 25453:9, 25455:17, 25456:4, 25456:20, 25462:24, 25463:21, 25466:14, 25469:5, 25508:22, 25509:14, 25516:18, 25553:19 1987 [11] - 25467:16, 25467:21, 25468:2, 25514:23, 25515:14, 25515:25, 25517:2, 25517:15, 25520:5, 25522:10, 25528:6 1988 [14] - 25366:5, 25366:20, 25457:13, 25463:24, 25532:6, 25534:23, 25535:4, 25535:8, 25537:6, 25541:19, 25544:25, 25545:16, 25549:10, 25549:16 1989 [5] - 25439:2, 25439:18, 25440:12, 25456:5, 25544:25 1990 [6] - 25320:23, 25337:19, 25340:10, 25345:18, 25354:1, 25400:2 1990-91 [1] - 25521:25 1990s [1] - 25321:10 1991 [1] - 25400:2 1992 [7] - 25314:20, 25314:24, 25374:2, 25487:7, 25508:23, 25536:20, 25547:9 1993 [2] - 25327:11, 25546:20 19th [3] - 25466:14, 25520:5, 25558:19 1:36 [1] - 25438:11 1st [2] - 25483:12, 25533:25		
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